

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

J.N., Appellant

and

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer**

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**Docket No. 14-1599
Issued: November 18, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 15, 2014 appellant filed a timely appeal from a February 6, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim as untimely and a May 14, 2014 nonmerit decision denying his request for reconsideration. 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 and over the May 14, 2014 decision.

ISSUES

The issues are: (1) whether appellant timely filed his claim under FECA; and (2) whether OWCP properly denied his request to reopen his case for further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 12, 2013 appellant, then an 83-year-old former marine pipefitter, filed an occupational disease claim alleging that he sustained pleural thickening of the lungs, a decrease

¹ 5 U.S.C. § 8101 *et seq.*

in lung volume and abnormal spots in his lungs due to asbestos exposure in the course of his federal employment. He first became aware of his condition and attributed it to his federal employment on April 15, 2013. Appellant related that he worked with pipes covered in asbestos beginning in June 1951 and continuing until April 26, 1985, the date he retired.

A computerized tomography (CT) scan obtained on April 22, 2013 revealed pleural plaques consistent with exposure to asbestos and a consolidation on the left lower lobe most likely caused by rounded atelectasis. An x-ray obtained April 22, 2013 showed an “apparent progressive volume loss in the left hemithorax in this patient with a history of asbestos exposure” and new areas of pleural thickening as compared to an x-ray of May 17, 2007. A CT scan obtained as a follow up to the April 22, 2013 study revealed stable pleural plaques consistent with asbestos exposure, a nodule at the base of the right lung and a mass like density on the left lower lobe most likely atelectasis but possibly a neoplasm.

The record contains pulmonary function studies dated April 3, 1978, April 9, 1979, April 6, 1981, April 2, 1982, April 18, 1983 and April 10, 1985. Chest x-rays dated 1966, 1967, 1970 and 1973 were interpreted as normal and chest x-rays obtained on 1979 and 1981 were interpreted as normal except for mild scoliosis.

An October 4, 1985 report obtained as part of the employing establishment’s asbestos medical surveillance program found that appellant had no clubbing, crackles or wheezing. The form provided the results of a pulmonary function study.

In a report dated August 12, 2013, Dr. Michael Puruckherr, a Board-certified internist and pulmonologist, related that diagnostic studies revealed a left lung mass which was likely rounded atelectasis and changes indicative of asbestos exposure.

On December 5, 2013 the employing establishment provided asbestos exposure data from appellant’s work area from 1993 to 2004. It was not required to collect data during the time of his employment.

By decision dated February 6, 2014, OWCP denied appellant’s claim as untimely under 5 U.S.C. § 8122. It determined that he did not file his claim within three years of the day of injury or demonstrated that his supervisor had actual knowledge of the injury within 30 days. OWCP determined that pulmonary function studies from 1979 to 1985 showed that appellant had actual knowledge of his condition prior to his retirement in 1985.

In a report dated June 6, 2013, received by OWCP on March 4, 2014, Dr. Puruckherr evaluated appellant for symptoms of shortness of breath, an abnormal CT scan and a history of asbestos exposure. He noted that appellant had a long history of asbestos exposure and exposure to dust and fumes during the course of his employment. Dr. Puruckherr diagnosed asthma, a history of asbestos exposure, a pulmonary mass, dyspnea and an abnormal CT scan. He related that the CT scan showed “clearly significant abnormalities from his asbestos exposure....”

On March 4, 2014 appellant requested reconsideration.² In a statement dated February 27, 2014, he questioned why OWCP believed that pulmonary function studies “could predict lung deterioration 25 years in advance and that I should have been aware of that condition as a preexisting condition. [OWCP] also determined that I should have filed a claim within 3 years of my retirement, approximately 25 years before the condition was known to actually exist. This seems to be an odd requirement that is worth disputing.”

By decision dated May 14, 2014, OWCP denied appellant’s request for reconsideration after finding that he did not submit evidence or raised an argument sufficient to warrant reopening his case for further merit review under section 8128.

On appeal appellant alleges that OWCP erred in finding that his claim was not timely. He asserts that his pulmonary function studies from 1979 to 1985 were normal and that chest x-rays showed no disease. Appellant indicates that he knew that he was exposed to asbestos but was not aware that it had damaged his lungs until 2013. He noted that he worked as a nuclear coordinator from 1973 until his retirement in 1985 during which time he was monitored for radiation and asbestos exposure.

LEGAL PRECEDENT

Section 8122(a) of FECA³ provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.⁴ Section 8122(b) provides that, in latent disability cases, the time limitation does not begin to run until the claimant is aware, or be the exercise of reasonable diligence should have been aware, of the causal relationship between the employment and the compensable disability.⁵ The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.⁶ Even if a claim as not timely filed within the three-year period of limitation, it would still be regarded as timely under section 8122(a)(1) if the immediate superior had actual knowledge of his alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to section 8119.⁷ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.⁸ The Board has indicated that an employee need only be

² In a report dated August 26, 2013, Dr. Michael S. McManus, who specializes in occupational medicine, diagnosed a history of asbestos exposure, pleural plaque, dyspnea on exertion, a pulmonary mass and a pulmonary nodule. In a report dated February 10, 2014, he related that he initially evaluated appellant for a lung condition related to asbestos on August 23, 2013. Dr. McManus noted that appellant had asbestos exposure installing and removing piping from 1951 through 1959 without protection. He indicated that further diagnostic testing revealed “asbestos-related lung disease or calcified pleural plaque with a lung mass probably representing rounded atelectasis.” Dr. McManus diagnosed occupational asbestos exposure with asbestos-related pleural disease and dyspnea on exertion.

³ 5 U.S.C. § 8101 *et seq.*

⁴ *Id.* at § 8122(a).

⁵ *Id.* at § 8122(b).

⁶ See *Linda J. Reeves*, 48 ECAB 373 (1997).

⁷ 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); see also *Larry E. Young*, 52 ECAB 264 (2001).

⁸ *Willis E. Bailey*, 49 ECAB 509 (1998).

aware of a possible relationship between his “condition” and his employment to commence the running of the applicable statute of limitations.⁹

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 condition and his employment. When an employee becomes aware or reasonably should have been aware that he or she has a condition which has been adversely affected by factors of his or her federal 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.¹⁰ 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.¹¹ The requirement to file a claim within three years is the claimant’s burden and not that of the employing establishment.¹²

ANALYSIS

On November 12, 2013 appellant filed a claim alleging that he sustained a lung condition causally related to his exposure to asbestos from June 1951 until April 26, 1985, the date he retired. He first became aware of his condition and attributed it to his federal employment on April 15, 2013. As appellant continued to be exposed to the alleged employment factors until the date of his retirement, the time limitation for filing the claim would normally begin to run on the date of his last exposure on April 26, 1985.¹³ In cases of latent disability, however, the time for filing a claim does not begin to run until the claimant is aware or by exercise of reasonable diligence should have been aware of the causal relationship between his condition and his employment.¹⁴

OWCP found that appellant should reasonably have been aware of his condition and its relationship to his employment because the employing establishment obtained pulmonary function studies from 1978 to 1985. The pulmonary function studies, however, do not demonstrate any determination of impairment or diagnosis of any lung condition due to his federal employment. In *Virginia D. King (Charles B. King)*, the Board found that the possibility of asbestosis was not sufficient to begin the time limitation period.¹⁵ Rather, the time limitation period began to run only after the claimant receives confirmation of the diagnosis of asbestosis.

⁹ *Edward C. Horner*, 43 ECAB 834, 840 (1992).

¹⁰ *See Larry E. Young*, 52 ECAB 264 (2001).

¹¹ *Id.*

¹² *See Debra Young Bruce*, 52 ECAB 315 (2001).

¹³ *See Larry E. Young*, *supra* note 10.

¹⁴ 5 U.S.C. § 8122(b); *see Luther Williams, Jr.*, 52 ECAB 360 (2001).

¹⁵ 57 ECAB 143 (2005).

In a report dated June 6, 2013, Dr. Puruckherr diagnosed asthma, a history of asbestos exposure, a pulmonary mass, dyspnea and an abnormal CT scan. He opined that a CT scan revealed substantial abnormalities due to appellant's asbestos exposure. This is the first medical report of record sufficient to provide appellant notice that he had a condition due to asbestos exposure that may be related to his federal employment. Appellant filed his claim on November 12, 2013, within the three-year time limitation for filing a claim which commenced on the date that he identified his awareness of his condition and its relationship to employment. The Board finds that he timely filed a claim based on the evidence of record.

CONCLUSION

The Board finds that appellant timely filed his November 12, 2013 occupational disease claim.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2014 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further action consistent with this decision.

Issued: November 18, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ In view of the Board's disposition of the timeliness issue, the issue of whether OWCP properly denied appellant's request for reconsideration, which is the subject of the May 14, 2014 decision, is moot.