

Dr. Robert Loper, a Board-certified otolaryngologist. An Office medical adviser reviewed the medical record on July 14, 2004. The Office medical adviser calculated that the employee had 12 percent binaural hearing loss based on audiometric findings obtained on behalf of Dr. Loper.

The employee died on December 28, 2007. In a June 12, 2008 telephone memorandum, the Office noted that the employing establishment called to report that the employee had passed away and to inquire about how appellant, the employee's spouse, could file a claim for the schedule award. It advised that, because a schedule award claim was never filed while the employee was living, appellant could not claim a schedule award. The Office noted that it erred in not issuing an acceptance letter prior to the employee's death.

On June 12, 2008 the Office accepted that the employee sustained employment-related bilateral hearing loss. It noted that it had neglected to send out the acceptance letter in the employee's case.

On July 1, 2008 appellant filed a claim for a schedule award (Form CA-7) on the employee's behalf.

By decision dated July 15, 2008, the Office denied appellant's claim for schedule award compensation. It found that, since the schedule award claim was not filed during the employee's lifetime, payment of a schedule award on behalf of the employee could not be made to the estate.

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].”²

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.³ If a claim has been filed during the employee's

² 5 U.S.C. § 8109(a). See *Carol T. Collins (Harold Turner)*, 54 ECAB 417 (2003).

³ *Carol T. Collins (Harold Turner)*, *id.*

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.⁴

ANALYSIS

In the present case, the employee filed a claim for compensation on March 1, 2004 and passed away on December 28, 2007. Appellant filed the Form CA-7 for schedule award benefits on July 1, 2008, after the Office accepted the claim on June 12, 2008. The Office found that, since the Form CA-7 was not filed during the employee's lifetime, appellant was not entitled to payment of a schedule award.

The Office noted that it erred in delaying its acceptance of the employee's occupational disease claim for hearing loss. The record indicates that the medical evidence on which the acceptance was based was developed in 2004. On appeal, appellant argues that, had the employee been timely notified in 2004 that his claim was accepted, he would have submitted the necessary paperwork to claim a schedule award. While the Office's delay in adjudicating the hearing loss claim is regrettable, there is no entitlement to a posthumous schedule award if the schedule award claim is not filed during the lifetime of the injured employee.⁵ The Board has held that a schedule award claim must be filed by an injured employee or someone acting on his or her behalf during the employee's lifetime to establish a valid claim for compensation under section 8107.⁶ The statutory language of 5 U.S.C. § 8109(a) is clear in providing that the employee must have filed a claim for a schedule award during his lifetime. In turn, the Office's implementing regulations provide that the right to claim compensation for permanent impairment ceases and does not survive the death of the employee.⁷

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 employee's rights.⁸ 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

⁴ See *Cheryl R. Holloway (Wryland R. Holloway)*, 54 ECAB 443 (2003).

⁵ *Carol T. Collins (Harold Turner)*, *supra* note 2; see *Mary Marie Young (David E. Young)*, 30 ECAB 94 (1978).

⁶ *Carol T. Collins (Harold Turner)*, *supra* note 2.

⁷ 20 C.F.R. § 10.105(d). 5 U.S.C. § 8133 provides for compensation in cases of death.

⁸ *Carol T. Collins (Harold Turner)*, *supra* note 2; *Stephen R. Lubin*, 43 ECAB 564, 569 (1992).

construed according to their common usage.⁹ In the instant case, neither the employee nor someone on his behalf filed a schedule award claim before his death on December 28, 2007. 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.¹⁰

CONCLUSION

Appellant, on behalf of the employee's estate, is not entitled to a posthumous schedule award because neither the employee nor someone on his behalf filed a schedule award claim during his lifetime.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated July 15, 2008 is affirmed.

Issued: June 23, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁹ *Id.* The treatise Sutherland Statutory Construction provides:

“Where 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).

¹⁰ 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).