

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

P.P., claiming as Administratrix of the Estate of DP., Appellant)	
)	
and)	Docket No. 21-0609
)	Issued: October 7, 2021
)	
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer)	
)	

Appearances:
Howard L. Graham, 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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On March 2, 2021 appellant, through counsel, filed a timely appeal from a September 25, 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 to consider the merits of this case.³

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 an 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.*

³ The Board notes that, following the September 25, 2020 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has established that she is entitled to an increased schedule award for permanent impairment of the employee's lungs due to his employment-related asbestosis.

FACTUAL HISTORY

On July 9, 2004 the employee, then a 60-year-old retired welder, filed an occupational disease claim (Form CA-2) alleging that he sustained pulmonary asbestosis due to occupational exposure to asbestos, chemicals, particles, and dusts in the performance of duty on or before May 15, 2001. On November 19, 2001 he underwent left anterolateral thoracotomy with left upper lobe wedge resection of a pulmonary mass. The employee remained exposed to the identified substances through his retirement from the employing establishment effective February 27, 2004. On September 7, 2005 OWCP accepted the claim for asbestosis.

The employee subsequently filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated November 3, 2006, OWCP granted the employee a schedule award for 15 percent permanent impairment of the right lung and 15 percent permanent impairment of the left lung. The award ran for 46.8 weeks from January 3 through November 26, 2005.

The employee subsequently filed a claim for an increased schedule award. Following additional development, by decision dated August 28, 2007, OWCP granted the employee an additional 23 percent permanent impairment of each lung for a total of 38 percent permanent impairment of each lung. The period of the award ran from November 27, 2005 through April 12, 2007.

On July 10, 2018 the employee filed a claim for an increased schedule award (Form CA-7). He submitted additional medical evidence.

In a June 11, 2018 report, Dr. David E. Corley, Board-certified in pulmonology and sleep medicine, noted the employee's history of pneumoconiosis due to asbestosis. He diagnosed mycobacterium avium complex pneumonia, chronic obstructive pulmonary disease (COPD), asbestosis, hypoxemia, obstructive sleep apnea, and osteopenia due to prolonged use of steroids prescribed for the employee's pulmonary conditions.

OWCP, in a development letter dated July 30, 2018, notified the employee of the additional evidence needed to establish his claim for an increased schedule award. It afforded him 30 days to submit such evidence. OWCP subsequently received March 15, 2018 laboratory test results and a May 14, 2018 bone density scan.

By decision dated September 4, 2018, OWCP denied the employee's claim for an increased schedule award.

On July 9, 2019 the employee again requested an increased schedule award (Form CA-7).

OWCP, in a development letter dated July 22, 2019, notified the employee of the additional evidence needed to establish his claim for an increased schedule award. It afforded him 30 days to submit such evidence. In response, the employee submitted laboratory and diagnostic test

results. He also provided September 7 and 18, 2018 reports by Beth Ann Turney, a nurse practitioner, noting that the employee was receiving palliative care due to respiratory failure.

By decision dated October 4, 2019, OWCP denied the employee's increased schedule award claim as the medical evidence submitted did not establish a percentage of permanent impairment greater than that previously awarded.

In an April 27, 2020 report, Dr. Corley opined that the employee had attained maximum medical improvement (MMI) on April 5, 2019. He opined that the employee had a Class IV impairment of both lungs, equaling a 45 to 65 percent impairment, with a diffusing capacity of 36 percent predicted value on June 2011 pulmonary function testing. Dr. Corley noted that the employee's "20-pack-year" history of tobacco use caused mild COPD, unrelated to the severe decrease in diffusing capacity attributable to asbestos-related lung disease.

By letter dated May 4, 2020, counsel informed OWCP that the employee passed away on May 3, 2020 due to lung disease.

OWCP subsequently received a state health department certificate of death dated May 6, 2020, wherein Dr. Corley noted the employee's cause of death was asbestosis, with COPD as a contributing condition.

On May 21, 2020 appellant, through counsel, requested reconsideration of the October 4, 2019 schedule award determination.

In a September 14, 2020 report, Dr. Amanda C. Trimpey, Board-certified in occupational medicine and serving as an OWCP district medical adviser (DMA), reviewed the medical record and a statement of accepted facts. She opined that the employee's employment-related asbestosis "contributed to [the employee's] respiratory failure and ultimate death on May 3, 2020."

By decision dated September 25, 2020, OWCP denied modification of the October 4, 2019 schedule award determination. It found that appellant was not entitled to an increased schedule award as the employee's death was caused by the accepted employment condition.

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.⁴

The schedule award provisions of FECA,⁵ and its implementing federal regulations,⁶ 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 American Medical Association (A.M.A.) *Guides* to the Evaluation of Permanent Impairment

⁴ See *R.B.*, Docket No. 17-1995 (issued August 13, 2018); *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁵ 5 U.S.C § 8107.

⁶ 20 C.F.R. § 10.404.

as the uniform standard applicable to all claimants.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

OWCP's 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*.⁹

Section 8109(a)(3) of FECA¹⁰ provides that, if an individual with an 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 the benefit of persons specified.¹¹

OWCP's 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.¹²

ANALYSIS

The Board finds that appellant has not established that she is entitled to an increased schedule award for permanent impairment of the employee's lungs due to his employment-related asbestosis.

On May 21, 2020 appellant, through counsel, requested reconsideration of the October 4, 2019 denial of the employee's increased schedule award claim.

As noted above, section 8109(a)(3) provides that, if an individual with an 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

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* at Chapter 3.700.2 and Exhibit 1 (March 2017).

⁹ *Id.* at Chapter 2.808.5(b) (March 2017).

¹⁰ *Supra* note 2.

¹¹ 5 U.S.C. § 8109(a). *See also T.D. (S.B.)*, Docket No. 18-1071 (issued January 16, 2019); *F.D., (D.D.)*, Docket No. 10-229 (issued August 2, 2010); *P.G. (T.G.)*, Docket No. 08-2183 (issued June 23, 2009).

¹² *Supra* note 8 at Chapter 2.808.7.a(7) (February 2013).

death shall be paid under an award made before or after death for the period specified by the schedule to and for the benefit of persons specified.¹³

In the present case, however, the medical evidence of record establishes that the employee died from asbestosis, an occupational condition accepted by OWCP. Section 8109(a)(3) provides that the injured employee must have succumbed from a “cause other than” the accepted injury.¹⁴

The employee’s physician, Dr. Corley, diagnosed asbestosis in a June 11, 2018 report. He opined in an April 27, 2020 report that the accepted asbestosis caused a severe decrease in the employee’s diffusing capacity. On the employee’s death certificate Dr. Corley noted the employee’s cause of death was asbestosis, with COPD as a contributing condition. Dr. Trimpey, an OWCP DMA, concurred in a September 16, 2020 report that the accepted asbestosis contributed to the employee’s death. The Board finds that these opinions relative to the cause of death establishes that the employee’s employment-related asbestosis caused or contributed to his death.

As the employee died due to an accepted occupational condition, appellant is not entitled to an increased schedule award under section 8109(a)(3) of FECA.¹⁵

CONCLUSION

The Board finds that appellant has not established that she is entitled to an increased schedule award for permanent impairment of the employee’s lungs due to his employment-related asbestosis.

¹³ *Supra* note 11

¹⁴ 5 U.S.C. § 8109(a)(3).

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 7, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board