

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

A.L., claiming as widow of A.L., Appellant)

and)

DEPARTMENT OF THE NAVY, PEARL)
HARBOR NAVAL SHIPYARD, Honolulu, HI,)
Employer)

**Docket No. 08-805
Issued: October 21, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 22, 2008 appellant filed an appeal from a February 8, 2007 decision of the Office of Workers' Compensation Programs that denied her claim for death benefits and decisions dated March 12 and December 5, 2007 that denied her requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant timely filed a claim for death benefits under 5 U.S.C. § 8122; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 24, 2006 appellant filed a Form CA-5 claim seeking compensation for the death of her husband, a retired equipment cleaner. She stated that the nature of injury which

caused death was asbestos-related disease, pneumonia, pulmonary tuberculosis (PTB) and polypoid cystitis. The employee, who retired from federal service in January 1982, died on May 19, 1998. The death certificate listed the immediate cause of death as Class IV community acquired pneumonia with an antecedent cause as T/C myocardial infarction and an underlying cause as diabetes mellitus with gastropathy.

In letters dated November 20, 2006, the Office informed appellant that it did not appear that her claim had been timely filed and informed her of the evidence needed to perfect the claim. It also asked that the employing establishment provide copies of exposure data, personnel and medical records. On December 12, 2006 appellant stated that she had good cause for filing the claim late, noting a limited budget, lack of resources, ignorance and inadvertence. She stated that she knew the employee had worked in asbestos and that he had submitted a claim with the Department of Veterans Affairs (VA) before his death. Appellant submitted a claim with the VA thereafter. Citing the Black Lung Benefits Reform Act of 1977, she stated that there was no time limitation on filing a survivor's claim. Appellant submitted records covering the employee's active-duty service in the Navy from June 4, 1945 until he retired on April 23, 1965. The employee had pneumonia on several occasions and active (pulmonary scarring) PTB in 1953. Appellant also submitted additional medical evidence covering the period June 1, 1979 to May 29, 1998. A report of the death of an American citizen abroad provides the same information provided on the death certificate.

The employee filed a claim with the VA on December 5, 1997, claiming service-related disability compensation for PTB, pneumonia and polypoid cystitis. Dr. Joven Q. Tanchuco performed a physical examination on March 24, 1998 listing a history of PTB in 1994 and noted that the employee was too weak to perform pulmonary function tests.¹ An attached chest x-ray reported moderately advanced bilateral infiltrates with underlying nonspecific bibasal pneumonitis and bilateral pulmonary emphysema. In a June 12, 1998 report, Dr. Tanchuco reported that the employee had pulmonary infiltrations of unknown etiology and recommended repeat studies in September 1998.

On June 17, 1998 appellant filed a survivor's claim with the VA. A VA rating decision dated February 17, 2000 denied the employee's claim for service-related PTB, polypoid cystitis, and pneumonia. The VA Board noted that, although the employee was treated for both pneumonia and PTB while in the service, both conditions had resolved with no residual disability, did not recur within three years of separation, and that the polypoid cystitis diagnosis was made too long after his retirement to relate to service origin.

By decision dated February 8, 2007, the Office denied the claim on the grounds that it was not timely filed. It found that the evidence did not establish that the employee's death was caused or aggravated by factors of his civilian employment. The Office noted that the employee's last exposure was in January 1982 when he retired, that he had claimed exposure to asbestosis during the period 1975 to 1981, that both he and appellant had filed VA claims, and that the record did not show that his supervisor was notified of his death and its possible relationship to his civilian employment within 30 days. It concluded that the reasons given by

¹ Dr. Tanchuco's credentials are not known.

appellant for not timely filing the claim were insufficient. The Office noted that there was no medical evidence to suggest that polypoid cystitis or PTB were related to the employee's death and that he was never diagnosed with an asbestos-related disease.²

On March 3, 2007 appellant requested reconsideration, contending that her claim was untimely due to ignorance and neglect. She again noted that, under the Black Lung Act, a survivor's claim was never considered untimely. By decision dated March 12, 2007, the Office denied appellant's reconsideration request on the grounds that her arguments were repetitious. On March 22, 2007 appellant filed an appeal with the Board.³

On June 11, 2007 appellant requested reconsideration before the Office, alleging that her claim was not timely filed due to poor advice from relatives and friends and due to the fact that it would have required an investigation. She submitted military and civilian personnel records, publications regarding asbestosis, medical evidence both before and after the employee's civilian retirement, records documenting exposure to ionizing radiation at the employing establishment, results of pulmonary studies, and a March 29, 1979 employing establishment report showing that the results of asbestos pulmonary monitoring were negative.

On June 24, 2007 appellant filed a motion with the Board to remand the case to the Office. By order dated August 17, 2007, the Board granted her request. In a decision dated December 5, 2007, the Office denied appellant's request for reconsideration without further merit review.

LEGAL PRECEDENT -- ISSUE 1

In cases of injury on or after September 7, 1974, section 8122(a) of the Federal Employees' Compensation Act⁴ provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.⁵ In the case of death due to a latent disability, 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.⁶

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; (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; (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; and

² Additional evidence regarding appellant's military service was received by the Office on February 12, 2007.

³ Docket No. 07-1141.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8122(a); *Gerald A. Preston*, 57 ECAB 270 (2005).

⁶ 5 U.S.C. § 8122(b); *Gerald A. Preston*, *supra* note 5.

(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. 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.⁷

ANALYSIS -- ISSUE 1

On October 24, 2006 appellant, the employee's widow, filed a claim contending that his death on May 19, 1998 was caused by asbestos-related disease, pneumonia, PTB and polypoid cystitis related to his federal civilian employment as an equipment cleaner. By decision dated February 7, 2007, the Office found that appellant's claim was not timely filed.

Appellant alleged that she he was exposed to asbestos during his civilian employment, and the record supports that his pulmonary condition was being monitored by the employing establishment. The Board has held that mere concern about a history of exposure to dangerous substances without positive medical evidence does not begin the three-year period for filing the claim.⁸ In this case, however, there is no medical evidence of record to support that the employee had any asbestos-related condition. Therefore, there is no justifiable claim that an asbestos-related disease caused the employee's death.

Regarding appellant's claim that employment-related pneumonia, PTB and polypoid cystitis caused the employee's death, the employee had filed a claim for these conditions with the VA prior to his death, alleging that they were service connected. Furthermore, appellant filed a survivor's claim with the VA on June 17, 1998. These claims were denied by the VA on February 17, 2000. The Board therefore finds that reasonable diligence at that time would indicate that, as these conditions were not service related, and that a claim could be filed for compensation under the Act. As appellant did not file her claim until October 24, 2006, her claim was not timely filed.⁹

Although 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, however, that these exceptions are not established by the evidence of record. There is no evidence that the employee's immediate supervisor had actual knowledge that the employee's death was related to his employment within 30 days. There is no evidence that appellant or the employee provided written notice to the employing establishment within 30 days of becoming aware of the possibility that the employee's death or illness was causally related to his employment. Additionally, none of the exceptions relating to a claimant's ability to file a claim apply in this case. Appellant was not a minor. She did not allege that she was

⁷ 5 U.S.C. § 8122; see *E.B., claiming as widow of N.B.*, 58 ECAB ____ (Docket No. 07-629, issued July 18, 2007).

⁸ *Edward C. Horne*, 43 ECAB 834 (1992).

⁹ *E.B., claiming as widow of N.B.*, *supra* note 7. Regarding appellant's claim that, under the Black Lung Act, her claim would not be untimely, the rules and evidence of that act are irrelevant to the instant claim filed under the Federal Employees' Compensation Act.

incompetent, and she did not provide evidence of an exceptional circumstance that would excuse her failure to timely file the claim. While appellant argued that ignorance and inadvertence, a limited budget and lack of resources prevented her from timely filing a claim, the Board has held that unawareness of possible entitlement, lack of information and ignorance of the law or of one's rights and obligations under it do not constitute exceptional circumstances that could excuse a failure to file a timely claim.¹⁰ She therefore did not timely file a claim under section 8122 of the Act.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.¹¹ Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).¹² This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.¹³ Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁴

ANALYSIS -- ISSUE 2

With appellant's requests for reconsideration on March 3 and June 11, 2007, she merely reiterated that her claim was timely filed, reiterating the same arguments that she presented when she initially filed her claim. She did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Consequently, appellant was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁵

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted no additional evidence with her March 3, 2007 reconsideration request. The Office therefore properly denied her reconsideration request by its March 12, 2007 decision. Appellant submitted additional evidence with her June 11, 2007 request, including military and civilian

¹⁰ See *Ralph L. Dill*, 57 ECAB 248 (2005).

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.608(a).

¹³ *Id.* at § 10.608(b)(1) and (2).

¹⁴ *Id.* at § 10.608(b).

¹⁵ *Id.* at § 10.606(b)(2).

personnel records, publications regarding asbestosis, medical evidence. However, none of this evidence is relevant to the underlying issue in this case, *i.e.*, whether she timely filed a claim for death benefits under section 8122 of the Act. As appellant did not submit relevant and pertinent new evidence not previously considered by the Office, it properly denied her reconsideration request by its December 5, 2007 decision.¹⁶

CONCLUSION

The Board finds that appellant did not timely file a claim for death benefits under 5 U.S.C. § 8122, and that the Office properly refused to reopen her case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 5, March 12 and February 8, 2007 be affirmed.

Issued: October 21, 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

¹⁶ See *Johnnie B. Causey*, 57 ECAB 359 (2006).