U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH A. MATAIS and FEDERAL EMERGENCY MANAGEMENT AGENCY, Alexandria, VA

Docket No. 00-2378; Submitted on the Record;
Issued December 10, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs acted properly in suspending appellant's compensation benefits until such time as the third-party credit in his case had been offset.

On April 30, 1997 appellant, then a 60-year-old disaster assistance employee, was injured in an automobile accident while in the performance of duty. The Office accepted the claim for L4-5 subluxation. Appellant stopped work on the date of injury and began receiving compensation for wage loss on the periodic rolls.

In a Form CA-1045 dated May 29, 1998, the Office notified appellant that his injury arose under circumstances which might place liability for damages on a third party. The letter stated in part:

> "When damages are recovered from a third party, the beneficiary must reimburse the United States for any payments made to or on behalf of him or her. However, the Federal Employees' Compensation Act also provides that where recovery is made, the beneficiary is entitled to retain at least one-fifth of the money or property remaining after the expenses of the suit or settlement (such as an attorney's fee and court costs) have been deducted. This amount is retained by the beneficiary and is not included in any further computation of the amount to be refunded to the United States. In addition, where a beneficiary used the services of an attorney in obtaining recovery from the third party, the amount to be refunded to the United States is reduced by a reasonable attorney's fee proportionate to the refund."

On February 10, 1999 appellant's counsel provided a statement of recovery to the Office showing that appellant had obtained a $90,000.00 settlement award in a third-party lawsuit filed against the driver responsible for his work-related automobile accident.

In a March 11, 1999 letter, the Office notified appellant as to his liability to the United States respecting reimbursement of compensation and medical benefits based on his receipt of a third-party settlement. The Office explained to appellant that, while his right to benefits had not been terminated, no further compensation payments would be made to him until the surplus from his third-party settlement award had been absorbed.

In a letter dated July 23, 1999, the Office advised appellant that the amount of the surplus was $25,327.02.[1]

In a May 28, 1999 letter, appellant informed the Office that he had spent most of his $90,000.00 settlement award on home improvements. He suggested that the Office prorate his offset so that he could continue to receive some type of reduced monthly compensation.

In a decision dated October 7, 1999, the Office determined that appellant's compensation would be offset by the $25,370.02 amount of the third-party settlement until such time as that surplus had been absorbed.

Appellant disagreed with the decision and requested a review of the written record by the Branch of Hearings and Review.

In a decision dated February 16, 2000, an Office hearing representative affirmed the Office's October 7, 1999 decision.

On February 28, 2000 appellant requested reconsideration and argued that he was entitled to greater than the allocated 20 percent of the settlement award used to calculate his offset.[2] In support of his reconsideration request, appellant submitted a standard Form 50 to verify his annual salary as of January 7, 1996.

In a decision dated June 5, 2000, the Office found the evidence insufficient to warrant modification of its prior decision.

The Board finds that the Office properly suspended appellant's compensation benefits until such time as the third-party credit in his case had been offset.

Section 8132 of the Act provides that an employee, who sustains an injury for which compensation is payable under circumstances creating legal liability in a party other than the

[1] From the sum of $90,000.00 the Office subtracted $30,000.00 in attorney fees and 20 percent of the net recovery ($12,000.00) to which appellant was entitled under the Act, leaving an adjusted net recover of $48,000.00. The Office further deducted $15,115.32 for a refund paid by appellant and $7,557.66 for the government allowance for attorney fees. The total of $22,672.98 ($15,115.32 + $7,557.66) was subtracted from $48,000.00 to find a surplus of $25,327.02.

[2] Appellant further argued that the Office was not entitled to a greater financial interest than was stated on the form CA-1045 letter dated May 29, 1998.

United States has the obligation to reimburse "to the United States the amount of compensation paid" once recovery is made against the responsible tortfeasor.[3] The purpose underlying this obligation is to prevent a double recovery by the employee.[4]

In the present case, appellant was properly advised by form letter CA-1045, that the United Sates was entitled to a third party liability credit and that any damages he recovered from a third party suit would be credited against his compensation benefits. At the time appellant received his $90,000.00 settlement award, he was on the periodic rolls for wage loss. The receipt of the settlement award and compensation for the same disability constituted a double recovery. Therefore, the Office applied section 8132 to ascertain a surplus amount of $25,370.03 to be offset against appellant's future compensation.

The Board has reviewed the Office's calculation of the offset amount and deems it to be correct. The Office properly deducted from the amount of the third-party settlement award the cost of suit and reasonable attorney fees. Appellant was also properly allowed to retain at least one-fifth or 20 percent of the settlement amount remaining after the expenses of the suit had been deducted and at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to be refunded to the United States as required by section 8132 of the Act.[5]

[3] 5 U.S.C. § 8132 provides as follows:

> "Adjustment after recovery from third person. 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 the liability as a result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the cost of suit and a reasonable attorney's fee, shall refund to the United Stated 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. No court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States. The amount refunded to the United States shall be credited to the Employees' Compensation Fund. 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. However, 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 settlement have been deducted; and in addition to the minimum and at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund to the United States." *Richard J. Maher*, 42 ECAB 902 (1991); *Paul L. Dion*, 36 ECAB 656 (1985).

[4] There is no regulatory support for appellant's argument that he is entitled to retain in excess of 20 percent of his settlement award in calculation of the offset for third-party liability. The Board further notes that the Office did not retain any portion of the settlement. Appellant retained not only 20 percent but the surplus amount, which was credited against future compensation.

[5] There is no regulatory support for appellant's argument that he is entitled to retain in excess of 20 percent of his settlement award in calculation of the offset for third-party liability. The Board further notes that the Office did not retain any portion of the settlement. Appellant retained not only 20 percent but the surplus amount, which was credited against future compensation.

In *David R. Gilmer*, the Board noted that it is was mandatory for the Office to offset the amount to which it is entitled from future compensation benefits and to see that any remaining surplus is also credited on future payments of compensation payable for the same injury."[6] In the present case, as in *Gilmer*, it is mandatory for the Office to offset the $25,307.02 third part credit against future compensation. Neither the Office nor the Board has authority to enlarge or modify the terms of the Act.[7]

Finally, the standard Form 50 submitted by appellant on reconsideration is not relevant to the third party credit determination as calculated by the Office. However, upon return of the case to the Office, a correct pay rate should be ascertained and any remaining surplus should be determined

The decision of the Office of Workers' Compensation Programs dated June 5, 2000 is hereby affirmed.

Dated, Washington, DC
December 10, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[6] *David R. Gilmer*, 34 ECAB 1342 (1982).

[7] *Id*.