

**United States Department of Labor
Employees' Compensation Appeals Board**

M.D., claiming as Executrix of the Estate of C.D.,
Appellant

and

DEPARTMENT OF THE NAVY, NAVAL AIR
STATION, Alameda, CA, Employer

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**Docket No. 06-1010
Issued: November 3, 2006**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 16, 2006 appellant filed a timely appeal of a November 7, 2005 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the employee filed a claim for an increased schedule award during his lifetime, precluding appellant from pursuing an increased schedule award on behalf of the employee's estate.

FACTUAL HISTORY

The Office accepted that the employee sustained fractures of the left and right distal radius and cervical radiculopathy from a fall while in the performance of duty on June 10, 1968. By decision dated July 2, 1969, the Office issued a schedule award for a 20 percent right upper extremity impairment and 14 percent left upper extremity impairment. The period of the award was 106.08 weeks from June 4, 1969. In a decision dated September 15, 1971, the Office issued

schedule awards for a 39 percent permanent impairment to the right upper extremity and 20 percent to the left upper extremity. The award ran for 158.80 weeks from June 4, 1969.

The record indicates that the employee requested reconsideration and argued that he was entitled to an increased schedule award. The Office denied an increased schedule award and he requested review by the Office's Branch of Hearings and Review. In a decision dated December 2, 1974, the Branch of Hearings and Review found that the case was not in posture for decision. The Branch of Hearings and Review noted that the medical evidence indicated that the employee underwent right arm surgery in November 1974 and was expected to be disabled for at least four months. In addition, further surgery on the left arm was contemplated if the right arm surgery was successful. The Branch of Hearings and Review concluded that he had not yet reached maximum medical improvement and it was not possible to determine the degree of permanent impairment. The case was therefore remanded to the Office "for further consideration. After medical treatment is completed and it is determined that the claimant has attained maximum medical improvement of his injury-related disability, the district Office should issue a determination as to whether the claimant has sustained a greater degree of disability than that for which he was previously awarded compensation."

The record does not contain any indication that the Office issued a final decision in accord with the December 2, 1974 decision. The employee died on November 3, 2001. A claim for compensation for a widow was filed and denied by decisions dated May 22, 2002 and January 29, 2004.

On August 30, 2004 appellant filed a claim for compensation (Form CA-7) and checked the box for "schedule award." She submitted additional medical evidence.

By decision dated September 27, 2004, the Office denied the claim for an increased schedule award. The Office stated that there were no provisions allowing a posthumous schedule award. Appellant requested a hearing, which was held on July 19, 2005. By decision dated November 7, 2005, the hearing representative affirmed the September 27, 2004 decision. The hearing representative found that a request for an increased schedule award was a new claim, and in this case the Form CA-7 claim was not filed until after the employee's death. Since the claim was not filed during the employee's lifetime, there was no entitlement to an increased schedule award in this case.

LEGAL PRECEDENT

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].”¹

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.² 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.³

ANALYSIS

In the present case, the Office found that, since the Form CA-7 was not filed until August 30, 2004 and the employee died on November 3, 2001, appellant was not entitled to any increased schedule award. The deficiency in this analysis of the case is the failure to acknowledge the development of the case in 1974. It is evident that the employee had claimed an increased schedule award and the issue was being developed. The Office was directed to issue a final decision with respect to an increased schedule award after maximum medical improvement was reached. In the record transmitted to the Board, there is no evidence that a final decision was issued or that the issue was resolved. Based on the evidence of record, there remained a pending claim for an increased schedule award during the employee’s lifetime.

Under these circumstances, there is no additional requirement for the filing of a claim for an increased schedule award. There is no provision in 5 U.S.C. § 8109 that would preclude appellant from pursuing the issue on behalf of the estate. Accordingly, the case will be remanded to the Office for an appropriate decision on the claim.

CONCLUSION

The employee filed a claim for an increased schedule award in 1974 and there is no indication that the issue was resolved. Appellant is not precluded from pursuing an increased schedule award on behalf of the employee’s estate.

¹ 5 U.S.C. § 8109(a).

² See *Carol T. Collins (Harold Turner)*, 54 ECAB 417 (2003).

³ See *Cheryl R. Holloway (Wryland R. Holloway)*, 54 ECAB 443 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 7, 2005 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 3, 2006
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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