

FACTUAL HISTORY

On January 7, 2001 the employee, then a 68-year-old supervisor, filed an occupational disease claim for compensation (Form CA-2) alleging that his lung condition was causally related to asbestos exposure during his federal employment. The claim form indicated that the employee had retired from federal employment in 1986; he indicated that he became aware of the lung condition in July 1998, when a chest x-ray revealed an abnormality. In a statement dated May 12, 2001, the employee indicated that he worked at the employing establishment from 1964 to December 1985 and was exposed to asbestos. He indicated that since April 1998 he had been working in private employment.

In a report dated May 2, 2001, Dr. R.J. Cerfolio, a cardiothoracic surgeon, indicated that the employee had adenocarcinoma of the lungs and he opined that asbestos exposure and smoking could have combined to cause the lung cancer. A second opinion referral physician, Dr. Allan Goldstein, a pulmonary specialist, opined in an August 27, 2001 report that the employee's lung cancer was causally relating to smoking, rather than asbestos exposure. By decision dated August 27, 2001, the Office denied the claim on the grounds that the medical evidence did not establish causal relationship between lung cancer and federal employment. In a decision dated April 11, 2002, an Office hearing representative found that a conflict in the medical evidence existed and the case was remanded for resolution of the conflict.

The record indicates that the employee died on April 18, 2002. Appellant filed a Form CA-5 (claim for compensation by widow) on June 18, 2002 and reported the date of injury as July 1, 1998. The physician selected as an impartial medical specialist, Dr. William Ferguson, Jr., a Board-certified pulmonary specialist, opined in an August 21, 2002 report, that asbestos exposure was a contributing factor to the employee's lung cancer and death. The Office advised appellant that she was entitled to survivor benefits as of April 18, 2002.

In a letter dated December 19, 2002, the Office requested that an attending physician, Dr. Durwood Bradley, provide an opinion with respect to the employee's disability from July 1, 1998 until his death. In a report dated January 23, 2003, Dr. Bradley stated that he first treated the employee in August 1999 and he was unable to work at that time. Dr. Bradley noted that he could not personally attest to the prior 11 months, but the history obtained suggested the employee could not work during that period. The Office requested an additional report from Dr. Bradley by letter dated March 7, 2003.

By decision dated June 9, 2003, the Office determined that appellant was not entitled to compensation for wage loss from July 1, 1998 to April 18, 2002, as the medical evidence did not establish the employee's total disability during that period. Appellant requested a review of the written record and submitted a June 18, 2003 report from Dr. Bradley. He stated that the employee had a significant degree of pulmonary impairment when he was treated in August 1999, that was not compatible with any form of work that the employee was prepared to do. Dr. Bradley noted that the degree of impairment developed over a period of years and was quite severe 11 months prior to the first examination.

In a decision dated December 23, 2003, the Office hearing representative affirmed the June 9, 2003 decision. Appellant requested reconsideration in a letter dated February 11, 2004.

By decision dated April 9, 2004, the Office modified the June 9, 2003 decision to reflect that compensation for wage loss, for the period July 1, 1998 to April 18, 2002 was denied because “there is no right to claim wage[-]loss benefits not previously claimed within the claimant’s lifetime.” The Office indicated that although the employee did file a claim for occupational illness, he did not file a claim for any specific period of wage loss.

Appellant requested reconsideration in a letter dated May 20, 2004. She stated that the employee did file a claim for compensation on January 7, 2001.

In a decision dated June 25, 2004, the Office determined that appellant’s request for reconsideration was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

The Office’s regulation provide: “If an injured employee or someone acting on the employee’s 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.”¹

ANALYSIS -- ISSUE 1

The April 9, 2004 Office decision modified the prior decisions and found that appellant was not entitled to compensation for wage loss from July 1, 1998 to April 18, 2002 because her husband, the employee, did not file a claim for a specific period of wage loss during his lifetime. The authority for this finding was reported to be the implemented federal regulation, which provides, as noted, that if the injured employee does not file a “claim” before his death, then the right to claim compensation disability does not survive the employee.² The Office concedes that the employee filed a Form CA-2 before his death. It therefore appears to be interpreting the regulation to require that an employee file an additional “claim” that specifies a period of disability before his death.

There is nothing in the regulation or Board precedent to support such an interpretation. The regulation provides only that an employee must file a claim before his or her death. The regulation states that “*claim* means a written assertion of an individual’s entitlement to benefits under the FECA, [Federal Employees Compensation Act] submitted in a manner authorized by this part.”³ Therefore, if the employee files a “claim” prior to death, then the right to compensation for disability survives the employee.⁴ The Form CA-2 is a prescribed form for making a claim under the Act.⁵ When the employee in this case filed the January 7, 2001 Form

¹ 20 C.F.R. § 10.105(d) (1999).

² The Office cited 20 C.F.R. § 10.105(e), which was a similar regulation in effect prior to January 4, 1999. The current regulation is at 10.105(d).

³ 20 C.F.R. § 10.5(c) (1999).

⁴ See *Ned C. Lofton (John D. Lofton)*, 33 ECAB 1497 at 1506 (1982) prior to his death, the employee filed a claim for compensation. The Board found a conflict in medical opinion on whether the employee’s hypertension was aggravated by factors of his employment.

⁵ 20 C.F.R. § 10.7 (1999).

CA-2, he filed a claim for compensation and the right to compensation for disability survives his death on April 18, 2002.

The case will be remanded to the Office for a proper decision with respect to whether appellant, on behalf of the employee's estate, is entitled to compensation for wage loss from July 1, 1998 to April 18, 2002. In view of the Board's findings, the denial of reconsideration issue will not be addressed.

CONCLUSION

The Board finds that the Office improperly interpreted 20 C.F.R. § 10.105(d) in finding that the right to disability compensation did not survive the employee's death even though he filed a Form CA-2 prior to his death. The case will be remanded for a proper determination as to whether the employee's estate is entitled to compensation for wage loss from July 1, 1998 to April 18, 2002.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 25 and April 4, 2004 are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: February 18, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
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