



## **FACTUAL HISTORY**

On March 18, 2005 appellant, then a 54-year-old letter carrier, sustained an injury in the performance of duty when, while delivering mail, a flagstone step gave way on a customer's front stairway and he fell down the stairs. The Office accepted his claim for sprain/strain shoulder/arm unspecified, sprain/strain of neck, sprain/strain lumbar region and contusion of the knee. Appellant received compensation for temporary total disability on the periodic rolls. On August 2, 2005 he underwent a right shoulder distal clavicle excision, acromioplasty and rotator cuff repair. Appellant returned to full-time work on November 26, 2005.

On June 5, 2006 Dr. Leo J. Troy, an attending Board-certified orthopedic surgeon, found that appellant had achieved a medical end result with respect to his shoulder. He provided a rating of permanent impairment. On June 12, 2006 appellant filed a claim for a schedule award. On August 24, 2006 Dr. Troy clarified that June 5, 2006 was the date of maximum medical improvement.

On February 26, 2007 appellant's representative inquired about the status of the schedule award claim, as the Office had all the information it needed with Dr. Troy's August 24, 2006 report. He inquired again on April 24, 2007, asking when the schedule award would be effective.

Appellant received a third-party recovery arising from his March 18, 2005 fall. On May 25, 2007 his representative completed a Form EN1108, statement of recovery. Appellant's representative refunded the Office two-thirds of the compensation paid at that time.<sup>2</sup>

On February 4, 2008 the Office granted a schedule award for a 15 percent impairment of appellant's right upper extremity. The period of the award was June 5, 2006 to April 28, 2007 and the award totaled \$27,999.76. The decision noted: "As you currently have a third[-]party recovery surplus of \$44,672.58 present on your case, the entitlement noted in line [seven] above [\$27,999.76] will be deducted from such surplus. You are not entitled to any payment at this time."

Appellant's representative requested a review of the written record by an Office hearing representative. He argued that the Office's delay caused the schedule award to be treated as a future benefit under the Statement of Recovery, which meant appellant received nothing because it was fully offset against the surplus. The representative argued that it was not a future benefit because appellant's entitlement accrued during the period of the schedule award and well before the resolution of the third-party case. He asked that the award be considered an Office disbursement, against which the Government allowance for representative fees would apply.

In a decision dated June 13, 2008, the Office hearing representative affirmed the February 4, 2008 schedule award and the offset against appellant's third-party recovery surplus. She found that the offset was mandatory. The hearing representative also found no provision

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<sup>2</sup> Line 14 of the Statement of Recovery showed \$33,570.42 in refundable Office disbursements, one-third of which appellant was entitled to retain for representative's fees.

allowing the retroactive revision of the Statement of Recovery to include a schedule award issued after the third-party settlement.

### **LEGAL PRECEDENT**

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 therefrom 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.<sup>3</sup>

The refundable disbursements of a specific claim consist of the total money paid by the Office from the Employees' Compensation Fund with respect to that claim to or on behalf of the Federal Employees' Compensation Act beneficiary, less charges for any medical file review done at the request of the Office and certain medical examinations.<sup>4</sup>

### **ANALYSIS**

On appeal, appellant's representative contends that the Office's delay in issuing the schedule award cost appellant a monetary benefit because it became a future benefit instead of a present distribution. He argues that appellant is entitled to receive the full amount of the schedule award granted, from which he would then give the Office the refund it is owed under the EN1108 worksheet.

Treating the schedule award as a present or refundable distribution on Line 14 of the EN1108 form would allow appellant to retain one-third of the award or \$9,333.25, for representative's fees. However, that is not the standard for determining whether appellant's February 4, 2008 schedule award should be considered a refundable disbursement or a future payment of compensation. The statute states that appellant shall refund to the United States the amount of compensation "paid" by the United States and regulations define refundable disbursements as the total money "paid" by the Office. The Office had paid no schedule award when his representative completed the EN1108 form on May 25, 2007. So no schedule award may be considered a refundable disbursement. The plain meaning of the statute and implementing regulations requires the Office to consider the February 4, 2008 schedule award a future payment of compensation payable to appellant for the same injury.

As to any delay in adjudicating the schedule award claim, the Board has set no time by which the Office must issue a decision. Even if the delay in this case was unreasonable, the statutory language and definition of refundable disbursements do not permit a schedule award

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<sup>3</sup> 5 U.S.C. § 8132.

<sup>4</sup> 20 C.F.R. § 10.714.

not actually paid to be included on Line 14 of the EN1108 form. Therefore, this is regardless of the period of entitlement.

The Board has held that if an employee has a surplus from a third-party recovery at the time the Office pays a schedule award, the amount of the award should be credited against the surplus.<sup>5</sup> In *Darlene Blocker*,<sup>6</sup> the employee received a third-party recovery and, on September 12, 2003, her representative forwarded a check reimbursing the Office for disbursements. Six days later, on September 18, 2003, the Office issued a schedule award. Noting that the employee had a surplus from her third-party recovery “at the time the schedule award was paid to her on September 18, 2003,” the Board held that the amount of the schedule award should have been credited against the surplus.

In the case of *Richard J. Maher*,<sup>7</sup> the employee received a third-party recovery and his representative repaid the Office for disbursements. The Office acknowledged receipt of the reimbursement check on March 5, 1986. Subsequently, a schedule award was issued on December 12, 1990 the period of which ran from February 1 to November 30, 1983. It did not matter that the entire period of the schedule award fell prior to 1986. At the time the Office paid the schedule award in 1990, the employee had a third-party recovery surplus. The Board held that, under section 8132 of the Act it was mandatory for the Office to offset the amount payable as a schedule award against the third-party recovery surplus. The Board noted that neither the Office nor the Board has the authority to enlarge or modify the terms of the Act.

Appellant’s representative argues that appellant should, at the very least, be allowed to take advantage of the lien reduction as applied to the gross recovery because the schedule award was not a future benefit. This appears to be the same argument the employee made in *John S. Abany*.<sup>8</sup> The employee correctly contended that, if the Office had issued his schedule award prior to the receipt of the third-party recovery, it would have become part of the total Government lien, and the greater the Government lien, the greater the amount he would be entitled to retain as the Government allowance for representative’s fees. He argued that he should not be penalized simply because the Office issued the schedule award after distribution of the third-party recovery. The Board held that the language of the statute made clear that a reasonable representative’s fee is allowed only at the time of distribution of the third-party recovery and that neither section 8132 nor any other section of the Act allowed an employee a reasonable representative’s fee proportionate to each offset made against the third-party recovery surplus, regardless of the nature of the offset. The Board again noted that there was no authority to enlarge or modify the terms of the Act.

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<sup>5</sup> *Thomas P. Murray*, 51 ECAB 630 (2000). The employee’s representative sent the Office a check for disbursements on March 15, 1995. The employee filed a schedule award claim on June 22, 1995. Two years later he received a schedule award. As the employee had “at the time the schedule award was paid to him” a surplus from his third-party recovery, the Board held that the amount of the schedule award should have been credited against the surplus.

<sup>6</sup> Docket No. 05-1008 (issued October 6, 2005).

<sup>7</sup> 42 ECAB 902 (1991).

<sup>8</sup> Docket No. 88-1186 (issued May 18, 1989).

The terms of the Act are controlling. Appellant's February 4, 2008 schedule award must be considered a future payment of compensation payable to him for the same injury and must be offset against his existing third-party recovery surplus. The Board will affirm the Office hearing representative's June 13, 2008 decision.

**CONCLUSION**

The Board finds that appellant's February 4, 2008 schedule award, for the period June 5, 2006 to April 28, 2007, should be considered a future payment of compensation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 13, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 5, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board