

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

_____)	
J.M., JR., son of J.M., Appellant)	
)	
and)	Docket No. 19-1373
)	Issued: October 6, 2020
DEPARTMENT OF ENERGY, IDAHO)	
NATIONAL LABORATORY, Idaho Falls, ID,)	
Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 10, 2019 appellant filed a timely appeal¹ from a May 1, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to Federal Employees' Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated July 22, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-1373 (issued July 22, 2020).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the May 1, 2019 decision appellant submitted additional evidence to OWCP and on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant filed a claim for survivor's benefits within the applicable time limitation.

FACTUAL HISTORY

On February 1, 2019 the employee's son, J.M. Jr., (born September 22, 1947), filed a claim for survivor's benefits (Form CA-5) on behalf of himself and his siblings, P.H. (born June 23, 1946), D.M. (born March 15, 1952), and M.M. (born April 21, 1954).⁴ Appellant alleged that radiation exposure sustained in the performance of duty as a firefighter at the Stationary Low-Power Reactor Number One (SL-1) experimental nuclear power reactor explosion on January 3, 1961 caused the employee's death on February 23, 1963, at the age of 49 years. The immediate causes of death listed on the death certificate are coronary thrombosis and myocardial infarction.

In a letter dated March 13, 2019, appellant explained his claim for compensation under FECA for survivor's benefits. He noted that he had previously filed a claim for his father's death under the Energy Employees Occupational Illness Compensation Act (EEOICPA), but that it had been denied because his father was a government employee. Appellant stated that Congressional correspondence had indicated that federal employees were covered by FECA for noncancerous illnesses and death related to radiation exposure.

In an undated narrative statement, appellant explained that his father was a fireman/emergency medical technician (EMT) working at the employing establishment at the time of the L1 experimental nuclear power reactor explosion on January 3, 1961, and had been called upon to assist in entering the SL-1 and to retrieve the only surviving reactor operator. He explained that two years after the employee's exposure to radiation, he died of a sudden heart attack, despite otherwise being in apparent good health.

Appellant attached a certificate of appreciation from the U.S. Atomic Energy Commission awarded to his father on March 5, 1962 for outstanding services performed following the SL-1 experimental nuclear reactor accident on January 3, 1961. He also provided additional documents to establish his father's radiation exposure. Appellant also cited research on deep space radiation exposure and coronary illness.

Appellant concluded that, due to his inability to obtain personnel records, he could only share what his father had told him concerning the event of January 3, 1961, apart from the October 3, 2001 letter confirming radiation exposure. He requested that a decision be made regarding entitlement to survivor's benefits under FECA.

Appellant submitted published articles and internet materials concerning radiation exposure and the January 3, 1961 nuclear accident. In a development letter dated March 25, 2019, OWCP explained that survivor benefits may be payable to eligible dependents if the employee's death resulted from a job-related injury or from a medical condition caused by hazardous exposure on the job. It further explained that appellant needed to provide factual and medical documentation

⁴ The Form CA-5 also noted that the employee's spouse, Lenna Ruth Dye McCracken, was deceased.

supporting the claim. OWCP afforded appellant 30 days for the submission of the requested additional factual and medical evidence.

On April 10, 2019 appellant responded to OWCP's development letter. He stated that in a decision dated February 6, 2017, EEOICP had found that his father was a federal employee. Appellant also provided further evidence and his arguments in support of the claim. He submitted a recommended decision dated February 6, 2017 under the EEOICPA. It recommended denial of survivor claims for coronary thrombosis and myocardial infarction under Part E of the EEOICPA, finding that the employee was a Department of Energy employee who worked at the employing establishment from January 25, 1951 through February 26, 1963, and not a covered contractor employee.

In a letter dated April 23, 2019, appellant noted his belief upon filing of the claim that his father was a government employee and that the claim should be filed under FECA.

By decision dated May 1, 2019, OWCP denied the claim, finding that it was untimely filed. It explained that, pursuant to 5 U.S.C. § 8122, appellant had not filed the claim for survivor's benefits within three years of the date of death of the employee and that there was no evidence that the employee's immediate supervisor or another employing establishment official had actual knowledge of the employee's death and its relationship to federal employment.

LEGAL PRECEDENT

Prior to the September 7, 1974 amendments, section 8122 of FECA provided a maximum five-year limitation for making a claim for compensation. Section 8122(a)(1) of FECA provided that an original claim for compensation for death shall be made within one year after the death. However, the Secretary of Labor may allow an original claim for disability to be made within one year after the injury for reasonable cause shown.⁵

Section 8122(c) of FECA⁶ provided:

“(c) The Secretary may waive compliance with the requirements of this subchapter for giving notice of injury and for filing claim for compensation for disability or death if --

- (1) a claim is filed within 5 years after the injury or death; and
- (2) the Secretary finds -- that the failure to comply was due to circumstances beyond the control of the individual claiming benefits; or that the individual claiming benefits has shown sufficient cause or reason in explanation of, and material prejudice to the interest of the United States has not resulted from the failure.

⁵ 5 U.S.C. § 8122.

⁶ 5 U.S.C. § 8122(c). See also *Oren D. Etter (Jessie Margaret Etter)*, 57 ECAB 538 (2006); *Aurora L. Palalay (Richard P. Palalay)*, 35 ECAB 1078 (1984).

“(d) The time limitations in subsections (a)-(c) of this section do not --

(1) begin to run against a minor until he reaches 21 years of age or has had a legal representative appointed; or

(2) run against an incompetent individual while he is incompetent and has not duly appointed legal representative.”⁷

ANALYSIS

The Board finds that appellant did not file a claim for survivor’s benefits within the applicable time limitation.

The Board notes initially that OWCP improperly reviewed the claim under the time limitations provisions enacted in 1974, rather than the applicable section 8122 of FECA for injuries or death which occurred prior to 1974. The Board has previously explained that the amendment to the time-limitation provision shall be applicable only to injuries occurring on or after the effective date of the amendments, September 7, 1974.⁸

The employee died on February 23, 1963 and, at the time of his death, FECA set forth a one-year time limitation for survivors to file a death benefits claim.⁹ This time limitation did not begin to run against the employee’s children until their twenty-first birthdays on June 23, 1967 for P.H.; September 22, 1968 for J.M.; March 15, 1973 for D.M.; and April 21, 1975 for M.M.¹⁰ Appellant filed a claim for death benefits on March 20, 2019, long after the applicable time limitation ended for him on September 22, 1969 and the latest applicable time limitation for M.M. ended on April 21, 1976. Thus, the claim was not timely filed.¹¹

While FECA extended the time limitation to five years upon proof of exceptional circumstances,¹² extension of the time limitation to five years would still render the claim untimely as of September 22, 1973 for the applicable time limitation for appellant, and as of April 21, 1980 for the latest applicable time limitation for M.M. As such, appellant’s claim would be untimely filed whether exceptional circumstances were established or not.¹³

⁷ 5 U.S.C. § 8122.

⁸ *Emanuel T. Poluszny*, 47 ECAB 651 (1996).

⁹ 5 U.S.C. § 8122(c).

¹⁰ *Id.* at § 8122(d)(1).

¹¹ *See N.F.*, Docket No. 17-1784 (issued April 9, 2018).

¹² 5 U.S.C. § 8122(c)(1).

¹³ *See id.*

Also, appellant did not allege that he was prevented from filing the claim due to incompetence, which would have tolled the applicable time limitation if established.¹⁴ Thus, he has not established an exception to the relevant time limitation provisions of FECA in the filing of the death benefits claim that would render the claim timely filed. The Board finds that the claim for death benefits was not timely filed.¹⁵

On appeal appellant argued that the claim for survivor's benefits had been timely filed due to an immediate supervisor's knowledge of injury or death within 30 days. The Board notes that at the time of the employee's death, the maximum time limitation under FECA for filing a death claim was five years upon the Secretary's finding of extraordinary circumstances; as such, an immediate supervisor's knowledge of injury or death within 30 days is not relevant to the timeliness analysis of this claim.¹⁶

¹⁴ *Id.* at § 8122(d)(2).

¹⁵ *See supra* note 9.

¹⁶ Prior to September 7, 1974, section 8119(b) of FECA provided that compensation may be allowed only if notice of injury was given within 48 hours after the injury or if the immediate superior of the employee had actual knowledge of the injury. This notice provision however only pertained to payment of medical benefits for the employee. *Emanuel T. Poluszny*, *supra* note 8; *See Richard T. Shnettler*, Docket No. 03-1182 (issued January 12, 2004); *Maurice J. Dayton*, 11 ECAB 139 (issued October 14, 1959).

CONCLUSION

The Board finds that appellant did not file a claim for survivor's benefits within the applicable time limitation.

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2019 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: October 6, 2020
Washington, DC

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

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

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