

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

E.L., Appellant)	
)	
and)	Docket No. 15-1180
)	Issued: September 3, 2015
DEPARTMENT OF COMMERCE,)	
ENVIRONMENTAL MANAGEMENT)	
SECTION, Washington, DC, Employer)	
)	

Appearances:
Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 5, 2015 appellant, through counsel, filed a timely appeal from a December 3, 2014 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.

ISSUE

The issue is whether OWCP properly determined that appellant’s claim for occupational lung disease is barred by the applicable time limitation provisions of FECA.

FACTUAL HISTORY

On June 11, 2012 appellant, then a 43-year-old former hazardous materials/waste facility assistant, filed an occupational disease (Form CA-2) claiming that he sustained chronic

¹ 5 U.S.C. § 8101 *et seq.*

bronchiectasis of both lungs due to hazardous exposures at work while inspecting containers, remediating chemical spills, and disposing of toxins and carcinogens from his hiring in 1998 until he retired from the employing establishment in September 2008. He stated that he had no respiratory issues prior to his federal employment. Appellant first became aware of his condition on January 15, 2001 when diagnosed with bronchiectasis, and first realized its connection to his federal employment on July 25, 2008. In associated statements, he alleged that he was exposed to asbestos at work in the employing establishment's 18th floor attic and mechanical rooms from February to April 2007, as demonstrated by air sampling tests as part of an investigation into employing establishment misconduct. Following his retirement, appellant elected disability retirement benefits through the Office of Personnel Management (OPM).

In support of his allegations of toxic exposures, appellant submitted January 20, April, and June 10, 2011 investigative reports confirming that air sampling tests in February and April 2007 demonstrated elevated airborne asbestos levels on the 18th floor of the building where appellant worked and performed inspections. The investigation revealed that he and others were subjected to "potential exposure to impressible levels of airborne asbestos between February and April 2007." Appellant also provided five coworker statements, dated from February 19, 2010 to April 19, 2013, confirming that he conducted inspections in all areas of the building, including the 18th floor attic.

Appellant also submitted medical evidence regarding treatment of his bronchiectasis beginning in 2000.² In an April 15, 2004 report, Dr. Maria T. Martinez, an attending physician Board-certified in pediatric pulmonology, diagnosed interstitial lung disease "most likely secondary to underlying ulcerative colitis." In an August 12, 2008 report, Dr. Samuel Spagnolo, an attending Board-certified pulmonologist, diagnosed bilateral bronchiectasis, likely associated with long-standing Crohn's disease. Dr. Chun Min Tseng, an attending Board-certified internist, opined on December 8, 2008 that appellant had bronchiectasis, Crohn's disease of the small and large intestine, a cough, and a seizure disorder.

In a September 24, 2012 report, Dr. Patrick A. Flume, an attending Board-certified pulmonologist, diagnosed idiopathic bronchiectasis of unknown etiology, complicated by a history of inflammatory bowel disease, status post colectomy, and ileostomy. He noted that appellant's respiratory disease could be related to military and occupational exposures, but that he could not determine this as he did not have access to the complete medical record.

The employing establishment provided July 3 and 12, September 11 and 27, October 2, and 12, 2012 statements controverting appellant's allegations of hazardous exposures. Its officials contended that February 2007 air samples showing high levels of asbestos and airborne particles were erroneous. The employing establishment alleged that appellant had a preexisting respiratory condition due to toxic exposures during his military service in the first Gulf War.

² Dr. Gale H. Rutan, an attending Board-certified internist, treated appellant beginning in October 2007. She diagnosed a history of bronchiectasis since 2000, and a severe cough with bloody sputum. Dr. Eric Marler, an attending Board-certified internist, stated in a December 8, 2011 report that appellant was first diagnosed with bronchiectasis in 2000. Imaging studies from March 27, 2001 to March 19, 2013 showed bilateral bronchiectasis, scattered atelectasis, with patchy infiltrates in both lungs.

On February 1, 2013 OWCP obtained a second opinion from Dr. Paul J. Marks, a Board-certified pulmonologist. Dr. Marks reviewed a statement of accepted facts, accepting that appellant was exposed to torn insulation around pipes, which could have released hazardous fibers into the air. He related appellant's history of exposure to burning oil wells during the 1992 Gulf War, a private sector position escorting asbestos abatement contractors from 1993 to 1998, and exposure to lead, polychlorinated biphenyls, and asbestos at the employing establishment from 1998 to November 2008. Appellant first noticed respiratory symptoms in 2001. He had a history of ulcerative colitis first diagnosed in 1994, Crohn's disease in 2005, and underwent a colectomy and ileostomy in January 2008. Dr. Marks opined that appellant's "lung disease likely [was] related to his inflammatory bowel disease," and was not related to federal or Gulf War exposures. He noted that appellant's exposure history possibly contributed to his respiratory problems to "an extremely minor degree."

By decision dated May 22, 2013, OWCP denied appellant's claim, finding that he failed to establish causal relationship. It accepted that the alleged exposures occurred as alleged. However, OWCP found that the medical evidence did not support that the accepted exposures caused the claimed respiratory condition. It noted that appellant's physicians attributed his respiratory condition to inflammatory bowel disease.

In a June 4, 2013 letter, appellant requested a hearing, held telephonically on November 15, 2013. During the hearing, he stated that he first became aware of the possible relationship between his federal employment and the claimed respiratory condition in 2006. Following the hearing, appellant resubmitted copies of investigative and medical reports previously of record.

By decision dated and finalized February 27, 2014, an OWCP hearing representative found that the case was not in posture for a decision. He noted that it appeared that appellant's claim was not timely filed within the applicable three-year time limitation, as he first realized his condition was work related in 2006, but did not file his claim until 2012. Additionally, the hearing representative noted that the nature and duration of appellant's exposures were not clear from the record. He remanded the case for further development on the issues of timeliness and the extent of appellant's hazardous exposures at the employing establishment.

In a May 5, 2014 letter, OWCP requested that appellant provide a statement explaining why he delayed filing his claim until 2012 if he was first aware of a possible causal relationship between work factors and the claimed respiratory condition in 2008.

Appellant responded by May 13, 2014 letter, asserting that following a medical visit in 2008, he informed the supervisor that his duties as a Hazardous Materials/Waste Facility Assistant "were aggravating [his] bronchiectasis." Appellant's supervisor and two other managers had no other work available. Appellant stated that he filed an equal employment opportunity complaint for denial of reasonable accommodations due to his respiratory conditions. He contended that investigative findings against J.B. and the employing establishment substantiated his allegations.

In a June 11, 2014 letter, OWCP requested that the employing establishment provide additional information regarding the timeliness of appellant's claim and the events of 2008. The

employing establishment responded by July 2, 2014 letter, asserting that it was difficult to determine when appellant first became aware of his condition, or why he waited until 2012 to file a claim.

By decision dated December 3, 2014, OWCP denied appellant's claim, finding that it was not timely filed within the applicable three-year time limitation under 5 U.S.C. § 8122. It found that he first realized his illness was caused or aggravated by his federal employment on July 25, 2008, but did not file a claim until June 11, 2012, more than three years later. As the claim was denied on the threshold issue of timeliness, OWCP did not address the issue of appellant's exposures or the medical evidence.

LEGAL PRECEDENT

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.³ 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.⁴ 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.⁵ 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 or her alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to section 8119.⁶ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.⁷ The Board has indicated that an employee need only be aware of a possible relationship between his or her "condition" and his or her employment to commence the running of the applicable statute of limitations.⁸

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.⁹ Where the employee

³ 5 U.S.C. § 8122(a).

⁴ *Id.* at § 8122(b).

⁵ See *Linda J. Reeves*, 48 ECAB 373 (1997).

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

⁷ *Willis E. Bailey*, 49 ECAB 509 (1998).

⁸ *Edward C. Horner*, 43 ECAB 834 (1992).

⁹ See *Larry E. Young*, *supra* note 6.

continues in the same employment after he reasonably should have been aware that he 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.¹⁰ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹¹

ANALYSIS

On June 11, 2012 appellant filed an occupational disease claim alleging that his bronchiectasis was due to his exposure to asbestos and other hazardous substances at work. The Board finds, however, that he did not file his claim within the applicable time limitation provisions of FECA.

On his occupational disease claim form, appellant stated that he first realized that his bronchiectasis was caused or aggravated by his employment on July 25, 2008. At the November 15, 2013 hearing, he acknowledged that he was aware of a possible relationship between toxic exposures at work as early as 2006.

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. In his May 13, 2014 letter responding to OWCP's request for additional information about the timeliness of his claim, he asserted that he told his supervisor in 2008 that workplace exposures aggravated his bronchiectasis. The employing establishment, however, denies that appellant alleged a work-related respiratory condition prior to his June 11, 2012 claim. There is no evidence of record corroborating that appellant informed his supervisor of a possible work-related condition prior to his retirement in September 2008. Therefore, he has not established that his immediate superior had actual knowledge of the claimed condition within 30 days under sections 8122(a)(1), 8112(a)(2), or 8119 of FECA.¹²

The Board finds that appellant's statements establish that he 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 of July 25, 2008. Appellant's assertion that he told his supervisor that he saw a link between 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 his claimed medical condition. The Board finds that his unconfirmed statement that he told his supervisor of the suspected connection is denied by the employing establishment and does not establish notice to the employing establishment. However, appellant's claim does establish that he knew in 2008 of a possible linkage. The factual propositions are different.

¹⁰ *J.N.*, Docket No. 14-1599 (issued November 18, 2014).

¹¹ See *Debra Young Bruce*, 52 ECAB 315 (2001).

¹² 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 7.

On appeal, counsel asserts that, while appellant first considered a possible causal relationship between work factors and his respiratory condition on July 25, 2008, he was not fully aware of the causation until Dr. Marks' February 22, 2013 examination. He argues that OWCP should rely on the February 22, 2013 date under the doctrines of latent disability and due diligence as set forth in the Board's holding in *D.S.*¹³ The Board notes, however, that appellant provided detailed statements explaining that he believed there was a causal relationship between occupational exposures and bronchiectasis in 2008, which is why he asked his supervisor for a transfer at that time. Counsel also contends that the employing establishment had actual knowledge of the hazardous exposures in 2008, thereby rendering appellant's claim timely. While the employing establishment was aware of the exposures in 2008, there is no evidence that appellant advised the employing establishment in 2008 that he believed those exposures caused a medical condition. Thus, the employing establishment's knowledge of the exposures is insufficient to render appellant's claim timely under 5 U.S.C. § 8122.

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 OWCP properly determined that appellant's claim for occupational lung disease is barred by the applicable time limitation provisions of FECA.

¹³ Docket No. 06-2155 (issued March 20, 2007).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 3, 2014 is affirmed.

Issued: September 3, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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