

ISSUE

The issue is whether appellant may make a posthumous claim for a schedule award.

FACTUAL HISTORY

This case was previously before the Board. The facts of the case as set forth in the Board's prior order are incorporated herein by reference.

On April 27, 2009 the employee, a 61-year-old mechanical engineering technician, filed an occupational disease claim (Form CA-2) alleging that he sustained renal cancer due to exposures to acetone, asbestos, asbestos, cadmium, dusts, epoxy paint fumes, Freon, silver brazing flux, and weld smoke while in the performance of duty. The employee explained that his exposures to these substances was most acute when he worked as a pipefitter at the employing establishment from October 1, 1974 to March 24, 1978, but that they continued for years afterward.

A position description confirmed that the employee's duties exposed him to radiation, chemicals, dusts, and fumes. A December 18, 1989 industrial hygiene survey confirmed that the employee was exposed to airborne asbestos fibers.

Dr. Thomas R. Hefty, an attending Board-certified urologist, diagnosed a cancerous tumor of the left kidney on April 8, 2009. On May 5, 2009 Dr. Hefty performed a left radical nephrectomy with left adrenalectomy and major periaortic and intra-aortocaval lymph node dissection.

By decision dated July 1, 2009, OWCP accepted that the employee was exposed to hazardous substances as alleged, but denied the claim as the medical evidence of record did not establish causal relationship.

The employee disagreed, and requested an oral hearing, held before an OWCP hearing representative on October 29, 2009. He submitted a July 10, 2009 report from Dr. Diana Velikova, an attending physician Board-certified in internal medicine, opining that toxic exposures while working as a pipefitter contributed to the development of the employee's renal cancer.

By decision dated January 14, 2010, an OWCP hearing representative vacated OWCP's July 1, 2009 decision and remanded the case to obtain a second opinion regarding the etiology of the employee's renal cancer. On remand of the case the employing establishment verified that the employee was exposed to cadmium in the course of his federal employment. Instead of obtaining a second opinion, OWCP referred the case to an OWCP medical adviser, who opined that the medical evidence submitted was insufficient to establish causal relationship. The employee passed away on April 4, 2010.

By decision dated April 29, 2010, OWCP denied the claim, finding that the medical evidence of record was insufficient to establish causal relationship. Appellant subsequently appealed to the Board.

By order dated May 12, 2011,³ the Board set aside OWCP's April 29, 2010 decision and remanded the case to obtain a second opinion as directed by OWCP's hearing representative in the January 14, 2010 decision. On remand of the case OWCP obtained a second opinion review of the medical record from Dr. Paul L. Weiden, a Board-certified internist and oncologist, who provided an October 27, 2014 report supporting that the employee's hazardous exposures in the course of his federal employment accelerated his renal cancer.

On October 30, 2014 OWCP accepted that the employee sustained an acceleration of a malignant neoplasm of the left kidney due to toxic exposures at work. Appellant received survivor benefits.⁴

On May 20, 2015 appellant, the employee's widow, claimed a schedule award (Form CA-7). In a June 2, 2015 letter, OWCP advised appellant of the additional evidence needed to establish her claim. In response, counsel provided a June 15, 2015 letter, contending that appellant was entitled to a schedule award for 100 percent loss of the employee's left kidney.

By decision dated July 24, 2015, OWCP denied appellant's schedule award claim, finding that the employee had not claimed a schedule award during his lifetime.

Appellant disagreed, and on July 31, 2015 requested an oral hearing, held on March 16, 2016. At the hearing, counsel contended that appellant's continuation of the employee's occupational disease claim after his death should be construed as a valid schedule award claim.

By decision dated May 26, 2016, an OWCP hearing representative affirmed OWCP's July 24, 2015 decision, finding that, as the employee did not claim a schedule award during his lifetime, appellant did not have the right to claim a schedule award after his 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 Docket No. 10-1555, *Order Remanding Case*, (issued May 12, 2011).

⁴ By notice dated July 23, 2015 and finalized September 18, 2015, OWCP found a \$24,822.73 overpayment of compensation as appellant had received concurrent Federal Employees' Retirement System (FERS) benefits and FECA compensation beginning March 1, 2013. Appellant was not at fault in the creation of the overpayment. The overpayment issue is not before the Board on the present appeal.

(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 on April 27, 2009. He died on April 4, 2010. OWCP accepted the claim on October 20, 2014. The record does not contain a Form CA-7 requesting a schedule award, or other written request for a schedule award, executed during the employee’s life. Counsel has acknowledged that the employee did not file a schedule award as OWCP did not accept the occupational disease claim until after the employee’s death on April 4, 2010. Appellant requested a schedule award on May 20, 2015, after the employee’s death.

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 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 for disability other than medical expenses 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 the employee’s death on April 4, 2010. There is no writing from the employee of record regarding a schedule award claim.

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

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

⁹ *Id.*

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

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 appellant on behalf of the employee's estate.¹¹ Therefore, OWCP's May 26, 2016 decision is proper under the law and facts of this case.

On appeal counsel contends that appellant should not be denied a schedule award due to OWCP's delay in accepting the occupational disease claim. As set forth above, as the employee did not claim a schedule award during his lifetime, appellant is not entitled to one after the employee's death.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 26, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 2017
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹¹ *V.M. (M.M.)*, *supra* note 8; *P.G. (T.G.)*, *supra* note 5. See also *Sandra J. Henley*, Docket No. 00-1619 (issued April 4, 2002). 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).