

**United States Department of Labor
Employees' Compensation Appeals Board**

D.A., Appellant

and

**DEPARTMENT OF THE ARMY, ARMY
NATIONAL GUARD, Salem, OR, Employer**

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**Docket No. 14-103
Issued: May 13, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 21, 2013 appellant filed a timely appeal of a May 24, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant's claim for compensation was filed within the applicable time limitation provisions of FECA.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, subsequent to the May 24, 2013 decision, OWCP received additional evidence. Appellant also submitted new evidence with his appeal to the Board. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. See 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

FACTUAL HISTORY

On June 25, 2012 appellant, then a 77-year-old retired production controller automotive worker, general mechanic, filed an occupational disease claim alleging that on May 13, 2008 he first realized his pulmonary fibrosis was employment related. He retired from the employing establishment effective July 24, 1993. In support of his claim, appellant submitted the following evidence.

In a July 3, 2008 report, Dr. Michael Puruckherr, a treating Board-certified internist with subspecialties in pulmonary, critical care and sleep medicine, diagnosed idiopathic pulmonary fibrosis.

On October 9, 2009 Dr. Ganesh Raghu, an examining Board-certified internist with subspecialties in critical care and pulmonary medicine, reported that appellant was last seen in June 2009. At that time he stated that appellant was seen for a clinical diagnosis of idiopathic pulmonary fibrosis.

In an August 6, 2010 report, Dr. Raghu stated that appellant was last seen in October 2009 and that prior visits occurred on August 29, 2008 and in June 2009. A review of appellant's employment history revealed significant exposure to asbestos. Dr. Raghu reviewed a July 4, 2010 computerized tomography (CT) chest scan, which showed findings consistent with asbestos-associated pulmonary fibrosis and pleural abnormalities.

On September 5, 2010 Dr. Raghu noted that appellant first came under his care in August 2008 and has been seen four times since the initial visit. He noted that appellant had clearly been exposed to asbestos at his employment based on reelicitation during the August 6, 2010 visit, which was prompted by a new CT scan and recent deterioration. Dr. Raghu stated that appellant was significantly impaired with pulmonary fibrosis. He related that the findings were "consistent with asbestos-associated pulmonary fibrosis" and appellant's exposure history.

In a February 10, 2012 letter, appellant noted his employment history and that he was first diagnosed in 2007 with pulmonary fibrosis. He stated that the physician attributed the diagnosis to his work duties.

By letter dated October 16, 2012, OWCP informed appellant that the evidence of record was insufficient to establish his claim. Appellant was advised as to the evidence required to establish his claim. OWCP also informed him that the evidence submitted was insufficient to establish that he had timely filed his claim.

In response to OWCP's request, appellant provided a statement detailing his employment history and duties. He stated that sometime in 2008 he was diagnosed with asbestos-associated fibrosis by Dr. Puruckherr. Appellant stated that he wanted a second opinion so he went to Dr. Raghu. He related that May 13, 2008 was the approximate date he was informed that his lung fibrosis was asbestos related and that he had no idea there was a time limit on filing a claim.

By decision dated November 25, 2012, OWCP denied appellant's claim on the grounds that it was not timely filed. It found May 13, 2008 as the date he first became aware of the relationship between his employment and the claimed condition. As appellant's claim was filed

on June 25, 2012 more than three years after the date he first became aware of the relationship between his condition and his employment, it was untimely filed.

On December 5, 2012 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on March 18, 2013. In his opening testimony, he acknowledged that his claim was untimely, but did not know that he could file a claim. Appellant stated that he had been diagnosed with pulmonary fibrosis in 2008, which was when he had his biopsy. He stated that at the time he was diagnosed he did not think about filing a claim as he was concerned more about his health. When questioned, appellant stated that, at the time he was diagnosed with pulmonary fibrosis, the physician informed him that it was due to asbestosis exposure. Next, he stated that, when he was first diagnosed, the physician diagnosed the condition as idiopathic. Lastly, the hearing representative requested appellant to ask his physician's when they first became aware that his condition was due to asbestos exposure.

In reports dated April 29 and 30, 2013, Dr. William T. Roth, a treating Board-certified family practitioner, noted that the CT scan, which was performed in 2009, "suggested the possibility of asbestosis."

In an April 10, 2013 report, Dr. Raghu reported that appellant was exposed to asbestos during his 20 years working for the employing establishment and that he was not receiving any specific treatment for his idiopathic pulmonary fibrosis.

A May 25, 2009 CT scan revealed asbestos-related pleural calcification. It noted that a differential diagnosis of unusual interstitial pneumonia was considered less likely if appellant's exposure history was correct.

By decision dated May 24, 2013, the hearing representative affirmed the November 29, 2012 decision denying appellant's claim as being untimely filed.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.³ In cases of injury on or after September 7, 1974, section 8122(a) of FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.⁴ Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless:

"(1) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or

³ *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

⁴ *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

“(2) written notice of injury or death as specified in section 8119 was given within 30 days.”⁵

In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware or reasonably should have been aware, of a possible relationship between his or her condition and his or her employment. Such awareness is competent to start the limitation period even though the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.⁶ Where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition which has been adversely affected by factors of federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.⁷ Section 8122(b) of FECA provides that the time for filing in latent disability cases does not begin to run until the claimant is aware or by the exercise of reasonable diligence should have been aware, of the causal relationship between the employment and the compensable disability.⁸ The requirement to file a claim within three years is the claimant’s burden and not that of the employing establishment.⁹

ANALYSIS

On June 25, 2012 appellant filed an occupational disease claim alleging that his pulmonary fibrosis condition was due to his exposure to asbestos at work. The Board finds that he did not file his claim within the applicable time limitation provisions of FECA.

On his occupational disease claim form, appellant indicated that he first realized that his pulmonary fibrosis had been caused or aggravated by his employment on May 13, 2008. He reiterated that May 13, 2008 was the date he first realized that his condition was due to his employment in response to OWCP’s October 16, 2012 letter requesting additional information.

The evidence establishes that appellant was aware or by the exercise of reasonable diligence should have been aware, of the possible causal relationship between his employment and the pulmonary fibrosis condition as early as May 13, 2008. His explicit linking of his exposure to asbestos at work with his development of a possible pulmonary condition, shows that he knew as early as 2008 of the possible relationship between these employment conditions and the claimed medical condition. Appellant has consistently stated, in response to OWCP’s October 16, 2012 letter requesting additional information, that he knew as of May 13, 2008 that his lung fibrosis was asbestos related. In addition, in his telephonic hearing testimony, he acknowledged that his claim had been untimely filed. Appellant also testified that at the time he

⁵ 5 U.S.C. § 8122(a). See *J.M.*, Docket No. 09-1563 (issued February 26, 2010); *J.P.*, 59 ECAB 178 (2007); *Cory W. Davis*, 57 ECAB 674 (2006).

⁶ *Larry E. Young*, 52 ECAB 264 (2001).

⁷ *Id.*

⁸ 5 U.S.C. § 8122(b).

⁹ *Gerald A. Preston*, *supra* note 4; *Debra Young Bruce*, 52 ECAB 315 (2001).

was first diagnosed with pulmonary fibrosis the physician told him that it was due to asbestosis exposure.

The hearing representative requested appellant to get reports from his physicians regarding when they first attributed his pulmonary fibrosis to asbestos. None of the medical reports from Drs. Raghu, Roth or Puruckherr specifically addresses when appellant was first told that his pulmonary fibrosis was due to asbestosis exposure.

The totality of the factual circumstances of record establish that appellant was aware or should have been aware as early as May 13, 2008 that his claimed injury was due to employment factors. Appellant did not file his claim for an employment-related pulmonary condition until June 25, 2012 and therefore he did not file his claim within the requisite three years of his awareness of the possible relationship between the implicated employment factors and the claimed medical condition.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate superior had actual knowledge of the injury within 30 days or under section 8122(a)(2) if written notice of injury was given to his immediate superior within 30 days as specified in section 8119. He has not made any claim that he has satisfied either of these provisions nor does the record support a finding that he has satisfied either of them.¹⁰

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not timely filed his claim for a work-related pulmonary condition within the applicable time limitation provision of FECA.

¹⁰ There is no indication in the record that appellant provided a statement to his immediate superior such that he satisfied the provisions of sections 8119 and 8122(a) of FECA. *See supra* note 5. Moreover, the employing establishment would not have otherwise been apprised of the possible link between work factors and the claimed pulmonary condition such that appellant satisfied the provisions of sections 8119 and 8122(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 24, 2013 is affirmed.

Issued: May 13, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board