United States Department of Labor
Employees' Compensation Appeals Board

I.P. Appellant	)	
	)	
and	)	**Docket Nos. 12-670 & 12-1250**
	)	**Issued: November 15, 2012**
DEPARTMENT OF THE NAVY,	)	
HUNTERS POINT NAVAL SHIPYARD,	)	
San Francisco, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 23, 2012 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) November 15, 2011 merit decision rescinding schedule awards and a May 8, 2012 overpayment decision.[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] The Board notes that appellant stated that he was appealing a December 14, 2011 OWCP decision. The Board notes that the December 14, 2011 document is an informational letter and does not purport to be a final adverse decision. *See* 20 C.F.R. § 501.3(a). In a letter, OWCP responded to appellant's request for payment of an existing third-party surplus. It advised him that he was not entitled to the surplus due to his ineligibility for a schedule award. The record contains OWCP's November 15, 2011 merit decision rescinding appellant's schedule awards for bilateral lung impairment which is within the Board's jurisdiction as it was filed within 180 days from the date of issuance. 20 C.F.R. § 501.3(e).

[2] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly rescinded its finding that appellant was entitled to schedule awards; (2) whether it properly found that he received an overpayment of compensation in the amount of $6,402.16 from May 2, 2003 through January 22, 2005 due to rescission of the schedule awards; and (3) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board.[3] In a December 3, 2004 decision,[4] the Board affirmed a March 16, 2004 OWCP merit decision finding that appellant had no more than 30 percent impairment of each lung, for which he received a schedule award[5] and a June 3, 2004 nonmerit decision denying his request for reconsideration of the schedule award decision on the grounds that he did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). In a January 23, 2007 decision,[6] the Board affirmed it nonmerit decision dated March 9, 2006 which denied appellant's request for an oral hearing regarding the denial of his claim for total disability compensation commencing August 1997. In a November 27, 2007 decision,[7] the Board affirmed a May 18, 2007 OWCP nonmerit decision denying appellant's request for reconsideration as untimely filed and lacking clear evidence of error in its March 8, 2005 decision which affirmed the denial of his claim for total disability compensation commencing August 1997. In an order dated August 8, 2008,[8] the Board dismissed appellant's appeal of a November 27, 2007 OWCP decision, finding that there was no adverse final decision issued within one year of the filing of the appeal on December 13, 2007. The facts of the case as set forth in the Board's prior decisions and order are incorporated herein by reference.

In a March 17, 2011 decision, OWCP granted appellant a schedule award for an additional two percent impairment of each lung, for a total 32 percent impairment of each lung. The period of the award ran from June 24 to August 6, 2010.[9]

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[3] On January 16, 2002 appellant, then a 64-year-old boilermaker, filed an occupational disease claim alleging that on August 3, 2001 he first became aware of his asbestos-related lung disease and realized that his condition was caused by stripping asbestos from pipes in boiler rooms on ships while working at the employing establishment. He was separated from the employing establishment on November 21, 1961 due to a reduction-in-force. OWCP accepted appellant's claim for calcified plaques due to asbestos exposure, bilateral pleurisy effusion or current tuberculosis, bilateral lung calcified nodules and left invasive moderately differentiated adenocarcinoma. On August 11, 2004 appellant notified OWCP of a third-party recovery in the amount of $60,000.00.

[4] Docket No. 04-1867 (issued December 3, 2004).

[5] The period of the March 16, 2004 schedule award ran from May 2, 2003 to February 15, 2005.

[6] Docket No. 06-1019 (issued January 23, 2007).

[7] Docket No. 07-1663 (issued November 27, 2007).

[8] *Order Dismissing Appeal*, Docket No. 08-853 (issued August 8, 2008).

[9] The March 17, 2011 schedule award which amounted to $521.04 was credited to appellant's third-party recovery surplus of $838.22.

On March 18, 2011 appellant requested an oral hearing before an OWCP hearing representative.

In a September 22, 2011 decision, OWCP's hearing representative affirmed the March 17, 2011 decision finding that appellant had no more than 32 percent impairment to each lung. The decision was set aside and remanded to OWCP for determination of his correct pay rate and consideration of an overpayment. The hearing representative found that appellant was not entitled to consumer price index (CPI) increases because his accepted employment injuries occurred prior to October 1, 1966 and he was not disabled for work more than one year prior to that date.

In an October 12, 2011 notice, OWCP proposed to rescind the March 16, 2004 and March 17, 2011 schedule award decisions on the grounds that it misapplied the law in appellant's case. It found that he was last exposed to the accepted work exposure on November 21, 1961. The lung did not become a scheduled organ under FECA until September 7, 1974 when FECA was amended. Citing, *Hiram L. Hendricks*,[10] OWCP noted that the Board had clearly stated that the provision was applicable only to an injury or death occurring on or after the date of enactment. Since appellant accepted work exposure ceased prior to the 1974 enactment, he was not entitled to a schedule award as the lung was not a scheduled organ at the time of his injury. OWCP stated that while appellant did not know of his condition until 2001, he sustained his injury during the period of exposure. Since he was last exposed on November 21, 1961, appellant's entitlement to a schedule award must be based on the pre-1974 statute, which did not provide for a schedule award of the lung. He was afforded 30 days to submit additional evidence or argument. Appellant did not respond.

In a November 15, 2011 decision, OWCP finalized the proposed rescission and terminated appellant's entitlement to schedule award compensation.

On November 16, 2011 OWCP issued a preliminary notice of overpayment, finding that appellant received schedule award payments in the amount of $6,402.16 from May 2, 2003 through January 22, 2005 to which he was not entitled. Although the period of the March 16, 2004 schedule award for which he received compensation for 30 percent impairment to each lung ran from May 2, 2003 to February 15, 2005, appellant only received payments from May 2, 2003 to January 22, 2005. OWCP further noted that on March 17, 2011 he was advised that his schedule award for an additional two percent impairment to each lung amounted to $521.04, but since he had an existing third-party surplus award that exceeded this amount, he was not paid an additional schedule award. It found that appellant was without fault in creating the overpayment. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a prerecoupment hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. OWCP requested that he complete an accompanying overpayment recovery questionnaire and submit financial documents.

On November 19, 2011 appellant requested a prerecoupment hearing, contending that he did not receive an overpayment. At the March 13, 2012 hearing, he reported that he received

[10] 33 ECAB 1487 (1982).

$970.00 a month in social security retirement benefits less $180.00 for medical expenses. Appellant received no other income and was not married. He reported monthly expenses which included $210.00 for rent, $200.00 for food, $50.00 for telephone service, $70.00 for internet service, $50.00 for automobile insurance and $30.00 to $40.00 for automobile gasoline. Appellant used credit cards for food and gasoline, but stated these expenses were duplicates of the previously mentioned expenses. Following the hearing, he submitted financial records which included a statement from the Social Security Administration noting that his monthly gross benefit was $972.90 less $99.90 for Medicare, resulting in $873.00. A letter from Kaiser Hospital reported a monthly premium of $76.00. Another letter from Kaiser stated that appellant owed $100.00 for various services. A letter from Foremost Insurance Group noted a monthly premium of $50.40 for automobile insurance. Gas and electric bills for the past several months indicated that $94.53 was paid for the two months ending on December 20, 2011, $47.14 for the period ending on February 21, 2012 and $41.90 for the period ending on March 21, 2012. The total for this four-month period was $183.57. AT&T bills for telephone and internet service were $116.74 for a two-month period ending on December 20, 2011, $61.36 for the month ending on February 20, 2012 and $56.45 for the month ending on March 20, 2012, totaling $234.55. A Merrick Bank statement showed a balance of $1,051.99 and a payment of $40.00. A Chevron credit card bill showed a balance of $2,185.64 and a current payment due of $100.00.

In a May 8, 2012 decision, OWCP's hearing representative finalized the $6,402.16 overpayment, finding that appellant was not entitled to wavier of recovery of the overpayment. Appellant's monthly income exceeded his monthly ordinary and necessary expenses by $50.00. The hearing representative found that he had monthly income of $873.00 based on a recent statement from the Social Security Administration. He further found that appellant's ordinary and necessary monthly expenses included $210.00 for rent, $200.00 for food, $40.00 for gasoline, $50.40 for automobile insurance, $45.89 for gas and electric,[11] $58.64 for internet and telephone service[12] and $76.00 for a Kaiser supplemental health insurance premium, totaling $680.93. The hearing representative did not include the monthly credit card payments for Merrick Bank and Chevron based on appellant's hearing testimony that the payments were included in his other expenses. He subtracted appellant's monthly expenses of $680.93 from his monthly income of $873.00 to calculate a balance of $192.07. The hearing representative directed repayment of the overpayment at the rate of $80.00 a month.

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or application.[13] The Board has upheld OWCP's authority to set aside or modify a prior decision and issue a new decision under section 8128 of FECA.[14] The power to annul an award, however, is not an arbitrary one and an

[11] OWCP's hearing representative calculated that the total amount of appellant's average four-month expense for gas and electric was $45.89.

[12] OWCP's hearing representative calculated that the total amount of appellant's average four-month expense for Internet and telephone service was $58.64.

[13] 5 U.S.C. § 8128; *see also M.E.*, 58 ECAB 694 (2007).

[14] *John W. Graves*, 52 ECAB 160 (2000).

award for compensation can only be set aside in the manner provided by the compensation statute.[15]

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud.[16] It is well established that, once OWCP accepts the claim, it has the burden of justifying the termination or modification of compensation benefits.[17] OWCP's burden of justifying termination or modification of compensation holds true where OWCP later decides that it has erroneously accepted a claim of compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.[18]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained calcified plaques, bilateral pleurisy effusion or current tuberculosis, bilateral lung calcified nodules and left invasive moderately differentiated adenocarcinoma due to his accepted asbestos work exposure. On March 16, 2004 it granted him a schedule award for 30 percent impairment to each lung. On March 17, 2011 OWCP granted appellant a schedule award for an additional two percent impairment for each lung, for a total 32 percent impairment of each lung.

The schedule award provisions of FECA provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body.[19] The lung was added to the list of organs in 1974 under the implementing federal regulations[20] as a result of the 1974 amendments to FECA.[21] Congress provided, however, that the amendment was not retroactive.[22] Therefore, injuries occurring before 1974 are not covered. For schedule award purposes, the date of injury for an occupational disease is the date of last exposure to the causal agent, which in this case is the date that appellant was separated from the employing establishment on November 21, 1961.[23] The Board finds that OWCP properly determined that appellant was not entitled to schedule awards for impairment to his lungs under FECA. OWCP met its burden to rescind appellant's schedule awards for impairment to his lungs.

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[15] *See Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002); 20 C.F.R. § 10.610.

[16] *L.C.*, 58 ECAB 493 (2007).

[17] *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

[18] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

[19] 5 U.S.C. § 8107.

[20] 20 C.F.R. § 10.404; *see Eugene Van Dyke*, 53 ECAB 706 (2002).

[21] 5 U.S.C. § 8107(c)(22).

[22] *See Katherine M. Dunlap*, 32 ECAB 875 (1981); *Robert Henry Guy*, 29 ECAB 734 (1978).

[23] *See Patricia K. Cummings*, 53 ECAB 623 (2002); *Sherron A. Roberts*, 47 ECAB 617 (1996); *Manuel Carbajal*, 37 ECAB 216 (1985).

LEGAL PRECEDENT -- ISSUE 2

FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[24] Permanent impairment to specified members of the body may entitle a claimant to a schedule award.[25] If OWCP later rescinds a claim, the amount of any compensation paid is considered an overpayment of compensation.[26]

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 a result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefore the costs of suit and a reasonable representative'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. 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.[27]

The refundable disbursements of a specific claim consist of the total money paid by OWCP from the Employees' Compensation Fund with respect to that claim to or on behalf of a FECA beneficiary, less charges for any medical file review done at the request of OWCP and certain medical examinations.[28]

ANALYSIS -- ISSUE 2

The record establishes that an overpayment was created as appellant received schedule awards to which he was not entitled. OWCP paid him a schedule award in the amount of $6,402.16 from May 2, 2003 through January 22, 2005 for 30 percent impairment of both lungs. It also paid appellant a schedule award for an additional two percent impairment for each lung, totaling 32 percent impairment of each lung. OWCP properly rescinded the schedule awards based on his date of injury, which precluded him from receiving schedule award payments. It properly determined that the period of the overpayment was May 2, 2003 through January 22, 2005. The record establishes that appellant received schedule award payments for 30 percent impairment of each lung only during the stated period rather than during the actual period of the award which ran from May 2, 2003 to February 15, 2005. Further, he was not entitled to receive additional compensation from June 24 to August 6, 2010 under the March 17, 2011 schedule award because the amount of the award, $521.04, was properly credited by

[24] 5 U.S.C. § 8102(a).

[25] *Id.* at § 8106(a).

[26] *George A. Rodriguez*, 57 ECAB 224 (2005).

[27] 5 U.S.C. § 8132.

[28] 20 C.F.R. § 10.714.

OWCP to his third-party recovery surplus of $838.22.[29] The Board finds that, as appellant was not entitled to the schedule award, for which he received payment of $6,402.16, an overpayment of compensation was created from May 2, 2003 through January 22, 2005.

LEGAL PRECEDENT -- ISSUE 3

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.[30]

If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of FECA; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.[31]

Recovery will defeat the purpose of FECA if both: (a) the individual from whom recovery is sought needs substantially all of his current income (including periodic benefits under FECA) to meet current ordinary and necessary living expenses; and (b) the individual's assets do not exceed the resource base (including but not limited to cash, the value of stocks, bonds, savings accounts, mutual funds) of $4,800.00 for an individual or $8,000.00 for an individual with a spouse or one dependent, plus $960.00 for each additional dependent. The first $4,800.00 or more, depending on the number of claimant's dependents, is also exempted from recoupment as a necessary emergency resource. If an individual has current income or assets in excess of the allowable amount, a reasonable repayment schedule can be established over a reasonable, specified period of time. It is the individual's burden to submit evidence to show that recovery of the overpayment would cause the degree of financial hardship sufficient to justify waiver.[32] An individual is deemed to need substantially all of his or her income to meet

[29] The Board notes that section 8132 of FECA provides that an employee who sustained an injury for which compensation is payable under circumstances creating a legal liability in a party other than the United States has the obligation to reimburse to the United States that amount of compensation paid and credit any surplus on future payments of compensation payable to him for the same injury. The purpose underlying this obligation is to prevent a double recovery by the employee. *See Thomas P. Murray*, 51 ECAB 630 (2000). OWCP regulations, at section 10.711, provide that a beneficiary can 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 beneficiary retains any surplus remaining and this amount is credited, dollar for dollar, against future compensation for the same injury. OWCP will resume the payment of compensation only after the beneficiary has been awarded compensation which exceeds the amount of the surplus. 20 C.F.R. § 10.711; *see Alvin Collins*, 54 ECAB 752 (2003).

[30] *Id.* at § 10.433(a).

[31] *Id.* at § 10.434. *See* 5 U.S.C. § 8129(b).

[32] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009). *See Miguel A. Muniz*, 54 ECAB 217 (2002); 20 C.F.R. §§ 10.436, 10.437.

current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than $50.00.[33]

Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.[34] Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.[35]

ANALYSIS -- ISSUE 3

As OWCP found appellant without fault in the creation of the overpayment of compensation, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.[36]

In determining that appellant was not entitled to a waiver of the recovery of the overpayment, OWCP reviewed his income, expenses and assets. Based on the hearing testimony and financial documentation supplied by appellant, it found that he had a monthly income of $873.00 and monthly expenses of $680.93 or a difference of $192.07. Its procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than $50.00.[37] The Board finds that, as appellant's monthly income of $873.00 exceeded his documented reasonable monthly expenses of $680.93 by $192.07, he is not entitled to waiver as he does not need substantially all of his income to meet current ordinary and necessary expenses.

Appellant does not argue, and the record does not establish, that recovery of the debt would be against equity and good conscience. He did not show that he gave up a valuable right or changed his position for the worse in reliance on the overpayment.

Because appellant has failed to establish that, recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that he has failed to show that OWCP abused its discretion by refusing to waive the $6,402.16 overpayment.[38]

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[33] *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

[34] 20 C.F.R. § 10.437(a).

[35] *Id.* at § 10.437(b).

[36] *Id.* at §§ 10.436, 10.437.

[37] Federal (FECA) Procedure Manual, *supra* note 32 at Chapter 6.200.6(a)(3) (June 2009).

[38] As recovery from continuing compensation benefits under FECA is not involved in this case, the Board has no jurisdiction over the amount OWCP determined that appellant should repay each month. *Terry A. Keister*, 56 ECAB 559 2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

CONCLUSION

The Board finds that OWCP properly rescinded its finding that appellant was entitled to schedule awards. The Board further finds that it properly found that appellant received an overpayment of compensation in the amount of $6,402.16 from May 2, 2003 through January 22, 2005 due to its rescission of the schedule awards. Lastly, the Board finds that OWCP properly denied waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the May 8, 2012 and November 15, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 15, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board