

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
T.D., claiming as representative of the estate of)	
S.B., Appellant)	
)	
and)	Docket No. 18-1071
)	Issued: January 16, 2019
)	
DEPARTMENT OF VETERANS AFFAIRS,)	
ILLIANA HEALTH CARE SYSTEM,)	
Danville, IL, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 1, 2018 appellant filed a timely appeal from a November 8, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of the employee's right upper extremity, warranting a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 10, 2008 the employee, then a 52-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on March 4, 2008 she sustained a right arm sprain when she tried to pull away from a patient who had grabbed and twisted her right hand. She stopped work on the date of injury and returned to limited duty on March 10, 2008.

Following an initial denial on April 29, 2008, by decision dated May 14, 2008, OWCP vacated its April 29, 2008 decision and accepted the employee's claim for soft tissue injury of the right upper extremity and right rotator cuff tear. It paid compensation benefits on the supplemental rolls commencing March 16, 2008. On July 22, 2008 the employee underwent an authorized right rotator cuff repair. OWCP continued to pay compensation on the supplemental rolls until the employee was placed on the periodic rolls on December 21, 2008. The employee returned to part-time modified duty on May 5, 2009, and to full-time modified duty in July 2009. She continued to receive wage-loss compensation for loss of premium pay.

On July 27, 2010 the employee filed a claim for a schedule award (Form CA-7).

By development letter dated August 9, 2010, OWCP requested that the employee provide a permanent impairment rating from a physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² It afforded her 30 days to submit the requested information. The employee did not respond.

On January 18, 2011 QTC Medical Services, OWCP's appointment scheduler, referred the employee, together with a statement of accepted facts, the medical record, and a set of questions, to Dr. Louis Angelicchio, a Board-certified orthopedic surgeon, for a second opinion examination to determine her current work capacity and restrictions, and to ascertain whether she still suffered residuals of her accepted injuries.

By letter dated January 31, 2011, OWCP notified the employee that, since it had not received a physician's report rating her permanent impairment in accordance with the sixth edition of the A.M.A., *Guides* and indicating that she had reached maximum medical improvement (MMI), her claim could not be considered at that time. It noted that, if she later obtained such evidence, she could then submit it along with a new Form CA-7.

In a January 31, 2011 medical report, Dr. Angelicchio described the employee's March 4, 2008 employment injury and her subsequent medical treatment. He noted that she continued to have significant right arm and shoulder symptoms that resulted in difficulties performing her regular job activities. Dr. Angelicchio reported right shoulder physical examination findings and diagnosed chronic right shoulder and arm pain related to a frozen right shoulder. He opined that she had continuing residuals of her accepted March 4, 2008 employment injury that required continued orthopedic care, including the possibility of additional surgery. Dr. Angelicchio advised

² A.M.A., *Guides* (6th ed. 2009).

that the employee could return to work eight hours a day with permanent restrictions. He did not provide a rating of permanent impairment.

On March 12, 2012 the employee accepted a permanent full-time mail and file clerk position, based on Dr. Angelicchio's work restrictions, effective March 25, 2012. By decision dated August 21, 2012, OWCP found that the employee's actual wages as a mail and file clerk fairly and reasonably represented her wage-earning capacity, and reduced her compensation benefits effective March 25, 2012.³

The employee retired on disability, effective January 16, 2015.

On February 7, 2017 OWCP was informed that the employee had died on February 5, 2017.

In correspondence dated March 23, 2017, appellant's then-counsel asked OWCP whether schedule award compensation had been paid to the employee.⁴ By letter dated April 17, 2017, OWCP responded that it had not received medical evidence or additional CA-7 forms related to a schedule award in response to its August 10, 2010 and January 31, 2011 letters. It noted that the employee's dependent(s) would not be entitled to an entire payment of a schedule award as the record did not indicate that a schedule award was being developed at the time of the employee's death and had not yet been paid. In addition, OWCP noted that it appeared that no eligible dependents remained in the claim.

In correspondence dated April 21, 2017, the employing establishment noted that appellant, the employee's daughter, was her next of kin.

By decision dated May 1, 2017, OWCP denied the employee's claim for a schedule award. It explained that she had not yet reached MMI, based on Dr. Angelicchio's January 31, 2011 report.

In a letter received on May 9, 2017, appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. On August 14, 2017 he forwarded a copy of the employee's death certificate. This indicated that the immediate cause of death was anoxic brain injury due to or a consequence of methicillin-resistant staphylococcus aureus (MRSA) septicemia and MRSA discitis, with Klebsiella pneumonia and diabetes mellitus type 2 as other significant contributing conditions. Counsel also forwarded a copy of appellant's birth certificate. This indicated that she was born on February 26, 1991 and that the employee was her mother.

During the October 3, 2017 hearing, counsel contended that the employee's death represented the ultimate date that she had reached MMI. He requested that the schedule award be

³ On August 23, 2013 OWCP suspended the employee's monetary compensation benefits effective August 25, 2013 because she failed to submit a required Form CA-1032. The employee submitted the form on October 1, 2013, and her monetary compensation was restored retroactively on December 3, 2013. On May 2, 2014 OWCP again suspended the employee's compensation benefits effective May 4, 2014 as it was unable to contact her and request that she submit an updated medical report to support her continued entitlement to compensation benefits.

⁴ The employee's then-counsel continued to represent appellant, the employee's daughter.

processed and paid to her estate pursuant to section 8109 of FECA and Chapter 2.808.7.a(7) of OWCP's procedures. Appellant testified that she was 26 years of age and was the employee's only child, that the employee was not married at the time of her death, and that she was not the employee's dependent at the time of her death.

By decision dated November 8, 2017, an OWCP hearing representative affirmed the May 1, 2017 decision. She found that, based on Dr. Angelicchio's report, the employee had not yet reached MMI. The hearing representative further found that appellant did not qualify as an eligible dependent and, thus, a schedule award could not be paid to the employee's estate.

LEGAL PRECEDENT

It is the claimant's burden of proof to establish that he or she sustained a permanent impairment of a scheduled member or function of the body as a result of an employment injury.⁵

The schedule award provisions of FECA,⁶ and its implementing federal regulations,⁷ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.¹⁰

Section 8119 of FECA,¹¹ provides that if an individual with a accepted injury files a valid schedule award claim during life and dies from a cause other than the employment-related injury before the end of the period specified by the schedule found in section 8107, the compensation specified by the schedule that is unpaid at death, whether or not accrued or due at death shall be paid under an award made before or after death for the period specified by the schedule to and for

⁵ See *R.B.*, Docket No. 17-1995 (issued August 13, 2018); *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁶ 5 U.S.C § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (March 2017).

¹⁰ *Id.* at Chapter 2.808.5(b) (March 2017).

¹¹ *Supra* note 1.

the benefit of persons specified. It continues that if there is no widow or widower, the award is made to the child or children.¹²

Section 8101(9) of FECA defines “child” as one who at the time of death of the employee is under 18 years of age or over that age and incapable of self-support, and includes stepchildren, adopted children, and posthumous children, but does not include married children.¹³

OWCP procedures further provide that if a claimant dies during the course of a schedule award from a cause other than the injury, payment for the remainder of the award may be made to his or her dependents as specified in section 8109 of FECA. If no eligible dependents remain, the balance of the award may not be paid to the estate. If at the time of the claimant’s death a schedule award claim is being developed, but has not yet been paid, the claimant’s dependent(s) would be entitled to the entire payment of the award.¹⁴

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of the employee’s right upper extremity, warranting a schedule award.

OWCP accepted that on March 4, 2008 the now deceased employee sustained a soft tissue injury of the right upper extremity and a right rotator cuff tear while in the performance of duty and authorized surgical repair, performed on July 22, 2008. On July 27, 2010 the employee filed a schedule award claim based on her accepted right shoulder injuries. By decision dated May 1, 2017, OWCP denied her schedule award claim, finding that, based on Dr. Angelicchio’s report, she had not yet reached MMI. This decision was affirmed by an OWCP hearing representative on November 8, 2017.

By development letter dated August 9, 2010, OWCP informed the employee of the type of evidence necessary to establish her schedule award claim and specifically requested that she submit an impairment evaluation from a physician in accordance with the sixth edition of the A.M.A., *Guides*. It afforded her 30 days to submit the necessary evidence. In a subsequent letter dated January 31, 2011, OWCP informed the employee that it could not consider her schedule award claim because it had not received a physician’s report rating her permanent impairment under the A.M.A., *Guides* and also indicating that she had reached MMI. It advised her that if she later obtained such evidence, then she should submit it along with a new claim for a schedule award. The employee did not respond to either of OWCP’s letters.

As discussed, a claimant has the burden of proof to establish permanent impairment of a scheduled member or function of the body.¹⁵ The medical evidence must include a description of

¹² 5 U.S.C. § 8109.

¹³ *Id.* at § 8101(9).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7.a(7) (February 2013).

¹⁵ *Supra* note 7.

any physical impairment in sufficient detail so that the claims examiner and others reviewing the file would be able to clearly visualize the impairment with its resulting restrictions and limitations.¹⁶ Despite the fact that OWCP notified the employee twice during her lifetime, she did not submit a physician's medical opinion as to whether she had a permanent impairment of her right shoulder due to her accepted employment injuries in accordance with the sixth edition of the A.M.A., *Guides*. As such she had not met her burden of proof to establish entitlement to a schedule award claim during her lifetime, and the record does not contain an impairment evaluation submitted subsequent to her death.¹⁷

Moreover, while appellant contends on appeal that she is entitled to schedule award compensation because she is the employee's only child, as indicated above, she does not qualify as a dependent child under sections 8101(9) and 8109 of FECA.¹⁸ At 26 years of age, she is not under 18, and the record contains no evidence to show that she is incapable of self-support.¹⁹

For the reasons set forth above, appellant has not established entitlement to a schedule award.

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 appellant has not met her burden of proof to establish permanent impairment of the employee's right upper extremity, warranting a schedule award.

¹⁶ *Supra* note 12; *see also J.D.*, Docket No. 18-0034 (issued May 22, 2018).

¹⁷ *See J.D.*, *id.*

¹⁸ 5 U.S.C. §§ 8101(9), 8109.

¹⁹ *Id.*; *see also* Federal (FECA) Procedure Manual, *supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the November 8, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 16, 2019
Washington, DC

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

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

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