

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

R.G., Appellant)

and)

DEPARTMENT OF STATE, FOREIGN)
SERVICE, OFFICE OF EMPLOYEE)
RELATIONS, Washington, DC, Employer)

Docket No. 06-369
Issued: December 13, 2006

Appearances:

J. Michael Hannon, Esq., for the appellant
Paul J. Klingenberg, Esq., for the Director

Oral Argument September 6, 2006

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 6, 2005 appellant, through counsel, filed a timely appeal from a September 9, 2005 decision of the Office of Workers' Compensation Programs' hearing representative, which limited allocation for loss of consortium under a third-party recovery to 25 percent. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether the \$625,000.00 third-party recovery that appellant received represented a joint recovery by appellant and her husband, or is solely attributable to the loss of consortium claim of appellant's husband; and, if so, (2) whether appellant met her burden of proof to establish an allocation for loss of consortium in excess of 25 percent.

FACTUAL HISTORY

On June 27, 1997 appellant, then a 49-year-old executive secretary, filed a traumatic injury claim alleging that on June 11, 1997 she sustained injury, when an elevator's deceleration switch failed causing it to suddenly stop. The Office accepted her claim for abdominal

laceration, pelvic cyst, aggravation of pelvic adhesions, bilateral pulmonary embolism, left kidney infection, intracranial hematoma, emergency laparotomy and prolonged post-traumatic stress disorder. Appellant stopped work and was placed on the periodic rolls. She received appropriate compensation benefits.

The record indicates that appellant and her husband pursued a third-party action against the parties allegedly responsible for her injuries. The third parties included ABM Industries Incorporated (ABM) and Amtech Elevator Services (Amtech).

In a letter dated February 20, 2003, appellant's representative advised the Office of settlement negotiations. He requested that the Office continue appellant's benefits in the event they were able to settle against two out of the three defendants. Counsel requested that, as an alternative, any settlement received should be treated as a payment to appellant's husband for his loss of consortium claim.

By letter dated June 19, 2003, appellant's representative advised the Office that he had reached a settlement agreement with two out of three of the defendants in the third-party matter. The agreement satisfied and extinguished appellant's husband's loss of consortium claim for \$625,000.00 dollars. He noted that appellant would continue to pursue her claim against third-party defendant, International Elevadores S.A., de C.V. (IDESA). Counsel contended that the Office "may obtain enforcement of its lien only pending the outcome of her claim against IDESA." He stated that the \$625,000.00 recovery was not a gross recovery which could be allocated on appellant's behalf, as it solely represented her husband's loss of consortium claim.

By letter dated July 23, 2003, the Office advised appellant's representative that he had not provided sufficient information to establish that the \$625,000.00 payment involved only the loss of consortium claim. The Office explained that it could not forgo or waive the lien, although appellant could make a request that the Office attribute more than the standard 25 percent for loss of consortium. Counsel was advised that complete documentation concerning the settlement was needed in order to make a determination regarding any allocation greater than the standard 25 percent.

Counsel provided the Office with a copy of the settlement agreement and dismissal papers. The settlement agreement was signed by appellant and her husband on April 25, 2003. The third parties, ABM and Amtech, signed it on May 8, 2003. The terms of the agreement included that it was made in relation to an elevator accident at the United States Embassy in Mexico City, Mexico, on June 11, 1997. The terms of the agreement included that appellant and her husband wished to: "settle fully and finally all [p]laintiff's claims against ABM and Amtech, including but not limited to all presale claims and postsale claims against ABM and Amtech that have been or could have been raised in the Litigation."¹ Furthermore, the agreement stated that appellant and her husband would receive a check in the amount of \$625,000.00 dollars made payable to her attorney and his firm. In exchange for the payment, "[p]laintiffs hereby forever discharge ABM, Amtech and Fidelity and Casualty ... from any and all claims, actions, causes of actions, suits, liabilities, obligations, demands, losses, damages, controversies, attorneys' fees and costs, of any kind whatsoever, which Plaintiffs may have, in law or in equity, known or

¹ The Board notes that appellant did not settle any claims against IDESA.

unknown by reason of any matter or thing from the beginning of the world to the date of this Agreement, including but not limited to, all allegations relating to presale and postsale acts or omissions by ABM and Amtech and all claims alleged or that could have been alleged against ABM and Amtech in the Litigation.” Appellant and her husband also released IDESA from all presale acts or omissions. The agreement included a reservation to proceed against IDESA to recover any damages for any claims based upon post-sale claims related to the June 11, 1997 elevator accident. Appellant and her husband agreed to “dismiss with prejudice all claims against ABM and Amtech in the Litigation and all presale claims against IDESA in the Litigation.” Under paragraph nine of the agreement, it was specified:

“[The c]onsideration set forth in the first numbered paragraph of this Agreement is the most that Plaintiffs will ever receive from Defendants, ABM and Amtech and Fidelity & Casualty, or Defendants ABM and Amtech and Fidelity & Casualty shall ever be required to pay for any claims relating to the June 11, 1997 elevator accident or to any claims that have been or could have been raised in the Litigation. Plaintiffs accept such consideration specifically without regard to whether Defendants are in fact determined to be joint tortfeasors. This provision is intended to obviate the necessity and expense of having Defendants remain as parties on the record and participate and incur expense in a trial merely for the purpose of determining whether they were tortfeasors so as to entitle any other party to the Litigation and/or any other tortfeasor to a reduction of a verdict.”

Under paragraph 10, it was noted that plaintiffs were responsible for determining whether any amount of the settlement was owed to other appropriate parties, including the Office. In paragraph 12, it was noted that the agreement comprised the entire agreement. Paragraph 13 stated that “Defendants understand that Plaintiffs, as between themselves and in consultation with their attorneys, have allocated the consideration paid under this Agreement to [appellant’s husband] whose claims will be dismissed in their entirety with prejudice. [Appellant] shall continue to prosecute her claim for damages only against IDESA for postsale claims. This decision is entirely the responsibility of Plaintiffs and their attorneys and shall not otherwise affect the promises contained herein.”

By letter dated November 20, 2003, the Office requested that appellant provide a statement of recovery and submit payment of the government’s statutory right of refund under 5 U.S.C. § 8132.

On March 9, 2004 appellant’s attorney was advised by the Office that appellant had received a third-party recovery in the amount of \$625,000.00 dollars. Counsel was advised that previous requests were made to attempt to settle the third-party matter, including requests for a statement of recovery; however, he had not responded. Appellant’s representative was informed that he should submit a statement of recovery and a check to the Office made payable to the Department of Labor within 30 days of receipt of the letter.

By letter dated March 19, 2004, appellant’s representative provided the Office with a draft of itemized expenses incurred in the pursuit of appellant’s claim.

By letter dated June 8, 2004, the Office advised counsel that it was not in agreement that the \$625,000.00 settlement was solely in satisfaction of appellant's husband's loss of consortium claim.² Appellant had not submitted any evidence to support that "the recovery of \$625,000.00 was solely for [her husband's] claim of loss of consortium." The Office noted that appellant had also released all of her claims against ABM, Amtech and IDESA that arose out of acts or omissions that occurred prior to June 10, 1996. Under the terms of the April 25, 2003 agreement, appellant released her claims and the monies received were made to both plaintiffs.³

By letter dated October 28, 2004, counsel requested that the Office issue a final decision. He contended that it was the clear intention of appellant and her husband that the monies received in the settlement agreement be received solely by appellant's husband and none of the settlement received by appellant. He noted, however, that the settlement between appellant's husband and the third-party defendant's would not have occurred without appellant's agreement to also dismiss her claims.

By letter dated November 8, 2004, the Office enclosed a proposed statement of recovery and requested that appellant submit payment in the amount of \$152,091.16 in satisfaction of its lien under section 8132. The Office arrived at this amount by subtracting \$156,250.00 or 25 percent for the loss of consortium, from appellant's gross third-party recovery of \$625,000.00 dollars. From the balance of \$468,750.00, it subtracted attorney's fees in the amount of 33 percent which was equivalent to \$156,093.75. The balance of the recovery was reduced to \$312,656.25. From this amount, the Office deducted court costs in the amount of \$26,627.84 and arrived at a balance of \$285,028.41. The Office deducted 20 percent, or \$57,005.68, for the recovery that appellant was afforded under the Federal Employees' Compensation Act, which reduced the balance to \$228,022.73. The Office subtracted the government's allowance for attorney's fees in the amount of \$75,931.57. The Office determined that a balance of \$152,091.16 was due as its refund.

By letter dated November 16, 2004, the Office advised appellant's representative that it disagreed with his position that "the whole third-party recovery of \$625,000.00 dollars was not a joint recovery but solely received for [appellant's husband's] claim of loss of consortium."

By decision dated February 10, 2005,⁴ the Office found that the \$625,000.00 recovery was jointly received by appellant and her husband, that the proper allocation for appellant's husband's loss of consortium was \$156,250.00, which represented 25 percent of the total recovery. It found that appellant had not established "good cause" under 20 C.F.R. § 10.712(b) to justify a greater allocation for loss of consortium and that a refund to the United States was due in the amount of \$152,091.16 under the statutory formula and implementing procedures.

Appellant subsequently requested a hearing, which was held on July 18, 2005.

² In an email correspondence dated February 28, 2003, the Office's legal representative advised appellant's counsel that she "was not aware of any case in which we have allowed an entire recovery against one defendant to be allocated for loss of consortium."

³ The Office further denied appellant's representative's in-house copying costs of \$5,819.55.

⁴ The Office originally issued a January 5, 2005 decision which was reissued on February 10, 2005.

By decision dated September 9, 2005, an Office hearing representative affirmed the February 10, 2005 decision

LEGAL PRECEDENT -- ISSUE 1

The Act, at 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 on his behalf, the beneficiary, after deducting therefrom 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 regard to allocation of recoveries between two individuals, such as husband and wife, 20 C.F.R. § 10.712 provides:

“(a) If a settlement or judgment is paid to or for more than one individual or in more than one capacity, such as a joint payment to a husband or wife for personal injury and loss of consortium or a payment to a spouse representing both loss of consortium and wrongful death, the gross recovery to be reported is the amount allocated to the injured employee. If a judge or jury specifies the percentage of a contested verdict attributable to each of several plaintiffs, the [Office] or [solicitor] will accept that division.”⁵

ANALYSIS -- ISSUE 1

The Office accepted appellant’s claim for abdominal laceration, pelvic cyst, aggravation of pelvic adhesions, bilateral pulmonary embolism, left kidney infection, intracranial hematoma, emergency laparotomy and prolonged post-traumatic stress disorder. By letter dated June 19, 2003, her attorney advised the Office that he had reached a settlement agreement with two out of three of the defendants in the third-party case. He contended that the agreement was solely to satisfy and extinguish the loss of consortium claim of appellant’s husband for \$625,000.00 dollars. Counsel alleged that the \$625,000.00 recovery was not a gross recovery, which could be allocated on appellant’s behalf, but represented only the loss of consortium claim.

In support of his position, counsel noted that appellant would continue to pursue her claim against third-party defendant, IDESA. He contended that the Office should accommodate appellant’s position that the \$625,000.00 payment was solely for her husband’s loss of consortium and that it could “obtain enforcement of its lien only pending the outcome of her

⁵ See also the Federal (FECA) Procedure Manual, Part 2 -- Claims, *FECA Third Party Subrogation Guidelines*, Chapter 2.1100(9)(b) (September 2003), provides that if “a judge or jury specifies the percentage of a contested verdict attributable to each of several plaintiffs, that division will be accepted.”

claim against IDESA.” Counsel argued that the settlement agreement supported appellant’s position that the monies received were solely by her husband and provided the Office with a copy of the agreement. He noted the clear intention of appellant and her husband that the monies received were solely for loss of consortium and argued that appellant did not receive any of the settlement proceeds. Counsel acknowledged that the agreement would not have occurred between defendants Amtech, ABM and appellant’s husband without appellant’s agreement to also dismiss her claims.

The Board finds that a third-party recovery was received by appellant in partial satisfaction of the claims arising against Amtech and ABM resulting from the June 11, 1997 injury. The Board does not agree with counsel’s contention that the settlement is solely attributable to the loss of consortium claim of appellant’s husband. Rather, it represents a joint recovery by appellant and her husband. A careful review of the settlement agreement reveals that it was signed by both appellant and her husband on April 25, 2003 to discharge any and all claims related to the June 11, 1997 elevator incident. Under the terms of the agreement, both appellant and her husband were content to: “settle fully and finally all [p]laintiff’s claims against ABM and Amtech, including but not limited to all presale claims and postsale claims against ABM and Amtech that have been or could have been raised in the Litigation.” The settlement agreement stipulated that appellant and her husband would receive a check in the amount of \$625,000.00 dollars made payable to counsel and his law firm. Appellant and her husband agreed to “forever discharge ABM, Amtech and Fidelity and Casualty ... from any and all claims, actions, causes of actions, suits, liabilities, obligations, demands, losses, damages, controversies, attorneys’ fees and costs, of any kind whatsoever, which Plaintiffs may have, in law or in equity, known or unknown by reason of any matter or thing from the beginning of the world to the date of this Agreement, including but not limited to, all allegations relating to presale and postsale acts or omissions by ABM and Amtech and all claims alleged or that could have been alleged against ABM and Amtech in the Litigation.” Additionally, appellant and her husband released IDESA from all presale acts or omissions. They agreed to “dismiss with prejudice all claims against ABM and Amtech in the litigation and all presale claims against IDESA in the litigation.” Paragraph nine of the agreement stipulated that the \$625,000.00 payment was the most that could be received in the litigation. Additionally, the agreement contained a provision that both plaintiffs would accept such consideration. Paragraph 10 indicates that plaintiffs were responsible for determining whether any amount of the settlement was owed to other appropriate parties, including the Office, and paragraph 12 provided that the agreement comprised the entire agreement. The Board finds that the recovery received by appellant was not solely for loss of consortium by her husband. Under the terms of the agreement, appellant clearly relinquished her claims arising out of the June 11, 1997 injury.

Paragraph 13 of the agreement states that the parties had agreed between themselves and in consultation with their attorneys to have the settlement distribution of \$625,000.00 dollars paid to appellant’s husband. However, both appellant and her husband agreed to dismiss their claims in their entirety with prejudice. The Board finds that, under the terms of the agreement, settlement was made by and between Amtech and ABM to resolve all issues arising out of the June 11, 1997 injury, not just the loss of consortium claim. The Board does not agree with counsel’s contention that appellant would continue to prosecute her claim for damages only against IDESA for postsale claims. The evidence does not support that the \$625,000.00 payment from Amtech and ABM was solely in satisfaction of the loss of consortium claim. To do so

would allow every married couple who receives a settlement to circumvent the Office's statutory right to recovery by structuring their settlements in this manner. The Board notes that there is no order or indication from a judge in this matter signifying an allocation between the parties other than that prescribed within the terms of the settlement agreement.⁶

Consequently, the Board finds that the \$625,000.00 settlement represents a joint recovery received by appellant in partial satisfaction of her claims arising out of the accepted injury. The Office is entitled to a portion of the recovery under section 8132 of the Act.

LEGAL PRECEDENT -- ISSUE 2

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 at 20 C.F.R. § 10.711(a)(1) provides:

"(a) The refund to the United States is calculated as follows, using the Statement of Recovery form approved by [the Office]:

"(1) Determine the gross recovery as set forth in [section] 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 Office] or SOL [Solicitor of Labor] to be reasonable, from the gross recovery (Subtotal A);

"(3) Subtract the costs of litigation, as allowed by [the Office] 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 [section] 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 Office] or SOL to be reasonable, to determine the [g]overnment's allowance for attorney's fees, and subtract this amount from Subtotal D."⁷

⁶ *Id.*

⁷ 20 C.F.R. § 10.711.

With regard to allocation of recoveries between two individuals, such as husband and wife, 20 C.F.R. § 10.712 provides:

“(b) In any other case, where a judgment or settlement is paid to or on behalf of more than one individual, [the Office] or SOL will determine the appropriate amount of the [Act] beneficiary’s gross recovery and advise the beneficiary of its determination. [The Act] beneficiaries may accept [the Office’s] or SOL’s determination or demonstrate good cause for a different allocation. Whether to accept a specific allocation is at the discretion of SOL or [the Office].”

The policy set forth in 20 C.F.R. § 10.712 and in the Federal (FECA) Procedure Manual recognizes that loss of consortium is a separate and distinct cause of action in most jurisdictions, including the District of Columbia. The allocation of 25 percent of a joint recovery to the spouse’s loss of consortium claim constitutes recognition by the Office that the separate loss of consortium claim is valuable, and separate from the claim of the injured employee against the responsible third-party tortfeasor.⁸ In the event a beneficiary seeks to justify an allocation in excess of 25 percent for loss of consortium, he or she must establish to the satisfaction of the Office or Solicitor of Labor, through the submission of evidence and legal argument, that a higher percentage is appropriate.⁹

ANALYSIS -- ISSUE 2

The Board finds that appellant received \$625,000.00 dollars under a third-party settlement due to injuries arising from her employment injury. Section 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.¹⁰ In this case, appellant received recovery under a third-party settlement as a result of a suit that she brought against defendants ABM and Amtech related to injuries sustained in an elevator while at work on June 11, 1997. Consequently, section 8132 requires that she 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.¹¹

The amount of the refund to the United States is determined according to the specific formula set forth at section 10.711 and 10.712. The formula, as applied in this case, is as follows: from appellant’s gross third-party recovery of \$625,000.00 dollars, the Office properly subtracted 25 percent for loss of consortium in the amount of \$156,250.00. With a balance of \$468,750.00, the Office subtracted attorney’s fees in the amount of 33 percent which was

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *FECA Third Party Subrogation Guidelines*, Chapter 2.1100(9)(b)(1) (September 2003).

⁹ *Id.*

¹⁰ See *Sammy L. High*, 55 ECAB 697 (2004); *Alvin Collins*, 54 ECAB 752 (2003).

¹¹ *Id.*

equivalent to \$156,093.75, which reduced the balance to \$312,656.25. From this amount, the Office deducted court costs in the amount of \$26,627.84 and arrived at a balance of \$285,028.41. The Office deducted 20 percent, or \$57,005.68, for the statutory recovery that appellant is afforded under the Act, and the balance was reduced to \$228,022.73. Finally, the Office subtracted the government's allowance for attorney's fees in the amount of \$75,931.57 and determined that the remaining balance of \$152,091.16 was due as its refund.

While counsel alleged that the recovery should be treated solely as a recovery by appellant's husband for loss of consortium and not as a joint recovery, the Board does not agree. Under section 10.712, the Office properly allocated 25 percent of the recovery for loss of consortium. The Board notes that by letters dated June 23 and November 20, 2003 the Office requested that appellant provide documentation to support a greater allocation in excess of 25 percent. However, no additional evidence was submitted to establish why an allocation larger than 25 percent should be awarded to appellant's husband. Appellant did not establish entitlement to an allocation greater than 25 percent for loss of consortium.

On appeal, appellant's counsel made numerous arguments which have been addressed in this decision. They include that the settlement agreement was approved by the trial judge and that the settlement should be accepted as a specification by the trial judge regarding the allocation pursuant to 20 C.F.R. § 10.712(a). However, as noted, there is no specific delineation by a trial judge as to how the proceeds were to be allocated.

Appellant's counsel contended that the Office hearing representative erred in finding that the third-party suit was not brought solely by appellant's husband for his loss of consortium. However, the Board notes that the Office hearing representative did not make a specific finding to this effect. The record reflects that he repeated the allegations of appellant's counsel. While counsel alleged that the Office hearing representative's decision was flawed as his explanations regarding the intent of the agreement were ignored, the text of the settlement agreement does not support his contentions. Finally, appellant's counsel alleged that the Office's interpretation of 20 C.F.R. § 10.712(a) preempted State laws and the laws of the District of Columbia concerning loss of consortium. However, the Board notes that the Office's joint recovery statement allocated 25 percent for appellant's husband's loss of consortium claim, consistent with its procedures. The Office properly complied with its regulations and procedures promulgated under 5 U.S.C. § 8132.¹²

¹² Appellant also asserts that the Office's actions denied her due process which raises a constitutional question. The Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures. As the Board is an administrative body, it does not have jurisdiction to review a constitutional claim such as that made by appellant. The federal courts retain jurisdiction over decisions under the Act where there is a charge of a violation of a clear statutory mandate or where there is a constitutional claim. The Board lacks jurisdiction to review the merits of this argument. *Robert F. Stone*, 57 ECAB ____ (Docket No. 04-1451, issued December 22, 2005).

CONCLUSION

The Board finds that a \$625,000.00 third-party recovery was received by appellant and represents a joint recovery by appellant and her husband. She has not met her burden of proof to establish an allocation for loss of consortium in excess of the 25 percent allowed by the Office.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 9, 2005 is affirmed.

Issued: December 13, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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