

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

_____)	
ROBERT E. RILEY, Appellant)	
)	
and)	Docket No. 05-1368
)	Issued: April 19, 2006
)	
TENNESSEE VALLEY AUTHORITY,)	
PARADISE STEAM PLANT, Drakesboro, KY,)	
Employer)	
_____)	

Appearances:
Robert E. Riley, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 13, 2005 appellant filed a timely appeal from a March 4, 2005 merit decision of the Office of Workers' Compensation Programs, denying his occupational disease claim on the grounds that his lung conditions were not sustained while in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue in this case is whether appellant's occupational disease claim was timely filed within the applicable time limitation provisions of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On February 5, 2003 appellant, then a 70-year-old retired truck driver, foreman and assistant general mechanic foreman, filed an occupational disease claim alleging that in 1970 he first realized that he had pulmonary lung disease caused by his exposure to hazardous materials while working at the employing establishment. He stated that, since he had a progressive

disease, he could not pinpoint the exact date that it began. Appellant indicated that he began having symptoms and received medical treatment in 1970 after years of being exposed to coal dust and asbestos while working at the employing establishment. He developed lung cancer, which required partial removal of a lung and chronic asthma. Regarding the delay in filing his claim, appellant explained that his pulmonary disease had progressed until it led to cancer and asthma. He was treated by many physicians and the medical findings confirmed that his exposure led to pulmonary lung disease. The employing establishment indicated that he first reported his lung condition to a supervisor on February 27, 2003 and that he was last exposed to the implicated employment factors on July 20, 1978.

In an October 27, 2003 letter, appellant stated that he began working for the employing establishment in 1960 and that he was exposed to coal dust, ash and asbestos. He further stated that his respiratory disease was progressive and, by the early 1970s, he developed allergies and nasal polyps, which had to be removed every eight months until he underwent major surgery. In the early 1990s he developed asthma which became chronic. Appellant stated that he was unable to perform his work duties and retired earlier than he had planned. He noted that in 1995 he had a cancerous growth removed from his right lung. Appellant submitted medical records from May 29, 1991 through October 10, 2003, regarding his lung and sinus conditions. An August 18, 1995 bronchoscopy performed by Dr. Robert N. Pope, a Board-certified internist, found a lesion on appellant's right middle lung and he recommended surgical removal. On September 12, 1995 Dr. John C. Powell, a Board-certified surgeon, performed surgery on appellant's right lung and removed the lesion. He diagnosed adenocarcinoma of the right middle lung.

The employing establishment controverted appellant's claim on the grounds that the medical evidence he submitted failed to show that his medical conditions were caused by his federal employment. The employing establishment stated that he had a 47-year history of smoking cigarettes beginning when he was 19 years old and ending in 1979 and there was no record of him being exposed to coal dust, asbestos or any other dust or gas during his 12 years of employment.

By letter dated July 8, 2004, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office requested that he submit additional factual information regarding his employment and smoking history, previous pulmonary conditions and known allergies, the date he first noticed his lung and asthma conditions, the date he related these conditions to the implicated employment exposure and whether he had previously filed a claim for a lung condition. The Office further requested that appellant submit a detailed and rationalized medical report from his attending physician which included, among other things, an explanation as to the causal relationship between his alleged injury and the implicated employment exposure.

In an August 16, 2004 letter, appellant provided his work history from 1952 to 1993. He indicated that he worked on and off for 12 years at the employing establishment from 1960 to 1980. Appellant stated that he smoked small cigars daily for approximately 25 years. He quit smoking in 1980 when he realized that it might help his allergies and numerous sinus polyps. Appellant did not remember the exact date he began having serious breathing problems. He guessed it was around 1985. Appellant indicated that he was bothered by excessive dust and smoke. He contended that he was exposed to ash, coal dust, heavy smoke and asbestos while

working at the employing establishment. Appellant noted that Dr. Pope and Dr. Frank E. Block, Jr., a Board-certified anesthesiologist, believed that his lung problems could be related to his exposure to asbestos. He was diagnosed as having chronic asthma and began receiving medical treatment for his respiratory problems in 1974 and was asked on several occasions about his exposure to asbestos. During the summer of 1995, appellant was diagnosed as having lung cancer and underwent surgery in September 1995. Appellant stated that he had never filed a claim for compensation until he received disability benefits from the Social Security Administration after experiencing breathing difficulties in the 1990s.

On December 3, 2004 an Office medical adviser reviewed the case record to determine whether his lung conditions were caused by his exposure to asbestos. The Office medical adviser found that he did not sustain a lung condition causally related to asbestos exposure while working at the employing establishment. The Office medical adviser opined that appellant's lung cancer, which was apparently cured, emphysema and chronic obstructive pulmonary disease resulted from smoking tobacco.

By letter dated January 18, 2005, the Office referred appellant together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Kenneth C. Anderson, a pulmonary critical care medicine specialist, for a second opinion examination. In a February 2, 2005 medical report, Dr. Anderson found that appellant did not have pneumoconiosis based on pulmonary function testing. He opined that appellant had probable adenocarcinoma of the right middle lobe status post resection in 1995, stage 1, with postsurgical changes noted in his right hemithorax. Dr. Anderson opined that appellant had a history of tobacco abuse, which involved approximately a 25-pack-year smoking history that ended in 1980. He stated that the pulmonary function tests revealed more of an obstructive asthma condition versus emphysema since appellant's diffusion capacity of carbon monoxide was normal. Dr. Anderson opined that appellant's sensitive asthma and nasal polyps were not caused by his federal employment.

By decision dated March 4, 2005, the Office denied appellant's claim. The Office found that the medical evidence of record failed to establish that he developed a lung condition caused by factors of his federal employment.

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.¹ The Board may raise the issue on appeal even if the Office did not base its decision on the time limitation provisions of the Act.²

¹ *Charles Walker*, 55 ECAB ____ (Docket No. 03-1732, issued January 8, 2004); *see also Charles W. Bishop*, 6 ECAB 571 (1954).

² *Id.*

Under the Act,³ as amended in 1974, a claimant has three years to file a claim for compensation.⁴ Section 8122(a) of the Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.⁵ In a case of occupational disease, the Board has held that 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.⁶ When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitation period even though he does know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.⁷ The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.⁸ Also, a claim would be regarded as timely under section 8122(a)(1) if the immediate supervisor, another employing establishment official or an employing establishment physician or dispensary had actual knowledge of the alleged employment-related injury within 30 days.⁹ This provision removes the bar of the three-year time limitation if met.¹⁰ The knowledge must be such as to put the immediate supervisor reasonably on notice of appellant's injury.¹¹ Additionally, section 8122(a)(2) of the Act¹² provides that the claim would be deemed timely if written notice of injury or death was provided within 30 days after the injury pursuant to 5 U.S.C. § 8119.¹³

Section 8122(d)(3) of the Act provides that time limitations for filing a claim do not run against any individual whose failure to comply is excused by the Secretary on the grounds that such notice could not be given because of exceptional circumstances.¹⁴

³ 5 U.S.C. §§ 8101-8193.

⁴ *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dotson*, 47 ECAB 253 (1995); see 20 C.F.R. § 10.101(b).

⁵ 5 U.S.C. § 8122(a).

⁶ *Duet Brinson*, *supra* note 4.

⁷ *Larry E. Young*, 52 ECAB 264 (2002); *Duet Brinson*, *supra* note 4; see also *Leo Ferraro*, 47 ECAB 350 (1996).

⁸ See *Larry E. Young*, *supra* note 7; *Garyleane A. Williams*, 44 ECAB 441 (1993); *Charlene B. Fenton*, 36 ECAB 151 (1984).

⁹ 5 U.S.C. § 8122(a)(1); *Larry E. Young*, *supra* note 7; see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

¹⁰ *Hugh Massengill*, 43 ECAB 475 (1992).

¹¹ *Kathryn A. Bernal*, 38 ECAB 470 (1987).

¹² 5 U.S.C. § 8122(a)(2).

¹³ U.S.C. § 8119(a), (c); see *Gwen Cohen-Wise*, 54 ECAB 732 (2003).

¹⁴ 5 U.S.C. § 8122(d)(3).

ANALYSIS

Appellant filed a claim for compensation on February 5, 2003 alleging that in 1970 he began having symptoms of pulmonary lung disease, which he attributed to many years of exposure to ash, coal dust, heavy smoke and asbestos in his federal employment. The Board finds that the record establishes that appellant was exposed to the above work factors while working at the employing establishment. The record indicates that, prior to his last day at work on July 20, 1978 when he retired, he was exposed to the implicated employment factors. There is no evidence of record indicating that a pulmonary condition was diagnosed by an attending physician prior to July 20, 1978. Appellant contended that his condition was progressive and he could not determine the beginning of his symptoms. The mere possibility of a future condition/injury given a claimant's general knowledge of exposure to chemical agents or other factors is not alone sufficient to start the time limitation running. There must be a medical diagnosis.¹⁵

Dr. Pope found a lesion on appellant's right middle lung and recommended that it be surgically removed. On September 12, 1995 Dr. Powell performed surgery on appellant's right lung and diagnosed adenocarcinoma. Dr. Powell's diagnosis of lung cancer is sufficient to establish that, by the exercise of reasonable diligence, appellant should have been aware that his lung condition was causally related to his employment. The Board finds that appellant was aware by September 12, 1995 that his diagnosis of lung cancer was related to his implicated employment exposures. Accordingly, the Board finds that the three-year time limitation for filing the claim for appellant's lung cancer began to run on September 12, 1995.¹⁶ As appellant did not file his occupational disease claim for his lung cancer until February 5, 2003, the Board finds that it was not filed within the three-year time limitation period.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor, another employing establishment official or an employing establishment physician or dispensary had actual knowledge of the injury within 30 days of September 12, 1995.¹⁷ The employing establishment indicated that appellant first reported his lung conditions to his supervisor on February 27, 2003. As appellant did not report his injury to his supervisor, another employing establishment official or an employing establishment physician or dispensary within 30 days after September 12, 1995, the Board finds that the employing establishment did not have actual knowledge of his claimed employment injury.

Moreover, the Board finds that the record does not establish that appellant provided written notice of his lung condition to his supervisor within 30 days pursuant to section 8119.

Appellant's excuse for not filing a timely claim was that his pulmonary lung disease was progressive and that medical findings confirmed that his cancer and pulmonary lung disease were caused by his work exposure. Even though appellant may not have been aware of the

¹⁵ *Virginia D. King*, Docket No. 04-1450 (issued October 14, 2005).

¹⁶ *Larry E. Young*, *supra* note 7.

¹⁷ See 5 U.S.C. 8122(a)(1); Federal (FECA) Procedure Manual, *supra* note 9; *id.*

seriousness or ultimate consequence of his injury,¹⁸ the Board finds that there are no exceptional circumstances that could excuse a failure to file a timely claim. Appellant has not established that he could not file a timely claim due to exceptional circumstances, as that term is used in section 8122(d)(3) of the Act. The Board finds that appellant's failure to timely file his claim within three years after he was last exposed to the implicated employment exposure on September 12, 1995 precludes him from seeking compensation.

CONCLUSION

The Board finds that appellant's occupational disease claim was not timely filed within the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2005 decision of the Office of Workers' Compensation Programs be modified to reflect that appellant's claim was barred by the time limitation provisions of the Act and affirmed as modified.

Issued: April 19, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ See generally *Emma L. Brooks*, 37 ECAB 407 (1986); *Rodney E. Hoover*, 32 ECAB 1469 (1981); *Fred L. Ingram*, 30 ECAB 959 (1979).