

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

L.C., Appellant)	
)	
and)	Docket No. 17-0906
)	Issued: December 15, 2017
)	
U.S. GOVERNMENT, Washington, DC,)	
Employer)	
)	

Appearances:
*Jon B. Robinson, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 19, 2016 appellant, through counsel, filed a timely appeal from a November 10, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied his direct claim for benefits under the War Hazards Compensation Act (WHCA).²

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 42 U.S.C. §§ 1701-17.

Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether appellant is entitled to benefits under section 101(a) of WHCA.

FACTUAL HISTORY

On April 28, 2016 appellant, then a 26-year-old military analyst manager working for an independent contractor, filed a claim for compensation (Form LS-203) alleging an injury due to cumulative exposure and war-risk hazards while in Kandahar Airfield and Tarin Kowt, Afghanistan. He specified the date of injury as November 17, 2011.

Appellant initially had filed a claim for benefits under the Defense Base Act (DBA).⁵ In a settlement application pursuant to section 8(i) of the Longshore and Harbor Workers' Compensation Act⁶ (LHWCA), as extended by DBA, employer and carrier contended that the statute of limitations on his claim began to run on October 11, 2012, when he telephoned the Department of Veterans Affairs (DVA) regarding treatment for post-traumatic stress disorder (PTSD). Employer and carrier argued that the claim for indemnity benefits was untimely under the two-year state of limitations for filing a claim under DBA as appellant had not filed his DBA claim until May 26, 2015. It conceded that his claim for medical benefits was timely. Appellant concurred that his claim was filed more than two years after October 11, 2012. The parties agreed to settle the claim for a lump-sum payment of \$120,000.00 in medical benefits and no indemnity benefits. The employer and carrier also agreed to pay \$20,000.00 in attorney's fees. The settlement application indicated that appellant could pursue a claim under WHCA, which had a three-year statute of limitations, if the court determined that he was not entitled to compensation under DBA.

On March 3, 2016 an administrative law judge with the Department of Labor (DOL) issued a decision and order approving the settlement compromise under DBA and section 8(i) of LHWCA. He approved \$120,000.00 for medical benefits only. The administrative law judge determined that employer and carrier had no liability for indemnity compensation under DBA as appellant's claim for employment injuries culminating November 17, 2011 was discharged by the expiration of the statute of limitations. He further approved \$20,000.00 in attorney's fees.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board's jurisdiction to review decisions of OWCP under WHCA was determined in *John Francis Dolezal*, 9 ECAB 220 (1957). *See also James R. Clark*, 27 ECAB 591 (1976); Federal (FECA) Procedure Manual, Part 4 -- Special Case Procedures, *War Hazards*, Chapter 4.300.10.d (September 1994) (individuals who file a claim under section 101 of WHCA receive the same appeal rights granted in regular FECA cases).

⁵ 42 U.S.C. § 1651 *et seq.*

⁶ 33 U.S.C. § 901 *et seq.*

By decision dated September 19, 2016, OWCP denied appellant's April 28, 2016 claim under WHCA. It noted that an administrative law judge had determined that appellant was entitled only to compensation under DBA for medical benefits but not for wage-loss compensation as his claim for wage-loss compensation was determined to have been untimely filed. OWCP explained that WHCA extended coverage to individuals whose injury or death was not compensable under DBA. In this case, the claim had been denied not because it was outside the coverage of the DBA but because the DBA claim had been untimely filed.

On October 21, 2016 appellant, through counsel, requested reconsideration. Counsel noted that appellant was not awarded indemnity benefits under DBA as he filed his claim more than two years after seeking assistance from the DVA for a psychological condition. He contended, therefore, that as benefits were not payable under DBA they could be recovered under WHCA. Counsel noted that WHCA did not define "payable" and thus it should be interpreted by its plain meaning as an amount owed or due.

OWCP, following a preliminary review, set aside the September 19, 2016 decision as it had failed to provide the appropriate appeal rights. It reissued the September 19, 2016 decision on November 10, 2016.

On appeal counsel contends that he established exposure to war-risk hazards during his employment in Afghanistan but could not receive indemnity benefits under DBA as he filed his claim more than two years after seeking assistance from DVA for a psychological condition. He argues that the claim was therefore not "payable" under DBA, asserting that "payable" should be an expansive term due to WHCA's humanitarian purpose. As "payable" is not defined by WHCA, counsel maintains that it should be interpreted by its plain meaning as an amount due or owed at a particular time. He notes that WHCA provided compensation to victims of war-risks hazards even if not engaged in the course of employment.

LEGAL PRECEDENT

WHCA supplements DBA, which extends LHWCA.⁷ WHCA completes the protection provided to federal contractors' employees and certain other selected employees performing work outside the United States. All liability for injury, death and detention benefits under the WHCA is assumed by the Federal Government, and is paid from the Employees Compensation Fund established by 5 U.S.C. § 8147.⁸

Section 101(a) of WHCA⁹ provides that, in case of injury or death resulting from injury to any person employed by a contractor with the United States, if such person is an employee specified in DBA, and no compensation is payable with respect to such injury or death under DBA, and such injury proximately results from a war-risk hazard, whether or not such person then actually was engaged in the course of his employment, the provisions of FECA, as

⁷ 33 U.S.C. § 901 *et seq.*

⁸ Federal (FECA) Procedure Manual, Part 4 -- Special Case Procedures, *War Hazards*, Chapter 4.300.6.a (September 1994).

⁹ 42 U.S.C. § 1701(a)(1).

amended, and as modified by WHCA, shall apply with respect thereto in the same manner and to the same extent if the person so employed were a civil employee of the United States and were injured while in the performance of his duty.

The regulations implementing WHCA provide that compensation under section 101(a) of WHCA is payable for injury or death due to a war-hazard risk of an employee regardless of whether or not he was engaged in the course of employment at the time of injury.¹⁰ A condition precedent to coverage under section 101(a) of WHCA is that no compensation is payable under DBA with respect to such injury or death. To this end, regulations implementing WHCA further provide: “An employee or his or her survivors may file a claim under section 101(a) of the WHCA only after a determination has been made that no benefits are payable under the DBA administered by [OWCP’s] Division of Longshore and Harbor Workers’ Compensation.”¹¹

The condition precedent is also found in OWCP’s procedures: “*An employee or survivor should file a claim directly with the Division of Federal Employees’ Compensation under section 101 of the WHCA only after a Longshore District Director has determined that no compensation is payable under the [DBA].*”¹²

ANALYSIS

Before a claimant may make a direct claim for compensation under section 101(a) of WHCA, a Longshore District Director must determine that no compensation is payable under DBA.¹³ Appellant has not produced such a determination. In a decision dated March 3, 2016, an administrative law judge with DOL approved a settlement compromise under DBA and section 8(i) of LHWCA. He found that appellant was entitled to \$120,000.00 for medical benefits and \$20,000.00 in attorney’s fees. The administrative law judge further found that employer and carrier had no liability for indemnity compensation under DBA as his claim for employment injuries culminating November 17, 2011 had not been filed within DBA’s statute of limitations. The Board finds that appellant’s claim could not be heard under the DBA, due to the untimely filing. There was no adjudication as to whether any benefits under DBA would have been payable. As noted, WHCA extended coverage to employees injured or killed by a war-hazard risk even if not engaged in the course of employment at the time of injury.¹⁴ Appellant was covered under DBA for medical benefits but his claim for indemnity benefits was untimely filed under DBA. There has been no finding that benefits under DBA were not otherwise payable and thus has not established coverage under WHCA.¹⁵

¹⁰ 20 C.F.R. § 61.201.

¹¹ *Id.* at § 61.201.

¹² Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 4.300.10.a (September 1994).

¹³ *Id.*; see also *K.W. (S.F.)*, Docket No. 13-2091 (issued August 8, 2014), *Nadegda Ankney*, 5 ECAB 220 (1952).

¹⁴ See *supra* note 10.

¹⁵ See *K.W. (S.F.)*, *supra* note 13.

Accordingly, the Board finds that appellant has not met the conditions for coverage under section 101(a) of WHCA and affirms the November 10, 2016 OWCP decision.

On appeal counsel contends that he demonstrated that his claim was not “payable” under DBA as it was not timely filed, noting that “payable” was not defined by WHCA and thus should be read by its plain meaning as an amount due or owed. He asserts that due to DBA’s humanitarian purpose its provisions should be read expansively. As discussed, however, the law is clear that appellant must show that no compensation is payable under DBA in order to make a direct claim for compensation under section 101(a) of WHCA.¹⁶ He received compensation in the form of medical benefits under DBA, and he was not entitled to indemnity benefits simply due to the running of the time limitations provisions, rather than because he did not fall within coverage of DBA.

CONCLUSION

The Board finds that appellant has not established that he is entitled to benefits under section 101(a) WHCA.

ORDER

IT IS HEREBY ORDERED THAT the November 10, 2016 decision of the Office of Workers’ Compensation Programs is affirmed.¹⁷

Issued: December 15, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees’ Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees’ Compensation Appeals Board

¹⁶ See *supra* note 12.

¹⁷ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.