U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MINNIE B. LEWIS and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Baltimore, MD

Docket No. 00-2153; Oral Argument Held March 20, 2002;
Issued June 17, 2002

Appearances: *Minnie B. Lewis, pro se*; *Jim C. Gordon, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs acted within its discretion under 5 U.S.C. § 8103(a) in reimbursing appellant $122,828.79 for an injury-related move to a new house and in requiring that this amount be returned to the government when the new house is relinquished or no longer needed.

On May 8, 1989 appellant, then a 46-year-old claims authorizer, filed an occupational disease claim asserting that she developed a sinus infection as a result of her exposure to cigarette smoke. The Office accepted her claim for permanent aggravation of chronic sinusitis and multiple chemical sensitivity. The Office authorized multiple sinus surgeries.

On January 16, 1995 Dr. Grace Ziem, a specialist in occupational and environmental health, reported that appellant needed to move from her existing home:

> "[Appellant] … has severe disabling chemical sensitivity. This was caused by an occupational exposure. An essential treatment for this illness is to reduce exposure to the maximum extent feasible. However, [she] lives in a city area with significant exposure to traffic exhaust and other contaminants such that she is unable to open a window without getting exposure from the outside.
>
> "In my experience with over a hundred patients with this condition, clinical improvement cannot occur without significant fresh air and [appellant] cannot utilize fresh air in the current location of her house. She thus urgently needs to relocate. [Appellant] needs a freestanding, nontoxic house to avoid exposures from other apartment dwellers. She needs to be located away from wood stoves and away from agricultural pesticides or industrial pollution sources. The ideal locations are free-standing dwellings near the bay or ocean or near public wooded

areas such as state and national parks. A freestanding dwelling is essential to avoid exposure from other tenants.

"[Appellant] may have sensitivity to turpenes from evergreen trees and is evaluating this further. Depending upon this information, she may need to locate near deciduous rather than evergreen trees. [Appellant] also needs to be in an area where chemical lawn treatments are not utilized."

The record indicates that prior to receiving approval for her claim appellant began building a house in a new development that was away from vehicular traffic and where the air was cleaner. She sold her existing townhouse and moved to the new house in March 1997. Appellant then requested that the Office assist her with the mortgage payments on her new house. Her former townhouse had no mortgage, so the move to a new home, allegedly necessitated by her employment injury, had caused a financial burden.

Dr. David B.K. Golden, a Board-certified specialist in allergy and immunology selected to resolve a conflict in medical opinion,[1] reported on November 20, 1998 that the suggested housing modifications were necessitated by appellant's hypersensitivity to multiple environmental irritants.

In a decision dated August 26, 1999, the Office authorized reimbursement for the difference between the worth of appellant's new house and the worth of her former house. The Office stated that it was medically necessary for appellant to relocate and that modifications could not have been made to her existing townhouse without causing structural damage. The Office further found that the new house appellant purchased was not superior to the former house in size or living space. The record indicated that appellant had no mortgage on her townhouse, which she sold for $72,000.00. The contract sales price for the new house was $176,395.00. The Office reimbursed appellant for the difference or $104,395.00. The Office advised, however, that reimbursement would not be made until appellant and her husband signed an agreement acknowledging that the Office was entitled to reimbursement for any value of the house over $5,000.00 but not exceeding $104,395.00 when relinquished or no longer needed by appellant.

In a decision dated April 13, 2000, an Office hearing representative modified the amount of the reimbursement due appellant. The hearing representative found that appellant was entitled to an additional $18,433.79, representing closing costs for the sale of the former townhouse and for the purchase of the new house. This additional amount increased appellant's reimbursement to $122,828.79.

The hearing representative denied reimbursement for the mortgage payments appellant made since her move in 1997, noting that appellant moved prior to authorization and opted not to accept the monies offered her when the Office approved her move in August 1999. The hearing

[1] Following a remand of the case by the hearing representative the Office selected Dr. Golden to resolve the conflict of medical opinion as to whether the diagnosis of multiple chemical sensitivity was established and causally related to factors of her federal employment and whether the requested housing modifications were necessitated by a condition causally related to her federal employment.

representative also denied reimbursement for the increase in property taxes, noting that the tax increase was caused by the fact that appellant's new house was substantially more valuable than her former house and that she would benefit from the increased value when the house was sold.

The hearing representative considered appellant's argument that her husband, should she predecease him, would be deprived of the mortgage-free residence that he would have had if the move were not necessary and found this argument to be valid. Accordingly, he found that the government would not seek reimbursement of the $122,828.79 until both parties had no further use of the house.

Appellant filed an appeal to the Board. An oral argument was held on March 20, 2002. Appellant argued that there is no provision requiring that she reimburse the Office once the new home is no longer needed.

The Board finds that the Office acted within its discretion under 5 U.S.C. § 8103(a) in reimbursing appellant $122,828.79 for an injury-related move to a new house and in requiring that this amount be returned to the Office once the new house is relinquished or no longer needed.

Section 8103(a) of the Federal Employees' Compensation Act provides in relevant part as follows:

> "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation."[2]

Section 8103(a) of the Act further provides that the employee may be furnished necessary and reasonable transportation and expenses incidental to the securing of such services, appliances and supplies.

In interpreting section 8103, the Board has recognized that the Office, acting as the delegated representative of the Secretary of Labor, has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. The Office therefore, has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of 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 established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[3]

[2] 5 U.S.C. § 8103(a).

[3] *Janice Kirby*, 47 ECAB 220 (1995) and cases cited therein.

The Office, through administrative procedures, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8103(a). As one such limitation, Office procedures provide as follows:

> "Where the present home cannot be modified without structural damage, [the Office] will be responsible for the difference between the cost of the new house and that of the existing house. For example: If the claimant owns a house worth $100,000[.00] with a mortgage at the time of sale of that house of $85,000[.00], his or her position at the time of purchasing or building the new home should be that he or she owes $85,000[.00] on the new mortgage. The [Office] does not purchase the house but will make up the difference up to the worth of the present residence, *i.e.,* $100,000[.00]. In such a case, the responsibility of [the Office] would also include housing modifications and modifications to the architectural plans."[4]

Appellant's occupational and environmental health specialist, Dr. Ziem, explained that appellant needed to move from her existing townhouse to an appropriately located freestanding, nontoxic house to reduce her exposure to traffic exhaust and other contaminants and to enable her to use fresh air. The Office thus found that modifications could not have been made to appellant's existing townhouse.[5] In such a case, the Office is responsible under its procedures for the difference between the cost of the new house and that of the existing house and will make up the difference up to the worth of the existing residence.[6] Although the difference between the cost of the new house ($176,395.00) and the existing townhouse ($72,000.00) was $104,395.00, the Office reimbursed appellant $122,828.79. This includes closing costs for both real estate transactions of $18,433.79. The Board finds that appellant is entitled to no greater amount under established procedures.[7]

In addition to the above costs the hearing representative awarded, appellant seeks additional reimbursement for the mortgage payments she made prior to the Office's approval of

---

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Housing and Vehicle Modifications*, Chapter 2.1800.5.b(3)(c) (September 1994).

[5] Under Chapter 2.1800.5.b(3) of the Federal (FECA) Procedure Manual, prior to approving the purchase or building of a new home, the Office must be satisfied that "it would be impossible to make the necessary modifications to the present home without causing structural damage." In this regard, the claimant must establish "with written certification" along with a full explanation "from an architect or a building contractor" as to why the current home is structurally unmodifiable. The Office rendered its decision that the house was unmodifiable solely on the basis of medical reports stating the need for appellant to move to an appropriately freestanding nontoxic house. Although clearly the Office did not obtain the required certification under its procedures, due to the unusual nature of appellant's condition and the medical opinions supporting her move, this is found to be harmless error. *See supra* note 4.

[6] The purpose of the law is not to provide an enrichment program. Modifications to a house, for example, must be consistent with the claimant's preinjury standard of living. *Id*., Chapter 2.1800.5.b(2). When a new house must be purchased or built, reimbursing the difference in cost up to the worth of the existing residence properly limits the Office's responsibility to pay for the preinjury standard of living.

[7] The Office is additionally responsible for any building modifications and modifications to the architectural plans made necessary by the nature of appellant's accepted condition, but no such modifications are shown in this case.

the purchase and for the higher property taxes. The Office has provided reasons for denying these additional amounts and the Board finds no abuse of the Office's broad discretion in these matters. Appellant argued for a life estate in the husband, which the Office granted.

Appellant also argues that there is no provision requiring that she reimburse the government for either the new home or the closing costs once the house is no longer needed. Office procedures, however, provide as follows:

> "The Government is entitled to reimbursement for the value of any housing modifications when relinquished or no longer needed by the claimant if the value at that time exceeds $5[,]000[.00]. In disposition of modified property any enhanced value over $5[,]000[.00] must be returned to the Government. For example, if an elevator is installed in the claimant's house and the house is later sold, the Office should be reimbursed from the proceeds of the sale for the current value of the elevator, if it exceeds $5[,]000[.00]. The current value may be determined in any reasonable, equitable manner, such as estimates from real estate sources or by comparing recent sale prices of similar house without the special equipment."[8]

The Board interprets this provision to be consistent with the corresponding provision for vehicle modifications, which makes clear that a claimant must reimburse to the Government the value of a purchased vehicle when the vehicle is sold, traded or no longer needed by the claimant if the value at that time exceeds $5,000.00.[9] These repayment provisions prevent unjust enrichment. Without them, a claimant who has received a Government subsidy to purchase property could turn a quick profit by simply selling the property. In this case, if appellant were to sell her new house for reasons unrelated to her claim and keep the $122,828.79 government subsidy, she would be unjustly enriched by the amount of that subsidy contrary to the purpose of the Act. Office procedures requiring reimbursement to the government attempt to return the claimant, after the property is relinquished, to substantially the same position he or she enjoyed previously. The Board finds that the Office acted within its discretion under section 8103(a) and in accordance with the implementing procedures to require appellant to return the funds advanced for both the house costs as well as the settlement costs, in the amount of $122,828.79 once her new house is relinquished or no longer needed.

On the issues of closing costs, mortgage payments, property taxes, life estate in the husband and repayment to the government, the Board will affirm the hearing representative's decision on housing reimbursement.

[8] *Id*., Chapter 2.1800.5.b(9).

[9] *Id*., Chapter 2.1800.5.a(11).

The April 13, 2000 decision of the Office of Workers' Compensation Programs is affirmed.[10]

Dated, Washington, DC
June 17, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas, Alternate Member, concurring in part and dissenting in part:

Appellant herein, Minnie B. Lewis, contends on appeal to the Board that the Office of Workers' Compensation Programs' claims examiner, E. Padar, in her decision dated May 6, 1999 erred in approving reimbursement only of $104,395.00 based on the difference in the contract sale price of her new home ($176,395.00) and the contract sale price of her existing home ($72,000.00). In this connection, appellant alleges that the settlement papers on her existing home show that, because she had to pay up front closing cost to complete the sale of her existing home, she realized only $64,833.45 and to that extent suffered a significant loss of $7,166.55 on the sale of her home.

Appellant further alleged that at settlement on her new home, the contract purchase price was $176,395.00 but in order to complete the purchase at settlement, she had to pay closing costs of $11,267.24 which raised the total cost of her new home to $189,380.35. Appellant stated that the difference in the settlement price of her new home and the contract price had to be paid out of her personal savings.

Appellant alleges that in order to be made whole that she should be reimbursed the closing costs on the sale of her existing home and the closing costs of her new home.

[10] The dissent construes the hearing representative decision to include the intent to make "gifts" of the settlement costs to appellant and that he meant to order recovery of only $104,395.00. A careful reading of the decision fails to disclose such an intent. Moreover, decisions not to reimburse for settlement costs, are within the discretion of the Office. The Board will intervene, only in the event that the facts show an "abuse of discretion," not evident here.

The hearing representative appeared to agree one hundred percent with appellant regarding reimbursement for settlement costs on the sale of her existing home and the purchase of her new home. In his decision dated April 13, 2000, the hearing representative stated:

> "I have considered all of the evidence and testimony now of record and do not believe that the Office properly calculated the amount of reimbursement due the claimant as a result of her move. In this regard, I note that the settlement papers submitted by the claimant indicated that she actually received $64,833.45 from the sale of her house rather than the $72,000.00 found by the Office because she had to pay $7,166.55 in settlement costs. I further note that she also had to pay settlement costs in the amount of $11,267.24, on the purchase of her new house and find that she is entitled to recover these amounts as part of her reimbursement, I therefore will set aside the decision of the district Office dated August 26, 1999 and find that the claimant is entitled to a reimbursement in the amount of $122,828,79."

In the penultimate paragraph of his decision, the hearing representative stated:

> "Finally, I have also considered [appellant's] argument that her husband, should she predecease him, would be deprived of the mortgage[-]free residence which he would have had if the move had not been necessary and finds it to be valid. Accordingly, I will order the [O]ffice to modify its letter to the claimant to state that the government will not seek reimbursement of the $122,828.79 that it has paid the claimant until both parties have no further use of the house."

In accordance with the hearing representative's decision, the Office in a letter dated April 28, 2000 informed appellant of the following:

> "(1) Reimbursement in the amount of $104,395.00 representing the difference between the worth of your new house located at 7507 Haystack Drive, Baltimore, MD 21244 and your former house located at 3311 Gwynns Falls Parkway, Baltimore, MD 21216; and
>
> (2) Reimbursement in the amount of $7,166.55 representing settlement costs from the sale of your former house at 3311 Gwynns Falls Parkway, Baltimore, MD 21216; and
>
> (3) Reimbursement in the amount of $11,267.24 representing settlement costs from the purchase of your new home at 7507 Haystack Drive, Baltimore, MD 21244."

It should be pointed out that the Office on remand carried out the hearing representative's order in separately directing reimbursement of $104,395.00 representing the difference in the worth of the new house and former house. However, one of the main issues presented to the Board on appeal is whether appellant is entitled to reimbursement for the sale of her former home and the purchase of her new home. In this connection, I find that the hearing

representative was clearly within his discretion in ordering reimbursement of closing costs of $7,166.55 and $11,267.24. I would affirm the finding of the hearing representative in reimbursing both settlement costs.

The next question is what were the hearing representative's intentions when he ordered separate reimbursement of the closing costs on appellant's former home and her new home. Did the hearing representative intend that settlement costs are necessary unavoidable expenses that must be paid and are reimbursable to appellant? If this indeed was his intent, then did the hearing representative through simple oversight forget to subtract the settlement costs he had just ordered reimbursed to appellant by ordering reimbursement to the government in the penultimate paragraph of his decision the exact same settlements costs on the death of both the claimant and her husband? These two separate actions by the hearing representative in the same decision are inconsistent.

The only way to discern the intent of the hearing representative is to remand the case and specifically ask him whether he intended settlement costs to be a reimbursable expense to appellant. If not, whether he intended the settlement costs reimbursed to appellant to be a simple interest free loan as long as appellant and her husband maintained the new home as their residence.

I believe the hearing representative in the penultimate paragraph was focusing on appellant's husband's right to live in the new residence if appellant predeceased him and that the hearing representative inadvertently included the settlement cost with the $104,395.00 representing the difference in the worth of appellant's new house and former house. I would simply exclude the settlement costs or remand the case to the hearing representative for clarification of his intentions.

Because the majority herein affirms the decision of the hearing representative, I must respectfully decline to do so on this issue. I do not now know whether settlement costs are *not* reimbursable to appellant as determined by the claims examiner or reimbursable to appellant as ordered by the hearing representative. If such settlement costs are indeed reimbursable, then I do not understand the legal basis of how the settlement costs convert into an interest free loan recoverable by the government on the death of appellant and her husband.

Nor is it clear to me why the hearing representative would set aside the claims examiner's decision if his intent was to engage in the illusion of granting settlement costs only to require the recapture of the same settlement costs in the same decision. In short, I cannot discern the rule of law flowing from this decision on how settlement costs should be treated.

For the reasons expressed above, I feel compelled to record this dissent on the issue of settlement costs.

In all other respects, I concur in the decision of the majority.

Willie T.C. Thomas
Alternate Member