

ISSUE

The issue is whether OWCP properly denied the schedule award claimed by appellant on behalf of his wife, the deceased employee.

FACTUAL HISTORY

OWCP accepted that on or before January 3, 1996, the employee, then a 42-year-old distribution clerk, sustained tendinitis of the right elbow due to repetitive upper extremity motions in the performance of duty.⁴ On April 14, 1997 she underwent a lateral epicondylectomy of the right elbow with extensor tendon origin reconstruction, approved by OWCP. The employee underwent a right carpal tunnel release on March 9, 1998 and a left carpal tunnel release on April 6, 1998. On July 9, 1999 she accepted a permanent modified clerk position.

On August 30, 1999 the employee underwent an ulnar nerve transposition with flexor pronator release of the right elbow, approved by OWCP. She stopped work and did not return. The employee received wage-loss compensation on the periodic rolls.

On August 15, 2000 OWCP obtained a second opinion from Dr. Randy J. Pollett, a Board-certified orthopedic surgeon. As an element of his report, Dr. Pollett provided an impairment rating according to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*) then in effect. He assessed a “one percent physical impairment” of unspecified members of the body, according to unspecified portions of the A.M.A., *Guides*.

On April 12, 2001 OWCP authorized the employee’s treatment by a chronic pain clinic. The employee underwent a series of nerve blocks in 2002.

The employee telephoned OWCP on June 21, 2006 asking for a notice of occupational disease (Form CA-2) to claim a left upper extremity condition. The call was returned by OWCP on June 22, 2006. The employee asserted that she sustained a consequential left arm injury. OWCP advised her to obtain a report from her physician explaining causal relationship. Once received, “further consideration will be given to [the employee’s] request.”

On May 31, 2006 the employee underwent an extensor tendon release and repair of the left elbow. OWCP expanded the claim to accept right hand/wrist tenosynovitis, left cubital tunnel syndrome, and bilateral lateral epicondylitis. The employee remained under medical treatment.

On July 10, 2008 OWCP obtained a second opinion from Dr. James Hood, a Board-certified orthopedic surgeon, who opined that the employee was permanently and totally disabled for work. The employee underwent implantation of a spinal cord stimulator on February 16, 2009. She was treated in a pain clinic through March 22, 2011.

⁴ OWCP initially denied the claim by decision dated March 20, 1998. Following additional development, it accepted the claim on March 30, 1998.

The employee died on May 27, 2011.

In a June 21, 2011 letter, appellant recalled that the employee had mailed “retirement papers,” which he claimed would start the schedule award process. He submitted a June 17, 2011 report from Dr. Thomas Whalen, an attending Board-certified anesthesiologist, who opined that the employee reached maximum medical improvement on May 24, 2007. Dr. Whalen offered an impairment rating for both upper extremities according to the sixth edition of the A.M.A., *Guides*.

In a December 13, 2011 letter, appellant asserted that the employee mailed retirement forms to the employing establishment on August 30, 2006. He contended that the employee’s retirement application showed a “clear and convincing good-faith attempt to retire and meet the necessary qualification” to receive a schedule award.

On June 14, 2014 appellant claimed a schedule award (Form CA-7) on behalf of the deceased employee. An OWCP medical adviser reviewed the medical record on June 24, 2014 and opined that the employee had five percent impairment of each upper extremity.

By decision dated September 2, 2014, OWCP denied appellant’s schedule award claim finding that the employee had not claimed a schedule award during her life. It noted that although Dr. Pollett performed the August 15, 2000 impairment rating prior to the employee’s passing, his report did not contain words of claim.

In a September 30, 2014 letter, counsel requested a telephonic hearing, which was held on April 20, 2014. At the hearing, he contended that Dr. Pollett’s impairment rating, along with a telephone conversation in “approximately June of 2006” between the employee and OWCP, constituted words of claim. Alternatively, counsel argued that OWCP had an “affirmative duty” to develop the schedule award issue during the employee’s lifetime, despite the absence of a schedule award claim. Appellant testified that, during the telephone conversation, OWCP advised the employee not to claim a schedule award until she had retired from the employing establishment to avoid a prohibited double benefit while in receipt of wage-loss compensation.

Following the hearing, counsel submitted an April 23, 2015 letter asserting that Dr. Pollett’s impairment rating, along with a telephone conference in “approximately June 2006” between the employee and OWCP, constituted words of claim. Alternatively, he argued that the employee and appellant intended to file a claim when communicating with the claims examiner who instructed the employee to retire claiming a schedule award.

By decision dated and finalized July 7, 2015, an OWCP hearing representative affirmed the September 2, 2014 decision denying appellant’s schedule award claim. The hearing representative found that there were no words of claim of record prior to appellant’s June 14, 2014 schedule award claim, filed three years after the employee’s death.

LEGAL PRECEDENT

Section 8109 of FECA 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].”⁵

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.⁶ 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.⁷

ANALYSIS

The employee filed a claim for compensation in 1996 and was continued on the periodic rolls until she returned to work in a permanent modified position in July 1999. She was off work due to authorized surgery for her right elbow and was returned to the periodic rolls following the August 30, 1999 surgery. The record does not contain a Form CA-7 requesting a schedule award or other written request for a schedule award from the employee. Appellant has acknowledged that the employee had not intended to file a schedule award claim until she retired, and had not filed a claim during her life. He requested a schedule award on June 14, 2014 on the employee’s behalf following her death on May 27, 2011.

There is no entitlement to a posthumous schedule award if the schedule award claim is not filed during the lifetime of the injured employee.⁸ 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

⁵ 5 U.S.C. § 8109(a). *P.G., (T.G.)*, Docket No. 08-2183 (issued June 23, 2009); *Carol T. Collins (Harold Turner)*, 54 ECAB 417 (2003).

⁶ *Id.*

⁷ *See Cheryl R. Holloway (Wryland R. Holloway)*, 54 ECAB 443 (2003).

⁸ *V.M. (M.M.)*, Docket No. 10-1732 (issued April 11, 2011); *P.G., (T.G.)*, *supra* note 5; *Carol T. Collins (Harold Turner)*, *supra* note 5; *Mary Marie Young (David E. Young)*, 30 ECAB 94 (1978).

employee's lifetime to establish a valid claim for compensation under section 8107.⁹ Additionally, OWCP's implementing regulations provide that the right to claim compensation ceases and does not survive the death of the employee.¹⁰

In the instant case, neither appellant, on the employee's behalf, nor the employee filed a schedule award claim before her death on May 27, 2011. There is no indication from the employee of record regarding a schedule award claim.

On appeal, counsel acknowledges that the employee did not file a schedule award claim during her life. He contends, however, that the impairment rating performed on August 15, 2000 by Dr. Pollett, the second opinion physician, and the employee's 2006 telephone conversation with OWCP, constitute "words of claim" that created an affirmative duty for OWCP to develop a schedule award claim and entitle appellant to receive a schedule award on behalf of the deceased employee.

Regarding the alleged telephone conversation, the Board finds that there is no documentation of record substantiating that appellant expressed any intention to file a schedule award claim. Instead, the June 21 and 22, 2006 telephone memoranda note that appellant requested an occupational disease claim form (Form CA-2) and asserted that she sustained a consequential left arm injury. The memoranda make no mention of a schedule award claim. The Board notes that there are no telephone memoranda of record on or about June 2006 that manifest an intention relative to a schedule award.

Regarding his contention that OWCP should have construed Dr. Pollett's impairment rating as a schedule award claim, counsel cites to the Board's decisions in Dale M. Newbigging,¹¹ Bobby J. Parker,¹² and Myra Lenburg,¹³ finding that a specific claim form is not required if there are written "words of claim" that evince the employee's intent to file a claim.

The issue in Mr. Newbigging¹⁴ concerned the timeliness of an occupational disease claim. The claimant had not filed an occupational disease claim form (Form CA-2) within the applicable time limitation. However, he submitted two letters to OWCP within the time limitation, referring to the submission of claims for medical treatment for an illness which he attributed to his federal employment, and noting his intention to file a formal claim for compensation. OWCP denied the claimant's occupational disease claim as untimely filed. The Board set aside the denial, finding that the two letters "reasonably may be construed or accepted as a claim for purposes of determining timeliness." The present case may be distinguished from the Board's ruling in Mr. Newbigging, as the employee did not submit any correspondence to

⁹ *Id.*

¹⁰ See 20 C.F.R. § 10.105(d); see also *V.M. (M.M.)*, *supra* note 8.

¹¹ 44 ECAB 551 (1993).

¹² 49 ECAB 260 (1997).

¹³ 36 ECAB 487 (1985).

¹⁴ *Supra* note 11.

OWCP, setting forth her intention to file a schedule award claim. Dr. Pollett provided the impairment rating as a routine element of his second opinion report. There is no evidence that the employee somehow directed Dr. Pollett to perform the rating, or that he did so because of her intention to later file a schedule award claim. Also, the employee did not submit correspondence or other writing to OWCP regarding the impairment rating, indicating that she intended to file a claim for permanent impairment.

Ms. Lenburg¹⁵ also addresses the circumstances under which writing other than an OWCP claim form can be used to determine the timeliness of a claim. The employing establishment filled out a state government injury report form within 30 days of the date the claimant later asserted that she sustained an injury. The form contained the claimant's name, address, the date, time, location, and cause of the injury, but was not signed by the claimant. As the claimant had not submitted a claim form (Form CA-1) within 30 days, OWCP denied continuation of pay. The Board affirmed this denial, finding that the state government form did not contain words of claim and was not signed by the claimant. Therefore, it did not demonstrate her intention to file a claim, and could not be construed as a valid claim for continuation of pay within 30 days of the date of injury. The Board notes that, in the present case, neither the employee nor the employing establishment completed any type of form prior to the employee's death evincing an intention to file a schedule award claim. The mere presence of Dr. Pollett's impairment rating as a routine element of his second opinion report is unrelated to any intention the employee may have had to eventually file a schedule award claim.

In Parker,¹⁶ the claimant asserted that he timely filed a Form CA-1 on the date of injury, but OWCP did not receive it. He provided a copy of his letter accompanying the original claim form, and a witness statement dated on the date of injury corroborating his account of events, including that the claimant completed a Form CA-1 on that day. OWCP denied the claim as untimely filed. The Board reversed, finding that the witness statement and claimant's correspondence established that the claim was timely filed even though the original claim form could not be located. The Board's ruling in Ms. Parker is distinguished from the present case, as appellant does not contend that the employee actually filed a schedule award claim that merely could not be located. Herein, Dr. Pollett's impairment rating stands alone. There is no evidence of record indicating that his report should be construed as evidence accompanying a schedule award claim form that was lost. The employee did not submit any correspondence regarding this rating, or demonstrate any intention to file a schedule award claim based upon it.¹⁷

Counsel also cites OWCP's procedures¹⁸ which, he asserts, state that OWCP should accept as a claim any writing "from which the substance of a claim can reasonably be deduced."

¹⁵ *Supra* note 13.

¹⁶ *Supra* note 12.

¹⁷ Counsel also cites to *Janet McCrosson (Eugene J. McCrosson)*, Docket No. 05-1322 (issued December 19, 2005), in which OWCP retroactively converted disability benefits to a posthumous schedule award, based on evidence provided by an attending physician during the claimant's life. *McCrosson* may be distinguished from the present claim as the Board's focus was on the appropriate rate of compensation, rather than entitlement.

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time, Traumatic Injury Claims*, Chapter 2.801(5)a. (March 1993).

However, as set forth above, the procedures cited by counsel can be distinguished from the present case, as the employee did not present any written claim or request regarding a schedule award.¹⁹ In other words, there is no writing from which to deduce the substance of a claim.

Counsel also asserts the doctrine of detrimental reliance, contending that the employee relied on the June 2006 conversation with OWCP to delay filing her claim until she retired. However, he has not established that OWCP gave the employee any advice regarding when to file a schedule award claim. There are no telephone memoranda, correspondence, or other communication of record from OWCP during the employee's life regarding a schedule award. Furthermore, the Board has held that even if an employee detrimentally relied on erroneous information from OWCP, such reliance does not give rise to equitable estoppel against OWCP and entitle appellant to monetary benefits not otherwise permitted under FECA or its implementing regulations.²⁰

As no valid schedule award claim was filed within the employee's lifetime, the Board finds that a posthumous claim for schedule award compensation may not be filed by the employee's estate.²¹ Therefore, OWCP's July 7, 2015 decision is proper under the law and facts of this case.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly denied the schedule award claimed by appellant on behalf of his wife, the deceased employee.

¹⁹ On December 22, 2015 the Director of OWCP filed a Memorandum in Justification of the July 7, 2015 decision, asserting that there was no indication of record that the employee filed a schedule award claim during life. The Director noted that a plain reading of 5 U.S.C. § 8109(a) made it clear that "a claim must be filed during the employee's lifetime to establish a valid claim for a schedule award." The Director cited to the Board's holdings in *Mary Marie Young (David E. Young)*, *supra* note 8, 30 ECAB 94 (1978); *Sandra J. Henley (Tracy V. Henley)*, Docket No. 00-1619 (issued April 4, 2002); *Emilene Valencourt (Joseph M. Valencourt)*, Docket No. 02-0003 (issued February 24, 2003); and *V.M. (M.M.)*, *supra* note 7; each finding that FECA does not permit a representative to make a posthumous claim for a schedule award.

²⁰ *Thomas C. Damato*, Docket No. 93-1213 (issued July 18, 1994).

²¹ *V.M. (M.M.)*, *supra* note 8; *P.G. (T.G.)*, *supra* note 5. Neither the Board nor OWCP has the authority to enlarge the terms of FECA as specified in the statute. *See e.g., Mary C. Anderson-Paine (Robert O. Anderson)*, 47 ECAB 148, 152 (1995).

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 5, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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