U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN A McDONALD and U.S. POSTAL SERVICE,
POST OFFICE, Merrifield, Va.

Docket No. 95-2787; Submitted on the Record;
Issued February 23, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a lump-sum settlement.

On October 25, 1979 appellant, then a 28-year-old letter carrier, was running at work when he developed severe pain in his lower back.[1] On November 28, 1980 appellant was attacked by a coworker, which aggravated his back pain. The Office accepted appellant's claim for degenerative disc disease, herniated nucleus pulposus at L5-S1, back strain and contusion and laceration of the skull. Appellant received continuation of pay from December 1, 1980 through January 8, 1981. The Office paid intermittent temporary total disability, from January 14 through February 14, 1981 and continuous temporary total disability compensation from February 15, 1981 through January 20, 1982. Appellant received compensation for the ability to work four hours a day for the period January 21 through March 15, 1982. In an April 29, 1982 decision, the Office terminated appellant's compensation for refusal to accept suitable work. On April 15, 1983 appellant underwent microlumbar discectomy at L5-S1, bilaterally. The Office reinstated appellant's temporary total disability compensation effective August 1, 1983. The Office subsequently accepted appellant's claim for depressive disorder with paranoid symptoms.

In an October 12, 1989 letter, appellant requested a lump-sum settlement. In response to a September 2, 1993 letter from the Office, appellant, in a November 15, 1993 letter, submitted a financial plan in which he proposed to invest his lump-sum settlement in municipal bonds, at four percent interest, which he calculated would provide sufficient annual income, supplemented by disability retirement income, for him to maintain his current standard of living. He discussed at length his relationship with the employing establishment in the early 1980's which he

[1] The case record submitted on appeal contains all of appellant's medical records from the beginning of his claim but only contains factual and administrative records after September 11, 1981. However, the record contains sufficient evidence to consider appellant's claim for a lump-sum settlement.

considered to be the cause of the termination of his compensation in 1982. He indicated that during the period he was not receiving compensation, he lived on the street for a brief period of time until his mother took him in. He contended that he made several visits to the Office in which he made enemies of people, who were in a position to terminate his compensation and carried out their intention to do so. He claimed that his compensation was terminated for refusal to accept employment, with the employing establishment even though the employing establishment offered only a vague position description and not a job and subsequently refused to even offer him a job but instructed him to apply for retirement. He argued that the employees of the Office and the employing establishment were guilty, of gross negligence in his case and contended that those employees should have used their positions to represent the U.S. Government and not carry out a personal vendetta against him. He stated that the final result of these actions was that he had suffered several psychological trauma and continued to suffer severe paranoia in all dealings with the Office. He claimed that he would never function as a whole being as a result of the actions of the employing establishment and the Office and argued that if he was ever to regain any part of his life, he should be separated from the Office through a lump-sum settlement.

In an August 26, 1994 decision, the Office rejected appellant's request for a lump-sum settlement on the grounds that the evidence of record did not establish the existence of extraordinary circumstances justifying further consideration of appellant's request for a lump-sum settlement. In an accompanying memorandum to the Director of the Office, an Office claims examiner indicated that under the Office's regulations, the Director, in the exercise of his discretion to make lump-sum settlements, had determined that lump-sum payments would no longer be made to individuals whose injury, in the performance of duty resulted in wage loss. The claims examiner indicated that appellant was not entitled to a lump-sum settlement because he had an injury which resulted in a loss of wage-earning capacity.

The Board finds that the Office did not abuse its discretion in denying appellant's request for a lump-sum settlement.

Section 8135(a) of the Federal Employees' Compensation Act,[2] which allows for the discharge of the liability of the United States by payment of lump sums, affords full discretion to the Secretary of Labor to decide whether or not to use lump sums at all as a means of fulfilling the responsibility of the Office in administering the Act. Revised 20 C.F.R. § 10.311(a) now provides that a lump-sum payment of wage-loss benefits will no longer be considered. 20 C.F.R. § 10.311 states:

> "(a)(1) In exercise of the discretion afforded by section 8135(a), the Director has determined that lump-sum payments will no longer be made to individuals whose injury in the performance of duty as a federal employee has resulted in a loss of wage-earning capacity. This determination is based on, among other factors:
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> "(i) The fact that [the Act] is intended as a wage-loss replacement program;

[2] 5 U.S.C. § 8135(a).

"(ii) The general advisability that such benefits be provided on a periodic basis; and

"(iii) The high cost associated with the long-term borrowing that is necessary to pay out large lump sums.

"(2) Accordingly, where applications for lump-sum payments for wage-loss benefits under sections 8105 and 8106 are received, the Director will not exercise further discretion in the matter."[3]

The rationale for promulgating the regulation, which was made effective for all pending cases, is set forth in the Federal Register[4] as follows:

"The preamble to the proposed rule published December 26, 1991 (56 Fed. Reg. 66,817), set forth the basis for the Secretary's determination that lump-sum payments of wage-loss benefits under [the Act] 5 U.S.C. § 8101 *et seq.*, will no longer be considered."

* * *

"Under section 8135 of the [the Act] the wage loss and schedule award obligations of the government may be met through a lump-sum payment of benefits, an amount determined by multiplying the yearly benefits by the number of years the beneficiary is expected to live and discounting at four percent. The decision to make a lump-sum payment is completely at the discretion of the Secretary of Labor, who has delegated this authority to the Director of the Office.

"The discretion is twofold: First, whether or not to fulfill the government's obligation through a lump-sum payment, since the statute only authorizes but does not require that such a form of payment be made; and second (if it is determined that a lump-sum payment may be made) whether or not the payment may be made in the individual case. The statute does not limit the Secretary's discretion in the first instance, but in the second, it limits the Secretary's authority to make such payments to only three situations: Where the monthly payment is less than $50.00; where the individual is about to become a nonresident of the United States; or where the Secretary determines that it is for the best interest of the beneficiary.

"Over the life of the program, lump-sum payments have rarely been made and, until now, the initial determination of whether or not to fulfill the government's obligation through a lump sum has been made on a case-by-case basis. Effective with this rule, however, lump-sum payments will not be substituted for periodic wage-loss benefits under any circumstances. Where lump-sum payment of

[3] 20 C.F.R. §§ 10.311(a)(1)-(2) (April 1, 1993).

[4] 57 Fed. Reg. 35,752 (1992).

compensation is required by statute pursuant to section 8135(b) (that is, where a surviving spouse entitled to compensation remarries before age 55), such payment shall be made. The Secretary has determined that a request for a lump-sum payment for a schedule award will still be considered on a case-by-case basis, using the statutory criterion of whether the payment would be in the best interest of the claimant. It will generally not be considered in the claimant's best interest to grant a lump-sum payment where the individual depends on the schedule award as a substitute for wage loss.

"The Secretary has made the determination that lump-sum payments will not be made in cases involving periodic wage-loss benefits based on several factors. Foremost among these is that regular periodic payments, providing for cost-of-living increases safe from speculation or economic fluctuations and free from creditors, generally more nearly provide the measure of security that the Act was designed to afford, and more closely approximates the lost wages that the Act is designed to replace. Lump-sum payments are not in any way required in order to fulfill the purposes of the Act. In addition, periodic payments are also consistent with government accounting and budgeting practices, while lump-sum payments are directly counter to those practices. This rule also represents sound fiscal policy, since the cost of lump-sum payments is generally greater than periodic payments where interest rates are above four percent and the claimant does not live longer than the life tables project.

"As noted, section 8135(a) merely authorizes lump-sum payments and gives the Secretary broad discretion to determine whether to grant a request for lump-sum payments. While the Secretary has until now chosen to exercise that discretion by deciding that each individual request should be reviewed, the proposed rule pointed out that such discretion can be exercised by deciding that no lump-sum payments will be made. Since the Secretary has now determined that the government will fulfill its obligation for wage-loss benefits only by means of periodic rather than lump-sum payments, there is no need to exercise further discretion in an individual case. *See International Union, UAW* v. *Dole*, 919 F.2d 753 (D.C. Cir. 1990). The administrative resources of the Secretary will thus be conserved, as the increasing number of lump-sum requests may be dealt with on the basis of the regulation instead of on a case-by-case basis which required factual and medical development of each individual case."[5]

In the analysis of comments contained within the Federal Register, the Secretary stated that he considered the regulation fully consistent with the Board's holdings in this area.[6]

[5] 57 Fed. Reg. 35,752, 35, 753 (1992).

[6] *See* 57 Fed. Reg. 35,754. In *Thelma R. Bushnell*, 43 ECAB 660 (1992) the Board stated that the Director was not required by statute, regulation, or Board case law to undertake any development of any application for a lump-sum payment or to make any determination on an applicant's best interest merely upon application.

Section 8135(a) of the Act does not give a claimant the right upon request, or impose a requirement upon the Office, to grant a lump-sum award. Section 8135(a) of the Act, which pertains to lump-sum awards, vests the Director of the Office[7] with the discretionary authority to determine whether or not it will grant a lump-sum award following a determination that a claimant is entitled to compensation for wage loss. Section 8135(a) of the Act states as follows:

> "The liability of the United States for compensation to a beneficiary in the case of death or of permanent total or permanent partial disability *may be* discharged by a lump-sum payment equal to the present value of all future payments of compensation computed at four percent true discount compounded annually if --
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> (1) [T]he monthly payment to the beneficiary is less than $50.00 a month;
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> (2) [T]he beneficiary is or is about to become a nonresident of the United States; or
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> (3) [T]he Secretary of Labor determines that it is for the best interest of the beneficiary...."[8] (Emphasis added.)

In the case of *Kenneth L. Pless*[9] the Board upheld the Office's new regulation. The claimant in that case contended that the congressional directive that "the liability of the United States ... may be discharged by a lump-sum payment" was not discretionary and must be interpreted to require the Office to grant a lump-sum payment once one of the three sub-paragraphs is found applicable. The Board disagreed. It found that the analysis in *International Union, UAW v. Dole*[10] was applicable. In *International Union, UAW* the court noted as follows:

> "The appropriate standard of review of the Secretary's interpretation of the statute is stated in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Chevron*'s two-part test, we first look to see if Congress had a clearly discernible intent on the precise question at issue. If so, then that intention must be given effect. If, however, the statute is ambiguous or silent on the issue, then we must determine whether the Secretary's interpretation is a permissible construction of the statute."[11]

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[7] The Director of the Office is the designated representative of the Secretary of Labor with respect to administration of the Act. 5 U.S.C. § 8145 states as follows: "The Secretary of Labor shall administer and decide all questions arising under this subchapter. He may -- (1) appoint employees to administer this subchapter, and (2) delegate to any employee of the Department of Labor any of the powers conferred on him by this subchapter." Pursuant to 5 U.S.C. § 8145 the Secretary of Labor has delegated responsibility for administering the provisions of the Act, except for 5 U.S.C. § 8149 which pertains to the Employees' Compensation Appeals Board, to the Director of the Office and his or her designees; *see* 20 C.F.R. § 10.2.

[8] 5 U.S.C. § 8135(a).

[9] 45 ECAB 175 (1993).

[10] 919 F.2d 753 (D.C. Cir.1990).

[11] *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781-82.

The intention of Congress in cases, involving lump-sum settlements is clear in granting discretion to the Secretary to award lump-sum settlements to injured federal employees, for a loss of wage-earning capacity. The use of the word "may" in section 8135 of the Act underscores the intent of Congress that discretion be delegated to the Secretary and hence to the Office, in the determination of whether or not to grant a lump-sum payment.

In this case, appellant has contended that it is in his best interest to receive a lump-sum settlement, because of his fear and suspicion of the Office and the employing establishment, arising from the termination of his compensation in the April 29, 1982 decision. However, his reasons for requesting a lump-sum settlement are not relevant under section 10.311(a) of the regulations. Appellant is currently receiving temporary total disability compensation. Under section 10.311 it is presumed that in, appellant's current circumstances, receipt of regular, periodic compensation payments is in his best financial interest. Section 10.311(a) is dispositive of appellant's application for a lump-sum settlement.

Appellant first requested a lump-sum settlement in an October 12, 1989 letter, prior to the issuance of section 10.311(a) of the regulations. However, the regulation applies to all requests for lump-sum payments pending at the time of the implementation of the regulation as well as all requests for lump-sum payments submitted after that time.[12] Appellant's request for a lump-sum payment, therefore, was subject to the application of section 10.311(a).[13]

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[14] There is no indication that the Office's action in denying appellant's request for a lump-sum payment was an abuse of discretion despite appellant's arguments to the contrary. There is no evidence of record that employees of the Office acted from personal motives in reaching the decision to terminate appellant's compensation or were acting from a personal vendetta as accused by appellant. Therefore, it would not be contrary to logic to have the Office continue to make periodic payments of compensation to appellant so as to provide for his financial security.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Lump-Sum Payments*, Chapter 2.1300.4 (September 1992).

[13] The Board notes that the Office, in the August 24, 1994 decision, denied appellant's request for a lump-sum settlement on the grounds that he failed to show extraordinary circumstances to would justify such a settlement. Since the implementation of section 10.311(a), this is no longer a basis to be used in denying a request for a lump-sum payment. However, the Office claims examiner, in the accompanying memorandum to the Board, cited the proper standard that, under 10.311(a), appellant would not receive a lump-sum settlement because he was still in receipt of compensation for wage loss.

[14] *Daniel J. Perea*, 42 ECAB 214 (1990).

The decision of the Office of Workers' Compensation Programs, dated August 26, 1994, is hereby affirmed.

Dated, Washington, D.C.
February 23, 1998

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member