

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL T. COLLINS, claiming as administratrix of the estate of HAROLD
TURNER and DEPARTMENT OF LABOR, MINE SAFETY & HEALTH
ADMINISTRATION, Mount Hope, WV

*Docket No. 01-1560; Submitted on the Record;
Issued February 24, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the employee's estate is entitled to file a posthumous schedule award claim for compensation in connection with the employee's accepted employment-related condition.

On January 20, 2000 the employee, then a 76-year-old retired mine inspector, filed an occupational disease claim (Form CA-2), alleging that he sustained malignant mesothelioma of his right lung due to exposure to asbestos at work.¹ The employee died on May 27, 2000 due to coronary artery disease. The Office of Workers' Compensation Programs developed the evidence and, on February 1, 2001, accepted that the employee sustained employment-related malignant pleural mesothelioma.

On February 15, 2001 appellant, the authorized administratrix of the employee's estate, filed a claim for a schedule award (Form CA-7) on the employee's behalf. By decision dated March 26, 2001, the Office denied appellant's claim for schedule award compensation. The Office found that, "[a]lthough the case was accepted for a rateable (sic) condition, the CA-7, claim for compensation indicated that [appellant] had no dependents."

The Board finds that the employee's estate is not entitled to claim a posthumous schedule award in connection with the employee's employment-related lung condition as no valid claim was filed during the employee's lifetime, as specified under 5 U.S.C. § 8109(a)(2).

It is well established that an award of disability compensation is personal to the recipient, based on the individual's need for a substitute for his or her lost wages and injury to earning capacity. There is no property right in an award of compensation which can survive in favor of heirs. Only compensation accrued but unpaid before death survives as an asset of the estate like

¹ The employee retired from the employing establishment in May 1986.

any other debt.² This is true with respect to all of the deceased employee's legally recognizable interests that are not extinguished by the death, such as carrying forward a claim or appeal instituted by the employee during his or her lifetime.³

Section 8109 of the Federal Employees' Compensation Act 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, in pertinent part:

“(a) If an individual --

- (1) has sustained disability compensable under section 8107(a) [providing for schedule awards] of this title;
- (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 -- [to specified beneficiaries].”⁴

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.⁵ To receive consideration for a schedule award, appellant must establish that the employee was entitled to future payments of compensation under section 8107.⁶ Appellant has not shown, however, that the employee was entitled to compensation under the schedule award provisions because he did not file a valid claim for a schedule award in his lifetime, as required by section 8109(a)(2).

There is no entitlement to a posthumous schedule award if the schedule award claim is not filed during the lifetime of the injured employee.⁷ The employee filed an occupational disease claim (Form CA-2) for disability compensation on January 20, 2000 but did not file a schedule award claim (Form CA-7) before his death on May 27, 2000. The Office's procedure manual provides that in determining the date a claim is filed, consideration is given to the date of receipt of a claim by the Office or the employing establishment.⁸ The manual identifies CA-1,

² *Kathleen Carlton (Jay Harold Carlton)*, 34 ECAB 606 (1983).

³ *Mrs. Hobart M. Bylesby*, 4 ECAB 667 (1952)

⁴ 5 U.S.C. § 8109(a).

⁵ See *Alta Jean James (Allen D. James)*, Docket No. 97-2426 (issued September 6, 2000).

⁶ The Board has noted that section 8109 directs payment of unpaid portions of schedule awards to specific dependents of the deceased employee. See *Kathleen Carlton (Jay Harold Carlton)*, *supra* note 2.

⁷ See *Mary Marie Young (David E. Young)*, 30 ECAB 94 (1978).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.4 (March 1993).

CA-2 and CA-7 forms, among others, which constitute claims for the purpose of considering the time limitation provisions of the Act.⁹ With regard to posthumous claims, the procedure manual states: “*Posthumous Claim*. Such a claim may be made by the estate or a survivor of a deceased employee for medical benefits only. A posthumous disability claim cannot be accepted.”¹⁰ This interpretation is supported by a review of the Office regulations adopted after the promulgation of 5 U.S.C. § 8109. These regulations provided: “If an employee *files a valid claim for a scheduled loss* (permanent disability which involves solely the loss or loss of use of a member) *in his lifetime* and dies from causes other than the injury before the entire amount due for such schedule is paid, claim for such unpaid balance may be made on Form CA-5A pursuant to [section] 1.13 as follows....” to specified beneficiaries.¹¹ (Emphasis added.) The Office’s current implementing regulations provide that the filing of a notice of injury or occupational disease will satisfy the time requirements for a death claim based on the same injury or occupational disease. However, if an injured employee or someone acting on his behalf does not file a claim before the employee’s death, the right to claim compensation for disability other than medical expenses ceases and does not survive.¹²

The Board finds that a schedule award claim must be filed by an injured employee or someone on his or her behalf during the employee’s lifetime to establish a valid claim for compensation under section 8107.¹³ A plain reading of 5 U.S.C. § 8109(a) makes this clear with respect to a claim for a schedule award. When examining the context of the use of the phrase “valid claim in his lifetime” within section 8109(a)(2), the statute clearly provides that the phrase refers to a schedule award claim rather than an initial claim for disability compensation. In turn, the Office’s regulations provide that the right to claim compensation for permanent impairment ceases and does not survive the death of the employee.

It is well established that the Act is a remedial statute and should be broadly and liberally construed in favor of the employee to effectuate its purpose and not in derogation of the

⁹ *Id.* The Office’s implementing regulations provide that notice of traumatic injury is to be filed on Form CA-1, notice of occupational disease on Form CA-2, and Form CA-7 used “to claim compensation for impairment to a body part covered under the schedule....” 20 C.F.R. § 10.103.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.8(d) (March 1993).

¹¹ 20 C.F.R. § 1.11(a), as reprinted in U.S. Department of Labor, Bureau of Employees’ Compensation, Regulations Governing Admin. of the Federal Employees’ Compensation Act of September 7, 1919, as amended, Relating to Civil Officers and Employees of the U.S. and others, Effective June 1, 1938, as amended to December 9, 1949 (Washington, DC 1951). The Office’s current regulations provide that a notice of death and claim for compensation is to be filed using Form CA-5 or CA-5b. 20 C.F.R. § 10.105(a)

¹² 20 C.F.R. § 10.110(d). 5 U.S.C. § 8133 provides for compensation in cases of death.

¹³ Under 5 U.S.C. § 8107(a) a compensation schedule was enacted, providing: “[i]f there is permanent disability involving the loss, or loss of use of a member or function of the body or involving disfigurement, the employee is entitled to basic compensation for the disability.” As interpreted by the Office and Board, the “permanent disability” described under this section is known as “permanent impairment.” Section 8107(b) provides the statutory compensation schedule for various members of the body, which has been supplemented by the Secretary under the implementing regulations. *See* 20 C.F.R. § 10.404(a). Compensation for permanent impairment is paid in fixed numbers of weeks for loss of use of defined members, organs or bodily functions.

employee's rights.¹⁴ The primary rule of statutory construction, however, is to give effect to legislative intent, and it is well settled that, in arriving at intent, the words in a statute should be construed according to their common usage.¹⁵ In the instant case, neither the employee nor someone on his behalf filed a schedule award claim before his death on May 27, 2000. As no valid schedule award claim was filed within the employee's lifetime, a posthumous claim for schedule award compensation may not be filed by the employee's estate.¹⁶

The March 26, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
February 24, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁴ *Stephen R. Lubin*, 43 ECAB 564, 569 (1992).

¹⁵ *Id.* The treatise *Sutherland Statutory Construction* provides, "[w]here administrative powers are granted for the purpose of effectuating broad regulatory programs which are deemed to be essential to the public welfare, interpretive attention may concentrate on the remedial character of the legislation to produce a liberal interpretation that enables the full benefits of the programs to be realized.... The grant of an express power carries with it the authority to exercise all other activities reasonably necessary to carry it into effect, and this has been employed with greater liberality in interpreting statutes granting administrative powers.... Where the meaning of a statutory provision is unclear, in doubt or ambiguous, the construction placed upon it by the administrative agency charged with its administration is entitled to great weight and deference." Norman J. Singer, *Sutherland Stat. Constr.* § 65.03, 394-403 (6th ed. 2001).

¹⁶ Neither the Board nor the Office has the authority to enlarge the terms of the Act as specified in the statute; *see Mary C. Anderson-Paine (Robert O. Anderson)*, 47 ECAB 148, 152 (1995).