

claim for right knee strain and right knee osteoarthritis and authorized right knee arthroscopic surgery in 1994 and a right tibial osteotomy on April 12, 1995.

On March 31, 1997 the employee filed a claim for a schedule award. On June 10, 1997 OWCP issued a schedule award for five percent impairment of his right leg. The period of the award was April 21 to July 30, 1997.

The employee underwent bilateral total right knee replacement on October 17, 2007. OWCP authorized only the right total knee replacement as work related.

On April 5, 2010 the employee's representative informed OWCP that the employee had passed away. The death certificate noted a date of death of February 26, 2010. The immediate cause was cardiac arrest and cardiac arrhythmia.

On December 1, 2011 the employee's representative, now appellant's representative, submitted a November 14, 2011 medical report from Dr. David Weis, an osteopath, to OWCP in support of a request for an increased schedule award. Appellant asserts that Dr. Weiss identifies 23 percent impairment to each of the lower extremity as a result of the bilateral total knee replacements. She requested an additional 23 percent impairment to the bilateral lower extremities. On December 7, 2011 appellant filed a claim for an additional schedule award.

In a decision dated June 19, 2012, OWCP denied appellant's claim on the grounds that the employee made no request for an increased schedule award prior to his death on February 26, 2010.

On June 26, 2012 appellant requested an oral hearing which was held on October 25, 2012.

On January 11, 2013 an OWCP hearing representative affirmed the decision dated June 19, 2012. The hearing representative explained that a claim for a schedule award was made during the employee's lifetime, but the issue was decided in previous decisions and was no longer under development. Because OWCP received no further claim for an increased award before the employee's death, there was no entitlement to such an award.

On appeal, appellant's representative argues that posthumous schedule awards are permitted under 5 U.S.C. § 8109(a). He argues that the employee did make a valid claim for a schedule award during his lifetime. Counsel adds that appellant has submitted substantial medical evidence to establish a 23 percent increase in the award previously paid.

LEGAL PRECEDENT

Section 8107 of FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.² Such loss or loss of use is known as permanent impairment.³

Section 8109(a) of FECA provides that, if an individual has sustained disability compensable under section 8107(a), has filed a valid claim in his lifetime, and 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, under an award made before or after the death and for the period specified by the schedule, to designated surviving beneficiaries.⁴

The Board has held that the intent of the statutory language is clear: for a beneficiary to be entitled to payment of a schedule award upon the death of an injured employee, such claim must have been filed within the employee's lifetime.⁵ 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 does not survive.⁶ The Board has held that FECA does not permit a representative to make a posthumous claim for an increased schedule award. Section 8109(a) provides that an injured employee or someone on his behalf must file a claim for an increased schedule award during the employee's lifetime to establish a valid claim for an award.⁷

A posthumous 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.⁸

ANALYSIS

On December 7, 2011 appellant, through her representative, made a posthumous claim for an increased schedule award. FECA does not permit such claims. The Board has held that the plain reading of section 8109(a) makes clear that an injured employee or someone on his

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ 5 U.S.C. § 8109(a).

⁵ *Carol T. Collins (Harold Turner)*, 54 ECAB 417 (2003).

⁶ 20 C.F.R. § 10.105(d).

⁷ *See F.D., (D.D.)*, Docket No. 10-229 (issued August 2, 2010) (where the Board held that FECA did not permit a posthumous claim for an increased schedule award; it held that the plain reading of section 8109(a) makes clear that a claim must be filed during the employee's lifetime to establish a valid claim for a schedule award; the evidence did not support that the employee filed a valid claim for an increased schedule award following full payment of a previous award).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.8(d) (March 1993).

behalf must file a claim during the employee's lifetime to establish a valid claim for a schedule award.⁹ Appellant's representative does not argue, and the evidence does not support, that the employee filed a valid claim for an increased schedule award following the five percent rating previously awarded on June 10, 1997. Rather, the evidence reveals that on December 7, 2011 appellant's representative filed a claim for an increased schedule award after the employee's death on February 26, 2010. Accordingly, the right to initiate a claim for compensation for an alleged increase in impairment did not survive the employee's death. Appellant's posthumous claim is invalid. The Board will therefore affirm OWCP's January 11, 2013 decision affirming the denial of her posthumous claim.

On appeal, appellant's representative argues that posthumous schedule awards are permitted under section 8109(a). This is true provided certain conditions are met, such as the filing of a valid claim in the employee's lifetime. One must distinguish the posthumous payment of a schedule award under section 8109 from a posthumous claim for a schedule award. There is no provision for a posthumous claim. For this reason, the Board holds that appellant's claim is invalid. Appellant's representative further asserts that the employee filed a valid claim for a schedule award during his lifetime. On March 31, 1997 the employee filed an initial claim for a schedule award. However, section 8109(a) addresses any scheduled compensation that is unpaid at his death. In this case, there was no outstanding or unpaid compensation under the previous schedule award claim. OWCP accepted that claim and fully paid the employee the compensation specified under the schedule. Neither claim was under development at the time of death.¹⁰

The Board finds that the wording of section 8109(a)(2) "has filed a valid claim in his lifetime" cannot refer to the employee's March 31, 2007 claim as this claim had been paid. It necessarily refers to a schedule award claim filed in the employee's lifetime that was unpaid at the time of his death or still under development. As noted, the record shows no such claim. Absent a valid claim filed in the employee's lifetime, there can be no entitlement to additional benefits under section 8109.

CONCLUSION

The Board finds that appellant may not make a posthumous claim for a schedule award.

⁹ See *F.D., (D.D.), supra* note 7; *Mary Marie Young (David E. Young)*, 30 ECAB 94 (1978).

¹⁰ See *F.D., (D.D.), supra* note 7; *but cf. Sue Howard (Jimmie L. Howard)*, 55 ECAB 715 (2004) (where the employee died after requesting an oral hearing on the issue of the percentage impairment awarded, the Board found that OWCP improperly denied appellant's right to contest the schedule award and pursue the employee's claim for a revised award); *Cheryl R. Holloway (Wryland R. Holloway)*, 54 ECAB 443 (2003) (initial claim under development at the time of death); *M.D. (C.D.)*, Docket No. 06-1010 (issued November 3, 2006) (where the employee filed a claim for an increased schedule award and the case was remanded for further development of the issue in 1974, but OWCP never issued a final decision in the matter and the issue remained unresolved, the Board held there was a pending claim for an increased schedule award during the employee's lifetime and that there was no provision in section 8109 precluding appellant from pursuing the issue on behalf of the employee's estate).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 11, 2013 is affirmed.

Issued: October 24, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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