United States Department of Labor
Employees' Compensation Appeals Board

A.C., Appellant	)	
and	)	**Docket No. 07-519**
	)	**Issued: September 24, 2007**
DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, Alameda, CA, Employer	)	

Appearances:
Sylvia R. Johnson, for the appellant
Thomas G. Giblin, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2006 appellant filed a timely appeal from a December 15, 2005 decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant is required to refund $48,242.54 to the Office because he received a double recovery from third-party settlements in addition to receiving wage-loss compensation under the Federal Employees' Compensation Act.[1]

FACTUAL HISTORY

This case has previously been before the Board. By decision dated August 13, 2003, the Board found that appellant received a double recovery from third-party settlements in addition to compensation payments under the Act. The Board found that the Office properly applied federal

[1] 5 U.S.C. §§ 8101-8193.

regulations to find that an overpayment was created in the amount of $48,242.54 and that mandatory recovery by offset against future compensation payments must be made at the rate of $1,000.00 per payment period.[2] On September 26, 2003 appellant filed a petition for reconsideration with the Board. By order dated July 1, 2004, the Board granted the petition for reconsideration, set aside the August 13, 2003 Board decision and remanded the case to the Office for further development to determine what was actually covered by the third-party settlements. The Board cited its previous case, *Edward S.J. Atwood*,[3] which remanded the case to the Office to obtain settlement agreements. The law and the facts of the previous Board decisions and orders are incorporated herein by reference.

By letter dated September 13, 2004, appellant's congressional representative forwarded a September 1, 2004 letter in which appellant's attorney advised that documentation regarding his settlement agreements "has long since been destroyed." Attached were copies of a Johns-Manville settlement trust list showing that appellant's claim had been settled and documents dated October 28, 1988 and April 9, 1992 identifying appellant as complainant and listing a number of asbestos manufacturers and the status of appellant's claims against them. This evidence reflects that he had received settlements totaling $91,326.00. The record includes a document showing that appellant's claim against combustion engineering was settled on April 9, 1992, correspondence showing that appellant had filed a claim against Amatex Corporation, and attorney client lists.

The Office stopped monthly deductions from appellant's ongoing compensation pending further development. By letter dated October 4, 2004, it requested information from appellant's attorney. The Office noted that appellant was claiming that the third-party recovery he received was for conditions other than those accepted by the Office which requested that the attorney furnish copies of the third-party agreements and/or other documentation indicating what medical conditions were covered and a statement as to whether he received additional monies from an additional nine companies. On October 19, 2004 the Office requested that appellant furnish copies of the third-party recovery agreements and other documentation concerning the agreements that he had in his possession.

On November 1, 2004 appellant's congressional representative faxed additional documentation to the Office including letters dated November 3 and 28, 1988 and February 17, 1989 to appellant from his attorney outlining ongoing negotiations with the Johns-Manville Trust. The November 3, 1988 letter informed appellant that "your civil settlements do reflect those future damages which could be estimated at the time of the original settlements, including future pain and suffering, future medical expenses and future loss of earning capacity," and that "the likelihood of a deterioration in your medical condition due to asbestos exposure was taken into account." The letter further explained the double recovery nature of workers' compensation claims and civil settlements. A settlement statement dated November 13, 1992 with Unarco was also forwarded.

[2] 54 ECAB 752 (2003).

[3] 40 ECAB 748 (1989).

By decision dated December 2, 2004, the Office denied modification of its May 7, 2001 decision, finding that the third-party settlements received by appellant included both the effects of asbestos exposure and its sequelae, thereby constituting a double recovery for the conditions accepted by the Office as employment related.[4] Deductions of $1,000.00 per pay cycle were reinstituted on December 3, 2004.

On December 28, 2004 appellant, through his congressional representative, requested a hearing. The overpayment of $48,242.54 was repaid on October 5, 2005. At the hearing, held on October 26, 2005, appellant's representative argued that any recovery should be subrogated between appellant's private and federal employment. Appellant testified that he had worked in both private and federal employment as a welder, and had asbestos exposure in both federal and private employment. Appellant's representative noted that there may not have been any "settlement agreements" *per se*, just that checks were distributed.

By decision dated December 15, 2005, an Office hearing representative affirmed the December 2, 2004 decision.

LEGAL PRECEDENT

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 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 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."[5]

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 Office]:
>
> (1) Determine the gross recovery as set forth in [section] 10.712;

[4] The accepted conditions are asbestosis, bullous emphysema, pulmonary fibrosis and chronic obstructive pulmonary disease.

[5] 5 U.S.C. § 8132.

(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 Government's allowance for attorney's fees, and subtract this amount from Subtotal D."[6]

ANALYSIS

The Board finds that appellant received a double recovery from third-party settlements in addition to compensation benefits under the Act. In the *Atwood* case,[7] the issue was whether the employee's 1980 claim for lung disease and his 1988 claim for lung cancer should be treated as separate claims since both conditions were causally related to his asbestos exposure for which he received third-party settlements. In this case, however, appellant filed a claim for "asbestosis/pulmonary illness" in 1989 and on September 7, 1989 the Office accepted that he sustained employment-related bullous emphysema, pulmonary fibrosis, surgical absence of both upper lobes of lungs, chronic obstructive pulmonary disease and asbestosis.

During the early development of this case, in April 1991, appellant furnished the Office with a list of asbestos manufacturers and stated, "these are the list [sic] of compan[ies] that paid me for exposure to asbestosis. All cases [were] settled when doctors told me my illness was asbestos related." On June 2, 1992 the Office requested that appellant's attorney complete a statement of recovery. On June 13, 1992 appellant's attorney furnished his congressional representative with copies of various correspondence including the list of appellant's settlement amounts. On August 21, 1992 appellant completed an Office form indicating that he had received $91,326.00 in third-party recovery. By letter dated December 16, 1993, the Office informed him that he had a surplus in the amount of $48,242.54. In a July 31, 2002 pleading prepared for appellant's first appeal to the Board,[8] his representative conceded that appellant received a third-party settlement for asbestos exposure and also received benefits under the Act. Appellant's representative merely challenged the determination that appellant was at fault

[6] 20 C.F.R. § 10.711.

[7] *Supra* note 3.

[8] *Supra* note 2.

regarding the ensuing overpayment in compensation that had been created. Counsel stated, "even though the claimant has no statutory right to keep all the funds he receive[d] in the overpayment of compensation," he should be granted waiver of recovery.

Following the Board's July 1, 2004 remand to the Office, the Office contacted both appellant and his attorney requesting copies of the settlement agreements. The Office was informed that the agreements had been destroyed. However, the Office was provided with summaries of the settlements received by appellant and correspondence provided by the attorney to plaintiffs, as described above.

The Board finds that the record in this case establishes that appellant received third-party recoveries from a number of asbestos manufacturers. Even though the specific settlement agreements are no longer available, the evidence of record is sufficient to establish that the third-party settlements were based on appellant's asbestos exposure during both his federal and his private employment and covered the conditions accepted by the Office as employment related. Appellant, therefore, received a double recovery in this case. The Board notes that, in a letter dated November 3, 1988 regarding claims against Johns-Manville, appellant's attorney informed him that the civil settlements took into account the progressive nature of asbestosis and reflected future damages which included not only pain and suffering but future medical expenses and future loss of wage-earning capacity. There is nothing in the record to suggest that appellant's other settlement agreements were based on different terms. Appellant received a double recovery and, pursuant to section 8132 of the Act, recovery may not be waived or compromised.[9] The Office determined the amount of the refund due to the United States in accordance with specific calculations as set forth in section 10.711 of the regulations and a surplus in the amount of $48,242.54 was created.[10]

On appeal, appellant's representative argued that his third-party settlements should be apportioned because some of his asbestos exposure was during private employment. The Board finds that, as a general rule, no attempt is made to apportion disability under the Act.[11] In this case, the Board finds that appellant did not sustain two separate injuries due to his asbestos exposure. Rather, the exposure in both his civilian and federal employment caused the lung conditions that have been accepted as employment related and for which he received a third-party recovery.[12] The Board notes that, as the $48,242.54 third-party surplus has been repaid, the issue of recovery of this overpayment is moot.

CONCLUSION

The Board finds that pursuant to 5 U.S.C. § 8132 appellant received a double recovery surplus in the amount of $48,242.54.

[9] *Sammy L. High*, 55 ECAB 697 (2004).

[10] 20 C.F.R. § 10.711; *see Walter F. Nied*, 57 ECAB ____ (Docket No. 06-510, issued June 22, 2006).

[11] *Ruey J. Yu*, 49 ECAB 256 (1997).

[12] *Compare R.G.*, 58 ECAB ____ (Docket No. 06-369, issued December 13, 2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 15, 2005 be affirmed.

Issued: September 24, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board