

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 8, 2017 appellant, the employee's son, filed a claim for survivor's benefits (Form CA-5), alleging that asbestos exposure caused the employee's December 19, 2001 death. By decision dated August 4, 2017, OWCP denied the claim, finding that it was untimely filed. On August 14, 2017 appellant requested a hearing before OWCP's Branch of Hearings and Review. During the January 10, 2018 hearing, he asserted that he was incompetent to timely file a claim. The hearing representative advised him to submit evidence substantiating that he was incompetent. By decision dated March 12, 2018, the hearing representative found that, in accordance with section 8122 of FECA, the claim was untimely filed.

Appellant appealed to the Board on March 23, 2018. By decision dated December 21, 2018, the Board found that appellant's claim was barred by the applicable time limitations of FECA.⁴ The Board reviewed the evidence of record and specifically found that the claim had not been filed within three years of the employee's death and that appellant had not met his burden of proof to establish any applicable statutory exception to the three-year time limitation.

On March 7, 2019 appellant requested that OWCP reconsider the case. He maintained that, due to a mental impairment, he was incompetent to timely file a claim. In support of his request, he submitted an unsigned August 8, 2003 "request to be selected as payee" for his Social Security Administration (SSA) Supplemental Security Income (SSI) benefits completed by D.C., identified as his mother. This document indicated that appellant needed a payee because he had a mental impairment. Appellant also submitted a payroll change slip for the employee dated July 9, 1974, a health benefits registration form for the employee with an illegible date of election, a notification of personnel action (SF-50) for the employee dated March 2, 1952, appointment affidavits form (SF-61) signed with an "x" by the employee on March 26, 1952,⁵ and an obituary dated October 26, 2008 for P.F.⁶

By decision dated May 20, 2019, OWCP denied modification of its prior decision. It found the evidence submitted was insufficient to support that appellant was incompetent or incapable to timely file a claim.⁷

³ Docket No. 18-0910 (issued December 21, 2018).

⁴ *Id.*

⁵ Appellant also submitted a copy of the employee's November 25, 1998 chest x-ray, previously of record.

⁶ On appeal appellant indicated that P.F. had been the employee's supervisor.

⁷ OWCP initially issued a merit decision on May 16, 2019 that was superseded by the May 20, 2019 decision. The May 16, 2019 decision misidentified appellant as the employee.

LEGAL PRECEDENT

The issue is whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.⁸ 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.⁹ 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.¹⁰

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 reasonable notice of an on-the-job injury or death within 30 days;¹¹ (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;¹² (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;¹³ 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.¹⁴ 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.¹⁵ 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."¹⁶

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

⁸ *A.M.*, Docket No. 19-1345 (issued January 28, 2020).

⁹ 5 U.S.C. § 8122(a); *D.D.*, Docket No. 19-0548 (issued December 16, 2019).

¹⁰ 5 U.S.C. § 8122(b); *M.S. (M.S.)*, Docket No. 14-0930 (issued February 25, 2015).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Death Claims*, Chapter 2.700.5.b (November 1996).

¹² 5 U.S.C. § 8122(a), (b); Federal (FECA) Procedure Manual, *id.* at Chapter 2.700.5.b(1).

¹³ *Id.* at § 8122(c).

¹⁴ *Id.* at § 8122(d).

¹⁵ *M.S. (M.S.)*, *supra* note 10.

¹⁶ 5 U.S.C. § 8122(d)(3).

of the individual giving the notice.¹⁷ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.¹⁸ 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.¹⁹

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.

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's March 12, 2018 decision because the Board considered that evidence in its December 21, 2018 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.²⁰

The time to file a claim began to run on December 19, 2001, 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.²¹

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

While, as in his previous appeal, appellant is maintaining that he was incompetent to timely file a claim, there is no probative medical evidence of record to support this assertion. The only evidence submitted to OWCP on reconsideration that addresses incompetency at all, is the SSA document dated August 8, 2003 in which his mother requests to be selected as payee for appellant's SSI benefits because he has a mental impairment. OWCP's procedures provide that the time limitations do not begin to run while the claimant is incompetent and has no duly appointed legal representative.²² It further provides that a determination of incompetence must be based on probative medical evidence and must be consistent with other actions by the claimant during the period in question.²³ The additional SSA payee document reflects appellant's mother recitation

¹⁷ *Id.* at § 8119; *T.D. (S.B.)*, Docket No. 18-1071 (issued January 16, 2019).

¹⁸ *G.M.*, Docket No. 18-0768 (issued October 4, 2018).

¹⁹ 5 U.S.C. § 8122(b); *see S.O.*, Docket No. 19-0917 (issued December 19, 2019).

²⁰ *See C.H.*, Docket No. 19-0669 (issued October 9, 2019); *J.D.*, Docket No. 18-1765 (issued June 11, 2019); *J.L.*, Docket No. 17-1460 (issued December 21, 2018).

²¹ 5 U.S.C. § 8122.

²² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Special Circumstances*, Chapter 2.801.8.b (March 1993); *see V.M.*, Docket No. 12-1611 (issued January 17, 2013); *Paul S. Devlin*, 39 ECAB 715 (1988).

²³ *Id.*

that he had a mental impairment, but no accompanying medical evidence establishing incompetency.²⁴

The additional documents received by OWCP with appellant's reconsideration request, including that payroll change slip for the employee dated July 9, 1974, a health benefits registration form for the employee with an illegible date of election, and a notification of personnel action (SF-50) for the employee dated March 2, 1952, do not provide probative medical evidence of appellant's incompetence to timely file this claim.

Furthermore, while section 8122(d)(3) of FECA (5 U.S.C. § 8123(d)(3)) 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." None of the additional documents received with appellant's request for reconsideration establish that he could not file a timely claim due to exceptional circumstances as that term is used in section 8122(d)(3) of FECA. Thus, appellant's failure to timely file his claim precludes him from seeking compensation under FECA.²⁵

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 established that he filed a timely claim for death benefits in accordance with 5 U.S.C. § 8122.

²⁴ *Id.*

²⁵ *Supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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