

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

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**J.S., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE, BIEN  
HOA AIR BASE, Vietnam, Employer**  
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**Docket No. 18-0315  
Issued: October 5, 2018**

*Appearances:*  
*Appellant, pro se*  
*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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On November 27, 2017 appellant filed a timely appeal from an August 29, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 appellant filed a timely claim for compensation under section 8122 of FECA.

**FACTUAL HISTORY**

On April 27, 2016 appellant, then an 83-year-old former distribution facilities manager, filed an occupational disease claim (Form CA-2) alleging that he sustained Type 2 diabetes mellitus, peripheral neuropathy, ischemic heart disease, a thyroid condition, dizziness/vertigo, and

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

cholesterol problems causally related to exposure to herbicides and Agent Orange while in Vietnam in 1967. He related that he first became aware of his claimed condition on June 15, 2011 and attributed it to his federal employment on October 1, 2011. Appellant had retired from the employing establishment on December 3, 1987.

Appellant submitted a letter of appreciation that he received from the employing establishment for his service in Vietnam from September 13 to December 16, 1967. He also submitted a December 2, 2011 letter from coworkers confirming that he volunteered to go to Vietnam in 1967 to support the Rapid Area Supply Support (RASS) team while working in distribution at the employing establishment.

By development letter dated May 2, 2016, OWCP requested that appellant submit additional factual and medical information in support of his claim, including evidence that his claim was filed within three years of the date he first became aware of the relationship between his claimed condition and his federal employment. It also advised appellant to provide a detailed description of his exposure to herbicides and Agent Orange while in Vietnam and reasoned medical evidence supporting that he sustained a diagnosed condition causally related to the identified employment factors.

In a May 31, 2016 statement, appellant related that he went to Vietnam on a temporary-duty assignment from September 13 until December 17, 1967. The area where he worked had been sprayed with Agent Orange and other herbicides. In June 2011, appellant communicated with veterans who had been exposed to Agent Orange and they recommended that he speak with the Department of Veterans Affairs (DVA).

On October 19, 2011 appellant filed a DVA claim asserting that his Agent Orange exposure in Vietnam caused vertigo, ischemic heart disease, prostate cancer, diabetes mellitus, Type 2, and post-traumatic stress disorder. By decision dated January 10, 2013, the DVA denied his claim finding that the claimed conditions were unrelated to military service.

By decision dated October 25, 2016, OWCP denied appellant's claim, finding that it was untimely filed pursuant to 5 U.S.C. § 8122, as he failed to file his claim within three years of October 19, 2011. It noted that appellant's filing of a claim for Agent Orange exposure with the DVA indicated that he was aware of the relationship between his claimed conditions and the work exposure no later than October 19, 2011.

Appellant, on November 19, 2016, requested a telephone hearing before an OWCP hearing representative. During the telephone hearing, held on June 15, 2017, he testified that he first became aware of his claimed conditions on June 15, 2011 and attributed them to his federal employment on October 1, 2011. Appellant noted that he filed a claim with the DVA on October 19, 2011, but the DVA denied his claim in January 2013 after finding that his diagnosed conditions were not service related since he was a civilian employee in Vietnam, not a military service member. He noted that the DVA provided a presumption of exposure to Agent Orange only for military service members in Vietnam.

In a July 1, 2017 letter, appellant asserted that the military kept its use of Agent Orange secret. He submitted provisions related to the Defense Base Act.

By decision dated August 29, 2017, OWCP's hearing representative affirmed the October 25, 2016 decision. She found that appellant's claim was untimely as it was not filed within three years of the date that he was first aware that his condition was related to his federal employment. The hearing representative further determined that there were no exceptional circumstances under section 8122(d) that would excuse his failure to comply with the time limitation provisions.

### **LEGAL PRECEDENT**

For injuries occurring between December 7, 1940 and September 6, 1974, the time limitation provisions of FECA require that an injured employee file a claim for compensation within one year after the injury.<sup>2</sup> The one-year requirement may be waived provided the claim is filed within five years after the injury or death and: (1) the failure to timely file was due to circumstances beyond the control of the employee; or (2) the employee has shown sufficient cause or reason in explanation of the failure to file within one year and material prejudice to the interest of the United States has not resulted.<sup>3</sup>

In 1974, section 8122(a) of FECA was amended to provide that, for injuries and deaths on or after September 7, 1974, an original claim for compensation for disability or death must be filed within three years after the injury or death.<sup>4</sup> If the claim is not filed within three years, compensation may still be allowed if: (1) written notice of injury or death was given within 30 days as specified in 5 U.S.C. § 8119; or (2) the immediate supervisor had actual knowledge (including verbal notification) of the injury or death within 30 days after occurrence. The knowledge or notification must be such as to put the immediate supervisor reasonably on notice of an on-the-job injury or death.<sup>5</sup>

In a case involving a claim for an occupational disease or illness, the time does not begin to run until the claimant is aware, or reasonably should have been aware, of causal relationship between his or her claimed condition and their federal employment.<sup>6</sup> In situations where the exposure to an injurious employment factor continues after the employee gains such awareness, the time for filing a claim begins to run on the date of the employee's last exposure to those

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<sup>2</sup> 5 U.S.C. § 8122 (1968); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3b (March 1993).

<sup>3</sup> *Id.*; see also *Allen E. Grether*, 24 ECAB 76 (1972).

<sup>4</sup> 5 U.S.C. § 8122 (1974); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3a (March 1993).

<sup>5</sup> *Id.*

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993). See *Charles Walker*, 55 ECAB 238 (2002); *William L. Gillard*, 33 ECAB 265, 268 (1981).

factors.<sup>7</sup> The time limitations do not run against an incompetent individual while he or she is incompetent and has no duly appointed legal representative.<sup>8</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant filed an occupational disease claim on April 27, 2016 alleging that he sustained multiple conditions causally related to exposure to herbicides and Agent Orange during the time that he worked in Vietnam from September 13 to December 16, 1967. He reported that he first became aware of the relationship between his claimed conditions and factors of his federal employment on October 1, 2011. Appellant submitted a letter from the employing establishment confirming his work in Vietnam from September 13 to December 16, 1967.

Under FECA, the date of injury governs which time limitation provision applies.<sup>9</sup> Where an injury is sustained over a period of time, the date of injury is the date of last exposure to the work factors causing an injury.<sup>10</sup> In this case, the date of injury is December 16, 1967, the date of appellant's last exposure to the implicated work factors.

OWCP's hearing representative denied appellant's claim, finding that it was not filed within three years of October 19, 2011, the date that appellant filed his DVA claim. OWCP's procedures provide, however, that for injuries occurring between December 7, 1940 and September 6, 1974, a claim for compensation must be filed within one year after the injury or death, and as noted, the one-year requirement may be waived under certain circumstances if the claim is filed within five years and certain criteria are met.<sup>11</sup>

The Board thus finds that OWCP's hearing representative incorrectly applied the three-year time limitation standard applicable to injuries or deaths after September 7, 1974. The case shall, therefore, be remanded for OWCP to apply the appropriate time limitation standard for injuries occurring between December 7, 1940 and September 6, 1974 and make a proper determination on the issue of whether appellant's claim was timely filed.<sup>12</sup> After such further development as deemed necessary, it shall issue a *de novo* decision.

### CONCLUSION

The Board finds that this case is not in posture for decision.

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<sup>7</sup> *Id.*; see also *Patricia K. Cummings*, 53 ECAB 623 (2002); *Jaried M. Bailey*, 26 ECAB 9 (1974).

<sup>8</sup> *Allen E. Grether*, *supra* note 3.

<sup>9</sup> See *J.R.*, Docket No. 07-2278 (issued May 19, 2008); *J.B.*, 58 ECAB 468 (2007).

<sup>10</sup> See *Patricia K. Cummings*, *supra* note 7.

<sup>11</sup> See *supra* note 3.

<sup>12</sup> See *J.B.*, *supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 29, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 5, 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