

ISSUE

The issue is whether OWCP properly found that appellant was not entitled to wage-loss compensation for the period December 10, 2012 to February 1, 2015 because the employee did not file a claim for disability during his lifetime.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the prior decision are hereby incorporated by reference. The facts relevant to the current appeal will be set forth.

On September 11, 2012 the employee, then a 54-year-old satellite communications engineer, filed a traumatic injury claim (Form CA-1) alleging that on September 4, 2012 he broke his leg when he fell out of his wheelchair while exiting an employing establishment taxi.⁴ He underwent an open reduction and internal fixation of a fractured right femur on September 10, 2012.

By decision dated November 30, 2012, OWCP denied the employee's claim after finding that he was not in the performance of duty at the time of the September 4, 2014 work incident. It determined that he had deviated from his employment by stopping at a building to return library books before reporting to work.

On November 25, 2013 the employee, through counsel, requested reconsideration. He asserted that the incident occurred during work hours, and that the employee was on the premises of the employing establishment renewing technical manuals related to his employment.

By decision dated February 21, 2014, OWCP denied the employee's request to reopen his case for further review of the merits of his claim under 5 U.S.C. § 8128(a). It found that he had not raised an argument or submitted evidence sufficient to warrant reopening of his case for further merit review.

The employee appealed to the Board. In a decision dated September 4, 2014, the Board set aside the February 21, 2014 decision.⁵ The Board found that the employee had raised a new legal argument not previously considered and thus remanded the case for OWCP to reopen his case for further merit review under section 8128(a).

The employee died in February 2015.

On July 30, 2015 OWCP vacated its February 21, 2014 decision and accepted the claim for a closed fracture of the lower end of the right femur.

³ Docket No. 14-0825 (issued September 4, 2014).

⁴ The employee suffered from muscular dystrophy.

⁵ See *supra* note 3.

Appellant filed a claim for compensation (Form CA-7) on October 23, 2015 on behalf of the employee from December 10, 2012 to February 1, 2015.

The employing establishment, in an October 23, 2015 statement, controverted the claim for wage-loss compensation as it was not filed by the employee within his lifetime.

By decision dated April 27, 2016, OWCP denied appellant's claim for compensation for the period December 10, 2012 to February 1, 2015. It found that, according to its procedures, it could not accept a posthumous claim for disability.

On May 24, 2016 appellant, through counsel, requested reconsideration. He maintained that the Board addressed the issue of a posthumous disability claim in *Margie Smith (J.B. Smith)*,⁶ and determined that OWCP regulations did not prohibit a claim for disability posthumously.

By decision dated August 19, 2016, OWCP denied modification of its April 27, 2016 decision.

On appeal counsel contends that 20 C.F.R. § 10.105(d) requires that the employee file a claim for a traumatic injury or an occupational disease claim before death but does not prohibit the posthumous filing of a claim for disability compensation, noting that the Board specifically addressed this matter in *Margie Smith (J.B. Smith)*.

LEGAL PRECEDENT

OWCP's implementing regulations provides: "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 ceases and does not survive."⁷

OWCP's procedures regarding posthumous claims provide that "[s]uch a 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

The employee filed a traumatic injury claim on September 11, 2012 alleging that he broke his leg on September 4, 2012 in the performance of duty. OWCP initially denied the claim but, following further development, on July 30, 2015 it accepted the claim for a closed fracture of the lower end of the right femur.

The employee died in February 2015. On October 23, 2015 appellant, as administrator of the estate, filed a claim for wage-loss compensation on behalf of the employee for the period

⁶ 56 ECAB 349 (2005).

⁷ 20 C.F.R. § 10.105(d).

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

December 10, 2012 to February 1, 2015. OWCP denied the claim as the employee had not filed a claim for compensation prior to his death. It noted that its procedures provide that it could not accept a posthumous disability claim.⁹

The Board previously considered the issue of whether OWCP's regulations allowed a posthumous claim for disability compensation. In *Margie Smith (J.B. Smith)*,¹⁰ the employee filed an occupational disease claim in January 2001. The employee died on April 18, 2002. Appellant, his executrix, requested compensation for wage loss from July 1, 1998 to April 18, 2002. OWCP denied the claim for disability compensation as it was not filed within the employee's lifetime. The Board noted that section 10.105(d) of OWCP's regulations provided that the right to claim disability ceases if a claim is not filed before the employee's death. It further reviewed OWCP's regulation defining a claim as "a written assertion of an individual's entitlement to benefits under FECA, submitted in a manner authorized by this part."¹¹ The Board concluded that as the employee filed an occupational disease claim prior to his death, the right to claim disability compensation survived his death.¹²

The Board, consequently, finds that OWCP erred in failing to adjudicate appellant's claim for disability compensation as it was not filed prior to the employee's death. The employee timely filed a traumatic injury claim within his lifetime and thus the right to file a claim for disability compensation survived his death. The case will be remanded for OWCP to adjudicate whether appellant, on behalf of the employee's estate, is entitled to compensation for wage loss from December 10, 2010 to February 1, 2015.

CONCLUSION

The Board finds that OWCP improperly interpreted 20 C.F.R. § 10.105(d) in finding that the right to disability compensation did not survive the employee's death as he filed his traumatic injury claim prior to his death. The case will be remanded for OWCP to determine whether the employee's estate is entitled to compensation for wage loss from December 10, 2010 to February 1, 2015.

⁹ *Id.*

¹⁰ *See supra* note 6.

¹¹ 20 C.F.R. § 10.5(c).

¹² The Board cited *Ned C. Lofton (John D. Lofton)*, 33 ECAB 1497 at 1506 (1982) (finding a conflict in medical opinion in a case where the employee filed a claim for compensation prior to his death).

ORDER

IT IS HEREBY ORDERED THAT the August 19 and April 27, 2016 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: February 2, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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