United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 20-1449**
	)	**Issued: July 8, 2021**
DEPARTMENT OF THE AIR FORCE, BIEN HOA AIR BASE, Vietnam, Employer	)	

Appearances:
Paul H. Felser, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 29, 2020 appellant, through counsel, filed a timely appeal from a February 24, 2020 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 over the merits of this case.[3]

[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.*

[3] The Board notes that, following the February 24, 2020 decision, OWCP received additional evidence. 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 has met his burden of proof to establish that he filed a timely claim for compensation under FECA.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 27, 2016 appellant, then a 83-year-old former distribution facilities manager, filed an occupational disease claim (Form CA-2) alleging that he sustained diabetes mellitus, peripheral neuropathy, ischemic heart disease, a thyroid condition, dizziness/vertigo, and cholesterol problems causally related to exposure to herbicides and Agent Orange while in Vietnam in 1967. He related that he had become aware of his condition on June 15, 2011 and had attributed it to his federal employment on October 1, 2011. Appellant retired from the employing establishment on December 3, 1987.

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

In a development letter dated May 2, 2016, OWCP requested that appellant submit additional factual and medical information in support of his claim. It asked that he provide evidence that his claim was filed within three years of the date that he had become aware of the relationship between his condition and his employment. OWCP also advised appellant that he should 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. It afforded him 30 days to provide the requested evidence.

In a May 31, 2016 response, appellant related that he was in Vietnam on a temporary-duty (TDY) assignment from September 13 until "December 17, 1967."[5] He worked full time in an area that had been sprayed with Agent Orange and other herbicides. In June 2011, veterans who had been exposed to Agent Orange recommended appellant contact the Department of Veterans Affairs (DVA). Appellant filed a claim for Agent Orange exposure with the DVA. He advised that he had served in the military and assumed that he should file the claim with the DVA. The DVA denied appellant's claim twice so he filed a claim with the employing establishment.

Appellant submitted a January 10, 2013 DVA decision denying his October 19, 2011 claim for vertigo, prostate cancer, diabetes mellitus, type 2, ischemic heart disease due to Agent Orange

[4] Docket No. 18-0315 (issued October 5, 2018).

[5] Appellant additionally submitted statements dated April 17 and 19, 2016 describing his employment with the RASS team in Vietnam in 1967.

exposure, and post-traumatic stress disorder, as the conditions were unrelated to his military service.[6]

By decision dated October 25, 2016, OWCP denied appellant's claim as it was untimely filed pursuant to 5 U.S.C. § 8122. It found that he failed to file his claim within three years of October 19, 2011, the date that he became aware of the relationship between his claimed condition and the work exposure. OWCP further noted that appellant had not established exposure to Agent Orange while in Vietnam or submitted medical evidence attributing a diagnosed condition to such exposure.

On November 19, 2016 appellant requested a telephone hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 15, 2017. He related that he volunteered to be part of the RASS team in Vietnam, but was not aware that he had been exposed to Agent Orange while performing his duties. Appellant noted that he had served in the military from May 1953 to May 1955. He advised that he became aware of his condition on June 15, 2011 and attributed it to his federal employment on October 1, 2011. Appellant filed a claim with the DVA on October 19, 2011 since he had prior military service. The DVA denied his claim in January 2013 after finding that it was not service related since he had been a civilian while in Vietnam. Appellant filed an appeal of the DVA's decision, which was eventually denied.

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.

Appellant appealed to the Board. By decision dated October 5, 2018, the Board set aside the August 29, 2017 decision.[7] The Board found that OWCP had improperly applied the time limitation standard applicable for injuries or deaths after September 7, 1974. The Board determined that appellant's date of injury was December 16, 1967, the date of his last exposure to the implicated employment factors. The Board remanded the case for OWCP to determine whether his claim was timely filed using the time limitation standard for injuries occurring between December 7, 1940 and September 6, 1974.

In a development letter dated October 25, 2018, OWCP requested that appellant submit evidence supporting that he provided timely notification of injury, that he actually experienced the claimed employment exposure, and medical evidence addressing whether his exposure caused or contributed to a diagnosed medical condition. It afforded him 30 days to provide the requested evidence.

By decision dated January 30, 2019, OWCP denied appellant's claim as it was untimely filed under FECA. It found that he had not submitted evidence sufficient to establish that he filed his claim within 60 days of the date of injury or within five years after he became aware of his

[6] At a January 17, 2014 hearing on his claim, the DVA advised appellant that it did not pay claims made by civilians.

[7] *Supra* note 4.

injury.[8] OWCP further found that appellant had not established exposure to Agent Orange or submitted medical evidence finding a diagnosed condition as a result of such exposure.

Thereafter, OWCP received an e-mail, dated May 4, 2017, from B.P., an archivist with the employing establishment. B.P. enclosed a December 16, 2011 e-mail that he had sent to appellant describing the history of the RASS team. He indicated that he had no doubt that appellant was part of the RASS team and would provide verification to the DVA.

Appellant also submitted a letter of commendation that he received for his work in Vietnam from September 13 to December 16, 1967. Additionally, appellant submitted a summary of the type of assistance that the RASS team was involved in during his TDY assignment. The RASS team consisted of 18 civilian and 2 military members.

In a statement dated October 8, 2019, appellant related that his mission was covert and that he was unaware that the area had been sprayed with Agent Orange. He advised that the medical evidence showed that he had disability due to Agent Orange exposure.

On October 15, 2019 appellant requested reconsideration.

By decision dated November 14, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

Subsequently, appellant submitted information from the Government Accounting Office (GAO) regarding civilian exposure to Agent Orange, various articles about the use of Agent Orange, and other herbicides in Vietnam, and a May 5, 1990 report from the DVA regarding the relationship between Agent Orange exposure and adverse health effects.

On January 29, 2020 appellant, through counsel, requested reconsideration. He noted that the government had undertaken a multimillion dollar remediation project at the employing establishment, which had been a storage facility for Agent Orange. Counsel asserted that the employing establishment had knowledge that appellant's condition had resulted in a medical condition in December 2011. He advised that in 2011 appellant claimed benefits from the DVA due to Agent Orange exposure, but his claim had been denied as he was not active duty military at the time of his deployment. Counsel noted that appellant had been in the military from 1953 to 1955. He had appealed the 2013 denial from the DVA and "was unsure if he could file any alternative benefit while his claim and appeal with the [DVA] was pending. Ultimately, the [DVA] denied his claim on appeal. It was only in 2016 that [he] reached out to the [employing establishment] and determined that a claim for benefits under FECA could be filed." Counsel asserted that appellant had filed his claim within five years, as he had initially become aware of his illness on June 15, 2011 and filed his claim prior to June 15, 2016. He maintained that appellant had "provided sworn testimony that the failure to comply with traditional filing requirements was due to circumstances beyond his control and that there was no material prejudice to the interest of the United States." Counsel further noted that the employing establishment was

[8] For injuries occurring prior to September 7, 1974, FECA requires an injured employee to file for a claim for compensation within one year after the injury. 5 U.S.C. § 8122 (1968). Section 8122 was amended as of September 7, 1974 to provide the current three-year time limitation. Additionally, the Board notes that appellant filed his claim within five years of the date that he became aware of his condition.

aware that Agent Orange was a recognized environmental hazard. He asserted that, at a minimum, the case should be remanded for factual development.

By decision dated February 24, 2020, OWCP denied modification of its January 30, 2019 decision.

LEGAL PRECEDENT

For injuries occurring prior to September 7, 1974, the time limitation provisions of FECA[9] require that an injured employee file a claim for compensation within one year after the injury.[10] The one-year requirement may be waived provided the claim is filed within five years 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 late filing and material prejudice to the interest of the United States has not resulted.[11]

The test for whether sufficient cause or reason was shown to justify waiver of the one-year time limitation is whether a claimant prosecuted the claim with that degree of diligence, which an ordinary prudent person would have exercised in protecting his or her right under the same or similar circumstances.[12]

In a case involving a claim for an occupational illness, the time does not begin to run until the claimant is aware, or reasonably should have been aware, of the causal relationship between his condition and federal employment.[13] 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 factors.[14] The time limitations do not run against an incompetent individual while he is incompetent and has no duly appointed legal representative.[15]

ANALYSIS

The Board finds that appellant has not established that he filed his claim for compensation within one year after the injury.

As appellant's claimed injury was sustained over a period of time, the date of injury is the date of last exposure to the work factors alleged to have caused an injury.[16] Appellant was last

[9] *Supra* note 2.

[10] 5 U.S.C. § 8122 (1968).

[11] *Id.*; *see also Allen E. Grether*, 24 ECAB 76 (1972).

[12] *Roseanne S. Allexenberg*, 47 ECAB 498 (1996).

[13] *See Charles Walker*, 55 ECAB 238 (2002); *William L. Gillard*, 33 ECAB 265, 268 (1981).

[14] *See Patricia K. Cummings*, 53 ECAB 623 (2002); *Jaried M. Bailey*, 26 ECAB 9 (1974).

[15] *Allen E. Grether*, *supra* note 11.

[16] *Patricia K. Cummings*, *supra* note 145.

exposed to the implicated work factors on December 16, 1967. As previously found by the Board in its October 5, 2018 decision, since the date of injury, December 16, 1967, was prior to September 7, 1974, the applicable time limitation is the pre-1974 section 8122.[17] This provision provided that claims for compensation must be filed within one year for all injuries occurring prior to September 7, 1974.

In an occupational disease claim, the time does not begin to run until the claimant is aware, or reasonably should have been aware, of the causal relationship between his condition and federal employment.[18]

The Board finds that the one-year limitation period began to run on October 1, 2011, the date that appellant indicated on his Form CA-2 that he initially realized that his condition was caused or aggravated by the implicated factors of his federal employment. The one-year limitation period expired on October 1, 2012. Appellant did not file his claim until April 27, 2016. As appellant filed his claim more than one year after October 1, 2011, the Board finds that the claim is untimely filed.

However, as noted above, the applicable time limitation provision of FECA for injuries sustained prior to September 7, 1974 provided that the one-year time limitation for filing the claim could be waived if the claim was filed within five years and the failure to file the claim timely was beyond the control of the employee or he or she has shown sufficient cause or reason for the late filing and material prejudice to the interest of the United States has not resulted from the delay.[19]

The Board further finds that appellant filed his claim on April 27, 2016, which was within five years of October 1, 2011, the date he first became aware of his condition and its relationship to his federal employment. The question then becomes whether appellant has provided sufficient cause to justify waiver of the one-year time limitation. As noted, the test for whether sufficient cause or reason has been shown to justify waiver of the one-year time limitation is whether a claimant prosecuted the claim with that degree of diligence, which an ordinary prudent person would have exercised in protecting his right under the same or similar circumstances.[20]

Appellant is a retired Korean War Veteran who later volunteered in his civilian employment to become a member of the RASS team in 1967 during the Vietnam conflict. Given the mission, his civilian service in Vietnam was highly classified. Decades later he became aware that during his TDY assignment on the RASS team in Vietnam in 1967 he was exposed to Agent Orange and attributed his claimed conditions to such exposure in October 2011. Because an inordinate amount of time had passed since his retirement from civilian service in 1987, appellant diligently sought through unclassified sources to secure information to establish that he was on TDY in Vietnam. Although the information he needed is generally in the control of the employing

[17] *See J.R.*, Docket No. 07-2278 (issued May 19, 2008); *Charles Walker*, *supra* note 13.

[18] *K.W.*, Docket No. 06-2182 (issued January 3, 2007); *William L. Gillard*, *supra* note 13.

[19] *Supra* note 11.

[20] *See N.F.*, Docket No. 17-1784 (issued April 9, 2018); *Willie E. Borchert*, Docket No. 02-0010 (issued May 6, 2002); *Roseanne S. Allexenberg*, *supra* note 12; *Edward Lewis Maslowski*, 42 ECAB 839 (1991).

establishment or other government source,[21] appellant independently contacted co-workers and the employing establishment's archivist in order to secure proof of his TDY assignment in Vietnam in 1967. The employing establishment's archivist and the co-workers confirmed his assignment. The fact that appellant initially pursued this very unique type of disability claim with the DVA should not preclude him from obtaining a waiver of the mandatory five-year time requirement[22] as he independently sought after and secured the information which was used for both claims, and it was reasonable for him to pursue both avenues of appeal under the circumstances, *i.e.*, having served in the military and as a civilian employee in service to the United States. By making the effort to acquire the evidence *via* his own resources, without intervention from OWCP, appellant prosecuted his claim with that degree of diligence which an ordinary prudent person would have exercised in protecting his or her rights under the same or similar circumstances. Given the multiple forums in which to prosecute his claims, it was not unreasonable for the sequence which he chose to do so. It is not enough to materially prejudice the interest of the United States under these circumstances by his delay in not filing within one year, but filing within the five-year time requirement. Consequently, the Board finds that the one-year time requirement for appellant's filing of his claim should be waived. As such, appellant has filed his claim within the applicable five-year time limitation provisions of FECA. Upon return of the case record, OWCP shall conduct such further development as is deemed necessary and issue a *de novo* decision as to whether appellant sustained any medical condition causally related to his accepted exposure to Agent Orange.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that he filed a timely claim for compensation under FECA. The case is remanded for a *de novo* decision regarding whether appellant sustained any condition causally related to his accepted exposure to Agent Orange.

[21] It is well established that proceedings under FECA are not adversarial in nature, and while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source. *See M.A.*, Docket No. 20-1590 (issued May 12, 2021), and cases cited therein.

[22] The five-year time limitation is a mandatory requirement that neither OWCP, nor the Board, has the power to waive. *See supra* note 20.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2020 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 8, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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