

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

---

S.D., Appellant )  
and ) Docket No. 07-256  
DEPARTMENT OF TRANSPORTATION, ) Issued: July 24, 2009  
FEDERAL AVIATION ADMINISTRATION, )  
Anchorage, AK, Employer )  
\_\_\_\_\_  
)

*Appearances:*

*Richard E. Vollertsen, Esq.*, for the appellant  
*Paul J. Klingenberg, Esq.*, for the Director

Oral Argument December 11, 2008

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 6, 2006 appellant, through his attorney, filed a timely appeal from a May 24, 2006 merit decision of the Office of Workers' Compensation Programs.<sup>1</sup> 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 the Office properly determined the amount that appellant owed the government from his third-party recovery.

**FACTUAL HISTORY**

On October 23, 2001 appellant, then a 47-year-old airway transportation system specialist, filed a claim for serious injuries sustained in a helicopter crash on October 18, 2001. On the claim form, his supervisor indicated that a third party, Era Aviation, was responsible for

---

<sup>1</sup> The Office reissued its May 24, 2006 decision on June 13, 2006 to appellant's correct address.

his injury. The Office accepted the claim for bilateral ankle fractures, a right hand fracture and a sternum fracture. Appellant stopped work on October 18, 2001 and returned to limited-duty employment on May 14, 2002.

By letter dated June 9, 2004, the Office advised appellant that compensation benefits paid to him totaled \$264,818.40 and medical benefits paid to him totaled \$145,019.71, reflecting a government lien of \$409,838.11. On February 15, 2005 appellant's attorney informed the Office that appellant had settled his civil claim against Era Aviation for \$2,300,000.00. Although appellant disputed several calculations regarding the total lien, he tendered a check for the undisputed portion of the lien in the amount of \$207,385.45.

By letter dated March 18, 2005, the Office provided appellant an approved worksheet entitled, Statement of Recovery (SOR).<sup>2</sup> From the \$409,838.11 government lien, it deducted \$136,476.09 in attorney's fees as the government contributes toward repayment of the attorney's fee, finding that the amount to be reimbursed was \$273,362.02. As appellant had already reimbursed the Office \$207,385.45, it requested that the remainder \$65,976.57 be paid in full.

Appellant disputed the amount on two grounds. First, he disagreed with the method for handling court costs in the Office's SOR worksheet and second, he disagreed with being responsible for repayment of certain expenditures that allegedly did not directly represent costs for his care but rather were incurred by the government for its own case management process.

Regarding the first issue, appellant argued that the SOR is inconsistent with the plain reading of the statute. The attorney points out the particular language of the statute: "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...." Appellant argued that while the worksheet provided a deduction for attorney's fees and court costs from the gross recovery, it provided only for a deduction of attorney's fees (not court costs) from the amount of compensation benefits to be reimbursed. This, appellant asserted, was clearly contrary to the plain language of the statute.

Regarding the second issue, appellant argued that \$11,713.46 should be subtracted from the amount of compensation payments already paid by the Office because these charges did not

---

<sup>2</sup> From appellant's gross third-party recovery of \$2,300,000.00, the Office subtracted the amount allocated for loss of consortium of \$575,000.00, attorney's fees of \$574,425.00 and court costs of \$44,867.28. This resulted in an adjusted gross recovery of \$1,105,707.72. The Office then deducted 20 percent for appellant, in the amount of \$221,141.54 (which is not subject to any deductions), yielding a total of \$884,566.18 from which reimbursement can be recovered. It determined that it had paid him \$409,838.11 in compensation benefits. From that amount, the Office deducted \$136,476.09 for attorney's fees, rendering a total amount due of \$273,362.02. As appellant has already paid the government \$207,385.45, a remainder of \$65,976.57 was due. The remaining amount -- \$884,566.18 (adjusted gross recovery) minus \$409,838.11 (compensation already paid) provided \$474,728.07 to be used by the Office as an offset for future compensation benefits.

represent charges for care he actually received.<sup>3</sup> He argued that these expenses were undertaken by the Office to simply evaluate his case to limit its exposure and expenditures, but not for either medical benefits or wage-loss compensation for him. In support of this argument, appellant noted that he was not permitted to obtain copies of these particular medical records because they were considered to be the property of the Office.

Appellant enclosed his own worksheet calculating the amount he believed that he owed the Office, \$207,385.45, and noted that the Office had already received this amount.

On March 18, 2005 the Office prepared an approved statement of recovery. It disagreed with appellant's calculations and reiterated that he continued to be responsible for full payment of \$273,362.02 (owing an additional \$65,976.57). The Office further found that the remaining amount of the settlement award constituted a surplus of \$474,728.07 that would offset future compensation benefits.

In a March 18, 2005 letter, accompanying the SOR, the Office noted that the approved court costs were only \$44,867.28, but by letter dated March 30, 2005, the approved costs were increased to \$49,028.26 to include video documentation.<sup>4</sup> This change did not affect the reimbursement amount; it simply changed the offset amount for future compensation benefits from \$474,728.07 to \$471,399.28.<sup>5</sup> The Office noted that appellant continued to owe the government \$65,976.57.

By decision dated May 24, 2006,<sup>6</sup> the Office found that appellant owed \$65,976.57 from his third-party recovery to the Office. In an accompanying memorandum incorporated by reference, the Solicitor of Labor (SOL), on behalf of the Director of the Office, explained that

---

<sup>3</sup> The disputed costs were: \$642.08 paid to Carol Jacobsen, a registered field nurse, for services during the period October 25 to 31, 2001; \$9,771.38 paid to Virginia Sampson, a registered field nurse, for services during the period November 1, 2001 to June 30, 2002; \$750.00 paid to John DeCarlo, an occupational therapist, for services rendered on April 9, 2002; and \$550.00 paid to Dr. Joella Beard, a Board-certified physiatrist, for services rendered on May 31, 2002. The Office hired Ms. Sampson, a field nurse with Northern Rehabilitation Services, to "assist in coordinating the medical aspects of [appellant's] care and facilitating the flow of information" between him and his physicians. On April 9, 2002 Mr. DeCarlo performed a functional capacity evaluation to determine appellant's physical abilities. Appellant's attending physician, Dr. Leslie Dean, a Board-certified orthopedic surgeon, requested the physical capacity evaluation by Mr. DeCarlo. On May 31, 2002 Dr. Beard performed an impairment rating on appellant at the request of Dr. George S. Rhyneer, an attending Board-certified internist.

<sup>4</sup> Although appellant disputes the method for handling court costs on the SOR, he does not dispute the final amount of costs determined by the Office of \$49,028.26.

<sup>5</sup> With the increase in court costs, the adjusted gross recovery amount changed to \$1,101,546.74, the 20 percent for appellant was \$220,309.95, yielding a total of \$881,237.39 for reimbursement. After reimbursement, \$471,399.28 remained to offset future compensation payments.

<sup>6</sup> In a letter dated April 21, 2005, the Office provided the attorney instructions for filing an appeal and on August 23, 2005 an appeal was filed with the Board. By order dated May 12, 2006, the Board found that the record did not contain a final decision as the Office's April 21, 2005 letter was simply informational in nature. The Board noted, however, that it appeared the Office had made a final decision regarding costs and a final amount due and owing to the government from the third-party litigation in the amount of \$65,976.57. That decision was not in the case record and the Board remanded the case for an appropriate decision to protect appellant's appeal rights.

the Office applied the regulatory formula at 20 C.F.R. § 10.711<sup>7</sup> in deducting court costs only from line 10 of the SOR. Regarding the attorney's challenge to the Office's payments to nurse case managers, the Solicitor noted that case management was used to minimize the length and extent of disability. He further maintained that payments to rehabilitation medicine associates and rehabilitation and sports medicine constituted refundable disbursements pursuant to 20 C.F.R. § 10.714.<sup>8</sup>

### **LEGAL PRECEDENT**

Section 8132 of the Federal Employees' Compensation Act<sup>9</sup> provides:

"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 the 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.... However, 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."<sup>10</sup>

In determining how much of a settlement or judgment must be paid to the government, 20 C.F.R. § 10.711<sup>11</sup> provides:

"(a) The refund to the United States is calculated as follows, using the [SOR] form approved by [the Office] --

(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 Office] or SOL to be reasonable, from the gross recovery (Subtotal A);

---

<sup>7</sup> 20 C.F.R. § 10.711 (2006).

<sup>8</sup> *Id.* at § 10.714 (2006).

<sup>9</sup> 5 U.S.C. §§ 8101-8193.

<sup>10</sup> *Id.*

<sup>11</sup> *Supra* note 7.

(3) Subtract the costs of litigation, as allowed by [the Office] or SOL (Subtotal B);

(4) Subtract one fifth of Subtotal B 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.

“(b) The credit against future benefits (also referred to as the surplus) is calculated as follows --

(1) If Subtotal C, as calculated according to paragraph (a)(4) of this section, is less than the refundable disbursements, as defined in [section] 10.714, there is no credit to be applied against future benefits;

(2) If Subtotal C is greater than the refundable disbursements, the credit against future benefits (or surplus) amount is determined by subtracting the refundable disbursements from Subtotal C.”

Regarding the determination of the amounts included in the refundable disbursements, the Office's regulations at 20 C.F.R. § 10.714 provide:

“The refundable disbursements of a specific claim consist of the total money paid by [the Office] from the Employees' Compensation Fund with respect to that claim to or on behalf of a FECA beneficiary, less charges for any medical file review (*i.e.*, the physician does not examine the employee) done at the request of [the Office]. Charges for medical examinations also may be subtracted if the FECA beneficiary establishes that the examinations were required to be made available to the employee under a statute other than the FECA by the employing agency or at the employing agency's cost.”

Further, the Office's procedure manual at 2.1100.9(h)<sup>12</sup> provides:

“(h) The United States does not contribute to or pay costs associated with the third-party action. The [Act] does not provide for or authorize the payment of costs other than as a deduction from the third-party recovery.”

---

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *FECA Third Party Subrogation Guidelines, Subrogation and Other Remedies: Processing the SOR*, Chapter 2.1100.9(h) (April 1995).

## ANALYSIS

The Office accepted that appellant sustained bilateral ankle fractures, a right hand fracture and a sternum fracture in a helicopter crash on October 18, 2001. Appellant filed a suit in state court against the company that operated the helicopter. He settled the case and received an award of \$2,300,000.00. Appellant submitted \$207,385.45 to the Office in payment of the subrogation lien. By decision dated May 24, 2006, the Office determined that he owed an additional \$65,976.57 from his third-party recovery based on its calculation of a refund amount totaling \$273,362.02.

Appellant's attorney argued that 5 U.S.C. § 8132 provides that court costs should be deducted not only to determine the adjusted gross recovery but also from the amount of disbursements made by the government. Reimbursement amount should be calculated after deducting both the cost of suit and a reasonable attorney's fee. The attorney stated:

“The computation sheet provided by [the Office] to claimants for use in calculating subrogation reimbursement to [the Office] is in error, however. The form substantially follows the provisions of 20 C.F.R. § 10.711. The calculation contained in the regulation[s] and the calculation form provided by [the Office], however, plainly deviates from the statutory obligation. While the computation does subtract costs when figuring the credit offset to [the Office], the costs are *not* subtracted in the portion of the computation calculating the reimbursement amount owed to [the Office]. Thus, the computation is violative of the statute in calculating the reimbursement amount owed to [the Office]. The statute specifically mandates that the ‘amount of compensation paid by the United States’ should be repaid by the claimant ‘after deducting therefrom the costs of the suit.’ [The Office] calculation does not permit this deduction; the costs of suit are only accommodated in calculating the offset relative to future benefits to the worker. [The Office] is thus freed from paying costs incurred by the worker in taking on the risk and exposure of litigation, when the statute plainly obligates the United States to pay such litigation costs.” (Emphasis in the original.)

The Solicitor submitted a memorandum in justification of the Office's decision, arguing that the clear language of section 8132 and its implementing regulations “address the issue of fees and costs directly, foreclosing any further argument.”

The clear statutory right of the Federal Government to recover from third-party settlements under section 8132 has been recognized by the Supreme Court. In *U.S. v. Lorenzetti*,<sup>13</sup> a special agent for the Federal Bureau of Investigation was injured in an automobile accident while on official business and received workers' compensation benefits. A tort action in Pennsylvania filed by appellant resulted in a recovery which, due to the particularities of Pennsylvania law, could consist of only pain and suffering. The Office sought recovery out of the settlement to reimburse the government for compensation benefits paid and that he claimed it was not subject to the government's lien as the award was only for pain and suffering. The

---

<sup>13</sup> *United States v. Paul B. Lorenzetti*, 467 U.S. 167 (1984) (holding that the government has a “right to reimbursement out of any damages awarded or settlement received by the claimant.”)

Court considered and upheld the Federal Government's right to reimbursement under section 8132, even for such noneconomic losses. The Court noted that the purpose of section 8132 was "not simply to prevent double recoveries but to minimize the cost of the [Act] program to the Federal Government."<sup>14</sup> The Court further found that section 8132 is one of the provisions of the Act "designed to shift the compensation burden from the United States to any third party who is independently liable for the employee's injuries."<sup>15</sup> In its ruling, the Court had to look no further than the plain language of the statute to recognize that the Office maintained that right, despite the characterization of the award as noneconomic recovery. It stated:

"The answer to the question here is evident on the face of the statute.... Section 8132 imposes only two conditions precedent to an employee's obligation to refund ... the amount of compensation paid by the United States. The first is that the employee must have suffered an injury or death under circumstances creating a legal liability in a third party to pay damages. The second is that the employee or his beneficiaries must have received money or other property in satisfaction of that liability."<sup>16</sup>

The terms of section 8132 are specific as to what must be charged against the proceeds of a third-party recovery. The section sets forth what will be deducted and also prescribes a minimum amount (20 percent) the employee may retain.

"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 the 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.... However, 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."

---

<sup>14</sup> *Id.* at 177, citing *Dahn v. Davis*, 258 U.W. 421 (1922).

<sup>15</sup> *Id.* at 171. See also A. Larson, *The Law of Workers' Compensation* § 117.01 (2007). (Larson indicates that the normal rule on reimbursement is that the "subrogated carrier is entitled to recover from the third party not merely its compensation outlay, but the full amount of the employee's or dependent's damages, including personal damages such as loss of consortium and companionship, but not including the penalties or expenses paid by the carrier. Larson further notes that the "concept underlying third-party actions is the moral idea that the ultimate loss from wrongdoing should fall upon the wrongdoer." The employer in a third-party recovery, "who, in a fault sense, is neutral comes out even; the third person pays exactly the damages he or she would ordinarily pay, which is correct, since to reduce the third-party's burden because of the relation between the employer and employee would be a windfall that the third party has done nothing to deserve....")

<sup>16</sup> *Supra* note 13 at 175.

Appellant does not quarrel with the Office's right to recovery; rather he argues that the method for calculating the amount of reimbursement to the Office for compensation benefits is flawed and contrary to the plain language of the statute. He contends that the costs of litigation should also be deducted from the amount of compensation benefits paid or the government receives a windfall -- the benefits of the recovery without having to undertake the costs of litigation.

Section 8132 of the Act allows the claimant to keep as a minimum one-fifth of the net compensation from the settlement or judgment after deducting a reasonable attorney's fee and litigations costs from the third-party recovery. The section further provides that the claimant may retain "*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."<sup>17</sup> (Emphasis added.) The purpose underlying this section of the Act is to prevent a double recovery by the employee. Neither the Office nor the Board may enlarge or modify the terms of the Act. The statute mandates that only attorneys' fees are deducted after the one-fifth recovery amount is calculated. Costs are not referenced at this point in the calculation and the Office further must offset the surplus in the present case against future payments of compensation in the form of either medical benefits or other compensation due him.<sup>18</sup>

The Office's regulations at 20 C.F.R. § 10.711 further interpret section 8132 of the Act by specifically allowing the subtraction of both court costs and attorney's fees from the gross recovery as well as the one-fifth allowance, plus an amount equal to the government's allowance of an attorney's fee.<sup>19</sup> It argued that the SOR is mandatory as it is based on the clear and straightforward language of the statute with no room for interpretation, citing to *Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach*.<sup>20</sup> The Board finds that the regulations promulgated at section 10.711 and the Office's procedure manual at interpreting these regulations (specifically, that the "United States does not contribute to or pay costs associated with the third-party action. The [Act] does not provide for or authorize the payment of costs other than as a deduction from the third-party recovery") are consistent with the plain language of the statute.<sup>21</sup>

Following those rules, the Office properly subtracted loss of consortium (\$575,000.00), attorney's fees of 33 1/3 percent (\$574,425.00) and court costs (\$49,028.26) from the gross recovery of \$2,300,000.00. This adjusted total was reduced by one fifth (\$220,309.35) in accord with section 8132 and then the balance (\$881,237.39) was utilized to determine whether reimbursement was required by appellant. The Office compared the adjusted gross recovery balance (\$881,237.39) to the total amount of compensation benefits already paid to appellant

---

<sup>17</sup> *Supra* note 7.

<sup>18</sup> *Alvin Collins*, Docket No. 03-141 (issued August 13, 2003). See also, e.g., *Donald Bonte*, 48 ECAB 270 (1997); *Richard J. Maher*, 42 ECAB 902 (1991); *Claude W. Darris*, 37 ECAB 190 (1985); and *Joseph A. Matais*, Docket No. 00-2378 (issued December 10, 2001).

<sup>19</sup> *Supra* note 7.

<sup>20</sup> *Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998).

<sup>21</sup> *Sammy High*, Docket No. 04-1190 (issued September 8, 2004).

(\$409,838.11) to determine if there is any remaining amount against which to offset future compensation benefits. In this case, it paid compensation benefits in an amount less than the recovery amount and therefore the lower amount is used to determine the future offset amount.<sup>22</sup> The final step was to subtract the approved attorney's fee (\$136,476.09) from the amount of benefits paid (\$409,838.11) to determine the amount of the refund owed (\$273,362.02).

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 \$2,300,000.00, appellant must refund \$273,362.02. Of that amount, \$207,385.45 has been paid leaving a balance of \$65,976.57. Further, the remaining balance from the adjusted gross recovery (\$881,237.39) less the compensation benefits paid (\$409,838.11) equals the credit against future benefits (\$471,399.28). Accordingly, the Board finds the Office properly determined the amount of recovery due from the third-party settlement.

The attorney further argued that the Office should not include payments to field nurses not directly involved in patient care as part of its distributions on behalf of appellant. He also challenged payments to an occupational therapist who performed a functional capacity evaluation and a physician who evaluated him to determine the extent of any permanent impairment. The attorney argued that these "expenditures were solely intended to benefit [the Office] and were used to limit [the Office's] exposure and expenditures." The Solicitor responded that the payments were for medical services in accordance with section 8103.<sup>23</sup>

Further, the Office's regulations, at section 10.714, provides that refundable disbursements include all money paid by the Office from the Employees' Compensation Fund for the claimant, excluding only charges for medical file review or if the charges were necessitated under another statute.<sup>24</sup> It hired the private field nurses to coordinate appellant's care and facilitate the sharing of medical information. The occupational therapist and the physician who performed the impairment evaluation both did so at the request of one of appellant's attending physicians. As neither service constituted medical file review and both expenses were paid from the Employees' Compensation Fund, the money paid constitutes a refundable disbursement pursuant to section 10.714. The Board finds that the Office properly included these amounts in the total amount of compensation benefits paid to appellant.

As appellant received money in a third-party settlement as a result of his employment injury, section 8132 of the Act requires that he refund a portion of that recovery to the United States. The amount of the refund to the United States is determined according to the specific calculations set forth at section 10.711 of the Office's regulations and described above. The Office does not have discretionary authority under section 8132 to waive or compromise the

---

<sup>22</sup> *Supra* note 7.

<sup>23</sup> *Supra* note 9 (section 8103 provides that the "United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation").

<sup>24</sup> *Supra* note 8.

required reimbursement amount.<sup>25</sup> Consequently, the Board finds that the Office properly determined that appellant owed an additional \$65,976.57 to the government.

**CONCLUSION**

The Board finds that the Office properly determined the amount that appellant owed the government from his third-party recovery.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 24, 2006 is affirmed.

Issued: July 24, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

---

<sup>25</sup> R.C., 60 ECAB \_\_\_\_ (Docket No. 08-1201, issued December 16, 2008).