United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant	)	
and	)	**Docket No. 18-0220**
	)	**Issued: July 27, 2018**
DEPARTMENT OF AIR FORCE, KELLY AIR FORCE BASE, TX, Employer	)	

Appearances:
Sara Kincaid, Esq., for the appellant[1]
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 7, 2017 appellant, through counsel, filed a timely appeal from a May 15, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the 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] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant's occupational disease claim is barred by the applicable time limitation provisions of 5 U.S.C. § 8122(a).

On appeal counsel contends that appellant's claim was timely filed as appellant's supervisor had actual knowledge of his exposure to asbestos through July 1999.

FACTUAL HISTORY

On January 31, 2016 appellant, then a 63-year-old retired pneudraulic systems mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed asbestosis due to exposures in his federal employment. He noted that he first became aware of his claimed condition on April 1, 1993 and first attributed it to his federal employment on September 29, 2006 when an x-ray showed nodules on his lungs. Appellant alleged that he experienced difficulty breathing, recurrent pneumonia, scarring on his lungs, dry cough, pleural effusion, loss of appetite, weight loss, fatigue, skin disorders, fever, and anemia.

In his accompanying statement, appellant also asserted that he developed bullous pemphigoid on December 29, 2011 as well as arthritis and psoriasis. He attributed these conditions to his exposure to asbestos. Appellant noted that he became aware of his lung disease due to exposure to asbestos in September 2006 when diagnosed by Dr. Edward Lefeber, a Board-certified internist. He reported that he worked in building 347 beginning in April 1993 and became aware of the asbestos in the building in 1998 during remodeling of the building. Appellant worked in building 347, 8 hours a day, 40 hours a week. Prior to clearing the base, union officials recommended that employees file Form CA-2s in the event of future illness related to exposure to asbestos.

In development letters dated February 16, 2016, OWCP requested additional information from appellant and the employing establishment. It afforded 30 days for a response. The employing establishment did not respond.

Appellant completed OWCP's questionnaire on March 4, 2016 and submitted additional documentation. He noted that the Form CA-2 he initially submitted could not be located by the employing establishment. Appellant alleged that he had official documentation from the employing establishment indicating that asbestos existed in the walls and ceiling of the building where he worked. He was not provided with safety equipment and was also exposed to fuels, gases, and paint fumes during his federal employment.

Appellant first became aware of his condition in September 2006 when he developed chronic nasal congestion and underwent chest x-rays which demonstrated lung abnormalities. His physicians asked about asbestos exposure and appellant replied positively. Appellant noted, "I did not know I had lung problems until I was diagnosed in October 2006, still I did not think anything about it until I was hospitalized on December 29, 2011 when I developed blisters to my arms and legs." He attribute his diagnosed bullous pemphigoid to deterioration of his autoimmune system due to asbestos exposure.

Appellant described repairs to remove the asbestos from his worksite, noting that in some areas the employing establishment sprayed glue to keep the asbestos intact. He alleged that asbestos dust could be seen all over his work area, that large chunks of asbestos fell off of the ceiling, that asbestos fibers fell on his clothing and skin, and that he inhaled the fibers.

Appellant alleged that he and coworkers filed Form CA-2s when they were advised of the asbestos exposure, but that he did not receive an OWCP file number. He noted that the employing establishment could not find a record of his claim. Appellant stopped work at the employing establishment on July 7, 1999 when the base closed. He alleged that he had photographs of building 347, which included signs indicating that there was asbestos in the building. Appellant asserted, "If asbestos still exists in this building, then it is reasonable to assume that it was there in 1993 when I was assigned to this same building. These signs were not posted when I was assigned to building 347 at the employing establishment in 1993."

Appellant underwent chest-x-rays on September 29, 2006. On October 27, 2006 Dr. Antonio Anzueto, an internist, examined appellant due to an abnormal chest x-ray with multiple lung nodules. He noted that appellant had a history of asbestos exposure while working as an airplane mechanic. Dr. Anzueto explained that appellant had a history of asbestos exposure and that he presented with multiple pulmonary nodules which were associated with calcified pleural thickening. He noted, "At this time it is difficult to assess the etiology of these nodules." Dr. Anzueto examined appellant on January 5 and July 27, 2007 and found that his chest x-ray demonstrated multiple lung nodules and pleural thickening. He again related that appellant had a history of asbestos exposure, but that it was difficult to assess the etiology of the lung nodules.

Dr. Marc Chalaby, a pulmonologist, examined appellant on July 9, 2014 and reported that appellant worked as a mechanic at the employing establishment, and was exposed to asbestos. He reviewed appellant's computerized tomography (CT) scan dated June 10, 2014 and found extensive nodules and significant calcification of the right diaphragm suggestive of asbestos-related exposure. Dr. Chalaby examined appellant on October 8, 2014 and opined that his CT scan was consistent with asbestos-related pleural disease. In notes dated June 1, 2015, he diagnosed bulbous pemphigoid, bronchiectasis, left pleural effusion, and pleural plaques. Dr. Chalaby noted that appellant worked at the employing establishment as a mechanic until 1998 and asserted that appellant was exposed to asbestos in construction. He noted that appellant's x-ray and CT scan findings were typical of calcified asbestos pleural plaques. On July 21, 2015 Dr. Chalaby diagnosed asbestosis based on appellant's July 9, 2015 CT scan.

By decision dated March 29, 2016, OWCP denied appellant's occupational disease claim as it was untimely filed. It found that appellant initially became aware of the relationship between his disease and illness to his federal employment on September 29, 2006 but did not file a claim until January 31, 2016. Additionally, OWCP found that the evidence of record did not support a finding that his immediate supervisor "had actual knowledge of the injury within 30 days of the date of injury."

Counsel requested reconsideration on March 28, 2017. She summarized appellant's factual statement and contended that appellant's claim was timely filed. Counsel alleged that appellant had timely provided written notice of his "exposure to asbestos" and that his immediate superior had actual knowledge of appellant's "exposure to asbestos" within 30 days of appellant's

last exposure. She asserted that the employing establishment had not contested his allegations that he submitted a Form CA-2 prior to the closure of the employing establishment and that OWCP should, therefore, accept appellant's allegations as factual and find that he had provided sufficient written notice for his claim to be timely under FECA.

Counsel also submitted an additional factual statement from a supervisor assigned to appellant's division, M.B. In his undated statement, M.B. noted that appellant worked in the same area as his unit and that he was aware that asbestos existed in building 347 as were all employees. He asserted that the building was built before 1950 and had asbestos in the walls and ceiling. M.B. noted that in the mid-1980's the asbestos became a health issue and the employing establishment sprayed the ceiling with a "glue-like substance."

In a statement dated June 27, 2016, one of appellant's coworkers at the employing establishment, R.V., noted building 347 was insulated with asbestos on the walls, ceiling, and pipes. He reported that, when the health hazards of asbestos became widely known, the employees were given the option to work in another building. The employing establishment withdrew this option when some aircraft components came in demand for aircraft engines, and directed the employees to return to building 347 to work on the items needed, while the asbestos was being removed. R.V. noted that the building was empty except for workers removing the asbestos and those employees directed to test aircraft components. He asserted that the employees were informed by union representatives to file OWCP claims for asbestos, but the claims were rejected. Appellant also provided photographs of signs warning of asbestos and breathing hazards.

In a March 24, 2017 report, Dr. Ko Ko Aung, a Board-certified internist, noted that he treated appellant from May 2010 through February 2016 due to cough, exertional shortness of breath, and recurrent bronchopulmonary infection. Dr. Aung reported appellant's employment history and medical test results. He noted that appellant's CT scans demonstrated pleural thickening, which was associated with asbestos exposure. Dr. Aung noted that appellant's findings on diagnostic studies were consistent with those typically found in individuals with lung disease originating from asbestos exposure. He also indicated that appellant was a former smoker, who stopped in 1990. Dr. Aung opined that appellant's interstitial fibrosis of the right lung was attributable to both prolonged asbestos exposure and tobacco use. He reported that appellant's lung function tests did not show obstructive disease typical of tobacco-related lung disease and that he concluded that appellant's lung conditions were attributable to a greater extent to asbestos exposure.

By decision dated May 15, 2017, OWCP reviewed the merits of appellant's claim, but denied modification of its March 29, 2016 decision. It again found that appellant's occupational disease claim was untimely filed.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.[3] In cases of injury on or after September 7,

[3] *C.S.*, Docket No. 18-0009 (issued March 22, 2018); *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

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.[4]

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. 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.[5] Where the employee 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.[6] Section 8122(b) of FECA 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.[7] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[8]

ANALYSIS

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

On January 31, 2016 appellant filed a claim alleging that he sustained lung and skin conditions causally related to his exposure to asbestos in his federal employment. The record establishes that appellant's last exposure to asbestos at the employing establishment was July 7, 1999 when the employing establishment closed. As appellant continued to be exposed to the alleged employment factors until July 7, 1999, the time limitation for filing a claim would normally begin to run on the date of his last exposure.[9] In cases of latent disability, however, the time for filing does not begin to run until the claimant is aware or by exercise of reasonable diligence should be aware of the causal relationship between his condition and his employment.[10]

Appellant has alleged that he did not become aware of the connection between his respiratory condition and factors of his federal employment until October 2006. He noted, "I did not know I had lung problems until I was diagnosed in October 2006, still I did not think anything about it until I was hospitalized on December 29, 2011 when I developed blisters to my arms and legs." Appellant attributed his diagnosed bullous pemphigoid to deterioration of his autoimmune

[4] *C.S., id.*; *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

[5] *C.S., id.*; *Larry E. Young*, 52 ECAB 264 (2001).

[6] *Id.*

[7] 5 U.S.C. § 8122(b).

[8] *C.S., supra* note 3; *Gerald A. Preston, supra* note 4; *Debra Young Bruce*, 52 ECAB 5 (2001).

[9] *See J.N.*, Docket No. 14-1599 (issued November 18, 2014); *Larry E. Young, supra* note 5.

[10] 5 USC § 8122(b); *see J.N., id.*; *Luther Williams, Jr.*, 52 ECAB 360 (2001).

system due to asbestos exposure. As the Board has previously noted, when an employee becomes aware or reasonably should have become aware, that he has a condition which has been adversely affected by factors of his employment, such awareness is competent to start the running of the time limitation period, even though he does not know the precise nature of the impairment, or whether the ultimate result of such adverse effect would be temporary or permanent.[11] In discussing the degree of knowledge required by the employee prior to filing a claim, the Board has emphasized that he need only be aware of a possible relationship between his condition and his employment to commence the statute of limitations. The Board has not required that appellant have definitive evidence of a condition and causal relationship on the date the claim is filed. Although he may have had some doubt as to a definitive diagnosis, the Board finds that appellant knew or reasonably should have known, of a relationship between his condition and his employment when he reported that his asbestosis-related lung disease was diagnosed in October 2006.[12] As this claim was filed on January 31, 2016 it was not filed within three years of appellant's discovery of his latent condition.

Appellant's claim, however, would still be regarded as timely under section 8122(a)(1) of FECA if his immediate supervisor had actual knowledge of the 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.[13] Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.[14]

Counsel contends that appellant's claim for asbestosis should have been considered timely as he filed a Form CA-2 in 1999 based on his employment-related exposure to asbestos as this provided written notice of the injury. Appellant did not submit a copy of this earlier Form CA-2 in support of his allegation. He did submit a statement from R.V. who also alleged that his coworkers, including appellant, were advised to and filed occupational disease claims based on the exposure to asbestos, but that these claims were rejected. 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] The Board has held that the time limitation begins when a claimant knew or should have known of causal relationship between a condition and the asbestos exposure.[16] Appellant has not alleged that he had a condition as a result of his exposure to asbestos in 1999, rather he indicated that he filed the 1999 claim merely as a place holder to protect his rights in the event of the

[11] *See supra* note 5.

[12] *Cf. Willie Wade*, Docket No. 03-0425 (issued April 4, 2003) (where appellant experienced only minor symptoms of wrist pain during his period of employment and the medical evidence did not show that his condition was such that he was aware or should have been aware of a possible employment related cause for his condition at that time, the Board found that it was reasonable that he would not relate his claimed upper extremity condition to his employment at that time).

[13] 5 U.S.C. § 8122(a)(1); *see C.S., supra* note 3; *Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

[14] *Id.* at § 8122(a)(1) and (2).

[15] 57 ECAB 143 (2005).

[16] *Charles Walker*, 55 ECAB 238 (2004).

development of a subsequent condition. The Board finds that as appellant has alleged that he filed his claim in 1999 based only on exposure, and not due to a condition, this claim would be insufficient to toll the time limit under FECA.[17]

In the present case, the record contains no evidence that appellant's supervisor had actual knowledge of the employment injury within 30 days. Appellant failed to submit any information to substantiate that management was aware that he had respiratory problems causally related to his employment prior to 2006. There was no statement from a supervisor establishing knowledge of a work-related injury.[18] Knowledge merely of an employee's exposure is insufficient to establish actual knowledge and timeliness. It must be shown that the circumstances were such as to put the supervisor on notice that the alleged injury was actually related to the employment or that the employee attributed it thereto.[19] Therefore, the Board finds that appellant has not established actual knowledge by his supervisors of his work-related condition within 30 days and therefore has not established a timely claim. The exceptions to the statute have not been met, and thus, he has failed to establish that he filed a timely claim on October 11, 2016. For the reasons noted above, counsel's allegations on appeal are not substantiated.

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's claim is barred by the applicable time limitation provisions of 5 U.S.C. § 8122(a).

[17] 20 C.F.R. § 10.101(b).

[18] *C.S., supra* note 3; *See Linda J. Reeves,* 48 ECAB 373 (1997) (where the Board held that while appellant submitted a statement from a former supervisor that established that he had some knowledge of her complaints, this statement is not sufficient to establish that her immediate superior had actual knowledge of a work-related injury as the statement only makes a vague reference to her health and does not indicate that she sustained any specific employment-related injury, rather the knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death).

[19] *C.S., supra* note 3; *See Roseanne S. Allexenberg,* 47 ECAB 498 (1996) (where the Board held that knowledge of an employee's illness is insufficient to establish actual knowledge and timeliness of a claim, it must be shown that the circumstances were such as to put the supervisor on notice that the alleged injury was actually related to the employment or that the employee attributed it thereto).

ORDER

IT IS HEREBY ORDERED THAT the May 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 27, 2018
Washington, DC

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

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

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