

ISSUE

The issue is whether appellant filed a timely claim for compensation under 5 U.S.C. § 8122(a).

FACTUAL HISTORY

On April 21, 2014 appellant, then a 49-year-old retired paramedic, filed an occupational disease claim (Form CA-2), alleging that exposure to airborne liquid and solid toxins while working at the World Trade Center (WTC) rescue and recovery site (Ground Zero) during the period September 12 through 30, 2001 caused Stage IVB Hodgkin's lymphoma, diagnosed on December 20, 2005, and chronic obstructive pulmonary disease (COPD) with bronchiectasis. He worked a 20-hour shift on September 12, 2001 and 12-hour shifts from September 13 to 30, 2001, setting up and staffing medical tents. Appellant asserted that his work area smelled of smoke and was covered in a heavy layer of dust. He alleged that he did not have training in how to use the respirator provided, increasing his level of exposure.³ After September 30, 2001, appellant returned to his regular job in the employing establishment until October 13, 2001 when he stopped work due to depression and increased alcohol consumption.

Appellant also filed a claim for wage-loss compensation (Form CA-7) for the period December 20, 2005 to October 9, 2014 and continuing. He noted that he first became aware of his condition on December 20, 2005, but did not learn that the disease could be work related until October 1, 2013.

In a July 17, 2014 letter, OWCP notified appellant that the evidence was insufficient to support that he had provided timely notification of his work injury, to establish a firm diagnosis of any condition resulting from any employment activity, or to establish how and why specific employment activities had caused, contributed to, or aggravated his medical condition. He was advised of the type of evidence needed to establish his claim and was asked to complete a two-page development questionnaire regarding his claim. He was afforded 30 days to submit such evidence.

In response, appellant submitted medical evidence, along with responses to the questionnaire dated November 4, 2014. In his responses, he noted that in December 2005, when he was first diagnosed with Hodgkin's lymphoma he believed that his lymphoma was due to his exposure at Ground Zero and that he asked multiple physicians for an opinion on whether his cancer was caused by exposure to Ground Zero, but was told that there was no science establishing the connection and they could not make the connection. Appellant contended that he was just a layperson and that until a physician could make that connection, he believed that any claim he filed would have been denied. He noted that it was not until 2013 when a physician agreed with his belief that his lymphoma could have been caused by his presence on September 11, 2001 as a responder.

³ Under File No. xxxxxx813, OWCP accepted appellant's claim for post-traumatic stress disorder (PTSD), chronic, and major depressive disorder recurrent, in remission which he had attributed to his September 2001 experiences at the WTC rescue and recovery site.

Dr. Vincent L. Hennessy, Jr., an attending thoracic surgeon, noted on February 2, 2006 that routine laboratory tests demonstrated an elevated white count with thrombocytosis. A computerized axial tomography (CAT) scan study showed mediastinal lymphadenopathy, confirmed in a December 2005 biopsy as Hodgkin's lymphoma. Dr. Hennessy diagnosed "Nonspecific lung disease from inhalation and debris at the time of 9-11."

By decision dated May 23, 2016, OWCP accepted that appellant was exposed to toxins at Ground Zero as alleged from September 12 to 30, 2001. It further found, however, that the medical evidence of record failed to establish that the accepted exposures caused or contributed to the development of Hodgkin's lymphoma.

In a June 22, 2016 letter, counsel requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated May 1, 2017, an OWCP hearing representative affirmed OWCP's May 23, 2016 decision, finding that the medical evidence of record failed to establish a causal connection between the exposure and the diagnosed conditions.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁶

Under section 8122(a) of FECA⁷ a claimant has three years to file a claim for compensation.⁸ In a case of occupational disease, the Board has held that 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 the employment. Such awareness is competent to start the limitation period even if the employee does not know the nature of the impairment or whether the ultimate result of such affect would be temporary or

⁴ *Supra* note 2.

⁵ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁷ 5 U.S.C. § 8122.

⁸ *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); *see* 20 C.F.R. § 10.101(b).

permanent.⁹ Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of his or her last exposure to the implicated factors.¹⁰

Even if the claim is not filed within the three-year period, it may be regarded as timely under section 8122(a)(1) if appellant's immediate supervisor had actual knowledge of the alleged employment-related injury within 30 days such that the immediate superior was put reasonably on notice of an on-the-job injury or death.¹¹ Section 8122(b) provides that, in latent disability cases, the time limitation does not begin to run until the claimant is aware or, by the exercise of reasonable diligence, should have been aware, of causal relationship between the employment and the compensable disability. The Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.¹²

ANALYSIS

OWCP determined that the claim was timely filed and ruled on the merits of the claim. The issue of whether a claim is timely filed, however, is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.¹³ The Board may raise the issue on appeal even if OWCP did not base its decision on the time limitation provisions of FECA.¹⁴

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. 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

“(2) written notice of injury or death as specified in section 8119 was given within 30 days.”¹⁵

Section 8119 of FECA provides: A notice of injury or death shall--

“(a) be given within 30 days after the injury or death;

⁹ *Duet Brinson, id.*

¹⁰ *Larry E. Young, 552 ECAB 264 (2001).*

¹¹ 5 U.S.C. § 8122(b); *Bennie L. McDonald, 49 ECAB 509, 514 (1998).*

¹² *Id.* at 8122(b); *Edward Lewis Maslowski, 42 ECAB 839, 846 (1991).*

¹³ *See Charles W. Bishop, 6 ECAB 571 (1954).*

¹⁴ *Id.*

¹⁵ *Supra* note 2 at 8122(a).

“(b) be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed;

“(c) be in writing;

“(d) state the name and address of the employee;

“(e) state the year, month, day, and hour when and the particular locality where the injury or death occurred;

“(f) state the cause and nature of the injury, or, in the case of death, the employment factors believed to be the cause; and

“(g) be signed by and contain the address of the individual giving the notice.”¹⁶

Section 8122(b) 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 and the Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.¹⁷ For actual knowledge of a supervisor to be regarded as timely filing, an employee must show not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.¹⁸

The Board finds that appellant did not timely file his occupational disease claim. The evidence of record reveals that appellant, a paramedic, alleged that his condition of Hodgkin’s lymphoma was due to toxic exposures at the WTC rescue and recovery site from September 12 to 30, 2001. Appellant worked at the Ground Zero site for only that time period. He then returned to his regular paramedic position for the employing establishment until October 13, 2001 at which time he stopped work due to depression and increased alcohol consumption. Appellant was diagnosed with post-traumatic stress disorder.¹⁹

The time limitation began to run when appellant knew, or reasonably should have known, of the causal relationship between a condition and the exposure. There is no evidence in the record to suggest that appellant’s supervisor had actual knowledge of the condition or that appellant had provided written notice of the injury within 30 days of the exposure. In his responses to OWCP’s July 2014 development letter, appellant clearly indicated that he was unaware of his condition until December 2005, when he was first diagnosed with Hodgkin’s lymphoma. He was concerned at that time that his Hodgkin’s lymphoma was a result of the exposure at Ground Zero and acknowledged that he had asked multiple physicians for an opinion

¹⁶ *Supra* note 2 at 8119; *Larry E. Young*, 52 ECAB 264 (2001).

¹⁷ *Supra* note 2 at 8119(b); *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹⁸ *Id.* at 8122(b); *Duet Brinson*, 52 ECAB 168 (2000).

¹⁹ *Supra* note 3.

on whether his condition was related to his exposure at Ground Zero. Because appellant was, therefore, aware or reasonably should have been aware of potential causal relationship between his employment and his diagnosed Hodgkin's lymphoma in December 2005 when he was first diagnosed, he would have had three years from that date, or until December 2008, to have filed a claim.

A medical report from Dr. Hennessy, dated February 2, 2006, reflects a diagnosis of "Nonspecific lung disease from inhalation and debris at the time of 9-11." Certainly, by that time, appellant would have been aware that his condition could have been related to his exposure at Ground Zero. With such a diagnosis, a reasonable person would have been aware, or reasonably should have been aware of possible causal relationship between diagnosed condition and toxins at Ground Zero, and the statutory time limitations would have begun to run. In fact, appellant acknowledged in his responses to OWCP's July 2014 development letter that he was concerned that his cancer was caused by exposure to toxins at Ground Zero, but that he waited to file his claim until he could find a physician who agreed with him. 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.²⁰

Even if the time began to run from the date of Dr. Hennessy's February 2, 2006 report wherein he attributed appellant's Hodgkin's lymphoma to his federal employment at Ground Zero, appellant would have only had until February 2, 2009 to file an occupational disease claim. As he did not file his claim until April 21, 2014, it was not filed within the statutory three-year time period. There is no provision in FECA tolling the time limitations of the statute while appellant searches for a physician who agrees that the diagnosed condition is causally related to his employment. In the absence thereof, the general statutory time limitation provisions of FECA must be applied and cannot be waived.

The Board thus finds that appellant's claim was untimely filed.

CONCLUSION

The Board finds that appellant's claim is barred by the applicable statutory time limitation provisions of FECA.

²⁰ *Edward C. Hornor*, 43 ECAB 834, 840 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 1, 2017 is affirmed, as modified.²¹

Issued: December 18, 2017
Washington, DC

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

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

²¹ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.