

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

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**J.R., Appellant**

**and**

**DEPARTMENT OF THE NAVY, HRO-  
GROTON-NAVAL SUBMARINE BASE,  
Groton, CT, Employer**

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**Docket No. 07-2278  
Issued: May 19, 2008**

*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  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 5, 2007 appellant filed a timely appeal from a merit decision of a hearing representative of the Office of Workers' Compensation Programs dated July 11, 2007 denying his occupational claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant's February 4, 2006 occupational disease claim was timely filed pursuant to 5 U.S.C. § 8122.

**FACTUAL HISTORY**

On February 4, 2006 appellant, then an 82-year-old former machinist helper at the Naval Torpedo Station, filed an occupational disease claim (Form CA-2) alleging that he developed restrictive and obstructive lung disease as a result of exposure to asbestos and dust during his

federal employment from 1943 to 1944.<sup>1</sup> He first became aware of a relationship between his condition and his federal employment on January 10, 1980.

Accompanying appellant's claim were reports from Dr. Peter Workum, a specialist in pulmonary medicine. In a February 10, 1995 report, Dr. Workum advised that he had followed appellant since 1984 for combined restrictive and obstructive lung disease. He noted that appellant had chronic bronchitis since his early twenties and complained of shortness of breath since 1980. During World War II, appellant was exposed to mustard gas and metal dust from grinding torpedo screws. Appellant was also exposed to asbestos while employed in the Merchant Marines and during subsequent construction work. Dr. Workum stated that appellant has not worked since 1980 because of respiratory problems and did not currently drink or smoke. Appellant's chest x-rays showed a small amount of scarring at the bases and a January 1985 pulmonary function test showed his lung capacity was 50 percent of predicted. Dr. Workum opined that appellant was totally disabled due to severe restrictive and obstructive lung disease. In a November 30, 1999 report, he indicated that the March 11, 1999 chest x-ray, which showed bilateral pleural thickening along the chest walls, was consistent with asbestos exposure. Dr. Workum opined that appellant had asbestos lung disease based on his history of asbestos exposure and the x-ray findings.

In a March 29, 2006 letter, the Office requested additional information from appellant. In a March 31, 2006 response, appellant described his work of grinding, polishing and buffing torpedo screws at Shop 13 of the Naval Torpedo Station during the period June 21, 1943 through March 16, 1944 and how he was exposed to asbestos. He became sick and bedridden during the period in which he was employed at the Naval Torpedo Station and a doctor told him it was from the asbestos and hot emery he was breathing at the station.

In a March 31, 2006 letter, the employing establishment advised that the Naval Torpedo Station was formally disestablished in December 1951 and that it was unable to locate any personnel records for appellant. Because of this, the employing establishment stated that it was unable to authenticate or confirm his employment during the period in question, his duties, working conditions or who his supervisors may have been.

By decision dated October 27, 2006, the Office denied appellant's claim on the grounds that it was untimely filed. The Office noted that the date of injury was January 10, 1980 and the current provisions of 5 U.S.C. § 8122 on time limitation applied.

On October 31, 2006 appellant requested an oral hearing, which was held April 26, 2007. He testified about his employment at the Naval Torpedo Station from June 21, 1943 through March 16, 1944 and that he was exposed to emery and asbestos in the work environment. Appellant related that he passed out one morning at the table in his parent's house and the doctor could see emery in his nose and thought it would be in his lungs. He stated that two naval officers and special police came to his parent's house for a security check and saw his condition. Appellant indicated that he was given medicine to loosen the emery in his lungs but this caused scars on his lungs. He stated that a physician recommended that he not return to work and he got

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<sup>1</sup> The record reflects that appellant resigned from the employing establishment on March 16, 1944 to join the Merchant Marines.

released from his employment as he told them he was going to join the Merchant Marines. Appellant testified that his breathing became worse in the 1980s. He indicated that Dr. Workum treated him since 1984 until his retirement in February 2007, when he came under the care of a Dr. Blanco. Appellant was first aware of a possible relationship between his former employment at the Naval Torpedo Station and his lung condition in the 1980's when he could not work and began seeing Dr. Workum. He filed his claim in February 2006 as the Federal Government and agencies did not recognize asbestos as a harmful or a hazardous material until a few months prior to the filing of his claim. Appellant submitted additional documents at the hearing and provided comments and corrections to the hearing transcript after the hearing.

By decision dated July 11, 2007, an Office hearing representative found that appellant's claim was untimely filed. The hearing representative found that appellant was reasonably aware of the relationship between his claimed condition and his former employment no later than November 30, 1999, the date of Dr. Workum's report. However, he did not file his claim within three years of that time.

### **LEGAL PRECEDENT**

Prior to the September 7, 1974 amendments, section 8122 of the Federal Employees' Compensation Act<sup>2</sup> provided that the Secretary may waive compliance with the requirements for giving notice of injury and for filing claim for compensation for disability or death within one year if-- (1) a claim is filed within five years after the injury or death; and (2) the Secretary finds that the failure to comply was due to circumstances beyond the control of the individual claiming benefits; or that the individual claiming benefits has shown sufficient cause or reason in explanation of, and material prejudice to the interest of the United States has not resulted from the failure.<sup>3</sup> After the September 7, 1974 amendments, section 8122(a) of the Act provided that an original claim for compensation for disability or death must be filed within three years after the injury or death.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> The time limitations do not run against an incompetent individual while he is incompetent and has no duly appointed legal representative.<sup>7</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8122 (1968); *see also* *Oren D. Etter (Jessie Margaret Etter)*, 57 ECAB 538 (2006); *Charles Walker*, 55 ECAB 238 (2004).

<sup>4</sup> 5 U.S.C. § 8122(a).

<sup>5</sup> *William L. Gillard*, 33 ECAB 265, 268 (1981).

<sup>6</sup> *Jaried M. Bailey*, 26 ECAB 9 (1974).

<sup>7</sup> *Allen E. Grether*, 24 ECAB 76 (1972).

## ANALYSIS

Appellant filed a claim for compensation on February 4, 2006 alleging that in 1980 he first became aware that his pulmonary lung disease was caused or aggravated by his former employment in 1943 to 1944. He was exposed to asbestos dust and hot emery while grinding, polishing and buffing torpedo screws. The record does not include any evidence from the employing establishment that refutes appellant's statements regarding his work environment. The record establishes that appellant was exposed to the implicated employment factors during 1943 to 1944.

The Board notes that appellant should have reasonably been aware of the causal relationship between his injury and federal employment and applied the current provisions of 5 U.S.C. § 8122 on time limitations which allow three years for filing a claim. However, the date of injury governs which time limitation provisions apply in a case.<sup>8</sup> Where an injury is sustained over a period of time, the date of injury is the date of last exposure to those work factors causing injury.<sup>9</sup> In a case of exposure to asbestos over a period of time, the date of injury is the date of last exposure.<sup>10</sup> In this case, the date of injury would be March 16, 1944, when appellant resigned from the employing establishment. Since the date of injury was prior to September 7, 1974, the applicable time limitation provision is the pre-1974 section 8122.<sup>11</sup> This provision provides that claims for compensation must be filed within one year for all injuries occurring prior to September 7, 1974.

In a claim for occupational disease, the time limitation period begins to run when the employee becomes aware, or reasonably should have been aware, of a possible causal relationship between his alleged disease and his federal employment. Appellant's last exposure occurred in 1944. The Office found that appellant should have been reasonably aware that his lung condition was employment related no later than November 30, 1999, the date of Dr. Workum's report which diagnosed asbestos-related lung disease. On his February 4, 2006 claim form, appellant acknowledged being aware of the relationship between his lung condition and his employment by January 10, 1980. The Board notes that appellant's hearing testimony establishes that he was aware of his asbestos exposure at the employing establishment and that he should have been aware of the relationship between his claimed condition and his employment no later than November 30, 1999, the date of Dr. Workum's report. Therefore, appellant had one year from November 30, 1999 to file a claim. As he did not file his claim until February 4, 2006, his claim was not filed within the one-year period. As noted, the one-year requirement may be waived under certain circumstances if the claim is filed within five years of November 30, 1999. However, this provision, if applicable, would not benefit appellant as his February 4, 2006 claim was also not filed within five years of November 30, 1999.

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<sup>8</sup> See *J.B.*, 58 ECAB \_\_\_\_ (Docket No. 07-274, issued April 23, 2007).

<sup>9</sup> *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

<sup>10</sup> See *Edward C. Hornor*, 43 ECAB 834 (1992) (appellant was exposed to asbestos until September 9, 1974 and therefore the time limitation period of section 8122 effective September 7, 1974 was applicable).

<sup>11</sup> See *Charles Walker*, *supra* note 3 (asbestos exposure was in 1968 and the pre-1974 time limitation provisions were applicable).

Appellant stated that he filed his claim shortly after the Federal Government recognized asbestos as a hazardous material. The Board, however, has held that unawareness of possible entitlement, lack of access to information and ignorance of the law or of one's obligations under it do not constitute exceptional circumstances that could excuse a failure to file a timely claim.<sup>12</sup> Moreover, even though appellant may not have been aware of the seriousness or ultimate consequences of his injury,<sup>13</sup> the Board finds that there are no exceptional circumstances that excuse his failure to file a timely claim in this case. As noted, the time limitations do not run against an incompetent individual while he is incompetent and has no duly appointed legal representative.<sup>14</sup> However, as appellant has not alleged mental incompetence, there is nothing to bar the running of the one year filing limit.

Appellant could still be eligible for medical benefits despite the failure to timely file a claim if he were able to demonstrate that a written notice of injury was filed in accord with 5 U.S.C. § 8119 or if his immediate supervisor had actual knowledge of the injury within 48 hours after the occurrence of the injury.<sup>15</sup> Appellant has provided no evidence that a written notice was ever filed with the employing establishment. Although he testified at his hearing that he got sick from the asbestos exposure and officials at the Naval Torpedo Station came to his house for a security check and noticed his condition, this is insufficient to establish that appellant's immediate supervisor had actual knowledge of a work-related illness within 48 hours. In this case, there is no probative evidence to establish that appellant's supervisor had actual knowledge sufficient that appellant's breathing problems were work related. Appellant has not shown that his supervisor was put on notice of the injury within 48 hours.

The Board accordingly finds that appellant's claim was not timely filed under the applicable provisions of 5 U.S.C. § 8122.

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<sup>12</sup> *Ralph L. Dill*, 57 ECAB 248 (2005).

<sup>13</sup> See generally *Emma L. Brooks*, 37 ECAB 407 (1986); *Rodney E. Hoover*, 32 ECAB 1469 (1981); *Fred L. Ingram*, 30 ECAB 959 (1979).

<sup>14</sup> *Allen E. Grether*, *supra* note 7.

<sup>15</sup> See, e.g., *Ida Ambler*, 25 ECAB 116 (1974).

**CONCLUSION**

Appellant's claim is barred by the time limitation provisions of the Act for injuries prior to September 7, 1974.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 11, 2007 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: May 19, 2008  
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