U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALVIN COLLINS and DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, Alameda, CA

Docket No. 03-141; Submitted on the Record;
Issued August 13, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether appellant received a double recovery from third-party settlements in addition to the payment of benefits under the Federal Employees' Compensation Act; and (2) whether the refund due the United States in the amount of $48,242.54 should be recovered as determined.

The Office of Workers' Compensation Programs accepted appellant's occupational disease claim for bullous emphysema, pulmonary fibrosis and chronic obstructive pulmonary disease resulting from his exposure to asbestos during his federal employment. Appellant underwent removal of both upper lobes of his lungs for apparent bilateral cancerous tumors and thereafter was found totally disabled.

As a result of the work-related injury, in the early 1980s, appellant received third-party settlements from several private companies which amounted to approximately $90,926.00. On February 28, 1989 appellant applied for wage-loss compensation benefits under the Act. Appellant was awarded compensation for temporary total disability and on November 7, 1990 he applied for a schedule award for permanent impairment of his lungs. On April 2, 1991 the Office advised appellant that the circumstances of his injury might place liability upon a party other than the United States and it requested that appellant advise it whether he had prosecuted a third-party action. On April 16, 1991 appellant partially completed a Form EN1045-0188 indicating that he had set forth a list of the companies that paid him awards for illness due to asbestos exposure but did not include the names on the form. On June 19, 1991 the Office began to develop appellant's case with respect to subrogation for the third-party recoveries. On December 16, 1993 the Office advised that had appellant notified it of the recoveries sooner in the amount of $90,926.00, he would have been asked to file a statement of recovery form, which would have established that he had a surplus in the amount of $48,242.54 which would have been a credit against payment of future compensation on account of the same injury.[1] The Office

[1] Appellant would not have been entitled to any future benefits from the Office until he was due to receive benefits in excess of the amount of the surplus.

determined that appellant received compensation benefits for wage loss and for a schedule award without first absorbing the surplus, which constituted a double recovery.

By letter dated September 15, 1998, the Office of the Solicitor advised appellant that he received third-party recoveries totaling $90,926.00 for which neither the government's refund of $33,805.53 had been paid nor the surplus of $48,242.54 had been absorbed. The Solicitor requested that appellant either submit a check payable to the Office for $33,805.53 within 30 days, or the Office would suspend his compensation until the surplus of $48,242.54 had been absorbed, which would be about 19 months at $2,434.00 per month, his monthly compensation payment.[2] The Solicitor requested that appellant choose which action he preferred.

By letter dated March 10, 1999, the Office of the Solicitor advised appellant either to make arrangements to refund the $33,805.53, or that the Office would declare an overpayment and initiate steps to collect the money due the United States. Two statements of recovery were completed that date which revealed a $30,406.43 and a $17,836.11 surplus. These totaled a $48,242.54 surplus.

In a memorandum dated July 28, 1999, the Solicitor advised the Office that, as appellant had not refunded the surplus, it should find an overpayment in the amount of $48,242.54 and initiate collection action.

In a preliminary determination dated January 18, 2000, the Office advised appellant that an overpayment of compensation in the amount of $48,242.54 had occurred because third-party settlements totaling $90,926.00 resulted in a surplus of $48,242.54. The Office found that appellant was at fault in the creation of the overpayment as he should have known that third-party surpluses received in connection with his asbestos injury had to be absorbed before compensation could be paid.

Appellant disagreed with this proposed action and requested a hearing.

A hearing was held on June 21, 2000 at which appellant testified that he was not overpaid, and that when he completed his application for the compensation benefits he had stated that he had received third-party settlements and therefore he did not falsify information.

By decision dated May 7, 2001, an Office hearing representative found that the Office had properly determined that appellant had received an overpayment of compensation in the amount of $48,242.54, the amount of the surplus from the third-party settlements. The hearing representative found that the Office's two sets of statements of recovery determined that appellant could either refund the Office a lump sum of $33,805.53, or the surplus of $48,242.54 would have to be absorbed by withholding $1,000.00 every four weeks from his continuing compensation benefits.[3] The hearing representative did not make a finding of fault, and

[2] On August 14, 1997 the Office advised appellant that a deduction of $175.00 each four weeks was being withheld from his continuing compensation benefits to recover a separate $14,691.60 overpayment which occurred because he received benefits from both the Office and the Office of Personnel Management for the period December 2, 1989 to February 6, 1993.

[3] A February 17, 2000 recovery questionnaire completed by appellant was of record at the time of the hearing.

addressed the federal regulations applicable to the recovery of third-party claims and refunds due to the United States.[4] Section 10.716 states:

> "If the required refund is not paid within 30 days of the request for payment, [the Office] can, in its determination, collect the refund by withholding all or part of any payments currently payable to the beneficiary under the [Act]. With respect to any injury, the waiver provisions of [sections] 10.432 through 10.440 do not apply to such determinations."[5]

The hearing representative noted that the record revealed that the Office of the Solicitor advised appellant four times that a refund was due, or a surplus would be declared and such surplus would be absorbed from future compensation benefits due appellant. The hearing representative determined that appellant's monthly income was $3,857.08, of which $2,379.08 was from monthly compensation payments, and his monthly expenses were $2,856.34, such that he had $1,000.72 available from which to recover the overpayment. The hearing representative determined that $1,000.00 would be withheld every month towards the absorption of the surplus.

The Board finds that appellant received a double recovery from third-party settlements in addition to the payment of benefits under the Act.

5 U.S.C. § 8132 is applicable to this case as appellant received recoveries from third parties in addition to compensation benefits under the Act.[6] Section 8132 of the Act provides that an employee who sustains an injury for which compensation is payable under circumstances creating a legal liability in a party other than the United States to pay damages, "shall refund to the United States the amount of compensation paid" once recovery is made against the responsible tortfeasor.[7]

Appellant received third-party settlements from several private asbestos manufacturers before he applied for and was awarded compensation benefits, including wage-loss benefits, medical benefits and a schedule award under the Act. When appellant applied for benefits under the Act, he did not notify the Office that he had previously received third-party settlements, such that no satisfaction of the interests of the United States had been made before the payment of benefits. When appellant received benefits under the Act, this created a double recovery for the same injury. As a claimant cannot receive double recovery for the same injuries or conditions, recovery of the refund due to the United States is mandatory under the statute.

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[4] 20 C.F.R. § 10.705 through 10.719 pertain to third-party liability.

[5] 20 C.F.R. § 10.716.

[6] Section 8132 states as follows: "If an injury … for which compensation is payable … is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury … receives money or other property in satisfaction of that liability as the result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury…. The amount refunded to the United States shall be credited to the Employees' Compensation Fund."

[7] 5 U.S.C. § 8132; *see Richard J. Maher*, 42 ECAB 902 (1991).

The statutory formula for repayment, as detailed in the Office's implementing regulations, at section 10.711, states as follows:

> "The statute permits a FECA beneficiary to retain, as a minimum, one-fifth of the net amount of money or property remaining after a reasonable attorney's fee and the costs of litigation have been deducted from the third-party recovery. The United States shares in the litigation expense by allowing the beneficiary to retain at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund due the United States. After the refund owed to the United States is calculated, the FECA beneficiary retains any surplus remaining, and this amount is credited, dollar for dollar, against future compensation for the same injury, as defined in § 10.719. OWCP will resume the payment of compensation only after the FECA beneficiary has been awarded compensation which exceeds the amount of the surplus.
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> "(a) The refund to the United States is calculated as follows, using the Statement of Recovery form approved by OWCP:
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> (1) Determine the gross recovery as set forth in § 10.712;
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> (2) Subtract the amount of attorney's fees actually paid, but not more than the maximum amount of attorney's fees considered by OWCP or SOL to be reasonable, from t he gross recovery (Subtotal A);
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> (3) Subtract the costs of litigation, as allowed by OWCP or SOL (Subtotal B);
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> (4) Subtract one fifth of Subtotal B from Subtotal B (Subtotal C);
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> (5) Compare Subtotal C and the refundable disbursements as defined in § 10.714. Subtotal D is the lower of the two amounts.
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> (6) Multiply Subtotal D by a percentage that is determined by dividing the gross recovery into the amount of attorney's fees actually paid, but not more than the maximum amount of attorney's fees considered by OWCP or SOL to be reasonable, to determine the Government's allowance for attorney's fees, and subtract this amount from Subtotal D.
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> "(b) The credit against future benefits (also referred to as the surplus) is calculated as follows:
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> (1) If Subtotal C, as calculated according to paragraph (a)(4) of this section, is less than the refundable disbursements, as defined in § 10.714, there is no credit to be applied against future benefits;

(2) If Subtotal C is greater than the refundable disbursements, the credit against future benefits (or surplus) amount is determined by subtracting the refundable disbursements from Subtotal C."[8]

The formula, as applied in this case, is as follows: From appellant's gross third-party recovery of $90,926.00, the Office subtracted attorney's fees of $26,435.74 and associated court costs of $4,187.08. This resulted in an adjusted gross recovery of $60,303.18, from which was subtracted appellant's statutory guarantee of 20 percent of the recovery which was $12,060.64, leaving an adjusted balance of $48,242.54. This resulted in a net adjusted balance of $48,242.54 as the surplus which the government may offset against future compensation benefits until the surplus has been exhausted.

The Board has recognized section 8132 as a "mandatory" provision by which the Office must offset the amount to which the government is entitled from future compensation payments. This section provides that if an employee makes a recovery against a responsible tortfeasor, the employee "shall refund to the United States the amount of compensation paid."[9] In *David R. Gilmer*, the Board stated:

"Under section 8132 it is mandatory for the Office to offset the amount to which it is entitled from future compensation benefits, as it did here. Furthermore, any remaining surplus is also credited on future payments of compensation payable for the same injury."[10]

The Board has explained that the purpose underlying this section of the Act is to prevent a double recovery by the employee.[11] Neither the Office nor the Board may enlarge or modify the terms of the Act. The statute mandates that the Office offset the surplus in the present case against future payments of compensation in the form of either medical benefits or other compensation due him.[12]

The Board notes that appellant received third-party settlements which amounted to approximately $90,926.00, yet he subsequently applied for and received compensation for temporary total disability, medical benefits, and a schedule award[13] for the same injury, without providing notice to the government of his third-party recovery, such that the surplus from the third-party settlements did not get absorbed. He consequently received a double recovery from private asbestos manufacturers and the United States for his employment-related asbestos

[8] 20 C.F.R. § 10.711.

[9] *David R. Gilmer*, 34 ECAB 1342, 1345-46 (1982).

[10] 5 U.S.C. § 8132.

[11] *See, e.g., Donald Bonte*, 48 ECAB 270 (1997); *Richard J. Maher*, *supra* note 7; *Claude W. Darris*, 37 ECAB 190 (1985); *David R. Gilmer, supra* note 8; *see also Joseph A. Matais*, Docket No. 00-2378 (issued December 10, 2001).

[12] *Clemence R. Mendoza*, 19 ECAB 33 (1967).

[13] Which has been determined to be a form of compensation. *See Donald Bonte, supra* note 10.

exposure. Therefore, the Office properly applied the federal regulations to find an overpayment in the amount of the surplus of $48,242.54 occurred and that mandatory recovery by offset must be made.

The Office hearing representative, by decision dated May 7, 2001, finalized the Office's preliminary overpayment determination which included a finding of fault. The hearing representative properly did not address the matter of fault. The Board notes that, when dealing with third-party recovery surpluses under 5 U.S.C. § 8132, the issue of fault is moot as the refund of amounts paid by the Office is mandatory under the Act and its implementing regulations and waiver does not apply.[14] Therefore, the full amount of the surplus is due and owed to the Office by appellant.

The Board also finds that the Office properly determined that the surplus should be recovered at the rate of $1,000.00 per month.

Section 10.716 of the Office's implementing regulations gives the Office discretion in the recovery of the surplus in the amount determined, as it specifies that the Office can withhold all or part of any future payments due the claimant.[15] The Office determined, from the financial information submitted to the record, that appellant had a total monthly income of $3,857.08 and total monthly expenditures of $2,856.34, which left $1,000.74[16] excess income each four weeks from which to recover the surplus. The Office did not abuse its discretion by directing recovery due the United States in the amount of $1,000.00 a month. As recovery is mandatory in this case, the Office was not required to determine whether appellant had a monthly excess in income before it determined the amount of withholding; however, it did so to the benefit of appellant.[17]

[14] *See* 20 C.F.R. § 10.716; *see also Donald Bonte, supra* note 10.

[15] Determination of hardship caused by the withholding of some or all compensation is not required to be considered under 20 C.F.R. § 10.716.

[16] The hearing representative mistakenly subtracted incorrectly and determined that appellant had $1,000.72 excess monthly income instead of $1,000.74 monthly income.

[17] *See* 20 C.F.R. § 10.716 which states: "If the required refund is not paid within 30 days of the request for payment, OWCP can, in its discretion, collect the refund by withholding all or part of any payments currently payable to the beneficiary under the [Act] with respect to any injury. The waiver provisions of [sections] 10.432 through 10.440 do not apply to such determinations."

Accordingly, the decision of the Office of Workers' Compensation Programs dated May 7, 2001 is hereby affirmed.

Dated, Washington, DC
August 13, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member