



## **FACTUAL HISTORY**

On May 8, 2017 appellant, the employee's son,<sup>3</sup> filed a claim for survivor's benefits (Form CA-5), alleging that asbestos exposure caused the employee's death.<sup>4</sup> The employee died on December 19, 2001. The immediate cause of death listed on the death certificate is illegible.<sup>5</sup> Other significant conditions contributing to death were chronic obstruction pulmonary disease and hypertension. In attached correspondence, appellant indicated that the employee had worked at the employing establishment from 1948 to 1979 when he voluntarily retired.

In a November 25, 1998 report, Dr. Ernesto Bondarevsky, a pulmonologist, noted that he examined the employee for possible asbestos-related disease. He noted a history that the employee had worked from 1948 to 1979 at the employing establishment as a laborer where he had possibly been exposed to asbestos insulation. The employee had severe shortness of breath with a productive cough and high blood pressure. Chest x-ray demonstrated increased interstitial infiltrates in both lungs. Spirometry was not acceptable due to poor effort. Dr. Bondarevsky concluded that, based on significant asbestos exposure, appellant had asbestosis.<sup>6</sup>

Correspondence from a law firm, dated May 24, 2017, indicated that settlements had been made to the employee's estate regarding asbestos claims. Court documents dated from September 13, 2004 to October 14, 2016 listed disbursements made to the employee's heirs, including appellant. The October 14, 2016 document indicated that the estate was closed.

By decision dated August 4, 2017, OWCP denied the claim, finding that it was untimely filed.

On August 17, 2017 appellant requested a hearing with OWCP's Branch of Hearings and Review. In correspondence dated August 14, 2017, appellant asserted that the employee was aware of the relationship between his asbestos and employment prior to his death on December 17, 2001, and that when he died, appellant was incompetent and under treatment for paranoid schizophrenia. He asserted that the claim was timely filed. Appellant forwarded a Social Security Administration (SSA) notice of award dated February 8, 2003 which indicated that appellant was entitled to receive Supplemental Security Income (SSI) beginning March 1, 2003.

An August 7, 2003 nurse assessment form described appellant's medication and indicated that he recently had eye surgery. On August 7, 2003 Dr. Jeffery Stephen Seward, a psychiatrist, prescribed medications. A Psychiatric Associates of Arkansas form listed appellant's medications and indicated that they had been reviewed by Dr. Philip Lewis Mizell, a Board-certified

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<sup>3</sup> Appellant's birth certificate confirms that the employee was his father.

<sup>4</sup> The Form CA-5 also noted that the employee had another son, W.H. Jr., who was born mentally impaired and died on February 9, 2014.

<sup>5</sup> In correspondence dated May 8, 2017, appellant indicated that the employee died from lung cancer.

<sup>6</sup> Copies of the chest x-ray and spirometry were attached.

psychiatrist, on August 1, 2017. The form listed a diagnosis of schizoaffective disorder, bipolar type.

A document filed with the 116<sup>th</sup> Judicial District in Dallas, Texas on May 7, 2003 indicated that the employee's heirs and estate had filed an asbestos-related claim against a third party. This document noted that appellant was one of the employee's children and that he would testify as a witness regarding changes that occurred in the employee's lifestyle, and appellant's physical and mental health incurred as a result of the employee's illness and death.

During the hearing, held on January 10, 2018, the hearing representative informed appellant that awareness would certainly have occurred by May 7, 2003, the date of the court document which named appellant and indicated that he would testify in that case. Appellant testified that he was incompetent to timely file a claim. He discussed his physical and mental conditions and maintained that he had been declared mentally incompetent 14 months after his father died. The hearing representative advised appellant to submit evidence substantiating that he was incompetent.

By decision dated March 12, 2018, the hearing representative affirmed the August 4, 2017 decision, finding that, in accordance with section 8122 of FECA, the claim was untimely filed. She noted that the employee died on December 19, 2001, and the claim was not filed until May 8, 2017. The hearing representative found that, while appellant claimed that he was incompetent to file a claim, he had submitted insufficient medical evidence to establish this status, noting that the court document dated May 7, 2003 indicated that appellant was aware on that date of the employee's work-related asbestos exposure. She noted that she had urged him to submit evidence establishing incompetency, noting that a document dated August 7, 2003 showed that he was diagnosed with schizoaffective disorder, bipolar type, but that, even if that did show incompetency on that date, it did not support that he remained incompetent until May 2017 when he filed the instant claim.

### **LEGAL PRECEDENT**

Whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.<sup>7</sup> 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.<sup>8</sup> In the case of death due to a latent disability, the time for filing a death claim does not begin to run until the employee has died and his survivors are aware of or by the exercise of reasonable diligence should have been aware of the causal relationship of the employee's death to factors of his employment.<sup>9</sup>

The three-year limit on filing a claim for compensation does not apply in the following limited circumstances: (1) the employee's direct supervisor had actual knowledge that created

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<sup>7</sup> See *M.S. (M.S)*, Docket No. 14-0930 (issued February 25, 2015); *Charles Walker*, 55 ECAB 238 (2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

<sup>8</sup> 5 U.S.C. § 8122(a); *E.B.*, 58 ECAB 642 (2007).

<sup>9</sup> 5 U.S.C. § 8122(b); *E.B.*, *id.*

reasonable notice of an on-the-job injury or death within 30 days;<sup>10</sup> (2) an employee or survivor gave formal written notice within 30 days of becoming aware that the injury or death was causally related to the federal employment;<sup>11</sup> (3) the employee filed a timely disability claim for a work-related injury or disability and the employee's death is based on the same injury;<sup>12</sup> and (4) the claimant is under 21 years old, the claimant is incompetent and has no legal representative, or the claimant is prevented from giving notice by exceptional circumstances.<sup>13</sup> Lack of awareness of possible entitlement, lack of information or ignorance of the law or one's rights and obligations under it do not constitute exceptional circumstances that excuse a failure to file a timely claim.<sup>14</sup> Section 8122(d)(3) of FECA provides that, time limitations for filing a claim "do not run against any individual whose failure to comply is excused by the Secretary on the grounds that such notice could not be given because of exceptional circumstances."<sup>15</sup>

Section 8119 of FECA provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury, or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.<sup>16</sup> Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.<sup>17</sup> For actual knowledge of a supervisor to be regarded as timely filing, a claimant 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.<sup>18</sup>

### ANALYSIS

The Board finds that appellant has not established that he filed a timely claim for death benefits in accordance with 5 U.S.C. § 8122.

Appellant, the son of the employee who died on December 19, 2001, filed the instant claim for death benefits on May 8, 2017. The time to file a claim began to run on December 19, 2001,

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<sup>10</sup> *Supra* note 7; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Death Claims*, Chapter 2.700.5.b (November 1996).

<sup>11</sup> 5 U.S.C. § 8122(a), (b); Federal (FECA) Procedure Manual, *id.* at Chapter 2.700.5.b(1).

<sup>12</sup> *Id.* at § 8122(c).

<sup>13</sup> *Id.* at § 8122(d).

<sup>14</sup> *E.B., supra* note 8.

<sup>15</sup> 5 U.S.C. § 8122(d)(3).

<sup>16</sup> *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

<sup>17</sup> *Laura L. Harrison*, 52 ECAB 515 (2001).

<sup>18</sup> 5 U.S.C. § 8122(b); *Duet Brinson*, 52 ECAB 168 (2000).

the date of the employee's death. As appellant filed his claim for death benefits on May 8, 2017, his claim was not timely filed within the three-year time limitation.<sup>19</sup>

Though appellant has not met his burden of proof to establish that he filed the claim within the three-year limitation, his claim could be considered timely if he met any of the statutory exceptions. The Board finds, however, that an exception has not been established by the appellant and the evidence of record.

The employee worked at the employing establishment from 1948 until he voluntarily retired in 1979. There is no evidence that the employee's immediate supervisor had actual knowledge that the employee's death was caused or related to his employment within 30 days. There is also no evidence that appellant or the employee provided written notice to the employing establishment within 30 days of becoming aware of the possibility that the employee's death or illness was causally related to factors of his federal employment. The record also does not indicate that the employee filed a disability claim under FECA for an asbestos-related condition prior to his death on December 19, 2001.

With regard to appellant, none of the exceptions relating to his ability to file a claim apply in this case. Appellant was not a minor at the time of the employee's death. Although he maintained that he was incompetent at the time of his father's death and subsequently, there is no probative evidence of record to support this assertion. The record merely contains an August 7, 2003 nurse assessment form and prescribed medications. A form from the Psychiatric Associates of Arkansas, indicated that appellant's medications had been reviewed by Dr. Mizell on August 1, 2017 who diagnosed schizoaffective disorder, bipolar type. The Board has held that it is appellant's burden to establish incompetency for a given period by submitting medical evidence stating that his condition was such that he was incapable of completing a claim form or of otherwise furnishing the relatively simple information necessary for filing a claim and satisfying the limitation requirements.<sup>20</sup> None of the evidence of record contains any opinion regarding appellant's competency from 2001 until 2017.

Appellant also submitted an SSA award dated February 8, 2003 which indicated that he was entitled to receive SSI compensation beginning March 1, 2003. This document also does not indicate that he was incompetent, pursuant to FECA. The Board has noted that findings of other government agencies are not dispositive with regard to questions arising under FECA.<sup>21</sup>

Lastly, appellant has not provided evidence of an exceptional circumstance that would excuse his failure to timely file the claim. The Board has held that unawareness of possible entitlement, lack of access to information and ignorance of the law or one's obligations under

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<sup>19</sup> 5 U.S.C. § 8122.

<sup>20</sup> *V.M.*, Docket No. 12-1611 (issued January 17, 2013).

<sup>21</sup> *See A.M.*, Docket No. 17-1192 (issued September 19, 2018).

FECA does not constitute exceptional circumstances that could excuse a failure to file a timely claim.<sup>22</sup>

The evidence of record establishes that the employee was diagnosed with asbestosis in November 1998, and thereafter his estate filed claims related to asbestos exposure with the 116<sup>th</sup> Judicial District in Dallas, Texas. A court document filed with that court on May 7, 2003 indicated that appellant was one of the employee's children, and he would testify as a witness in a case against the third party defendant. The Board finds this evidence probative that appellant was competent on that date such that a death claim should have been filed no later than May 7, 2006. The record did not support that appellant was incapable of filling out a claim form to satisfy the time limitation requirement within three years after May 7, 2003.<sup>23</sup>

Section 8122(d)(3) of FECA provides that, time limitations for filing a claim "do not run against any individual whose failure to comply is excused by the Secretary on the grounds that such notice could not be given because of exceptional circumstances." Appellant has not established that he could not file a timely claim due to exceptional circumstances as that term is used in section 8122(d)(3) of FECA. The Board finds that appellant's failure to timely file his claim within three years of the employee's death on December 19, 2001, or at the latest three years following the May 7, 2003 court document, precludes him from seeking compensation under FECA.<sup>24</sup>

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 has not filed a timely claim for death benefits in accordance with 5 U.S.C. § 8122.

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<sup>22</sup> *Ralph L. Dill*, 57 ECAB 248 (2005).

<sup>23</sup> *See S.A.*, Docket No. 14-0611 (issued October 15, 2014).

<sup>24</sup> *E.B.*, *supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 12, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 21, 2018  
Washington, DC

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

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

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