

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated November 7, 2002, the Board affirmed an Office decision dated February 19, 2002, finding that appellant had not established entitlement to a schedule award as he had not yet reached maximum medical improvement. The Board further found that he had no loss of wage-earning capacity.¹ The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.²

The record indicates that appellant received the gross amount of \$385,000.00 from a settlement award in a third-party lawsuit filed against the owner of the pit bull terriers responsible for his injuries. Appellant, through his attorney, sent the Office a check in the amount of \$38,436.27.³

On February 20, 2003 appellant filed a claim for compensation (Form CA-7) requesting compensation for intermittent dates from December 30, 2002 through April 7, 2003. In an accompanying time analysis form, he indicated that he missed work on various dates during this period due to “extreme stress.”

By letter dated March 31, 2003, the Office requested additional factual and medical information regarding his alleged recurrence of disability beginning December 30, 2002. In a response dated April 14, 2003, the employing establishment informed the Office that appellant was not alleging a recurrence of disability but that instead he “still require[d] physical and emotional therapy” due to his employment injury.

In support of his claim, appellant submitted a medical report dated December 30, 2002 from Dr. Benjamin Hirsch, a psychologist, who diagnosed “serious post[-]traumatic stress” and opined that appellant’s employment injury caused him to miss time from work for treatment and when he became “so overwhelmed that he cannot function.” Appellant submitted office visit notes from Dr. Hirsch indicating that he received treatment for stress on January 20, February 3 and March 3, 13, 17 and 24, 2003.

In a report dated January 3, 2002, Dr. H. Sasson, a Board-certified plastic surgeon, opined that appellant’s injuries caused him to miss work. The record contains a progress report from Dr. Sasson, for treatment received by appellant on March 5, 2003 for treatment regarding his upper extremities.

In a decision dated July 24, 2003, the Office found that appellant had not established a recurrence of disability for intermittent periods from December 30, 2002 through April 7, 2003.

¹ *Angel E. Cordero*, Docket No. 02-1118 (issued November 7, 2002). Appellant filed a petition for reconsideration of this decision on December 2, 2002, which the Board denied by order dated May 27, 2003.

² Appellant sustained multiple lacerations of his arms, legs and torso and post-traumatic stress disorder from an attack by three pit bull terriers on May 2, 2000. He returned to limited-duty employment on November 18, 2001.

³ By letter dated February 6, 2003, the Office acknowledged receipt of its partial refund of \$38,436.27 and requested an additional \$7,031.33 refund.

The Office determined that appellant had not established a change in the nature and extent of his limited-duty position or submitted sufficient medical evidence to establish that he was unable to perform his limited duty.⁴

On August 7, 2003 appellant requested an oral hearing. On February 2, 2004 a hearing representative noted that appellant had withdrawn his request for a hearing in order to request reconsideration.

Appellant underwent authorized surgery for his employment-related condition on June 2, 2004. The Office accepted that he sustained a recurrence of disability beginning that date. The Office noted that, as appellant had a surplus of compensation from his third-party recovery, it must calculate the amount of compensation to which he was entitled and deduct that amount from his surplus of compensation.

Appellant submitted progress notes from Dr. Sasson dated January 2, March 5 and April 7, 2003. He submitted additional progress notes from Dr. E. Wiseman, a Board-certified psychiatrist, dated December 30, 2002, January 17, March 6 and April 2, 2003, regarding his treatment for problems with his upper and lower extremities, neck and back.

By letter dated July 12, 2004, appellant's attorney requested reconsideration of the Office's July 24, 2003 decision.⁵ Counsel argued that the Office should expand appellant's accepted conditions and find that he sustained a loss of wage-earning capacity resulting from his employment injury. The Counsel also contended that the medical evidence established that he was disabled from employment for the period claimed.

In a letter dated October 13, 2004, the Office determined that appellant had a \$94,546.60 surplus of compensation from his third-party recovery. From the sum of \$385,000.00, the Office subtracted \$96,250.00 in attorney's fees, \$96,250.00 in personal property damage and \$2,248.74 in court costs. The Office further deducted 20 percent of the net recovery, \$38,050.25 to which appellant was entitled under the Federal Employees' Compensation Act⁶ for an adjusted net recovery of \$152,201.01. The Office then deducted payments of \$57,654.41 for a total remainder of \$94,546.60.

By decision dated October 13, 2004, the Office denied the payment of compensation to appellant on the grounds that he had a surplus of \$94,546.60 from a third-party recovery. The Office expanded his accepted conditions to include major depressive disorder, post-traumatic stress disorder and bilateral carpal tunnel syndrome.⁷ The Office noted that the issue of whether

⁴ The Office further indicated that, as appellant attributed his absences from work to "severe stress" instead of medical appointments, he must establish that he sustained a recurrence of disability.

⁵ Appellant also submitted medical reports regarding his need for additional surgery and regarding his degree of disability; however, these issues are not currently before the Board.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ It appears from the record that the Office previously accepted appellant's claim for post-traumatic stress disorder.

appellant sustained a loss of wage-earning capacity had previously been addressed by the Board in its November 7, 2002 decision.

LEGAL PRECEDENT -- ISSUE 1

In determining whether a claimant has discharged his or her burden of proof and is entitled to compensation benefits, the Office is required by its statute and regulations to make findings of fact. Section 8124(a) of the Act provides: The [Office] shall determine and make a finding of fact and make an award for or against payment of compensation....”⁸ Section 10.126 of Title 20 of the Code of Federal Regulations provides: “The decision shall contain findings of fact and a statement of reasons.”⁹

The Office procedures provide that a decision should contain a discussion of the issues, requirements for entitlement, a background framework so that the reader can understand the issues at hand, a discussion of the relevant evidence, a basis for the decision and a conclusion.¹⁰

ANALYSIS -- ISSUE 1

In this case, appellant requested reconsideration of the Office’s July 24, 2003 decision, which found that he had not established a recurrence of disability for intermittent dates from December 30, 2002 through April 7, 2003. The Office issued a decision dated October 13, 2004, granting modification in part and denying modification in part of its July 24, 2003 decision. The Office determined that appellant was not entitled to compensation benefits because he had a surplus of \$94,546.60 from a third-party recovery and could not receive further compensation benefits while there remained a surplus.¹¹ The Office further expanded the accepted conditions to include major depressive disorder and bilateral carpal tunnel syndrome. The Office declined to address the issue of whether appellant sustained a loss of wage-earning capacity as the issue had previously been adjudicated by the Board. In its October 13, 2004 decision, however,

⁸ 5 U.S.C. § 8124(a).

⁹ 20 C.F.R. § 10.126.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (March 1997).

¹¹ The Board notes that section 8132 of the Act provides that an employee who sustained an injury for which compensation is payable under circumstances creating a legal liability in a party other than the United States has the obligation to reimburse to the United States that amount of compensation paid and credit any surplus on future payments of compensation payable to him for the same injury. The purpose underlying this obligation is to prevent a double recovery by the employee. See *Thomas P. Murray*, 51 ECAB 630 (2000). The Office regulations, at section 10.711, provide that a beneficiary can retain, as a minimum, one-fifth of the net amount of money or property remaining after a reasonable attorney’s fee and the costs of litigation have been deducted from the third-party recovery. The United States shares in the litigation expense by allowing the beneficiary to retain at the time of distribution, an amount equivalent to a reasonable attorney’s fee proportionate to the refund due the United States. After the refund owed to the United States is calculated, the beneficiary retains any surplus remaining and this amount is credited, dollar for dollar, against future compensation for the same injury. The Office will resume the payment of compensation only after the beneficiary has been awarded compensation which exceeds the amount of the surplus. 5 U.S.C. § 10.711; see *Alvin Collins*, 54 ECAB ___ (Docket No. 03-141, issued August 13, 2003).

the Office did not specifically address the pertinent issue of whether appellant sustained a recurrence of disability for intermittent dates from December 30, 2002 through April 7, 2003. The Office did not review any of the medical evidence relevant to the period in question or make a finding regarding whether he had established a recurrence of disability for specific dates from December 30, 2002 through April 7, 2003 such that the amount to which he was entitled would be credited against his surplus of compensation. As noted above, the Office decisions shall contain findings of fact and a statement of reasons.¹² It is well established that appropriate findings of fact are necessary in the Office's adjudication of a claim for compensation, both for the purpose of enabling the Board to make a proper review and to apprise the claimant in order to afford him an opportunity to address any defects appearing in his claim.¹³ By failing to address the specific periods claimed by appellant, the Office has precluded the Board from making an informed decision on his entitlement to compensation during the dates in question. The case, therefore, will be remanded for the Office to make findings regarding whether appellant sustained a recurrence of disability causally related to his accepted employment injury.¹⁴

On appeal, appellant's attorney contends that the Office erroneously refused to address the issue of loss of wage-earning capacity. The Board's jurisdiction, however, is limited to review of final decisions by the Office.¹⁵

CONCLUSION

The Board finds that the case is not in posture for decision.

¹² 20 C.F.R. § 10.126.

¹³ See *James D. Boller, Jr.*, 12 ECAB 44 (1960).

¹⁴ In view of the Board's disposition of the first issue, the issue of whether the Office properly found that he was not entitled to compensation for intermittent dates from December 30, 2002 through April 7, 2003 as he had a surplus from his third-party recovery is premature.

¹⁵ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 13, 2004 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 5, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board