

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHRYN L. CORNETT, claiming as widow of ELMER CORNETT and
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION,
Wilkes Barre, PA

*Docket No. 03-989; Submitted on the Record;
Issued September 22, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant filed a timely claim for death benefits under the three-year time limitation of section 8122 of the Federal Employees' Compensation Act.

In a letter dated September 28, 2001, appellant's attorney indicated that he was filing a claim for death benefits and submitted evidence. The letter states that it was "hand-delivered" and contains a handwritten notation that it was received on October 1, 2001. The received date printed on the bottom of the letter is October 18, 2001. The Form CA-5, claim for compensation by widow, widower, and/or children, was dated July 26, 2001, and marked as received by the Office of Workers' Compensation Programs on October 18, 2001. Appellant alleged that her husband, a federal employee born on January 1, 1929, developed coal workers' pneumoconiosis, which she claimed caused pulmonary failure, stroke and multi-infarct dementia. The employee, a former federal mine safety and health inspector for the employing establishment, worked in the coal mining industry for approximately 40 years until his retirement in August 1990. The death certificate indicated that the employee died on May 16, 1998. Appellant submitted medical evidence in support of the death benefit's claim.

The death certificate reported the cause of death as pulmonary failure, stroke and multi-infarct dementia. The Office received an autopsy report dated August 25, 1998 from Dr. Katherine Tabatowski, an attending pathologist, who provided the employee's final anatomic diagnosis at date of death, which included dust macules with associated centroacinar emphysema, consistent with coal workers' pneumoconiosis. She reported that the presence of dust macules associated with mild centroacinar emphysema was consistent with coal workers' pneumoconiosis, particularly in view of the long-term underground coal mining employment and nonsmoking status per history.

The Office also received a report from Dr. Stephen Ulrich, an attending family practitioner, dated November 6, 1998 who noted that he completed the pathology report, chest x-rays, discharge summary and death certificate on the deceased employee. He stated:

“It is clear that the patient had pneumoconiosis.... [Patient] had developed shortness of breath over the years but did not like doctors and medical tests. He had not been evaluated by me for his pulmonary disease.

“He had a stroke on November 12, 1995 and again on April 23, 1998. He developed aspiration pneumonia in the hospital. This resolved and he was sent home on hospice.

“He developed a recurrent pneumonia and expired at home. It is my opinion that the presence of pneumoconiosis significantly contributed to the coal miner’s death in that he did not have adequate pulmonary reserve to compensate for the effect of his stroke on weakening his respiratory system. Had he had normal lungs it is my opinion that he might have survived a good deal longer than he did.”

By decision dated October 24, 2001, the Office denied appellant’s claim for death benefits on the grounds that the claim was not timely filed. The Office noted that the CA-5 claim form was signed by appellant on July 26, 2001 but not received by the Office until October 18, 2001. The Office further noted that appellant should have been aware that factors of her husband’s employment contributed to his death on the date that the autopsy report was released on August 25, 1998. Therefore, the Office determined that appellant should have filed a claim for compensation no later than August 25, 2001 to be considered timely.

In a letter dated August 21, 2002, appellant through counsel requested a review of the written record and submitted additional evidence.¹ In an affidavit signed by appellant on September 9, 2002, she asserted that she was not aware that her husband’s mine work had anything to do with his death until she received the November 6, 1998 report by Dr. Ulrich on November 15, 1998.

By decision dated December 9, 2002, an Office hearing representative determined that appellant had failed to supply timely written notification of injury required under the Act and affirmed the October 24, 2001 decision. The Office hearing representative noted that written notification of injury was submitted to the Office on October 1, 2001, although the district Office erroneously determined that the notice was received on October 18, 2001. The Office hearing representative indicated that, although the CA-5 claim form indicated a date of receipt of October 18, 2001, the September 28, 2001 letter from which appellant’s counsel provided notice of injury contained a handwritten date of October 1, 2001 as received by the Office. The Office hearing representative found, however, that this date also exceeded the three-year time limitation and affirmed the denial of the claim.

¹ Appellant through counsel initially requested an oral hearing by letter dated November 12, 2001 which was scheduled for August 29, 2002. On August 21, 2002 appellant’s counsel requested that the Branch of Hearings and Review conduct a review of the written record instead.

The Board finds that appellant's claim for death benefits was timely filed.

Section 8122 of the Act² states, in pertinent part, that an "original claim for compensation for disability or death must be filed within three years after the injury or death."³ The three-year time period begins to run from the time "the employee is aware, or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment."⁴ The Board finds that the employing establishment received appellant's notice of injury through her attorney on October 1, 2001.⁵ The record indicates that appellant's attorney hand delivered the claim form and accompanying evidence to the Office on October 1, 2001. Although the CA-5 was dated July 26, 2001, there is no indication that appellant mailed the claim form or otherwise attempted to file a claim prior to October 1, 2001. The Board therefore finds the date the claim was filed as October 1, 2001. The Board further finds that appellant's death benefit claim was timely filed.

Appellant alleged that her husband, the federal employee, had developed coal workers' pneumoconiosis during his employment as a coal miner. In a September 9, 2002 certified statement, appellant explained that she was not aware that her husband's mine work had contributed to his death until she received the November 6, 1998 report from Dr. Ulrich, a family practitioner, on November 15, 1998. The Office found that appellant should have been aware of the causal relationship of the employee's death to factors of his federal employment by at least August 25, 1998, the date of Dr. Tabatowski's autopsy report and that appellant had until August 25, 2001 to give timely notice of injury under the Act. Since appellant did not file a claim until October 2001, the Office concluded that appellant's claim was not timely filed within the three-year period of limitation.

The death certificate of the employee reported the cause of death as pulmonary failure, stroke and multi-infarct dementia. The August 25, 1998 autopsy report from Dr. Tabatowski which appellant maintained she received in November 1998 contained diagnoses at date of death, including dust macules with associated centroacinar emphysema, consistent with coal workers' pneumoconiosis. The Board finds that the evidence of record does not clearly establish that appellant was aware or should have been aware of the causal relationship between her husband's anatomic diagnosis at date of death and his federal employment until November 15, 1998. There is a report of record from Dr. Ulrich dated November 6, 1998 which discussed his pathologic findings of the decedent and the connection to his employment. Appellant provided an affidavit asserting that she was unaware of the connection until November 15, 1998. Although the Office received the autopsy report from Dr. Tabatowski on August 25, 1998, there is no evidence of record that appellant was aware of a causal relationship of the employee's death with his federal

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8122(a).

⁴ 5 U.S.C. § 8122(b).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Date Claim is Filed*, Chapter 2.801.4(a) (March 1993) provides: "Form CA-1, CA-2, CA-5, CA-5b and CA-7 constitute claims for the purpose of considering the time requirements. The claims examiner must determine whether the claim was received by the Office or the employing establishment within the time specified in paragraph 3."

employment or that she should have been aware of the relationship at that time. Because there is no substantial evidence to support that appellant should have known earlier than being notified by her physician of the employee's anatomic diagnosis at date of death and connection to his employment, appellant had until November 15, 2001 to file the claim. Therefore, appellant's claim is found timely filed.

Accordingly, the decision of the Office of Workers' Compensation Programs dated December 9, 2002 is reversed.

Dated, Washington, DC
September 22, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member