

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

WALTER F. NIED, Appellant

and

**ENVIRONMENTAL PROTECTION AGENCY,
Chicago, IL, Employer**

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**Docket No. 06-510
Issued: June 22, 2006**

Appearances:
Walter F. Nied, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 28, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated December 7, 2005 finding that the \$94,360.69 surplus of the third-party recovery received by him must be credited against his future compensation payments and a merit decision dated December 9, 2005 finding that appellant was required to refund \$98,770.44 to the Office following a third-party recovery.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that the proceeds from appellant's medical malpractice suit constituted a third-party recovery under 5 U.S.C. § 8132; and (2) whether the Office properly determined that, under 5 U.S.C. § 8132, \$98,770.44 of the third-party recovery received by appellant must be refunded to the Office and the \$94,360.69 surplus credited against his future compensation payments.

¹ The December 7 and 9, 2005 decisions were not accompanied by appeal rights; however, as the Office made findings of fact and a statement of reasons in these correspondences to appellant, the Board finds that they constitute decisions. See 20 C.F.R. § 10.126.

FACTUAL HISTORY

This case is before the Board for the second time. In the first appeal, the Board affirmed July 17 and December 2, 1998 decisions finding that appellant had no more than a 40 percent impairment of his left lower extremity for which he received schedule awards.² The Office accepted the claim for left knee strain and a left and right knee medial meniscus tear. The findings of fact and conclusions of law are hereby incorporated by reference.

The record indicates that appellant brought a lawsuit against Dr. David F. Biegler, a Board-certified orthopedic surgeon, for negligence during his September 15, 1998 right knee surgery, which he contended caused an undue valgus deformity and excess bone loss from the knee.³ On August 16, 2004 a jury awarded a total of \$438,213.24 which included \$50,000.00 for disfigurement, \$100,000.00 for disability, \$250,000.00 for pain and suffering, \$29,213.24 for medical care and \$9,000.00 for lost earnings.

In a letter dated March 7, 2005, appellant's attorney requested clarification regarding whether the Office had a lien on any of the jury award in the malpractice case against Dr. Biegler. The attorney noted that the case was settled subsequent to the jury verdict for \$425,000.00. He further indicated that appellant had previously received an award in a suit brought against the party responsible for his original employment injury of June 9, 1994 and that the Office had recovered \$63,123.35 from the third-party settlement. He stated:

“It is our position that the proceeds of the medical malpractice case were for a nonwork-related injury inflicted by Dr. Biegler as a result of negligent medical care. Such an injury would not be an injury for which compensation was payable under the Federal [Employees'] Compensation Act (FECA), and, accordingly was a ‘new injury’ not arising out of the employment but rather as a result of negligent surgical procedure performed on September 14, 1998.”

By letter dated April 20, 2005, the Office informed appellant's attorney that it had a “statutory right of reimbursement on that recovery” as the Act covered injuries due to medical malpractice.⁴ The Office enclosed a statement of recovery for completion.⁵

A statement of recovery signed on June 8, 2005 calculated the surplus of the third-party settlement and the amount to be refunded to the Office. From appellant's gross third-party recovery of \$425,000.00, the Office subtracted attorney's fees of \$118,749.25 and court costs of

² *Walter F. Nied*, Docket No. 99-1428 (issued February 1, 2001).

³ On September 15, 1998 Dr. Biegler performed a partial lateral meniscectomy and a high tibial valgus closing wedge osteotomy with internal fixation on the right knee.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ The record contains a letter dated April 29, 2005 from the Office to appellant's attorney stating that it had made an error in its calculations because it had not considered the prior third-party recovery of September 1998. The letter is accompanied by a statement of recovery which shows Office disbursements as \$192,097.29, a balance to be refunded of \$138,423.29 and a surplus of compensation of \$39,332.24. In a letter dated May 4, 2005, appellant's attorney questioned the Office's method of calculating its total disbursements as \$192,097.29.

\$16,763.84. This resulted in an adjusted gross recovery of \$289,286.91, from which was subtracted appellant's statutory guarantee of 20 percent or \$57,857.38, leaving an adjusted balance of \$231,429.53. The Office calculated its disbursements for disability compensation and medical treatment as \$137,068.84 for disability compensation and the allowance for attorney's fees as \$38,298.40. The Office determined that the amount of \$98,770.44 was due as a refund and \$94,360.69 was a surplus to be credited against future benefits.

On June 8, 2005 appellant's attorney sent the Office a check for \$98,770.44.

By decision dated December 7, 2005, the Office found that appellant received a third-party recovery and that the amount of \$94,360.69 must be used to offset any future medical expenses or disability.

In a decision dated December 9, 2005, the Office notified appellant that it had properly required a refund of \$98,770.44 as injuries due to medical malpractice in treating an employment injury were covered under the Act.

LEGAL PRECEDENT -- ISSUE 1

Section 8132 of the Act provides:

"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."⁶

The Office's implementing regulations provide, "Since an injury caused by medical malpractice in treating an injury covered by the [Act] is also an injury covered under the [Act], any recovery in a suit alleging such injury is treated as gross recovery that must be reported to [the Office] or SOL [Solicitor of Labor]."⁷

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left knee strain and right and left knee medial meniscus tears due to a June 9, 1994 employment injury. On September 15, 1998 Dr. Biegler performed a right knee partial lateral meniscectomy and a high tibial valgus closing wedge osteotomy with internal fixation.

⁶ 5 U.S.C. § 8132.

⁷ 20 C.F.R. § 10.717.

Appellant filed a complaint in state court for medical malpractice against Dr. Biegler in performing the September 15, 1998 surgery. He settled the case and received an award of \$425,000.00. Appellant's attorney argued that the medical malpractice award was for a new injury caused by the medical malpractice and thus was not employment related. Office regulations specifically provide, however, that any recovery in a medical malpractice suit for malpractice in treating a covered injury under the Act is considered "a gross recovery that must be reported..."⁸ Consequently, the Board finds that appellant's medical malpractice settlement constituted a third-party recovery and the Office is entitled to a portion of the recovery under section 8132 of the Act.

LEGAL PRECEDENT -- ISSUE 2

With respect to the amount of any settlement or judgment that must be refunded, section 8132 provides that "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."⁹ The Office's implementing regulation, 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 section 10.719. [The Office] will resume the payment of 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 [s]tatement of [r]ecovery form approved by [the Office]:

- (1) Determine the gross recovery as set forth in section 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 [the Office] or SOL to be reasonable, from the gross recovery (Subtotal A);
- (3) Subtract the costs of litigation, as allowed by [the Office] or SOL (Subtotal B);

⁸ *Id*; see also *Ruey J. Yu*, 49 ECAB 256 (1997).

⁹ 5 U.S.C. § 8132.

- (4) Subtract one fifth of Subtotal [A] from Subtotal B (Subtotal C);
- (5) Compare Subtotal C and the refundable disbursements as defined in section 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 no more than the maximum amount of attorney's fees considered by [the Office] or SOL to be reasonable, to determine the Government's allowance for attorney's fees, and subtract this amount from Subtotal D.¹⁰

“(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 section 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.”¹¹

ANALYSIS -- ISSUE 2

There is no dispute that appellant received \$425,000.00 from a third-party lawsuit brought for medical malpractice due to surgery necessitated by his employment injury. Section 8132 provides that an employee receiving money from a third party in satisfaction of a legal liability resulting from the injury, shall refund to the United States, after deducting costs such as attorney fees, the amount of compensation paid. The purpose of this section is to prevent a double recovery by the employee -- that is, the recovery of both compensation for wage loss and recovery from a responsible tortfeasor for the same injury.¹² In this case, appellant received money in a third-party settlement as a result of a medical malpractice suit that he brought against a physician who treated his employment injury. Consequently, section 8132 requires that he refund a portion of that recovery to the United States. The statute is mandatory and neither the Office nor the Board may enlarge or modify the terms of the Act.¹³

The amount of the refund to the United States is determined according to the specific calculations set forth at section 10.711. The formula, as applied in this case, is as follows: From appellant's gross third-party recovery of \$425,000.00, the Office properly subtracted attorney's

¹⁰ 20 C.F.R. § 10.711.

¹¹ *Id.*

¹² See *Sammy L. High*, 55 ECAB ____ (Docket No. 04-1190, issued September 8, 2004); *Alvin Collins*, 54 ECAB 752 (2003).

¹³ *Id.*

fees of \$118,749.25 and associated court costs of \$16,963.84. This resulted in an adjusted gross recovery of \$289,286.91 from which was subtracted appellant's statutory guarantee of 20 percent of the recovery (\$57,857.38) leaving an adjusted balance of \$231,429.53. The initial amount to be refunded to the Office on behalf of appellant (\$98,770.44) was determined by reducing the medical disbursements made by the Office on behalf of appellant (\$137,068.84) by his allowance for attorney's fees (\$38,298.40). In accordance with the regulatory formula, appellant's representative properly refunded the amount of \$98,770.44 to the Office. Reducing the adjusted balance by the disbursements made by the Office resulted in a surplus of \$94,360.69, which the Office properly found as an offset against future compensation benefits until the surplus has been exhausted.

CONCLUSION

The Board finds that the Office properly determined that the proceeds from appellant's medical malpractice suit constituted a third-party recovery under 5 U.S.C. § 8132. The Board further finds that the Office properly determined that \$98,770.44 of the third-party recovery received by appellant was to be refunded to the Office and the \$94,360.69 surplus credited against his future compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 9 and 7, 2005 are affirmed.

Issued: June 22, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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