

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).

FACTUAL HISTORY

On August 3, 2018 appellant, then a 73-year-old former welding training leader, filed an occupational disease claim (Form CA-2) alleging that on May 18, 2010 he first became aware of his pulmonary condition and of its relationship to his former federal employment duties. On the reverse side of the claim form the employing establishment indicated that appellant first reported his condition to his supervisor on June 4, 2018. It also related that he had retired from federal employment on August 3, 1995.

A notification of personnel action (Form SF-50) dated August 3, 1995 indicated that appellant retired from federal employment effective that day.

In a development letter dated August 7, 2018, OWCP advised appellant that the evidence submitted was insufficient to establish that he timely filed his claim. It also advised him that the medical portion of his claim had been reviewed and was found to be insufficient. OWCP explained the medical and factual evidence needed to establish appellant's claim. It afforded him 30 days to submit the necessary evidence.

In a letter dated August 14, 2018, the employing establishment challenged appellant's claim. It related that he erroneously indicated on his claim form that he was last exposed to the employment factors contributing to his condition on May 18, 2010, which was 15 years after he had retired. The employing establishment also noted that there was no contemporaneous medical evidence to support appellant's claim.

In a statement dated August 20, 2018, appellant related that he had not filed his claim in a timely manner because he was unaware that his illness could be compensated. He noted that he first became aware that he was able to file a claim for his alleged condition in May 2018.

In a report dated June 16, 2011, received by OWCP on August 27, 2018, Dr. Frank M. Ganzhorn, Board-certified in critical care medicine, internal medicine, and pulmonary disease, examined a computerized tomography (CT) scan of appellant's chest and diagnosed asbestos-induced pleural plaques, abnormal pulmonary function with pulmonary restriction, and diminished diffusing capacity, dyspnea on exertion, and rhinitis.

In a report dated November 10, 2014, received by OWCP on August 27, 2018, Dr. Dee Ann H. Taylor, Board-certified in family medicine, examined x-rays of appellant's chest and noted an impression of no acute cardiopulmonary findings possible increased plural thickening posteriorly.

By decision dated September 7, 2018, OWCP denied appellant's claim finding that he failed to file a timely claim within the requisite three years under section 8122 of FECA. It found that the date of injury was May 18, 2010, and that he had not filed a claim for compensation until August 3, 2018, more than eight years after the date of injury. OWCP further found that there was

no evidence that appellant's immediate supervisor had actual knowledge within 30 days of the date of injury.

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, 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 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.⁵ 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.⁶

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.⁷

Even if a claim is not 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 his or her alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to section 8119.⁸ 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's occupational disease claim is barred by the applicable time limitation provisions of 5 U.S.C. § 8122(a).

The record establishes that appellant's last exposure to the implicated factors of his federal employment occurred on August 3, 1995, the date of his retirement from federal service. Appellant filed an occupational disease claim on August 3, 2018, a date which is more than three

³ *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

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

⁵ 5 U.S.C. § 8122(b).

⁶ *Edward C. Hornor*, 43 ECAB 834, 840 (1992).

⁷ See *Linda J. Reeves*, 48 ECAB 373 (1997).

⁸ 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); see also *Larry E. Young*, 52 ECAB 264 (2001).

⁹ *B.H.*, Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey*, 49 ECAB 511 (1998).

years after the date of last exposure. Consequently, he filed his claim outside the three-year limitation period.¹⁰

Appellant has alleged that he did not become aware of the connection between his condition, the factors of his former federal employment, and the fact that he could file a claim for benefits until May 18, 2010. He submitted a June 16, 2011 report from Dr. Ganzhorn who diagnosed asbestos-induced pleural plaques, abnormal pulmonary function with pulmonary restriction, and diminished diffusing capacity, dyspnea on exertion, and rhinitis. Appellant failed to file a claim for compensation until August 3, 2018, more than eight years after he indicated on his Form CA-2 that he was aware of his condition and its relationship to factors of his former federal employment.

In his August 20, 2018 statement, appellant indicated that he did not file a claim for compensation until eight years after he became aware of the condition and its relationship to factors of his federal employment because he did not realize that he could be compensated for such claim. However, ignorance of the law or one's obligations under it does not constitute exceptional circumstances that would otherwise excuse an untimely filing.¹¹

The Board has previously held that when an employee becomes aware or reasonably should have become aware, that he or she has a condition which has been adversely affected by factors of his or her employment, such awareness is competent to start the running of the time limitations period, even though he or she does not know the precise nature of the impairment, or whether the ultimate result of such adverse effect would be temporary or permanent.¹² In discussing the degree of knowledge required by the employee prior to filing a claim, the Board has emphasized that he or she need only be aware of a possible relationship between his or her condition and the 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.¹³

The Board finds, therefore, that the totality of the factual circumstances of record establish that appellant was aware or reasonably should have become aware as early as 2010 that his claimed pulmonary condition was due to federal employment factors.¹⁴

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

¹⁰ See *J.Y.*, Docket No. 16-0332 (issued June 8, 2016); *R.V.*, Docket No. 10-1776 (issued April 1, 2011); *James W. Beavers*, 57 ECAB 254 (2005).

¹¹ See *B.C.*, Docket No. 14-1659 (issued June 8, 2015) (ignorance of the law or one's obligation under it does not constitute exceptional circumstances that would otherwise excuse an untimely filing); 5 USC § 8122 (d)(3) (exceptional circumstances); see *Ralph L. Dill*, 57 ECAB 248, 253-54 (2005).

¹² *J.E.*, Docket No. 16-1493 (issued May 7, 2018).

¹³ See *Edward Lewis Maslowski*, 42 ECAB 839 (1991); see also *William A. West*, 36 ECAB 525 (1985).

¹⁴ *C.S.*, Docket No. 18-0009 (issued March 22, 2018); *S.I.*, Docket No. 08-0095 (issued May 14, 2008).

injury or death.¹⁵ Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.¹⁶

The Board finds that the evidence of record does not establish that appellant's supervisor had actual knowledge of an employment injury or that written notice of the injury had been provided within 30 days. Appellant failed to submit evidence to substantiate that management was aware that his pulmonary conditions were causally related to his federal employment at the time of his injury. There was no evidence from a supervisor establishing knowledge of an employment-related injury.¹⁷ In fact, the employing establishment indicated that they were first informed of the claimed injury on June 4, 2018. 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.¹⁸ Therefore, the Board finds that appellant has not established actual knowledge by his supervisors of his employment-related conditions within 30 days and, therefore, has not established a timely claim. Further, the Board finds that the record is devoid of any indication that appellant's immediate supervisors had written notice of his employment-related injury within 30 days. The exceptions to the statute have not been met and, thus, appellant has failed to establish that he filed a timely claim on August 3, 2018.¹⁹

Appellant may submit new evidence or argument with a written request for reconsideration, to OWCP within one year of the Board's 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 occupational disease claim is barred by the applicable time limitation provisions of 5 U.S.C. § 8122(a).

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

¹⁶ *Id.* at § 8122(a)(1) and (2).

¹⁷ *See supra* note 8.

¹⁸ *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).

¹⁹ *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the September 7, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 4, 2019
Washington, DC

Christopher J. Godfrey, 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