

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALTA JEAN JAMES (claiming as widow of ALLEN D. JAMES) and
DEPARTMENT OF THE AIR FORCE, OKLAHOMA CITY AIR LOGISTICS
CENTER, TINKER AIR FORCE BASE, OK

*Docket No. 97-2426; Submitted on the Record;
Issued September 6, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to rescind the schedule award granted appellant on the grounds that she was not entitled to a schedule award requested after the employee's death.

Appellant is the widow of the decedent, a materials expeditor, who on July 7, 1989 sustained a left shoulder rotator cuff tear while in the performance of duty, which was accepted by the Office as being employment related. The employee received monetary compensation benefits during his lifetime. He passed away on July 7, 1995 for reasons unrelated to his accepted employment injury.

On July 28, 1995 appellant filed a Form CA-7 claiming a schedule award for permanent impairment of the decedent's left upper extremity.

On May 13, 1996 the Office granted appellant a schedule award for a 35 percent permanent impairment of the employee's left upper extremity.

However, the Office thereafter reviewed the Federal Employees' Compensation Act¹ and determined that, in accordance with section 8109(a)(2) of the Act,² for a beneficiary to be entitled an award of unpaid compensation at the death of the employee, the employee must have filed a valid claim during his lifetime.

By decision dated June 11, 1996, the Office rescinded its May 13, 1996 schedule award finding that the granting of the schedule award had been erroneous, as appellant was not entitled

¹ 5 U.S.C. § 8101 *et seq.*

² 5 U.S.C. §§ 8109(a)(2) and (3)(B).

to a schedule award for permanent impairment of the decedent's left upper extremity as the claim was made after his death. The Office cited the provisions of 5 U.S.C. § 8109 that required that the employee must have applied for the schedule award prior to his death.

By letter dated June 19, 1996, appellant requested an oral hearing on the rescission of the award. A hearing was held on February 13, 1997 at which appellant testified. Appellant claimed that on August 3, 1993 she and the employee wrote a letter to the Office in response to an Office proposal to reduce the employee's compensation on the grounds that he could perform a minimum wage job, requesting a "settlement and release," as the employee was then on oxygen 24 hours per day.³ Appellant acknowledged that they did not file a claim form but reiterated that they did request a "settlement and release."

By decision dated April 15, 1997, the hearing representative affirmed the June 11, 1996 rescission decision finding that the granting of the schedule award had been erroneous as the employee had not filed a schedule award claim prior to his death. The hearing representative noted that the August 3, 1993 letter did not state that the employee was asking for a schedule award but only that he had been told that he might be eligible for a settlement award for his shoulder injury. The hearing representative cited 20 C.F.R. § 10.105(e) which stated that if no claim was filed by an injured employee or by someone acting on his behalf prior to his death, the right to claim compensation for disability other than medical expenses ceases and does not survive.

The Board finds that the Office met its burden of proof to rescind the schedule award on the grounds that the employee did not submit a valid claim during his lifetime.

Once the Office has accepted a claim, it has the burden of justifying the termination or modification of compensation benefits. Under such circumstances, the Office must either establish that its original determination was erroneous or that the employment-related disability has ceased.⁴ To justify rescission of a prior acceptance, the Office has the burden of establishing through new or different evidence or argument that its prior acceptance was erroneous.⁵

In *Daniel E. Phillips*⁶ the Board discussed the type of evidence the Office must have in order to justify rescinding acceptance of a claim. In *Phillips* the Board held that to justify a rescission of acceptance of a claim the Office must show that it based its decision on new evidence. In *Roseanna Brennen*,⁷ the Board upheld the Office's rescission of its prior

³ The August 3, 1993 letter from the employee stated: "In a previous letter, you stated I may be eligible for a settlement award for my shoulder injury.... I hope you will take into consideration all the things I have related to you concerning my shoulder injury and the nerve damage to my neck and hands.... Please give this matter your earliest consideration as my workers' compensation is the only income I (and my wife) have at this time."

⁴ *Thomas Meyers*, 35 ECAB 381 (1983); *Francis F. Fitzpatrick*, 33 ECAB 720 (1982).

⁵ See *Daniel E. Phillips*, 40 ECAB 1111 (1989), *petition for recon. denied* 41 ECAB 201 (1989); *Roseanna Brennan*, 41 ECAB 92 (1989), *petition for recon. denied*, 41 ECAB 371 (1990).

⁶ *Id.*

⁷ *Id.*

authorization for continuation of pay, finding that the Office had advanced sufficient evidence and legal argument in the form of its implementing regulations to establish that it erroneously authorized continuation of pay when under the circumstances of the case continuation of pay was precluded by regulation. In *John C. Smith*⁸ the Board found that the Office met its burden of proof to rescind its acceptance of a claim after determining that, by regulation, appellant's claim was barred by the applicable time limitation provisions.

In the instant case, the Office introduced new legal argument based on the Act and its implementing regulations which prohibit the payment of a schedule award which was not filed for during the employee's lifetime.

The Office, in its June 11, 1996 decision proffered new legal argument in the form of section 8109(a)(2) of Title 5 of the Code of Federal Regulations, noting:

“(a) If an individual --”

* * *

“(2) has filed a valid claim in his lifetime; and

“(3) dies from a cause other than the injury before the end of the period specified by the schedule;

“the compensation specified by the schedule that is unpaid at his death, whether or not accrued or due at his death, shall be paid --”

* * *

(B) for the period specified by the schedule;

(C) to and for the benefit of the persons then in being within the classes and proportions and on the conditions specified by this section; and

(D) in the following order of precedence:

(i) If there is no child, to the widow or widower.”

This intent of the statute is clear, for a beneficiary to be entitled to payment of a schedule award such claim must have been filed within the employee's lifetime.

At the hearing appellant argued that the employee had applied for a schedule award by letter dated August 3, 1993. However, a review of this letter fails to reveal the necessary words of claim, as is required to put the Office on notice that a claim for additional compensation in the

⁸ 42 ECAB 396 (1991).

form of a schedule award was being made.⁹ Accordingly, the Board finds that the August 3, 1993 letter does not constitute a claim for a schedule award.

The hearing representative evaluated the wording of the August 3, 1993 letter, determined that it did not contain words of claim sufficient such as to put the Office on notice that a claim for a schedule award for permanent impairment of the employee's left upper extremity was being made and denied appellant's claim. The Office hearing representative noted that the claim for a schedule award was erroneously accepted as the Office's implementing regulations at 20 C.F.R. § 10.105(e) provide: "If no claim is filed by an injured employee or by someone acting on the employee's behalf prior to his or her death, the right to claim compensation for disability other than medical expenses ceases and does not survive."¹⁰

The Board finds that the Office met its burden of proof to rescind the schedule award issued in this case based on the legal arguments premised on the Act at sections 8109(a)(2) and (3) and the implementing regulations at 20 C.F.R. § 10.105(e).

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 15, 1997 is hereby affirmed.

Dated, Washington, D.C.
September 6, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

⁹ See *Mary H. Martin*, 46 ECAB 295 (1994).

¹⁰ 20 C.F.R. § 10.105(e)