

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

J.T., Appellant)	
)	
and)	Docket No. 20-1093
)	Issued: August 23, 2022
DEPARTMENT OF THE AIR FORCE, KELLY)	
AIR FORCE BASE, TX, Employer)	

Appearances:

Lisa Varughese, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 29, 2020 appellant, through counsel, filed a timely appeal from a November 18, 2019 merit decision of the Office of Workers’ Compensation Programs (OWCP). Pursuant to the Federal Employees’ Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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.*

ISSUE

The issue is whether appellant's occupational disease claim is barred by the applicable time limitation provision of 5 U.S.C. § 8122(a).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as presented in the prior appeal are incorporated herein by reference. The relevant facts are as follows.

On January 31, 2016 appellant, then a 63-year-old retired pneudraulic systems mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed asbestosis due to exposures in his federal employment. He first became aware of his condition on April 1, 1993 and first attributed it to his employment on September 29, 2006 when an x-ray showed nodules on his lungs. Appellant alleged that he experienced difficulty breathing, recurrent pneumonia, scarring on his lungs, dry cough, pleural effusion, loss of appetite, weight loss, fatigue, skin disorders, fever, and anemia.

In his accompanying statement, appellant also asserted that he developed bullous pemphigoid on December 29, 2011 as well as arthritis and psoriasis. He attributed these conditions to his work-related exposure to asbestos. Appellant noted that he became aware of his lung disease due to exposure to asbestos in September 2006 when diagnosed by Dr. Edward Lefeber, a Board-certified internist. He reported that he worked in building 347 beginning in April 1993 and became aware of the asbestos in the building in 1998 during remodeling of the building. Appellant worked in building 347, 8 hours a day, 40 hours a week. Prior to clearing the base, union officials recommended that employees file Form CA-2s in the event of future illness related to exposure to asbestos.

In development letters dated February 16, 2016, OWCP requested additional information from appellant and the employing establishment regarding exposure. It afforded 30 days for a response. The employing establishment did not respond.

Appellant completed OWCP's development questionnaire on March 4, 2016 and submitted additional documentation. He noted that the Form CA-2 he submitted was not found by the employing establishment. Appellant alleged that he had official documentation from the employing establishment indicating that asbestos existed in the walls and ceiling of the building where he worked. He was not provided with safety equipment and was also exposed to fuels, gases, and paint fumes during his federal employment.

Appellant first became aware of his condition in September 2006 when he developed chronic nasal congestion and underwent chest x-rays which demonstrated lung abnormalities. His physicians inquired about asbestos exposure and appellant replied positively. Appellant noted, "I did not know I had lung problems until I was diagnosed in October 2006, still I did not think anything about it until I was hospitalized on December 29, 2011 when I developed blisters to my

³ *J.T.*, Docket No. 18-0220 (issued July 27, 2018).

arms and legs.” He attributed his diagnosed bullous pemphigoid to deterioration of his autoimmune system due to asbestos exposure.

Appellant described repairs to remove the asbestos from his work site, noting that in some areas the employing establishment sprayed glue to keep the asbestos intact. He alleged that asbestos dust could be seen all over his work area, that large chunks of asbestos fell off of the ceiling, that asbestos fibers fell on his clothing and skin, and that he inhaled the fibers.

Appellant alleged that he and coworkers filed Form CA-2s when they were advised of the asbestos exposure, but that he did not receive an OWCP file number. He noted that the employing establishment could not find a record of his claim. Appellant stopped work at Kelly Air Force Base on July 7, 1999 due to the base closure. He alleged that he had photographs of building 347 which included signs indicating that there was asbestos in the building. Appellant asserted, “If asbestos still exists in this building, then it is reasonable to assume that it was there in 1993 when I was assigned to this same building. These signs were not posted when I was assigned to building 347 at Kelly Air Force Base in 1993.”

Appellant underwent chest-x-rays on September 29, 2006. On October 27, 2006 Dr. Antonio Anzueto, an internist, examined appellant due to an abnormal chest x-ray with multiple lung nodules. Dr. Anzueto explained that appellant had a history of asbestos exposure working as an airplane mechanic and that he presented with multiple pulmonary nodules which were associated with calcified pleural thickening. He noted, “At this time it is difficult to assess the etiology of these nodules.” Dr. Anzueto examined appellant on January 5 and July 27, 2007 and found that his chest x-ray demonstrated multiple lung nodules and pleural thickening. He again related that appellant had a history of asbestos exposure, but that it was difficult to assess the etiology of the lung nodules.

Dr. Marc Chalaby, a pulmonologist, examined appellant on July 9, 2014 and reported that appellant worked as a mechanic at the employing establishment, and was exposed to asbestos. He reviewed appellant’s computerized tomography (CT) scan dated June 10, 2014 and found extensive nodules and significant calcification of the right diaphragm suggestive of asbestos-related exposure. Dr. Chalaby examined appellant on October 8, 2014 and opined that his CT scan was consistent with asbestos-related pleural disease. In notes dated June 1, 2015, he diagnosed bulbous pemphigoid, bronchiectasis, left pleural effusion, and pleural plaques. Dr. Chalaby noted that appellant worked at Kelly Air Force Base as a mechanic until 1998 and asserted that appellant was exposed to asbestos in construction. He noted that appellant’s x-ray and CT findings were typical of calcified asbestos pleural plaques. On July 21, 2015 Dr. Chalaby diagnosed asbestosis based on appellant’s July 9, 2015 CT scan.

By decision dated March 29, 2016, OWCP denied appellant’s occupational disease claim as it was not filed in a timely manner. It found that he initially became aware of the relationship between his disease and illness to his federal employment on September 29, 2006, but did not file a claim until January 31, 2016. Additionally, OWCP found that the evidence of record did not support a finding that his immediate supervisor “had actual knowledge of the injury within 30 days of the date of injury.”

Counsel requested reconsideration on March 28, 2017. She summarized appellant's factual statement and contended that his claim was timely filed. Counsel alleged that he had timely provided written notice of his "exposure to asbestos" and that his immediate superior had actual knowledge of appellant's "exposure to asbestos" within 30 days of appellant's last exposure. She asserted that the employing establishment had not contested his allegations that he submitted a Form CA-2 prior to the closure of Kelly Air Force Base and that OWCP should therefore accept appellant's allegations as factual and find that he had provided sufficient written notice for his claim to be timely under FECA.

Counsel also submitted an additional factual statement from a supervisor assigned to appellant's division, M.B. In his undated statement, M.B. noted that he was not appellant's immediate supervisor, but appellant worked in the same area as his unit. He further indicated that he was aware that asbestos existed in building 347. He asserted that the building was built before 1950 and had asbestos in the walls and ceiling. M.B. noted that in the mid-1980's the asbestos became a health issue and the employing establishment sprayed the ceiling with a "glue-like substance."

In a statement dated June 27, 2016, one of appellant's coworkers at the employing establishment, R.L., noted building 347 was insulated with asbestos on the walls, ceiling, and pipes. He reported that when the health hazards of asbestos became widely known, the employees were given the option to work in another building. The employing establishment withdrew this option when some aircraft components came in demand for aircraft engines, and directed the employees to return to building 347 to work on the items needed, while the asbestos was being removed. R.L. noted that the building was empty except for workers removing the asbestos and those employees directed to test aircraft components. He asserted that the employees were informed by union representatives to file OWCP claims for asbestos, but the claims were rejected. Appellant also provided photographs of signs warning of asbestos and breathing hazards.

In a March 24, 2017 report, Dr. Ko Ko Aung, a Board-certified internist, noted that he treated appellant from May 2010 through February 2016 due to cough, exertional shortness of breath, and recurrent bronchopulmonary infection. Dr. Aung reported appellant's employment history, and medical test results. He noted that appellant's CT scans demonstrated pleural thickening which was associated with asbestos exposure. Dr. Aung noted that appellant's findings on diagnostic studies were consistent with those typically found in individuals with lung disease originating from asbestos exposure. He also indicated that appellant was a former smoker, who stopped in 1990. Dr. Aung opined that appellant's interstitial fibrosis of the right lung was attributable to both prolonged asbestos exposure and tobacco use. He reported that appellant's lung function tests did not show obstructive disease typical of tobacco-related lung disease and that he concluded that appellant's lung conditions were attributable to a greater extent to asbestos exposure.

By decision dated May 15, 2017, OWCP reviewed the merits of appellant's claim and denied modification of the March 29, 2016 decision. It again found that his occupational disease

claim was untimely filed. Appellant appealed this decision to the Board on November 7, 2017. In its July 27, 2018⁴ decision, the Board found that appellant's claim was untimely filed.

On July 26, 2019 appellant, through counsel requested reconsideration of the prior decision. She provided an additional statement from G.Q., a coworker, and new photographs of warning signs. Counsel again contended that appellant's claim was timely filed as he had provided written notice and as his immediate supervisor had actual knowledge of his exposure to asbestos within 30 days of his date of last exposure.

In his July 18, 2019 statement, G.Q. noted that he worked in buildings 347, 348, and 351 with appellant at Kelly Air Force Base. He asserted that the building had steam pipes wrapped in asbestos that had deteriorated during the years becoming torn or damaged exposing it to the air of the employees' working environment. G.Q. noted that the employees would consistently find pieces of the insulation fiber on the floor and work areas during work time. He reported that the floors in building 347 had six-inch asbestos tiles which were frequently broken, cracked, or partially missing. G.Q. also noted that the ceilings were sprayed with fiber asbestos.

Appellant also provided two photographs of signs. One sign cautioned of an asbestos dust hazard, warned to avoid breathing dust, and to wear assigned protective equipment. The second sign indicated that a surface contained asbestos fibers that may cause cancer, that asbestos caused lung damage, and directed the reader to avoid creating or breathing dust.

In a July 25, 2019 statement, appellant noted that the only new evidence available was a statement from a coworker. He again asserted that the only place he was exposed to asbestos was in building 347 of Kelly Air Force Base.

On August 26, 2018 appellant, through counsel, provided a statement from M.B., a coworker. He asserted that he worked at Kelly Air Force Base building 347 between 1984 and 2000. Appellant was advised between the years of 1990 and 2000 that the building contained asbestos and that a crew performed abatement.

By decision dated November 18, 2019, OWCP denied modification of its prior decision. It noted that there was no evidence substantiating where the submitted signs were located. OWCP found that appellant had not established that his claim was timely filed.

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.⁵ 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

⁴ *Id.*

⁵ *D.R.*, Docket No. 18-1754 (issued April 4, 2019); *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

death must be filed within three years after the injury or death.⁶ 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.⁷

In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware, or reasonably should have been aware, of a possible relationship between his condition and his employment. Such awareness is competent to start the limitation period even though the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.⁸ Where the employee continues in the same employment after he reasonably should have been aware that he has a condition which has been adversely affected by factors of federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.⁹ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹⁰

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).

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's May 15, 2017 decision because the Board considered that evidence in its July 27, 2018 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹¹

The time to file a claim began to run on July 7, 1999, the date of appellant's last exposure.¹² As he filed his occupational disease claim on January 31, 2016, his claim was not timely filed within the three-year time limitation.¹³

⁶ *D.R., id.*; *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

⁷ 5 U.S.C. § 8122(b).

⁸ *C.S.*, Docket No. 18-0009 (issued March 22, 2018); *Larry E. Young*, 52 ECAB 264 (2001).

⁹ *Id.*

¹⁰ *C.S.*, *supra* note 8; *Gerald A. Preston*, 57 ECAB 270 (2005); *Debra Young Bruce*, 52 ECAB 315 (2001).

¹¹ *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).

¹² *J.N.*, Docket No. 14-1599 (issued November 18, 2014); *Larry E. Young*, 52 ECAB 264 (2001).

¹³ 5 U.S.C. § 8122; *B.J. (W.H., Sr.)*, Docket No. 19-1409 (issued March 9, 2020).

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.

In cases of latent disability the time for filing does not begin to run until the claimant is aware, or by exercise of reasonable diligence should be aware, of the causal relationship between his condition and his employment.¹⁴ The Board previously found that appellant knew, or reasonably should have known, of a relationship between his condition and his employment when he reported that his asbestosis-related lung disease was diagnosed in October 2006.¹⁵ As noted above, appellant did not file his occupational disease claim until January 31, 2016 and it was thus untimely filed.

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 injury or death.¹⁶ Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.¹⁷

In support of his claim, appellant submitted additional statements from G.Q. and M.B., who alleged that they, as well as appellant, were exposed to asbestos in the performance of job duties. He also provided photographs of two asbestos warning signs with no further identification. These statements and photographs do not establish that appellant's supervisor had actual knowledge of the employment injury within 30 days. Appellant failed to submit any information to substantiate that management was aware that he had respiratory problems causally related to his employment prior to 2006. The Board previously noted that there was no statement from an immediate supervisor establishing knowledge of a work-related injury.¹⁸ Knowledge merely of an employee's exposure is insufficient to establish actual knowledge and timeliness. It must be shown that the circumstances were such as to put the immediate supervisor on notice that the alleged

¹⁴ 5 U.S.C. § 8122(b); *see J.N., supra* note 12; *Luther Williams, Jr.*, 52 ECAB 360 (2001).

¹⁵ *Cf. Willie Wade*, Docket No. 03-0425 (issued April 4, 2003) (where appellant experienced only minor symptoms of wrist pain during his period of employment and the medical evidence did not show that his condition was such that he was aware or should have been aware of a possible employment-related cause for his condition at that time, the Board found that it was reasonable that he would not relate his claimed upper extremity condition to his employment at that time).

¹⁶ 5 U.S.C. § 8122(a)(1); *L.H.*, Docket No. 19-0818 (issued December 9, 2019); *C.S., supra* note 8; *Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

¹⁷ *Id.* at § 8122(a)(1) and (2).

¹⁸ *C.S., supra* note 8; *See Linda J. Reeves*, 48 ECAB 373 (1997) (where the Board held that while appellant submitted a statement from a former supervisor that established that he had some knowledge of her complaints, this statement is not sufficient to establish that her immediate superior had actual knowledge of a work-related injury as the statement only makes a vague reference to her health and does not indicate that she sustained a ny specific employment-related injury, rather the knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death).

injury was actually related to the employment or that the employee attributed it thereto.¹⁹ Therefore, the Board finds that appellant has not established actual knowledge by his supervisors of his work-related condition within 30 days and therefore has not established a timely claim. The exceptions to the statute have not been met, and thus, he has failed to establish that he filed a timely claim on October 11, 2016.

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's occupational disease claim is barred by the applicable time limitation provisions of 5 U.S.C. § 8122(a).

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ *C.S., supra* note 8; 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).