

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of ARDATH W. JACKSON and DEPARTMENT OF THE ARMY,  
MILITARY SEA TRANSPORTATION SERVICE, Seattle, Wash.

*Docket No. 97-779; Submitted on the Record;  
Issued February 22, 1999*

---

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether appellant is entitled to a schedule award for a permanent loss of use of his lungs; (2) whether the Office of Workers' Compensation Programs used the proper rate of pay in computing appellant's compensation for the period beginning May 19, 1994; and (3) whether the Office properly determined that further compensation benefits cannot be paid to appellant until the surplus from his third-party recoveries is offset.

On May 8, 1989 appellant filed a claim for asbestosis or pulmonary impairment which he attributed to his exposure to asbestos during his federal employment as a pipefitter, boiler tender and oiler from 1948 to 1951. By letter dated June 15, 1990, the Office advised appellant that it had accepted that he had sustained asbestos-related disease in the performance of duty, but that there was at that time no evidence of impairment or disability. By decision dated November 9, 1995, the Office found that appellant was entitled to compensation for total disability beginning May 19, 1994. The Office based appellant's payment of compensation on the rate of pay he was receiving at the time he last worked for the federal government on November 15, 1951.

By decision dated January 24, 1996, the Office found that it had used the proper rate of pay in computing appellant's compensation, that he was not entitled to a schedule award for permanent impairment of the lungs and that he was not entitled to receive continuing compensation for disability while an unresolved third-party surplus existed. By decision dated March 28, 1996, the Office again found that appellant's rate of pay was properly computed. By decisions dated July 11 and September 23, 1996, the Office refused to reopen appellant's case for further review of the merits of his claim.

The Board finds that appellant is not entitled to a schedule award for permanent loss of use of his lungs.

Since it was amended on October 14, 1949,<sup>1</sup> the Federal Employees' Compensation Act has provided for payment of schedule awards for permanent loss of use of certain specified anatomical members or functions of the body.<sup>2</sup> Schedule awards are not payable for parts or functions of the body, such as the lung, not specifically enumerated in the Act.<sup>3</sup> The Act was amended effective September 7, 1974 to authorize a schedule award for loss or loss of use of "any other important external or internal organ of the body as determined by the Secretary [of Labor]."<sup>4</sup> Pursuant to regulations, the Office has provided for a schedule award for a permanent loss of use of the lungs.<sup>5</sup> However, the 1974 amendments specifically state that this provision is applicable only to an injury or death occurring on or after the date of enactment, September 7, 1974. This amendment is therefore inapplicable to appellant because his exposure to asbestos in his federal employment ended in 1951, prior to the effective date of the 1974 amendments.<sup>6</sup>

The Board finds that the Office properly selected appellant's pay rate on November 15, 1951, the date appellant last worked for the federal government, as the basis for its payment of compensation for disability beginning May 19, 1994.

Section 8105(a) of the Act<sup>7</sup> provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability." Section 8101(4) of the Act provides: "'monthly pay' means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than 6 months after the injured employee resumes full-time employment with the United States, whichever is greater."<sup>8</sup>

In the present case, appellant resigned from the employing establishment effective November 15, 1951, but continued to work for various private employers until February 17, 1994. Appellant's attending physician stated, and an Office referral physician concurred, that appellant became disabled on May 19, 1994. There is no medical evidence that appellant became disabled at an earlier date.<sup>9</sup> Since appellant last worked for any employer on February 18, 1994, he had no monthly pay or pay rate at the time his disability began on

---

<sup>1</sup> 63 Stat. 854.

<sup>2</sup> The schedule award provision is presently at 5 U.S.C. § 8107.

<sup>3</sup> *Hiram L. Hendricks*, 33 ECAB 1487 (1982).

<sup>4</sup> Act of September 7, 1974, 88 Stat. 1145.

<sup>5</sup> 20 C.F.R. § 10.304(a).

<sup>6</sup> *Beth P. Chaput*, 37 ECAB 158 (1985).

<sup>7</sup> 5 U.S.C. § 8105(a).

<sup>8</sup> 5 U.S.C. § 8101(4).

<sup>9</sup> A July 23, 1996 report from appellant's attending physician was not received by the Office prior to its most recent decision, and therefore cannot be considered by the Board, as its review is limited by 20 C.F.R. § 501.2(c) to "the evidence in the case record which was before the Office at the time of its final decision."

May 19, 1994.<sup>10</sup> As this case does not involve a recurrence of disability after resumption of employment with the United States, the Office properly concluded that his highest rate of pay under section 8101(4) of the Act was the rate of pay on the date of injury.<sup>11</sup>

The Board finds that the Office properly determined that further compensation benefits cannot be paid to appellant until the surplus from his third-party recoveries is offset.

Section 8132 of the Act<sup>12</sup> provides that an employee who sustains injury for which compensation is payable under circumstances creating legal liability in a party other than the United States has the obligation to “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” once recovery is made against the responsible tortfeasor. The purpose underlying this obligation is to prevent a double recovery by the employee.<sup>13</sup>

In the present case, appellant received settlements from several companies involved in the manufacture or distribution of asbestos products. Although appellant made a payment to the Office to cover a portion of its disbursements, the amount of the settlements, less the statutory deductions, still exceeded the amount of the Office’s disbursements. The statute mandates that the Office offset the surplus against future payments of compensation for disability or medical benefits.<sup>14</sup>

---

<sup>10</sup> *Fernando O. Valles*, 44 ECAB 776 (1993). (The Board stated: “In the present case, appellant had no ‘pay rate’ as of July 18, 1989, the date of his accepted recurrence of disability, as he had retired and had no earnings or salary from federal or civilian employment. Therefore, the Office properly concluded that the highest rate of pay under section 8101(4) was the rate of pay as of the date of the injury.”) FECA Program Memorandum No. 268 (issued December 16, 1980), does not apply to the present case, as it addresses pay rate in situations where “the individual is working in private industry at the time disability begins.” As noted in the body of this decision, appellant was not working for any employer at the time his disability began on May 19, 1994.

<sup>11</sup> The date of “injury” is the date of last exposure to asbestos in federal employment. *Daniel J. Alfano*, 34 ECAB 314 (1982).

<sup>12</sup> 5 U.S.C. § 8132.

<sup>13</sup> *Richard J. Maher*, 42 ECAB 902 (1991).

<sup>14</sup> *Claude W. Darris*, 37 ECAB 190 (1985).

The decisions of the Office of Workers' Compensation Programs dated September 23, July 11, March 28 and January 24, 1996 are affirmed.

Dated, Washington, D.C.  
February 22, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member