

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

M.H., widow of W.H., Appellant)	
)	
and)	Docket No. 20-1140
)	Issued: June 15, 2021
DEPARTMENT OF DEFENSE, NATIONAL)	
SECURITY AGENCY, Fort Meade, MD,)	
Employer)	
)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 14, 2020 appellant, through counsel, filed a timely appeal from a January 30, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has established entitlement to the death gratuity benefit under 5 U.S.C. § 8102a.

FACTUAL HISTORY

OWCP, under OWCP File No. xxxxxx885, accepted that the employee's death on September 28, 2016 was related to Agent Orange and dioxin exposure while stationed in Vietnam in the early 1970's.³ It found that appellant, the deceased employee's surviving spouse, was an eligible dependent for the consideration of survivor benefits under FECA. OWCP paid appellant compensation on the periodic compensation rolls for the employee's death commencing March 31, 2019.

On May 1, 2019 appellant filed a survivor benefits claim (Form CA-41) claiming death gratuity benefits under 5 U.S.C. § 8102a. She indicated that the employee was exposed to Agent Orange at Bien Hoa Air Base while the Armed Forces were conducting a contingency operation in the region in the early 1970's. The employee died on September 28, 2016.

OWCP created a death gratuity claim, which it assigned the claim OWCP File No. xxxxxx041. In a May 3, 2019 development letter, it requested that appellant provide information regarding whether the employee died of injuries incurred in connection with the employee's service with an Armed Force in a contingency operation. OWCP also noted that 20 C.F.R. § 10.903 allows the death gratuity payment to be retroactively applied if "the employee died on or after October 7, 2001 and before January 28, 2008,⁴ if the death was the result of injuries incurred in connection with the employee's service with an Armed Force in the theater of operations of Operation Enduring Freedom or Operation Iraqi Freedom."

Also on May 3, 2019, under separate cover, OWCP provided the employing establishment with the Form CA-42 and requested that it complete the form. It also requested any information that established that the employee was serving with an Armed Force as set forth under the criteria noted for a death gratuity claim.

In a May 10, 2019 letter, counsel advised that the employee died on September 28, 2016 due to injurious exposure of Agent Orange in Vietnam in 1970-1971. He argued that appellant was entitled to the death gratuity benefits because the employee died on September 28, 2016, after the new section 8102a was adopted, and there was no limitation enumerated in the statute, public law, regulation or Federal (FECA) Procedural Manual for employees who died after the law was adopted. Counsel further noted that the section pertaining to retroactive awards applied only to

³ The record reflects that the employee, an Integrated Analyst, was assigned to the Army's 175th Radio Research Field Station at Bien Hoa Air Force Base, Vietnam in the early 1970's.

⁴ The National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, was enacted on January 28, 2008. Section 1105 of Public Law 110-181 amended FECA, creating a new section 8102a.

deaths that happened before the law was adopted and was not applicable in this case as the employee died well after the adoption of the law.

In a June 25, 2019 letter, the employing establishment indicated that the employee was retired. It further advised that it did not have the employee's file/information records, which had been sent to the Department of Labor.

By decision dated July 2, 2019, OWCP denied appellant's claim for death gratuity benefits. It found that the evidence failed to establish that the employee's death was incurred in connection with service with an Armed Force in the contingency operations of Operation Enduring Freedom or Operation Iraqi Freedom.

On July 31, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. In briefs dated October 22 and November 5, 2019, counsel set forth several arguments as to why appellant's death gratuity benefits claim should be accepted. He asserted that, by definition under 20 C.F.R. § 10.912(d)(1)(A), the Vietnam War was a contingency operation. Counsel argued that the retroactive provision was not relevant as the employee's death was after the enactment of the 2008 law. He also argued that the death gratuity provision was not limited to deaths related to Operation Enduring Freedom or Operation Iraqi Freedom.

A telephonic hearing was held on November 15, 2019. Counsel testified that the employee was assigned to the Army's 175th Radio Research Field Station at Bien Hoa Air Force Base during the Vietnam War from 1971 to 1972. He indicated that the employee was in Vietnam during Operation Ranch Hand where he was exposed to Agent Orange. Counsel also presented arguments, as set forth in his briefs, that appellant should be entitled to the claimed death gratuity benefit under 5 U.S.C. § 8102a.

By decision dated January 30, 2020, an OWCP hearing representative affirmed OWCP's July 2, 2019 decision. The hearing representative found that there was no provision under the law to provide death gratuity benefits to deaths sustained from other military contingency operations and concluded that the Vietnam War was not a contingency operation. The hearing representative further found that the death gratuity benefit was only for injuries as identified in the operation of Operation Enduring Freedom or Operation Iraqi Freedom. The hearing representative instructed OWCP to combine the current claim with OWCP File No. xxxxxx885, with OWCP File No. xxxxxx885 serving as the master file.

LEGAL PRECEDENT

A claimant seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation

⁵ See *supra* note 2.

period of FECA,⁶ that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁷

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁸ Under FECA an “employee” means, but is not limited to, “a civil officer or employee” in any branch of the government of the United States, including an officer or employee of an instrumentality wholly owned by the U.S.⁹ The definition also includes an individual rendering personal service to the U.S. similar to the service of a “civil officer or employee” of the U.S., without pay or for nominal pay, when a statute authorizes the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual.¹⁰

Chapter 2.0700.21 of OWCP’s procedures¹¹ discusses the FECA Death Gratuity as follows:

“The National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181 amended the FECA, creating a new section 8102(a). The section establishes a new FECA benefit for eligible survivors of federal employees and Non-Appropriated Fund Instrumentality (NAFI) employees who die of injuries incurred in connection with service with an Armed Force in a contingency operation.

“Section 8102a states that the United States will pay a death gratuity of up to \$100,000[.00] to those survivors upon receiving official notification of the employee’s death. Section 8102a also states that the United States will pay the death gratuity to the eligible survivors ‘immediately upon receiving official notification’ of an employee’s death. There is a retroactive payment provision, stating that the death gratuity will be paid for employees of certain agencies who died on or after October 7, 2001, due to injuries incurred in connection with service with an Armed Force in the theater of operations of Operation Enduring Freedom and Operation Iraqi Freedom. Regulations implementing the FECA death gratuity are set forth at 20 C.F.R. [§] 10.900-916. The \$100,000[.00] death gratuity is offset and reduced by any other death gratuity paid for the same death.”

⁶ See *H.S.*, Docket No. 19-1183 (issued December 19, 2019); *T.C.*, Docket No. 19-0227 (issued July 11, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ See *H.S.*, *id.*; *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8101(a)(A); 20 C.F.R. § 10.5(h)(1).

¹⁰ *Id.* at § 8101(a)(B); *id.* at § 10.5(h)(2).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Death Claims*, Chapter 2.0700.21 (September 2020).

Part 10, Claims for Compensation under the FECA, as amended, subpart J., Death Gratuity states:

Under 20 C.F.R. § 10.902 an employee's death due to injuries incurred in connection with his or her service with an Armed Force in a contingency operation qualifies for the death gratuity administered by this subpart if the death occurs on or after January 28, 2008, the date of enactment of Public Law 110-181 (2008).

Under 20 C.F.R. § 10.903, an employee's death qualifies for the death gratuity if the employee died on or after October 7, 2001 and before January 28, 2008, if the death was the result of injuries incurred in connection with the employee's service with an Armed Force in the theater of operations of Operation Enduring Freedom or Operation Iraqi Freedom.

Under 20 C.F.R. § 10.904, if an employee's death results from an occupational disease incurred in connection with the employee's service in a contingency operation, the death qualifies for payment of the death gratuity under this subpart.

Under 20 C.F.R. § 10.905, if an employee incurs a covered injury in connection with his or her service with an Armed Force in a contingency operation, but does not die of the injury until years later, the death qualifies for the death gratuity of this subpart regardless of how long after the injury the employee's death occurs.

ANALYSIS -- ISSUE 1

The Board finds that appellant has established entitlement to the death gratuity benefit under 5 U.S.C. § 8102a.

The employee, a retired Integrated Analyst who died on September 28, 2016, was exposed to Agent Orange at Bien Hoa Air Base, Vietnam in the early 1970's while the Armed Forces were conducting the contingency operation of Operation Ranch Hand in the region. He passed away on September 28, 2016. Under OWCP File No. xxxxxx885, OWCP accepted that the employee's death on September 28, 2016 was related to Agent Orange and dioxin exposure while stationed in Vietnam in the early 1970's. Appellant subsequently filed a survivor benefits claim (Form CA-41) for death gratuity benefits under 5 U.S.C. § 8102a. OWCP, however, denied the death gratuity benefit claim based on a misinterpretation of 5 U.S.C. § 8102a and the retroactive payment provision of 20 C.F.R. § 10.903.

Counsel argues, that OWCP ignored the plain language of section 8102a of FECA, 20 C.F.R. §§ 10.902, 10.904, and 10.905 of the implementing regulations, and OWCP procedures, which allows for employees' deaths that occur in connection with service with an Armed Force in a contingency operation to qualify for a death gratuity if the date of death is after January 28, 2008, the date section 8102a was enacted. 20 C.F.R. § 10.904 covers an employee's death which results from an occupational disease incurred in connection with the employee's service in a contingency operation. 20 C.F.R. § 10.905 indicates that when the employee, who incurs a covered injury, dies of the injury years later, the death qualifies for the death gratuity regardless of how long after the injury the employee's death occurs.

OWCP previously accepted that the employee's death on September 28, 2016 was related to Agent Orange exposure in Vietnam in the early 1970's. At the time of the employee's exposure to Agent Orange, the employee's record supports that the Armed Forces were also conducting the contingency operation of Operation Ranch Hand in the region. There is no evidence to the contrary. Thus, the employee's death on September 28, 2016 occurred in connection with service with an Armed Force in a contingency operation of Operation Ranch Hand and appellant is entitled to the death gratuity benefit under 5 U.S.C. § 8102a.

The Board also finds that OWCP erred in finding that the death gratuity provision was limited only to deaths related to Operation Enduring Freedom or Operation Iraqi Freedom. The retroactive provision of 20 C.F.R. § 10.903 applies only to those cases where the employee died before 2008 if they died in connection with Operation Enduring Freedom or Operation Iraqi Freedom. In this case, the retroactive provision under 20 C.F.R. § 10.903 is not applicable as the employee's death occurred on September 28, 2016.

CONCLUSION

The Board finds that appellant has established entitlement to the death gratuity benefit under 5 U.S.C. § 8102a.

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 15, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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