

**United States Department of Labor
Employees' Compensation Appeals Board**

SAMMY L. HIGH, Appellant

and

**DEPARTMENT OF THE NAVY, SEA
SYSTEMS COMMAND, Vallejo, CA,
Employer**

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**Docket No. 04-1190
Issued: September 8, 2004**

Appearances:
Sammy L. High, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 31, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 24, 2004, finding that appellant was required to refund \$38,090.00 to the Office following a third party recovery and the refund would be recovered by deducting \$200.00 every 28 days from appellant's continuing compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant is required to refund \$38,090.00 to the Office pursuant to 5 U.S.C. § 8132; and (2) whether the Office properly determined that the refund should be collected by withholding \$200.00 from appellant's continuing compensation.

FACTUAL HISTORY

In the present case, the Office accepted that appellant sustained trauma to the right eye in the performance of duty on September 16, 1987. The Office also accepted major depression and post-traumatic stress disorder as employment related. The record contains a letter dated November 30, 1992 from the Office to appellant's representative indicating that appellant had received a third party recovery of \$125,000.00 with respect to his employment injury. According to the Office, appellant did not complete a statement of recovery (Form CA-162) or submit payment of the refund owed to the United States. The Office reported that, through November 7, 1992, appellant had received \$115,609.67 in compensation for wage loss and that he continued to receive \$1,961.00 every 28 days. The Office noted the provisions of 5 U.S.C. § 8132 that proceeds of a suit or settlement should not be paid to a beneficiary without first satisfying the interest of the United States.

In a letter dated December 29, 1992, appellant's representative argued that appellant did not owe any refund to the United States. The representative alleged that, pursuant to a settlement, the United States had waived any Federal Employees' Compensation Act recovery to the \$125,000.00. There is no indication that appellant submitted a settlement agreement to the Office. Appellant's representative also alleged that the United States discarded essential evidence that prevented appellant from recovering additional funds in a court action against the third parties.

In a letter dated August 10, 1994, the Office advised appellant's representative that the refund owed to the United States was \$38,090.00. The Office requested that appellant submit an itemization of the listed \$8,000.00 in court costs. Appellant did not submit an itemization.

In a memorandum dated December 4, 2003, the director indicated that no refund had ever been paid in the case. A statement of recovery (Form CA-162) dated December 4, 2003, provided the calculations regarding the amount of refund owed to the United States. From the gross recovery of \$125,000.00, attorneys fees of \$43,750.00 (representing 35 percent of the gross recovery) and court costs of \$8,000.00 were deducted, for an adjusted gross recovery of \$73,250.00. A deduction of 20 percent of the adjusted recovery left a balance of \$58,600.00 and from this balance \$20,510.00 was deducted as the government allowance for attorney's fees retained by appellant, resulting in a balance of \$38,090.00.

In a letter dated January 13, 2004, the Office advised appellant that the requested refund of \$38,090.00 remained unpaid. The Office enclosed a Form OWCP-20 questionnaire regarding appellant's financial circumstances and indicated that he should submit evidence within 30 days or a decision would be issued that deducted \$200.00 from his continuing compensation payments. A memorandum of telephone conference dated January 22, 2004, indicated that appellant stated his attorney had told him that he did not owe any money because the federal government had destroyed records. Appellant did not submit any additional evidence.

By decision dated February 24, 2004, the Office determined that appellant owed a refund of \$38,090.00 and that the refund would be collected by deducting \$200.00 every 28 days from continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8132 provides in pertinent part:

“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 that liability as a result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefore the costs of suit and a reasonable attorney’s fee, shall 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....”

With respect to the amount of any settlement or judgment that must be refunded, section 8132 provides that “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 or settlement have been deducted; and in addition to this minimum and at the time of distribution, an amount equivalent to a reasonable attorney’s fee proportionate to the refund to the United States.” The Office’s regulations provide:

“(a) the refund to the United States is calculated as follows, using the [s]tatement of [r]ecovery form approved by [the] OWCP:

- (1) Determine the gross recovery as set forth in § 10.712;
- (2) Subtract the amount of attorney’s fees actually paid, but not more than the maximum amount of attorney’s fees considered by [the] OWCP or SOL [Solicitor of Labor] to be reasonable, from the gross recovery (Subtotal A);
- (3) Subtract the costs of litigation, as allowed by [the] OWCP or SOL (Subtotal B);
- (4) Subtract one fifth of Subtotal [A] from Subtotal B (Subtotal C);
- (5) Compare Subtotal C and the refundable disbursements as defined in § 10.714. Subtotal D is the lower of the two amounts.
- (6) Multiply Subtotal D by a percentage that is determined by dividing the gross recovery into the amount of attorney’s fees actually paid, but not more than the maximum amount of attorney’s fees considered by [the] OWCP or SOL to be reasonable, to determine the Government’s allowance for attorney’s fees, and subtract this amount from Subtotal D.”¹

¹ 20 C.F.R. § 10.711.

ANALYSIS -- ISSUE 1

There is no dispute that appellant received \$125,000.00 from a third party lawsuit brought with respect to his employment injury. 5 U.S.C. § 8132 provides that an employee receiving money from a third party in satisfaction of a legal liability resulting from the injury, shall refund to the United States, after deducting costs such as attorney fees, the amount of compensation paid. The purpose of this section is to prevent a double recovery by the employee -- that is, the recovery of both compensation for wage loss and recovery from a responsible tortfeasor for the same injury.² Appellant received money in a third party settlement for his injuries. Therefore, section 8132 requires that he refund a portion of that recovery to the United States. The statute is mandatory and neither the Office nor the Board may enlarge or modify the terms of the Act.³

The amount of the refund to the United States is determined according to the specific calculations set forth at section 10.711. In this case, the Office subtracted attorney's fees totaling 35 percent from the gross recovery and then subtracted court costs. The adjusted total is subtracted by one fifth in accord with section 8132 and then the balance is compared to the total amount paid by the Office with respect to the claim and the lower of the two is the balance.⁴ In this case, the Office paid compensation benefits well in excess of the \$58,600.00 balance and therefore the lower number was used. The final step is to subtract the attorney's fees percentage to determine the amount of the refund.

In this case, the Office followed each step as set forth in the regulation. The specific calculations in this case establish that, from the gross recovery of \$125,000.00, appellant must refund \$38,090.00.

The December 29, 1992 letter from appellant's representative essentially raises two arguments as to why appellant should not have to refund the \$38,090.00: (1) the United States waived its right to a refund; and (2) federal employees destroyed evidence, which caused appellant to be unable to pursue additional recovery against the third parties and rendered it impossible to recover the "[Act] lien" against the third parties. With respect to the first argument, the Board notes that section 8132 is a mandatory statutory provision regarding recovery from a third party. Any allegation that the United States waived its rights under section 8132 must be accompanied by probative and unequivocal evidence of such waiver. There is no evidence of record containing any settlement agreement or other probative evidence that the United States waived any rights pursuant to section 8132 in this case.

With respect to the second argument, the record does not contain a detailed explanation of the evidence that is alleged to have been destroyed or contain any probative evidence supporting the allegation. Moreover, it is not clear how the argument made by appellant's representative is relevant to the recovery mandated under section 8132. She refers to recovery of

² See *Alvin Collins*, 54 ECAB ____ (Docket No. 03-141, issued August 13, 2003).

³ *Id.*; see also *Claude W. Darris*, 37 ECAB 190 (1985).

⁴ See 20 C.F.R. § 10.714.

the “[Act] lien” against the third parties, but section 8132 is limited to recovery against the beneficiary who receives money from a third party. Regardless of whether appellant’s representative felt additional recovery was possible, the record establishes that appellant received \$125,000.00. The Office is entitled to a refund of a portion of that recovery as determined by the act and implementing federal regulations. Appellant has not offered a valid argument as to why the clear language of section 8132 is inapplicable in this case. The Board finds that, under section 8132 and the implementing regulations, appellant must refund \$38,090.00 to the Office.

LEGAL PRECEDENT -- ISSUE 2

With respect to payment of a refund owed to the Office, the Office’s regulations provide:

“If the required refund is not paid within 30 days of the request for payment, [the] OWCP can, in its discretion, collect the refund by withholding all or part of any payments currently payable to the beneficiary under the [Act] with respect to any injury. The waiver provisions of §§ 10.432 through 10.440 do not apply to such determinations.”⁵

An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or action taken that is clearly contrary to logic and probable deductions from established facts.⁶

ANALYSIS -- ISSUE 2

As the above regulation indicates, the Office has discretion to collect the refund by withholding all or part of the continuing compensation payments. There is no requirement that the Office consider financial hardship caused by the withholding of some or all of the compensation.⁷ The Office advised appellant that it intended to recover the refund by deducting \$200.00 every 28 days, but offered appellant the opportunity to submit financial evidence with respect to the amount withheld. Appellant did not provide any relevant evidence. Based on the evidence of record and in view of the broad provisions of section 10.716 allowing the withholding of all or part of the compensation payments, the Board finds that the Office did not abuse its discretion by deducting \$200.00 every 28 days from the continuing compensation payments.

CONCLUSION

The Board finds that pursuant to 5 U.S.C. § 8132 appellant must refund to the Office \$38,090.00 and the Office did not abuse its discretion in determining that the refund should be recovered by deducting \$200.00 every 28 days from continuing compensation.

⁵ 20 C.F.R. § 10.716.

⁶ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁷ *Alvin Collins*, *supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 24, 2004 is affirmed.

Issued: September 8, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member