



decision regarding appellant's wage-earning capacity on July 9, 2003 finding that her job as modified city carrier was suitable and that her actual earnings met or exceeded the then current wages of the job she held when she was injured. Accordingly, appellant's compensation benefits were terminated.

Appellant obtained a third-party recovery for her injury in the gross amount of \$215,000.00. Subsequently, on September 12, 2003, appellant's representative, George Dixie, forwarded a check to the Office in the amount of \$19,443.25, payable to appellant and the Office, representing reimbursement for disbursements made on behalf of appellant by the Office.

By decision dated September 18, 2003, the Office granted appellant a schedule award for a five percent impairment of her left upper extremity, resulting in a payment to appellant in the amount of \$10,147.80.

By letter dated January 22, 2004, the Office issued a preliminary finding that appellant had received an overpayment in the amount of \$10,147.80, in that she had accepted compensation for the schedule award without offset against her third-party settlement as required by section 8132 of the Federal Employees' Compensation Act. The Office further found that appellant was at fault because she had accepted the compensation for the schedule award with the knowledge that a third-party settlement was pending which could have affected her entitlement to receive compensation.

On February 13, 2004 appellant requested a hearing on the issue of fault, contending that she had held the checks representing compensation for the schedule award for at least 30 days and did not understand why no one contacted her when the error was discovered.

On March 12, 2004 the Office finalized its preliminary finding of overpayment and fault.

A hearing was held on October 20, 2004 at which appellant's representative requested that the Office reduce the amount of the overpayment by 40 percent in consideration of the attorney's efforts in recovering the award. He contended that had he known that a schedule award was imminent, he would have delayed the third-party settlement so that appellant would have received a credit for the attorney's fees against the amount owed. Appellant's representative further argued that the Office was equitably estopped from recovering the overpayment in that it had been put on notice of the pendency of a third-party settlement; that appellant had made diligent inquiry as to her entitlement to the schedule award; and that, after receiving no response from the Office, appellant had used the funds to purchase a home. He acknowledged that he had informed appellant that she owed a surplus and that she would not receive compensation for additional medicals until the surplus had been satisfied.

By decision dated February 2, 2005, the Office hearing representative affirmed the Office's January 22, 2004 preliminary finding of overpayment and found that \$1,000.00 per month should be collected from appellant as repayment towards her debt.

### LEGAL PRECEDENT -- ISSUE 1

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.<sup>1</sup>

The purpose underlying this obligation is to prevent a double recovery by the employee.<sup>2</sup> Under this section of the Act, a claimant is obligated to reimburse the United States out of any third-party recovery for any disbursements made by the Office. This includes benefits that would be payable pursuant to a schedule award.<sup>3</sup>

### ANALYSIS -- ISSUE 1

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

Section 8132 is applicable to this case as appellant received a recovery from a third party in addition to compensation benefits under the Act. Appellant received a third-party settlement before she was awarded compensation for a schedule award under the Act. Her representative acknowledged that appellant was aware that a surplus existed prior to payment of the schedule award. In spite of this knowledge, she accepted the compensation benefit for the schedule award and used the money to purchase a home. Appellant’s receipt of those benefits 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.

Section 10.711 of the Office’s implementing regulations provides the formula for repayment:

“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

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<sup>1</sup> 5 U.S.C. § 8132. See *Alvin Collins*, 54 ECAB \_\_\_\_ (Docket No. 03-141, issued August 13, 2003). See *Richard J. Maher*, 42 ECAB 902 (1991).

<sup>2</sup> *Charles E. Davis*, 39 ECAB 322 (1987).

<sup>3</sup> See *Thomas P. Murray*, 51 ECAB 630 (2000). See also *Richard J. Maher*, *supra* note 1.

compensation only after the FECA beneficiary has been awarded compensation which exceeds the amount of the surplus.

“(a) The refund to the United States is calculated as follows, using the Statement of Recovery form approved by OWCP:

- (1) Determine the gross recovery as set forth in § 10.712;
- (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 the gross recovery (Subtotal A);
- (3) Subtract the costs of litigation, as allowed by OWCP or SOL (Subtotal B);
- (4) Subtract one fifth of Subtotal B from Subtotal B (Subtotal C);
- (5) Compare Subtotal C and the refundable disbursements as defined in § 10.714. Subtotal D is the lower of the two amounts.
- (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.

“(b) The credit against future benefits (also referred to as the surplus) is calculated as follows:

- (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.”<sup>4</sup>

The formula, as applied in this case, is as follows: From appellant’s gross third-party recovery of \$215,000.00, the Office properly subtracted attorney’s fees of \$86,000.00 and associated court costs of \$170.00. This resulted in an adjusted gross recovery of \$128,830.00, from which was subtracted appellant’s statutory guarantee of 20 percent of the recovery (\$25,766.00) plus medical expenses paid by appellant (\$191.32), leaving an adjusted balance of \$102,872.68. The initial amount to be refunded to the Office by appellant was determined by reducing the medical disbursements made by the Office on behalf of appellant (\$32,405.42) by

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<sup>4</sup> 20 C.F.R. § 10.711.

appellant's allowance for attorneys' fees (\$12,962.17). In accordance with the regulatory formula, appellant's representative properly refunded the amount of \$19,443.25 to the Office. Reducing the adjusted balance by the disbursements made by the Office resulted in a surplus of \$70,467.26, which the government may offset against future compensation benefits until the surplus has been exhausted.

The Board notes that appellant received a third-party settlement which amounted to \$215,000.00. Yet, she subsequently received compensation for a schedule award for the same injury. At the time the schedule award was paid to her on September 18, 2003, appellant had a surplus from her third-party recovery in the amount of \$70,476.26. The amount of the schedule award, \$10,147.80, should have been credited against this surplus. Instead it was paid to appellant, and the result is an overpayment of compensation in the amount of \$10,147.80.

### **LEGAL PRECEDENT -- ISSUE 2**

The Board has recognized section 8132 of the Act as a "mandatory" provision by which the Office must offset the amount to which the government is entitled from future compensation payments.<sup>5</sup> 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."<sup>6</sup> The Board has explained that the purpose underlying this section of the Act is to prevent a double recovery by the employee.<sup>7</sup> Neither the Office nor the Board may enlarge or modify the terms of the Act.<sup>8</sup>

### **ANALYSIS -- ISSUE 2**

By decision dated March 12, 2004, the Office hearing representative finalized the Office's preliminary overpayment determination, which included a finding of fault. The hearing

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<sup>5</sup> Section 8132 of the Act provides as follows: If an injury or death for which compensation is payable under this subchapter 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 or death 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. No court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States. The amount refunded to the United States shall be credited to the Employees' Compensation Fund. If compensation has not been paid to the beneficiary, he shall credit the money or property on compensation payable to him by the United States for the same injury. However, the beneficiary is entitled to retain, as a minimum, at least one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted; and in addition to this minimum and at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund to the United States. 5 U.S.C. § 8132.

<sup>6</sup> See, e.g., *Alvin Collins*, *supra* note 1.

<sup>7</sup> See *Sammy L. High*, 55 ECAB \_\_\_\_ (Docket No. 04-1190, issued September 8, 2004).

<sup>8</sup> *Id.*

representative should not have addressed the matter of fault. The Board notes that, when dealing with third-party recovery surpluses under 5 U.S.C. § 8132, the refund of amounts paid by the Office is mandatory under the Act and its implementing regulations.<sup>9</sup> Therefore, the issue of fault is moot; waiver does not apply; and the full amount of the surplus is due and owed to the Office by appellant.<sup>10</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8129(a) of the Act provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled.<sup>11</sup> However, where no further compensation benefits are due an individual, the Board does not have jurisdiction, and the recovery of an overpayment remains within the discretion of the Office. The Board's jurisdiction over recovery is limited to review of those cases where the Office seeks recovery from continuing compensation under the Act.<sup>12</sup>

### **ANALYSIS -- ISSUE 3**

With respect to recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act.<sup>13</sup> Pursuant to the Office's July 9, 2003 wage-earning capacity decision, appellant was not in receipt of continuing compensation at the time the final decision was entered in this matter. Therefore, this Board lacks jurisdiction to review recovery of the overpayment.<sup>14</sup>

### **CONCLUSION**

The Board finds that an overpayment of \$10,147.80 occurred as a result of a third-party settlement; that the waiver of the overpayment should be denied on the grounds that, under 5 U.S.C. § 8132, when a claimant has received double recovery as a result of a third-party settlement, recovery of the refund due to the United States is mandatory; and that the Board does not have jurisdiction to review the recovery of overpayment, in that appellant was not in receipt of continuing compensation at the time the final decision was entered.

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<sup>9</sup> 20 C.F.R. § 10.716 provides in pertinent part that the waiver provisions of sections 10.432 through 10.440 do not apply to determinations regarding the process of collecting refunds due to third-party settlements.

<sup>10</sup> See *Alvin Collins*, *supra* note 1.

<sup>11</sup> 5 U.S.C. § 8129(a).

<sup>12</sup> *Terry A. Keister*, 56 ECAB \_\_\_\_ (Docket No. 04-1136; issued May 23, 2005); see also *Albert Pineiro*, 51 ECAB 310 (2000).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* See also *Judith A. Cariddo*, 55 ECAB \_\_\_\_ (Docket No. 03-227, issued February 24, 2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 2, 2005 decision of the Office of Workers' Compensation Programs is affirmed on the issues of fact and amount of overpayment and waiver.

Issued: October 6, 2005  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board