

FACTUAL HISTORY

On December 28, 1985 the employee, then a 31-year-old letter carrier, filed a traumatic injury claim alleging that he twisted his left knee when he slipped on ice while coming down a step. OWCP accepted the claim for internal derangement of the left knee.

On August 10, 2001 the employee filed a claim for a schedule award and submitted a December 24, 1998 impairment report from Dr. David Weiss, an osteopath. OWCP began development of the impairment issue and, in 2005, requested that the employee file a Form CA-7 claim for compensation indicating that he was seeking entitlement to a schedule award. On September 22, 2005 the employee again filed a claim for a schedule award.

On January 4, 2006 the employee filed a notice of recurrence alleging that his work stoppage as of December 12, 2005 was due to no work being available within his restrictions.² In a March 2, 2006 letter, counsel advised that the employee's schedule award claim must be withdrawn in light of the fact that he had filed a recurrence. He asked OWCP to confirm in writing that the schedule award has been withdrawn and that the recurrence claim would proceed. In a March 16, 2006 letter, OWCP acknowledged that the schedule award had been withdrawn per the employee's request. It advised that he could submit his request for a schedule award again when his physician opined that maximum medical improvement has been reached. In a June 30, 2006 letter from counsel, OWCP was advised that the employee had passed away on June 25, 2006.

On April 12, 2010 appellant, the employee's widow and administratrix of his estate, filed a claim for a schedule award. By decision dated May 4, 2010, OWCP denied entitlement to a schedule award as the medical evidence was insufficient to establish permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. On May 11, 2010 appellant requested a hearing before an OWCP hearing representative, which was held September 15, 2010. In a January 21, 2011 decision, OWCP's hearing representative vacated the May 4, 2010 decision and remanded the case for further medical development.

By decision dated May 17, 2011, OWCP denied the claim for a schedule award as the evidence was not sufficient to establish that a valid claim for benefits was submitted within the employee's lifetime. It specifically found that the employee, through counsel, withdrew the active August 1, 2001 schedule award claim on March 2, 2006, prior to adjudication. Although the claim was resubmitted and a new claim filed after the employee's death on June 25, 2006, those claims cannot be considered to have been submitted during the employee's lifetime.

In a May 23, 2011 letter, counsel requested an oral hearing, which was held *via* videoconference on April 23, 2012. He argued that the schedule award request made in August 2001 was a valid claim during the employee's lifetime. Appellant indicated that, due to a recurrence, a request was made not to proceed with the schedule award on March 2, 2006.

² By decision dated April 15, 2008, the Board set aside OWCP's April 3, 2007 decision denying the employee's recurrence claim and remanded the case to OWCP for further development. Docket No. 07-2367 (issued April 15, 2008). OWCP ultimately accepted the recurrence.

However, the recurrence was approved and the request for a schedule award was renewed after the employee's death.

By decision dated June 20, 2012, OWCP's hearing representative affirmed the May 17, 2011 decision finding that there was no valid or pending claim for a schedule award on record at the time of employee's death on June 25, 2006.

LEGAL PRECEDENT

Section 8109 of FECA provides for the payment of compensation under schedule awards unpaid at death to beneficiaries and lists an order of precedence for identifying eligible beneficiaries. The statute provides that, if an individual has sustained disability compensable under section 8107(a), has filed a valid claim in his lifetime, and 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 to designated surviving beneficiaries.³

The Board has held the intent of this statutory language is clear, for a beneficiary to be entitled to payment of a schedule award upon death of an injured employee, such claim must have been filed within the employee's lifetime.⁴ If a claim has been filed during the employee's lifetime and the claim was under development, the employee's estate may be entitled to schedule award benefits if entitlement is established by the medical evidence.⁵

ANALYSIS

The record indicates that the employee requested a schedule award on August 10, 2001 and September 22, 2005. In a March 2, 2006 letter, counsel requested a formal withdrawal of the schedule award claim. OWCP acknowledged the formal withdrawal of the schedule award claim and sent the employee and counsel a letter indicating such on March 16, 2006. The employee passed away on June 25, 2006. Appellant requested a schedule award on his behalf on April 19, 2010.

There is no entitlement to a posthumous schedule award if the schedule award claim is not filed during the lifetime of the injured employee.⁶ The Board has held that a schedule award claim must be filed by an injured employee or someone acting on his behalf during his lifetime to establish a valid claim for compensation under section 8107.⁷ Additionally, OWCP's implementing regulations provide that the right to claim compensation ceases and does not

³ 5 U.S.C. § 8109(a). *Carol T. Collins (Harold Turner)*, 54 ECAB 417 (2003); *P.G. (T.G.)*, Docket No. 08-2183 (issued June 23, 2009).

⁴ *Id.*

⁵ See *Cheryl R. Holloway (Wryland R. Holloway)*, 54 ECAB 443 (2003).

⁶ *Carol T. Collins (Harold Turner)*, *supra* note 3; *Mary Marie Young (David E. Young)*, 30 ECAB 94 (1978); *P.G. (T.G.)* *supra* note 3.

⁷ *Id.*

survive the death of the employee.⁸ In the instant case, counsel requested a formal withdrawal of the employee's schedule award claim on March 2, 2006, which OWCP accepted and acknowledged on March 16, 2006. While appellant's attorney on appeal argued that the employee's schedule award claim had to be interrupted during the period of recurrence, his March 2, 2006 letter used clear and definitive language that he wished to withdraw the employee's schedule award. OWCP confirmed the withdrawal on March 16, 2006 and counsel did not communicate any desire to renew the claim prior to the employee's death. Thus, there is no valid or pending schedule award claim on record at the time of the employee's death on June 25, 2006. As no valid schedule award claim was filed within the employee's lifetime, the Board finds that a posthumous claim for schedule award compensation may not be filed by appellant.⁹

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

⁸ See 20 C.F.R. § 10.105(d); see also *P.G. (T.G.)*, *supra* note 3.

⁹ *P.G. (T.G.)*, *supra* note 3. Neither the Board nor OWCP has the authority to enlarge the terms of FECA as specified in the statute. See, e.g., *Mary C. Anderson-Paine (Robert O. Anderson)*, 47 ECAB 148, 152 (1995). *C.f.*, *F.D. (D.D.)*, Docket No. 10-229 (issued August 2, 2010) (appellant asserted that the employee filed a valid claim for a schedule award during his lifetime, the Board noted that, while he filed previous schedule award claims which had been paid, there remained no unpaid claim for a schedule award under the previous schedule award claim and no claim that was under development at the time of death). Here, as noted, the previous claim had been withdrawn by counsel and no such claim was under development at the time of the employee's death.

CONCLUSION

The Board finds that appellant is not entitled to a posthumous schedule award on behalf of the employee.

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 28, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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