

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHY DUNGAN, executrix of the estate of BENJAMIN R. DUNGAN and
DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Philadelphia, PA

Docket No. 03-943; Submitted on the Record;
Issued November 19, 2003

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs used the proper rate of pay for the employee's schedule award; (2) whether an overpayment of compensation occurred in the amount of \$49,992.21; and (3) whether the Office abused its discretion in denying waiver of the overpayment.

On June 16, 1981 the employee, then a 53-year-old assistant planner, filed an occupational disease claim (Form CA-2) alleging that his asbestosis was employment related.¹ The Office accepted the claim for malignant mesothelioma.² The employee filed a claim for a schedule award on May 22, 2000.

On November 8, 2000 the Office advised the employee that he was entitled to a schedule award for a 100 percent impairment for each lung.

In a January 2, 2001 memorandum, the Office calculated the employee's lump-sum award for the period October 3, 2000 to September 25, 2006. The effective pay rate date was August 25, 1982 with a commutation date of January 28, 2001. The January 28, 2001 commutation date was based on the employee's receipt of payment for the period October 3, 2000 to January 27, 2001. The employee's weekly pay as of the date of injury on August 25, 1982 was \$498.40 and the pay rate, including current pay increase as of August 25, 1983, was \$332.27 for compensation purposes. The Office then determined a weekly award, including all current pay increases after August 25, 1983, was \$540.25 with a 28-day compensation calculated at \$2,161.00

¹ The employee retired on disability effective August 25, 1982.

² The Office initially denied the claim on June 21, 1984. The employee requested reconsideration and the Office, in an October 18, 2000 decision, vacated the June 21, 1984 decision and accepted the employee's claim.

In memoranda dated January 10 and 22, 2001, the Office calculated claimant's lump-sum award as \$144,490.04. In reaching this calculation, the Office noted that "[u]sing a commutation date of January 28, 2001, a schedule award period expiration date of September 25, 2006, inclusive and the annual compensation figure of \$28,093.00 in the memorandum, the total dollar amount payable would be \$144,490.04."

On January 17, 2001 the Office informed the employee that it had used an incorrect pay rate date of August 25, 1982 and that the correct date was October 3, 2000. The claimant was advised that his lump-sum payment for the remainder of his schedule award would have to be recalculated. In a memorandum dated January 17, 2001, the Office calculated his monthly compensation as \$2,161.00 with an effective pay rate date of October 3, 2000. In reaching this calculation the Office used the following formula: $28,093 \times 2,067 \times 5.4518223 \div 2191 = \$144,490.04$."

On February 9, 2001 the Office issued the employee a schedule award for a 100 percent impairment to both lungs. The weekly pay was \$550.08 and the weekly compensation pay was \$333.39. The period of the award was from October 3, 2000 to September 25, 2006. No cost-of-living adjustments were noted. A partial payment was made on the schedule award to the employee on a periodic basis for the period October 3, 2000 to January 27, 2001. The 28-day compensation amount was \$1,336.56. In a separate letter of the same date, the Office informed the employee that the lump-sum amount would be \$144,490.04 as of January 28, 2001.

On February 9, 2001 the Office issued a preliminary finding that an overpayment in the amount of \$3,457.51 had occurred because the Office used the incorrect pay rate of August 25, 1982 when it should have used October 3, 2000 for the partial payment of the schedule award for the period October 3, 2000 to January 27, 2001. The Office found the employee was without fault in the creation of the overpayment and advised him of the information required to be entitled to waiver of the overpayment.

The employee accepted the Office's calculation of his lump-sum amount on February 13, 2001.

In a letter dated February 21, 2001, the Office informed the employee that a lump-sum check in the amount of \$72,240.04 for the remainder of the schedule award would be issued on February 23, 2001 and that he should pay the overpayment of \$3,457.51 in full.

On March 2, 2001 the employee's counsel requested a review of the written record regarding the overpayment issue. The employee also requested review of the proper calculation of his pay rate.

In a letter dated May 16, 2001, the hearing representative noted that the employee wished to pay off the overpayment of the lump-sum award and provide information as to where to send the payment.³ He advised the employee that the issue of the proper pay rate for his schedule award would be considered in his decision.

³ The employee paid \$3,457.51 by check which was sent on May 24, 2001.

By decision dated July 5, 2001 and finalized on July 9, 2001, the hearing representative found that the Office had correctly calculated the employee's pay rate and affirmed the February 9, 2001 decision.⁴

In an audit report, the Office of the Inspector General determined that the Office incorrectly calculated claimant's lump-sum award based on the "wrong 28-day compensation amount figure" which resulted in the claimant being overpaid \$55,324.77.

On October 19, 2001 the Office issued a decision finding that an overpayment existed due to the claimant receiving a lump-sum award based upon an incorrect monthly compensation figure.

In a letter dated November 12, 2001, the employee's counsel requested that the Office vacate its October 19, 2001 decision due to deficiencies in the decision. Specifically, he noted that the decision failed to address the issues of fault and waiver and failed to describe the manner in which the overpayment was calculated.

In a December 12, 2001 report, the Office medical adviser responded to the Office's request for the date that the employee's disability began. The Office medical adviser concluded that the employee's 100 percent impairment of both lungs was due to the malignant mesothelioma and that disability began the date he was diagnosed, not when he retired. He stated, "The rationale of 100 percent is based on N.O. Memo of 12/18/84, p3 based on fatal prognosis of the diagnosis, not on functional impairment of the lung on that date of diagnosis."⁵ Lastly, he concluded that January 27, 2000 was "the earliest evidence which showed the mesothelioma."

In a March 11, 2002 memorandum, the Office calculated the lump-sum award as \$82,591.04. In recalculating the claimant's lump-sum award, the Office used the following formula: " $17,927 \times 1,817 \times 4.62989522 \div 18256 = \$82,591.04$." "Using a commutation date of January 28, 2001, a schedule award period expiration date of January 18, 2006, inclusive and the annual compensation figure of \$17,927.00 in the memorandum, the total dollar amount payable would be \$82,591.04."

The employee's counsel requested an oral hearing concerning the preliminary overpayment determination on April 12, 2002.

In a March 18, 2002 nonmerit decision, the Office found that there was no decision in posture for appeal as the Office had vacated the July 5, 2001 decision on October 19, 2001.

On March 21, 2002 the Office issued a revised schedule award for a 100 percent impairment for both lungs. The Office determined that the employee's weekly pay was \$500.08 and his weekly compensation was \$333.39 (66 2/3 of \$500.08). The period of the award was to run from January 27, 2000 to January 18, 2006. The Office noted that the employee was entitled

⁴ Claimant died on September 3, 2001.

⁵ An Office medical adviser issued a memorandum dated, December 17, 1984, recommending a 100 percent impairment for the claimant diagnosed with malignant mesothelioma due to its fatal prognosis.

to a total amount of \$100,070.21 and that he had been overpaid \$49,992.21. In reaching its calculations, the Office found that the employee was entitled to \$11,906.79 for the period January 27 to October 2, 2000, \$5,572.38 for the period October 3, 2000 to January 27, 2001 and a lump sum of \$89,591.04 for the period January 28, 2001 to January 17, 2006 which resulted in a total amount of \$100,070.21. The Office noted that the employee had been paid the amount of \$5,572.38 for October 3, 2000 to January 27, 2001 and was paid a lump sum of \$144,490.04 for the period January 28, 2001 to January 17, 2006 which resulted in a total amount of \$150,062.42.

On March 21, 2002 the Office issued a preliminary overpayment determination finding that the employee received an overpayment in the amount of \$49,992.21. The overpayment occurred due to an incorrect monthly pay rate used to compute the lump-sum schedule award. Specifically, the Office stated it had incorrectly applied cost-of-living increases. The Office found that the employee was without fault in the creation of the overpayment.

In a letter dated November 20, 2002, appellant's counsel requested a review of the written record concerning the existence of an overpayment. Appellant argued the preliminary overpayment determination was premature as the employee had appealed the calculation of the lump-sum payment. Submitted with her request for a written review of the record, appellant submitted a copy of the Letters Testamentary qualifying her as executrix of the employee's will, which was dated May 3, 2002. The employee died on September 3, 2001.

By decision dated February 18, 2003 and finalized on February 20, 2003, the hearing representative denied the employee's request for waiver and found the entire amount of the overpayment due and payable. In reaching this conclusion, the hearing representative noted that, while there was no financial evidence in the file, it appeared "that the estate does have the necessary funds to repay the debt, given that they offered to do so."

The Board has reviewed the record and finds that the Office used the correct pay rate in calculating employee's schedule award. However, the Board finds this case is not in posture for decision on the issue of how the lump-sum award was calculated.

In all situations under the Federal Employees' Compensation Act, including those involving a schedule award, compensation is to be based on the pay rate as determined under section 8101(4) of the Act.⁶ This section provides three alternative dates for calculating rate of pay: the date of injury, the date disability began, or the date of a recurrence of disability. In a situation such as this, the date of injury is the date of the employee's last exposure to asbestos which adversely affected the employee's lungs. This is so because every exposure, which had an adverse affect (an aggravation) constitutes a new and independent injury.⁷ In this case, the Office properly used August 25, 1982 as the effective date for appellant's weekly pay rate of \$500.08 as this was the date of injury. The Office has not paid compensation to the employee for disability to work.

⁶ *Kenneth Deerman*, 35 ECAB 799 (1984).

⁷ *Louis L. DeFrances*, 33 ECAB 1407 (1982).

It is well established that the period covered by a schedule award commences on the date appellant reaches maximum medical improvement.⁸ In the instant case, this date was January 27, 2000, the date the employee's malignant mesothelioma was diagnosed. As the employee never lost time because of the accepted condition of malignant mesothelioma, the Office also properly used the date the schedule award began as the date for application of current pay increases. According to the procedure manual:

“Where the schedule award represents the first payment for compensable disability, the claimant's entitlement to [current pay increases] does not begin until one year after the award begins (*see Franklin A. Armfield*, 28 ECAB 445).”⁹

The Office determined that appellant reached maximum medical improvement on January 27, 2000. Where a schedule award is being paid and the claimant had no disability for work prior to the date of maximum medical improvement, the one-year waiting period begins on the starting date of the award. This date represents the claimant's first entitlement to compensation, even though the effective date of the pay rate (date of injury) may be earlier.¹⁰

In the instant case, the Board finds that there is an overpayment in this case as the Office incorrectly applied current pay increases to the August 25, 1982 pay rate. The application of all current pay increases after August 25, 1983 resulted in an incorrect weekly pay rate of \$540.25. Thus, the Office correctly determined that there was an overpayment as the correct weekly pay rate was \$333.39.

The Board, however, is unable to determine whether the amount of the overpayment calculated by the Office was correct. In recalculating the claimant's lump-sum award, the Office used the following formula: $17,927 \times 1,817 \times 4.62989522 \div 1826 = \$82,591.04$. In calculating the lump sum, the first two numbers of 17,927 and 1,817 noted in the lump-sum formula can be understood as yearly pay and number of days remaining in the schedule award. However, the record does not explain, and the Board cannot determine, where the last two numbers of 4.62989522 and 1,826 of the formula are derived. As it is unclear to the Board where the Office derived the second two numbers used in the formula to determine the claimant's lump-sum award, the Office should clarify this issue on remand.

The Board also finds that the case is not in posture for a decision on the issue of waiver of the overpayment.

With regard to the overpayment, the Board finds that the Office did not properly adjudicate this overpayment, as it did not comply with its regulations. A review of the record reveals that, by letter dated March 21, 2002, the Office advised the executrix of the claimant's

⁸ *Yolanda Librera*, 37 ECAB 388 (1986); *Daniel Dunmire*, 36 ECAB 249 (1984).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(a)(4) (November 1998).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.901.12(a)(3) (December 1995).

estate¹¹ that an overpayment existed, but did not inform the executrix that the heirs were entitled to have waiver considered or what was required to obtain waiver of the overpayment. At the time the Office notified the executrix of the estate of the overpayment, a standard overpayment form was sent out without advising the executrix as to whom this applied to. Office regulations provide that waiver will apply to the heirs of the estate.¹² As the Office failed to properly advise the executrix or the heirs of their right to waiver, the Office failed to comply with the procedure manual as well as failing to provide due process to those involved. Consequently, the case must be remanded for the Office to properly inform the executrix and the heirs of their right to waiver. Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on this aspect of the claim.

The decision of the Office of Workers' Compensation Programs dated March 21, 2002 concerning the claimant's schedule award is set aside and the case remanded for further consideration consistent with the above decision. The decision of the Office dated February 18, 2003 and finalized on February 20, 2003 concerning an overpayment is vacated.

Dated, Washington, DC
November 19, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹¹ The executor noted at this time was Larry Dungan, the employee's son, who subsequently died.

¹² See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(e)(2) (July 1997).