

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL R. HOLLOWAY, (claiming as executrix of the estate of WRYLAND R. HOLLOWAY) and DEPARTMENT OF DEFENSE, Columbus, OH

*Docket No. 02-2153; Submitted on the Record;
Issued February 28, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for a posthumous schedule award under 5 U.S.C. § 8107 of the Federal Employees' Compensation Act.

On October 17, 1995 the employee, then a 57-year-old carpenter, filed an occupational disease claim¹ alleging a left thumb condition due to repetitious use of his hands in the course of his employment. The Office accepted the case for post-traumatic arthritis of the left carpometacarpal (CMC) joint. The Office also expanded the employee's claim to include bilateral carpal tunnel syndrome.²

On January 28, 1998 the employee underwent authorized carpometacarpal arthroplasty surgery on the left thumb.

On August 13, 1998 the employee filed a Form CA-7 for a schedule award for permanent impairment of the hand.³

In an October 9, 1998 treatment note, Dr. Raymond Kobus, a Board-certified orthopedic surgeon, indicated that the employee was over eight months post surgery and received an excellent functional result with good range of motion of the thumb including interphalangeal (IP) range of motion from 20 degrees of hyperextension to 35 degrees of flexion, metacarpophalangeal (MP) motion from 0 degrees to 50 degrees of flexion; CMC joint showed 50 degrees of palmar adduction, 40 degrees of radial abduction and 4 centimeters of thumb opposition. He opined that the employee had reached maximum medical improvement.

¹ The claim was originally filed as a traumatic injury claim.

² The Office combined appellant's claim with file number 09- 429764, for bilateral carpal tunnel syndrome.

³ Compare *Carol T. Collins (Harold Turner)*, 54 ECAB ____ (Docket No. 01-1560, issued February 24, 2003).

By memorandum dated December 24, 1998, the Office requested that the Office medical adviser review Dr. Kobus' October 9, 1998 evaluation and provide an impairment rating.

In a December 29, 1998 report, the Office medical adviser advised that the employee had a 13 percent impairment to the upper extremity and requested additional information regarding his carpal tunnel condition.

By letter dated February 11, 1999, the Office requested additional information from Dr. Kobus regarding the employee's request for a schedule award to the left hand and wrist.

In reports dated February 12 and March 2, 1999, Dr. Kobus noted the employee's history of injury and treatment and stated that, functionally, he had done well post surgery, although he had continued to experience weakness and loss of full dexterity of the left upper extremity secondary to CMC arthritis and postsurgical condition. Dr. Kobus opined that the employee was unable to return to all of the duties required for his previous position as a carpenter. Dr. Kobus stated that appellant had lost strength and dexterity in his left upper extremity and secondary to his hand condition, he was unable to work effectively on ladders and scaffolding and do overhead work or work in cramped and awkward positions. Finally, he indicated the use of vibrating tools necessary to the employee's trade was also restricted secondary to discomfort and loss of dexterity of the left upper extremity and the employee did not have the ability to do lifting above 20 pounds on a regular basis. Dr. Kobus noted that the employee was at maximum medical improvement and he had evaluated him for an impairment evaluation on February 12, 1999. He opined that due to loss of mobility of the left thumb, as well as loss of strength and dexterity the employee had a 30 percent impairment of the left thumb secondary to loss of thumb opposition and thumb adduction, which translated to a 12 percent impairment of the hand, and 11 percent impairment of the upper extremity, and a 7 percent impairment of the whole person.

By letter dated February 24, 2000, the employee's attorney requested a schedule award.

On March 6, 2000 the Office referred the case for review by an Office medical adviser, Dr. Nabil Angley, a Board-certified orthopedic surgeon.

In a March 15, 2000 report, Dr. Angley indicated that additional information was required from the treating physician.

By letter dated March 30, 2000, the Office requested additional information from Dr. Kobus.

The record indicates that, on April 3, 2000, the employee passed away and Cheryl Holloway was made the "executor" of the estate by a court of appropriate probate jurisdiction.⁴

In a report dated July 5, 2000, Dr. Kobus indicated that the employee was seen for re-evaluation of his thumb on February 12, 1999 and had impairment of 30 percent of the thumb, secondary to loss of thumb opposition and abduction. He explained that the employee had

⁴ The death certificate indicated that the employee's cause of death was "sudden death" due to heart disease.

thumb opposition at that time of 3 cm, which using Table 7 on page 29 translated to a 13 percent impairment of the thumb, due to abnormal motion. Dr. Kobus stated that the employee at that time had 30 degrees of radial abduction of the thumb, which using Table 6 on page 28 of the A.M.A., *Guides*, translated to three percent impairment of the thumb, due to abnormal motion. He indicated that the employee had six cm of adduction, which using the A.M.A., *Guides*, Table 7 on page 28, translated to eight percent impairment of the thumb due to abnormal motion. Dr. Kobus indicated that the employee had MP motion from 0 to 40 degrees, which using the A.M.A., *Guides*, Figure 13, in page 27 translated to a two percent impairment of the thumb. Finally, he indicated that appellant had a range of motion of the IP joint of the thumb from 20 degrees of hyperextension to 30 percent of flexion, which using Figure 10, on page 26, corresponds to a 4 percent impairment of the thumb. He noted that the employee had no impairment secondary to bilateral carpal tunnel syndrome. Finally, Dr. Kobus indicated that when using the A.M.A., *Guides* on page 29, there were two or more abnormal thumb functions, and these values were added because of the relative value each thumb functional unit had to be taken into consideration. He stated that, when adding these values, the employee had a 30 percent impairment of the left thumb, which corresponded to a 12 percent impairment of the left hand, and an 11 percent impairment of the left upper extremity, and 7 percent impairment of the whole person. Dr. Kobus opined that these were based on the A.M.A., *Guides*.⁵ Further, he repeated that the employee had reached maximum medical improvement on October 9, 1998.

By decision dated July 25, 2001, the Office denied the employee's claim on the basis that the "matter was still under development," when the deceased passed away.

By letter dated August 7, 2001, appellant disagreed and requested a hearing, which was held on April 30, 2002.⁶

By decision dated July 23, 2002, the Office hearing representative affirmed the July 25, 2001 decision denying payment of a schedule award.

The Board finds that the Office improperly denied appellant's claim for a posthumous schedule award under 5 U.S.C. § 8107 of the Act.

A disabled employee has the right to compensation for periods of temporary total or partial disability until the maximum improvement is reached; upon reaching maximum improvement, the evidence ordinarily permits a determination to be made as to the precise degree of permanent loss of use of the schedule member of the body. The Board has held that, in cases involving posthumous schedule awards, precision often cannot be obtained. Nevertheless, in those situations, schedule awards have been made in other jurisdictions where the evidence shows the extent of the permanent impairment. Evidence based on conjecture, of course, would not meet the required standard of proof. However, where a physician, with a reasonable degree of medical certainty, is able to render an opinion as to the permanent loss of use of the injured

⁵ 4th ed. 1993.

⁶ At the hearing, appellant's attorney asserted that the evidence supported that the employee had a permanent impairment of the hand prior to his death and that it was the fault of the Office that the schedule award was not paid in a timely manner

member, such evidence should be given credence. Although in a particular case there may be a conflict as to the extent of the impairment, this would present a question of fact which, as in any other case, would be resolved by weighing the evidence.⁷

In the instant case, the Board finds that the Office erred in refusing to issue a schedule award to the employee after his death on the grounds that an award had not been issued. The record reflects that the employee made a claim for a schedule award during his lifetime⁸ and the claim was under development. Dr. Kobus was of the opinion that the employee had reached maximum medical improvement prior to his death and provided several reports explaining his findings. Dr. Kobus clarified his opinion in his most recent report dated July 5, 2000 that the employee reached maximum medical improvement or maximum level of recovery as of his last examination of February 12, 1999.⁹ Because Dr. Kobus noted physical findings at the time of his last examination of the employee on February 12, 1999 and explained his calculations pursuant to several requests for further clarification from the Office, the Office erred by not referring the claim to an Office medical adviser for review of the employee's permanent impairment in the left lower extremity in accordance with the A.M.A., *Guides*.¹⁰

The Board finds that the Office should refer the results of Dr. Kobus' reports to an Office medical adviser for calculation of the employee's permanent impairment and a posthumous schedule award should be issued.

⁷ *Mary F. York (Ransom E. York)*, 15 ECAB 383 (1964).

⁸ *See* 5 U.S.C. § 8109(a).

⁹ Dr. Kobus specifically stated the employee was at maximum medical improvement as of October 9, 1998.

¹⁰ 5th ed. 2001.

Accordingly, the July 23, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
February 28, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member