

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

D.F., (Estate of M.F.), Appellant

and

**DEPARTMENT OF THE NAVY,
Subic Bay, Philippines, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 06-2169
Issued: February 9, 2007**

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 21, 2006 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated July 17, 2006 which denied compensation on the grounds that the evidence failed to show that appellant's husband's death was causally related to his employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(1), the Board has jurisdiction over this matter.

ISSUE

The issue is whether appellant filed a timely claim for death benefits under section 5 U.S.C. § 8122 of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On August 22, 2005 appellant filed a Form CA-5 claim seeking compensation for the death of her husband, a painter. She indicated that the employee died in 1998, at the age of 74. Appellant claimed that the injury that caused the employee's death was cardiovascular accident due to exposure to noxious gases and the date of injury was January 11, 1980. Dr. Justin

Agpoon completed the back of the form and stated that the employee's direct cause of death was cerebral hemorrhage and the contributory cause was a cardiovascular accident. He opined that the employee's exposure to noxious gases during his employment caused his brain injury. No additional information was submitted by Dr. Agpoon.

By letter dated October 13, 2005, the Department of the Navy submitted appellant's document request letter and decedent's personnel history including two employee's notice of injury or occupational disease. The January 18, 1969 notice of injury or occupational disease was for an injury that occurred when the decedent was struck in the head with a ladder. The January 22, 1968 notice of injury or occupational disease was for mild irritative conjunctivitis.

In a December 6, 2005 letter, the Office requested further information from appellant. She did not respond.

By decision dated July 17, 2006, the Office denied appellant's claim based on insufficient evidence to show that the employee's death was causally related to 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

Under the Act,³ an original claim for compensation for injury or death must be filed within three years after the injury or death of an employee.⁴ In the case of death due to latent condition, the time for filing a death claim does not begin to run until the employee has died and his survivors are aware of or by the exercise of reasonable diligence should have been aware of, the causal relationship of the employee's death to factors of his employment.⁵

The three-year limit on filing a claim for compensation does not apply in the following limited circumstances: (1) the employee's direct supervisor had actual knowledge that created reasonable notice of an on-the-job injury or death within 30 days;⁶ (2) an employee or survivor gave formal written notice within 30 days of becoming aware that the injury or death was causally related to the federal employment;⁷ (3) the employee filed a timely disability claim for a work-related injury or disability and the employee's death is based on the same injury;⁸ and

¹ See *Charles W. Bishop*, 6 ECAB 571 (1954).

² *Id.*; *Charles Walker*, 55 ECAB 238 (2004).

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8122(a).

⁵ 5 U.S.C. § 8122(b); *Lucile B. Shores*, 49 ECAB 219 (1997).

⁶ 5 U.S.C. § 8122(a).

⁷ 5 U.S.C. § 8122(a) and (b).

⁸ 5 U.S.C. § 8112(c).

(4) the claimant is under 21 years old, the claimant is incompetent and has no legal representative, or the claimant is prevented from giving notice by exceptional circumstances.⁹ Lack of awareness of possible entitlement, lack of information or ignorance of the law or one's rights and obligations under it do not constitute exceptional circumstances that excuse a failure to file a timely claim.¹⁰

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.¹¹ 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.¹²

ANALYSIS

The Board finds that appellant's claim for benefits are barred by the applicable time limitation provisions of the Act. The three-year time limit began to run when the employee died on December 22, 1998. Appellant did not file a claim until August 22, 2005.

Though appellant has not met the burden of proving that she filed within the three-year limitation, her claim could be considered timely if she met any of the statutory exceptions. The Board finds that these exceptions do not apply to her claim. There is no medical evidence that the employee had a latent condition. There is no evidence that the employee's supervisor had notice of an on-the-job-injury. There is no evidence that the employee gave formal written notice of an injury causally related to his employment that eventually contributed to his death. There is no evidence that the employee filed a disability claim for a brain injury due to employment factors. There is no evidence that appellant fits into any other exception which would toll the time limitation.

In this case, no disability claim was filed. The claim form states the date of injury as January 11, 1980 however there is no evidence in the record of any incident or claim filed in that year or in the three years after his employment ceased. The only medical evidence in the record is the note from Dr. Agpoon on the back of the claim form which opines that the noxious gases caused employee's brain injury. However there is no evidence that employee had a brain injury except for the cerebral hemorrhage which caused his death.

The latent disease exception which could toll the three-year time limitation for filing a claim does not apply to this case as there is no medical evidence that the employee had a latent disease. If the employee had had a latent disease then the time limit would begin when appellant

⁹ 5 U.S.C. § 8112(d).

¹⁰ *Roger W. Robinson*, 54 ECAB 846 (2003) (government's failure to recognize for several years that Gulf War personnel were exposed to potentially dangerous chemicals not exceptional circumstances did not constitute exceptional circumstances).

¹¹ *William L. Gillard*, 33 ECAB 265 (1981).

¹² *Jaried M. Bailey*, 26 ECAB 9 (1974).

should have reasonably discovered that the disease was related to the employee's federal employment. However as there is no evidence of any such disease the time limit is not tolled and the time limit began on the date of the employee's death. The claim was not filed within three years of the employee's death therefore the claim was not timely filed.

CONCLUSION

The Board finds that appellant did not file a timely claim for death benefits in accordance with 5 U.S.C. § 8122.

ORDER

IT IS HEREBY ORDERED THAT the July 17, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 9, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board