

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

K.M., Appellant

and

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

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**Docket No. 16-1701
Issued: October 3, 2017**

Appearances:
John Eiler Goodwin, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 23, 2016 appellant, through counsel, filed a timely appeal from a May 16, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² Appellant, through counsel, filed a timely request for oral argument. After exercising its discretion, by order dated April 19, 2017, the Board denied his request finding that his arguments could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 16-1701 (issued April 19, 2017).

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

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

On appeal counsel argues that appellant's claim was timely filed.

FACTUAL HISTORY

On March 11, 2015 appellant filed an occupational disease claim (Form CA-2) dated June 27, 2014. He, then a retired 64-year-old physical science technologist, alleged that he had developed chronic obstructive pulmonary disease (COPD) while working on ships that were being decommissioned.⁴ Appellant noted that he first became aware of his claimed condition and realized that it was causally related to his federal employment in April 2010. On the reverse side of the claim form, the employing establishment noted that he had retired, effective July 1, 2011, and that it had received the claim form on March 4, 2015 *via* facsimile from OWCP.⁵

In support of his occupational disease claim appellant submitted Notifications of Personnel Action (SF-50 forms) dated January 3, 2010 and July 1, 2011. The January 3, 2010 SF-50 noted a general pay adjustment while the July 1, 2011 SF-50 noted appellant's retirement effective that date.

By letter dated March 17, 2015, OWCP requested additional information from appellant noting that the evidence submitted was insufficient to establish that his claim had been timely filed. It also informed him that the evidence of record was insufficient to establish that he sustained an injury in the performance of duty. OWCP advised appellant regarding the factual and medical evidence required and afforded him 30 days to provide the requested information.

OWCP thereafter received additional evidence. Appellant, in a statement dated April 13, 2015, related that he had been diagnosed with COPD in April 2010. He noted that he was exposed to paint and welding fumes; dust from multiple sources; vapor and fumes from jet fuel, engines, and diesel engines; and particulates from insulation or nuclear piping being installed or ripped out.

In a report dated April 13, 2015 and signed on April 15, 2015, Dr. Robert Caulkins, a treating Board-certified family medicine physician, noted appellant's history of COPD, lengthy history of cigarette smoking, and extensive exposure to multiple pulmonary irritants over many years. He noted that appellant quit smoking in April 2010. Dr. Caulkins opined that appellant's exposure to pulmonary irritants at work contributed to the development of his COPD.

⁴ Appellant has several prior claims with OWCP, including an occupational disease claim filed on March 10, 2015, assigned OWCP File No. xxxxxx535.

⁵ There is no evidence of record, however, which supports that OWCP faxed the claim form to the employing establishment on March 4, 2011. The record reflects that the claim form was first received by OWCP on March 11, 2015.

In a statement dated April 15, 2015, appellant referenced Dr. Caulkins' report in support of his claim that his COPD was employment related.

In an April 16, 2015 report, Dr. Griffith M. Blackmon, a treating physician Board-certified in critical care medicine, occupational medicine, pulmonary disease, sleep medicine, and internal medicine, diagnosed COPD and noted a 42-year smoking history.

On May 1, 2015 OWCP received an undated letter from Dr. Caulkins concerning appellant's occupational disease claim. Dr. Caulkins noted that over many years appellant was exposed at work to multiple irritants and chemicals, which included radiation exposure, welding, asbestos, paint, jet fuel, and vaporous fumes. He noted a February 22, 2012 pulmonary evaluation showed a compromised respiratory status. According to Dr. Caulkins, it was reasonable to assume appellant's exposure at work over many years was a contributing cause to his respiratory condition.

On May 18, 2015 OWCP received employee health unit records for the period May 29, 1985 to January 28, 2011. The records noted a smoking history of at least one pack per day, that appellant had quit smoking in 2010, occupational exposure to ionizing radiation, no documented lung problem, and no difficulty breathing. A January 28, 2011 form noted that no medical condition was detected from which continued occupational exposure would place appellant at an increased risk. The form also advised appellant of the increased risk of lung cancer attributable to the combined impact of asbestos exposure and smoking. A January 28, 2011 employee health unit record noted that appellant had stopped smoking and had lung disease (the lung diseases listed were COPD, bronchitis, pneumonitis, and emphysema). The record also noted that appellant had difficulty breathing when climbing stairs. Appellant checked "no" to the question of whether he had shortness of breath while performing his work duties.

By decision dated June 5, 2015, OWCP denied appellant's claim, finding that the evidence of record failed to demonstrate that his claim was timely filed within 3 years of the date of injury or that his immediate supervisor had actual knowledge within 30 days of the date of injury. The decision noted that the date of injury was April 1, 2010 and that the claim was received on March 11, 2015.

On June 25, 2015 OWCP received appellant's request for an oral hearing before an OWCP hearing representative. A hearing was held on December 2, 2015 where appellant was represented by counsel. Appellant testified that he mailed two claims with one being mailed by Express Mail on June 27, 2014 and the second being mailed by regular mail on June 28, 2014. He testified that the postal employee informed him that his June 27, 2014 claim form would be received by OWCP on July 1, 2014. Appellant stated that while he was "a little confused myself because it was so long ago," he believed that the current claim was sent certified since he wanted to make sure it arrived within the applicable time limits. Counsel stated that they would be submitting the Express Mail receipt. He asserted that OWCP ignored the fact that appellant's last date of exposure was July 1, 2011 so that the filing of the claim was timely as OWCP received the claim form on June 30, 2014.

By decision dated January 28, 2016, OWCP's hearing representative affirmed the denial of appellant's claim, finding that it was untimely filed. He found that the mail receipt referenced

by counsel during the hearing was not received and that there was no evidence of record to support that the claim was filed within three years from the date of last exposure.

On March 16, 2016 appellant requested reconsideration. He noted that he was exposed to pulmonary irritants at the employing establishment until he retired on July 1, 2011. Appellant also argued that his claim was timely filed as it was delivered to OWCP by June 30, 2014. He submitted U.S. Postal Service (USPS) tracking receipts indicating that documents were received by OWCP on that date.

By decision dated May 16, 2016, OWCP denied modification of its prior decisions, finding that the evidence of record failed to establish that appellant's occupational disease claim was timely filed. It noted that, while the USPS tracking receipts indicated that something was received by OWCP on June 30, 2014, without a valid claim number on the documents, there is no way of knowing what was sent and what happened to it. As the Form CA-2 of record was received by OWCP on March 11, 2015, it was outside the statutory time limit of three years and there was no evidence of record establishing that appellant had notified his supervisor of his claimed medical condition.

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.⁶ 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 the causal relationship between the employment and the compensable disability.⁷ 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.⁸ Even if a claim is 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 her alleged employment-related injury 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.⁹

ANALYSIS

The Board finds that appellant did not file his claim within the applicable time limitations of FECA.

Although appellant's Form CA-2 was dated June 27, 2014, OWCP's procedures provide that the date the claim is filed is the "date of receipt of a claim by OWCP or the employing

⁶ 5 U.S.C. § 8122(a).

⁷ *Id.* at § 8122(b).

⁸ *J.P.*, 59 ECAB 846 (2003).

⁹ *Id.*

establishment, rather than the date the claim was completed.”¹⁰ The record reflects that appellant’s Form CA-2 was first received by the employing establishment on March 4, 2015 and by OWCP on March 11, 2015. While appellant has submitted USPS tracking receipts showing that OWCP did receive mail from appellant on June 30, 2014, it cannot be determined that the claim form for the current case was indeed the article of mail received as the mail received did not contain a valid OWCP file number.

Appellant first became aware of his COPD and its relationship to his federal employment in April 2010. The time limitation for filing his occupational disease claim began to run on July 1, 2011, the effective date of his retirement and date of last exposure.¹¹ As his Form CA-2 was not received by OWCP until March 11, 2015, his claim was untimely filed outside of the three-year statutory limitation of FECA.¹²

Additionally, there is no evidence of record establishing that appellant’s supervisor or the employing establishment had knowledge of his occupational disease claim within 30 days, or that he provided written notice of injury within 30 days of the date of last exposure.¹³ Employee health records note that appellant had a smoking history of a pack a day until quitting in 2010. The most recent health record form dated and signed by appellant on January 28, 2011 reported that no medical condition was detected for which continued occupational exposure would place him at an increased risk. The January 28, 2011 health record noted that a lung disease had been diagnosed and that appellant had difficulty breathing when climbing stairs, but appellant checked “no” to the question of whether he had shortness of breath while performing his work duties. There is no evidence of record establishing that appellant attributed his COPD at the time to his employment or that a supervisor or the employing establishment was aware that he attributed this condition to his employment. Thus, the Board finds that appellant failed to meet his burden of proof.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board’s merit decision, pursuant to 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not file a timely claim for compensation under 5 U.S.C. § 8122(a).

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.4 (March 1993).

¹¹ See *R.V.*, Docket No. 10-1776 (issued April 1, 2011); *James W. Beavers*, 57 ECAB 254 (2005).

¹² *Supra* note 7.

¹³ *Roger W. Robinson*, 54 ECAB 846 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 16, 2016 is affirmed.

Issued: October 3, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board