

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

B.J., <i>et al</i> , claiming as survivors of B.J., Appellant)	
)	
and)	Docket No. 08-289
)	Issued: July 18, 2008
TENNESSEE VALLEY AUTHORITY,)	
SHAWNEE FOSSIL PLANT,)	
Chattanooga, TN, Employer)	
)	

Appearances:
Ellis Jones, for the appellants
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 6, 2007 appellants filed a timely appeal of the August 27, 2007 decision of the Office of Workers' Compensation Programs which affirmed a decision denying their claim as untimely filed. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On May 25, 2006 appellants' representative¹ filed an occupational disease claim alleging that the employee, a deceased technical services supervisor, developed renal cell cancer with metastasis while performing his work duties which included sampling and testing coal and mixing hazardous chemicals. She noted that the employee was first aware of his disease on August 15, 1999 and that appellants first realized it was causally related to the employee's employment on May 17, 2006. The employee was terminated from employment due to a reduction-in-force on November 15, 1996. Appellants' representative submitted a death certificate indicating that the employee died on April 6, 2003 and that the cause of death was renal cell carcinoma and metastasis with other contributing conditions of small bowel obstruction and pneumonia.

By letter dated July 5, 2006, the Office noted that it was treating the matter as a claim for survivor's benefits and requested additional information in support of the claim. In a letter of the same date, the Office requested the employing establishment submit a statement from the employee's supervisor providing his job titles, employment duties, inclusive dates of employment and exposure to carcinogens while employed.

Appellants' representative submitted a July 17, 2006 statement which noted that the employee was a technical services supervisor and was responsible for chemical analysis of fuel, lubrication and insulating oil, coal and material testing analysis. Appellants first realized the employee's disease or illness was caused by his work on May 17, 2006, when the employee's daughter saw a legal notice on television which described a financial settlement for employees who died of cancer caused by exposure to hazardous chemicals at the employing establishment. The representative noted that employing establishment power plants had asbestos in boilers, turbines and generators. She indicated that, while she was married to the employee, he would come home from work with a chemical odor and his clothing would be covered with coal dust which left a residue after washing. The representative asserted the employee's exposure to hazardous and toxic chemicals caused his death. Also submitted was an employment benefit election form dated August 14, 1985, a divorce decree dated August 18, 1995 and retirement forms dated November 12, 1996.

Appellants' representative submitted medical records for a hospital admission from November 14 to 19, 2002, in which the employee presented with left leg pain and was diagnosed with a left femur fracture. Dr. Burton Stodghill, a Board-certified orthopedist, noted the employee underwent a repair of the left femur fracture on November 14, 2002 and opined that the femur fracture was possibly secondary to metastatic renal cell cancer. He indicated that the employee's history was significant for a left nephrectomy in August 2000 for renal cell cancer. Dr. Stodghill stated that a November 16, 2002 computerized tomography scan of the chest showed left pleural effusion with left lower lobe atelectasis. On November 20, 2002 the employee underwent a thoracentesis which revealed no malignancy and reactive mesothelial cells. Dr. Stodghill diagnosed left femoral fracture, bibasilar atelectasis, left pleural effusion, left

¹ The record contains a notarized statement signed by appellants, the employees' surviving nondependent children, which grants power of attorney to Ellis Jones, their mother and ex-wife of the employee, to represent them before the Office in this matter.

nephrectomy in August 2000 secondary to cancer, hypertension and renal insufficiency. On January 2, 2003 the employee was hospitalized for progressive weakness with metastatic renal cell carcinoma with anemia and hypercalcemia. He was treated by Dr. Harry W. Carloss, a Board-certified internist, who noted the employee's history and advised that the employee also had a pulmonary mass with pleural effusions; however, the pathology reports were negative for malignancy. The employee was later seen for radiation therapy. Dr. Carloss diagnosed metastatic renal cell carcinoma, anemia, renal insufficient and hypercalcemia from tumor and discharged the employee to his home on January 10, 2003.

By decision dated August 22, 2006, the Office denied the claim on the grounds that it was not timely filed in accordance with 5 U.S.C. § 8122. The Office noted that the employee retired on November 15, 1996 and died on April 6, 2003. The Office advised that the employee should have been aware of the relationship of his employment to the claimed condition by May 15, 1999;² however, a claim was not filed until May 25, 2006, which was over three years later.

Appellants' representative requested an oral hearing that was held on June 12, 2007. In a September 11, 2006 statement, appellants' representative stated that appellants first realized the employee's disease or illness was caused by his employment on May 17, 2006 when the employee's daughter saw a legal notice on television which described a financial settlement among employing establishment employees who died of cancer caused by exposure to hazardous chemicals. Appellants' representative asserted that sufficient evidence was submitted to establish that the employee's death was work related. Also submitted were employing establishment medical records from December 11, 1984 to May 7, 1996 and a notice of reduction-in-force advising that the employee would be terminated effective November 15, 1996. Other medical records noted the employee's hospitalizations from November 12 to 19, 2002 and January 2 to 10, 2003 for renal cell carcinoma and a femur fracture.

The employing establishment submitted an undated, unsigned statement from a supervisor who noted that the employee was hired on January 17, 1985. In 1995 he began working with the employing establishment "Synterprise Group" for approximately one year before he was terminated due to the reduction-in-force in 1996. The supervisor noted that it was unclear what duties the employee performed during his employment with Synterprise Group; however, he was exposed to asbestos insulation which was present throughout the employing establishment. The employee worked in the areas of the plant containing asbestos approximately three hours per day for the first few months that he was classified as a first period student and subsequently two hours per workday when he was classified as a materials tester. The supervisor noted that the industrial hygiene data for the employing establishment indicated that it was well within the permissible levels for asbestos exposure and the employee was provided with a respirator, safety glasses, a hard hat and hearing protection. He noted that the materials the employee was exposed to did not come in containers with product composition and safety labeling.

In an August 27, 2007 decision, the hearing representative affirmed the August 22, 2006 decision. The hearing representative found that, "at the present, there have been no medical or

² This appears to be a typographical error as August 15, 1999, not May 15, 1999, is listed on the May 26, 2006 claim form as the date that the employee was first aware of his diagnosis.

factual records provided indicating that the claimant had recognized or that a treating physician had suggested a relationship of the employee's condition to his employment." The hearing representative noted that "the fact that the family became aware of a possible connection of the claimant's condition and resulting death to his employment after watching a commercial does not establish that the family [was] reasonably aware of a relationship of the employment particularly since there was no medical evidence addressing the employee's condition or death and his employment exposure." The hearing representative concluded that the evidence was not sufficient to establish that a timely claim was filed.

LEGAL PRECEDENT

Section 8122(a) of the Act states that "[a]n original claim for compensation for disability or death must be filed within three years after the injury or death."³ In the case of death due to a latent condition, the time for the claim does not begin to run until the survivor is aware, or reasonably should have been aware, of the causal relationship between the death and the employment.⁴

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;⁵ (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;⁶ (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;⁷ and (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.⁸ 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.⁹

³ 5 U.S.C. § 8122(a).

⁴ 20 C.F.R. § 10.105(c); *see Lucile B. Shores*, 49 ECAB 219 (1997).

⁵ 5 U.S.C. § 8122(a).

⁶ 5 U.S.C. § 8122(a) and (b).

⁷ 5 U.S.C. § 8122(c).

⁸ 5 U.S.C. § 8122(d).

⁹ *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 and did not constitute exceptional circumstances); *see also Gwenda Brown*, Docket No. 05-1375 (issued November 10, 2005) (late receipt of Office determination that appellant's injury may be covered under the Act did not extend limits on filing a claim).

ANALYSIS

In its August 27, 2007 decision, the hearing representative affirmed the Office's denial of appellants' claim for compensation on the grounds that it was not timely filed in accordance with 5 U.S.C. § 8122.

Appellants claim that the employee died on April 6, 2003, over six years after his November 15, 1996 retirement, due to cancer caused by the harmful substances to which he was exposed during his employment as a technical services supervisor. In a July 17, 2006 statement, the representative explained that his family was not aware that the employee's work had contributed to his death until May 17, 2006 when a legal notice was broadcast on television describing a financial settlement for employees who died of cancer caused by exposure to hazardous chemicals at work. The Office indicated that the employee should have been aware of the relationship of his employment to the claimed condition by May 15, 1999, the date his condition was diagnosed. Since appellants did not file a claim until May 26, 2006, the Office concluded that the claim was not timely filed within the three-year period of limitation.

In this case, the Office has mixed the awareness requirements in section 8122(a) of the Act¹⁰ and in section 10.105 of the regulations.¹¹ The statute and its implementing regulations are phrased in terms of the disjunctive "or." Disability claims are distinct from death claims and the awareness provisions are similarly separated.¹²

The three-year limitation on filing a disability claim based on a latent condition runs from the date on which the employee has a compensable disability and is aware or should have been aware of the causal relationship between his condition and his employment.¹³ The three-year limitation on filing a death claim based on a latent condition cannot begin to run until the employee has died and his survivors were aware or should have been aware of the causal connection between his employment-related condition and his death.¹⁴

In this case, the employee's children had no grounds for filing a death claim until the employee died. Thus, any predeath knowledge of whether the condition was related to employment and the lack of the employee's filing of a claim are not relevant to the timely filing of the death claim. Therefore, the Office erred in finding the survivor's claim untimely filed. In this case, the earliest time appellants could have been aware of the relationship between the employment and the employee's death was April 6, 2003, the date of death of the employee.

The issue is whether appellants were aware or should have been aware of the connection at the time of the employee's death in 2003. The death certificate dated April 6, 2003 noted a

¹⁰ 5 U.S.C. § 8122(a).

¹¹ 20 C.F.R. § 10.105(c); see *Lucile B. Shores*, *supra* note 4.

¹² See *Lucile B. Shores*, *supra* note 4.

¹³ 20 C.F.R. § 10.101(c).

¹⁴ *Supra* note 4.

cause of death of renal cell carcinoma and metastases with other contributing conditions of small bowel obstruction and pneumonia. Because cancer is not the type of disease that is obviously linked to any particular job activity, it is not evident that a cancer diagnosis, alone, is sufficient to establish that by exercise of reasonable diligence appellants could have been aware of a causal connection.¹⁵

Appellants indicated that they became aware of the potential relationship between the employee's job and his death on May 17, 2006 when the employee's daughter saw a legal notice on television. The Board finds that the evidence of record does not establish that appellants were aware or should have been aware of the causal relationship between the employee's anatomic diagnosis and his federal employment on the date of death in April 2003. The evidence does not otherwise support that they reasonably should have been aware of the causal relationship between the death and the employment before May 17, 2006 when appellants state that they first became aware of the causal relationship. Because there is no substantial evidence to support that appellants should have known earlier than May 17, 2006 of the employee's anatomic diagnosis and connection to his employment, appellants had until May 17, 2009 to file the claim to meet the statutory requirements. Therefore, the claim filed on May 26, 2006 was timely filed. Upon return of the case record, the Office should proceed to further adjudicate the death benefits claim consistent with its procedures for timely claims.

CONCLUSION

The Board finds that appellants filed a timely claim for survivor benefits in accordance with 5 U.S.C. § 8122.

¹⁵ Compare *Virginia D. King*, 57 ECAB 143 (2005) (finding that a diagnosis of asbestosis started running the three-year filing limit for an employee exposed to asbestos) with *Kathryn L. Cornett*, 54 ECAB 812 (2003) (autopsy that did not clearly link the employee's cause of death to his employment was not a basis for establishing that the claimant should have been aware of the causal relationship).

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: July 18, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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