

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PERCY L. MOORE and DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD, Portsmouth, Va.

*Docket No. 97-2727; Submitted on the Record;
Issued May 25, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant's claim for occupational disease is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.¹

The Board finds that the Office of Workers' Compensation Programs properly denied appellant's compensation claim on the grounds that he did not establish that his claim was filed within the applicable time limitation provisions of the Act.

Appellant filed a notice of occupational disease on October 21, 1996 alleging that on May 1, 1989 he became aware that he had developed chronic obstructive pulmonary disease due to asbestos exposure in his federal employment. Appellant's last federal employment-related asbestos exposure occurred sometime prior to his termination from the employing establishment on February 2, 1979. Appellant later worked several years as an asbestos remover for Masterclean, Inc., a private company. By decision dated July 22, 1997, the Office denied appellant's claim finding it was not timely filed.

Section 8122(a) of the Act² states that "[a]n original claim for compensation for disability or death must be filed within three years after the injury or death." 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.³ The Board has held that, where the employee continues in the same employment after such awareness, the time limitation begins to run on the last date of his exposure to the implicated employment factors.⁴ A claim

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8122(a).

³ 5 U.S.C. § 8122(b).

⁴ *William F. Dotson*, 47 ECAB 253 (1995).

filed outside the three- year time limitation might still be considered timely, under section 8122(a)(1) of the Act if appellant's immediate superior 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.⁵

In the present case, as appellant stopped work for the employing establishment in 1979, and as there is no evidence in the record that appellant's immediate supervisor had any actual knowledge of appellant's employment-related condition within 30 days of his exposure, the time limitation began to run when appellant first became aware, or should have been aware, of a relationship between his claimed condition and his employment exposure. Appellant indicated on his claim form that he first became aware of his condition, and first became aware that his condition was caused or aggravated by his employment, on May 1, 1989. Appellant did not state under what circumstances he became aware of his condition, or of its possible relationship to his federal employment. In support of his claim, appellant submitted medical evidence from his treating physicians, including a report dated July 2, 1993, from Dr. Stephen L. Leighton, a Board-certified family practitioner, who noted appellant's history of asbestos exposure as related to him by appellant and diagnosed significant asbestosis as a result of this exposure. This report is the earliest medical evidence pertaining to asbestosis or asbestos exposure contained in the record. The presence of Dr. Leighton's report in the record indicates that appellant was aware, or reasonably should have been aware, of a possible relationship between his condition and his employment by at least July 2, 1993. Because appellant did not file a claim until October 21, 1996, his claim was not timely filed within the three-year period of limitation.⁶ Appellant has therefore failed to show that the time limitations of sections 8122(a) and 8122(b) do not run against him.

⁵ *Emanuel T. Posluszny*, 47 ECAB 651 (1996).

⁶ Furthermore, appellant has not shown that he is entitled to have the time limitations toll due to incompetence, pursuant to section 8122(d)(2) of the Act, or due to "exceptional circumstances" as provided by section 8122(d)(3) of the Act; *see* 5 U.S.C. § 8122(d)(2), (3).

The decision of the Office of Workers' Compensation Programs dated July 22, 1997 is hereby affirmed.

Dated, Washington, D.C.
May 25, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member