



**EMPLOYEE:** [Name Deleted]  
**CLAIMANT:** [Name Deleted]  
**CASE NUMBER:** [Number Deleted]  
**DOCKET NUMBER:** 20221201-48314-5  
**DECISION DATE:** December 13, 2022

### **NOTICE OF FINAL DECISION**

This final decision of the Final Adjudication Branch (FAB) concerns the above-noted claim for benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq.* FAB's prior February 6, 2008 final decision concerning the employee's Part E claim for wage-loss and impairment benefits was vacated by a Director's Order dated June 21, 2022. Also, pursuant to that Director's Order, the Seattle district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) issued a new recommended decision on December 1, 2022. For the reasons set out below, FAB re-accepts the employee's Part E claim for wage-loss benefits and also accepts his Part E claim for impairment benefits.

### **STATEMENT OF THE CASE**

On February 28, 2007, FAB issued a final decision under Part E of EEOICPA accepting the employee's claim for asbestosis and asbestos-related lung disease and awarded him medical benefits for these illnesses. In that decision, FAB stated that the employee had received (as of that date) \$119,640.94 from a state workers' compensation (SWC) claim for the same two covered illnesses and \$51,955.91 in tort settlements based on his work-related asbestos exposure, and thus determined that there was a surplus of \$171,596.85 at that time that would need to be absorbed out of future Part E benefits for his two covered illnesses.

On February 6, 2008, FAB issued a final decision accepting the employee's request for Part E impairment benefits, awarding him \$40,000.00 based on his 16% whole-person impairment rating, accepting his request for Part E wage-loss benefits for the years 2003 through 2005 and awarding him wage-loss benefits in the amount of \$10,000.00 for 2003 and \$15,000.00 for the years 2004 and 2005 (for a total of \$40,000.00 in wage-loss benefits). However, FAB found that (as of that date) the employee had received \$146,534.29 in SWC benefits and \$58,592.17 in tort settlements. Thus, his total award of impairment and wage-loss benefits of \$80,000.00 was credited towards his surplus, which resulted in a remaining surplus of \$125,126.46.

On December 5, 2017, FAB issued a final decision accepting the employee's Parts B and E claim for chronic silicosis. Then, on August 18, 2021, FAB issued a final decision accepting his later claim for multiple myeloma and consequential anemia under Parts B and E.

On September 26, 2021, the employee requested additional impairment benefits due to all of his accepted covered illnesses and asked that Dr. Laurence Fuortes perform the impairment evaluation. On December 13, 2021, the district office issued a letter decision accepting the employee's Parts B and E claim for adenocarcinoma of the rectum.

On December 20, 2021, the employee responded to a request for additional documentation regarding his receipt of SWC benefits and tort settlements by providing a December 14, 2021 settlement status report, which indicated that the various defendants in his tort suit had made payments in the total amount of \$143,034.83, and that \$4,649.03 in costs (none of which were itemized) and \$53,123.26 in attorney fees were subtracted from that amount, so that he received \$85,262.54. With respect to the employee's SWC claim, he submitted a January 10, 2022 letter from Helmsman Management Services stating that "the total paid on your [SWC] claim is \$754,976.69."

In a January 5, 2022 report, Dr. Fuortes concluded that the employee had reached maximum medical improvement, and opined that he had: (1) a 45% whole-person impairment due to his adenocarcinoma of the rectum; (2) a 21% whole-person impairment due to his asbestosis, asbestos-related lung disease and chronic silicosis; (3) a 25% whole-person impairment based on his anemia; and (4) a 60% whole-person impairment based on his multiple myeloma. Using the Combined Values Chart in the 5th edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA's *Guides*), Dr. Fuortes determined that the employee had an 87% whole-person impairment due to all of his covered illnesses.

On February 28, 2022, the district office referred the employee's case to DEEOIC's Policy Branch for guidance on how to calculate his potential impairment award. Thereafter, on June 21, 2022, the Director of DEEOIC issued an order that vacated FAB's February 6, 2008 decision and returned his case to the district office for further development. Specifically, the Director ordered the district office to: (1) recommend re-awarding the employee wage-loss benefits for the years 2003 through 2005 (totaling \$40,000.00); (2) obtain updated information on the amount of SWC benefits that he had received to date; (3) ascertain whether any acceptable itemized costs were involved in his tort suit; (4) review Dr. Fuortes' January 5, 2022 revised impairment evaluation to determine if it meets all criteria for an impairment rating; and (5) if the impairment rating appeared acceptable, recommend awarding the employee impairment benefits, explaining that because his impairment rating includes two covered illnesses that are subject to both a tort offset and coordination of SWC benefits, his new impairment award must be apportioned.

Pursuant to that order, on July 6, 2022, the district office requested that the employee provide updated information regarding the amount of SWC benefits and tort settlements that he had received to date. On July 21, 2022, the employee's representative indicated that the employee had not received any further tort settlements since the December 14, 2021 status report, and that a request had been made to Helmsman Management Services regarding his receipt of SWC benefits.

On August 8, 2022, the district office requested that the employee provide an itemized list of the costs involved in bringing his tort suit, and his representative submitted such a list on August 25, 2022. On October 4, 2022, the district office sent the employee a final request for additional

evidence on his current receipt of SWC benefits and stated that if he was unable to submit these records, the district office would calculate the amount of SWC benefits that he had received to date based on information in his file and then issue a new recommended decision. The district office noted that while it always strives to obtain the most updated and accurate information as possible before calculating the amount of a Part E impairment award, it also recognized that the amount of the surplus that would result from the employee's receipt of both tort settlements and SWC benefits made obtaining such updated information less crucial. The district office did not receive a response from the employee to this final request.

Accordingly, on December 1, 2022, the district office issued a new recommended decision consistent with the instructions in the Director's June 21, 2022 order. First, the district office recommended re-awarding the employee wage-loss benefits for the years 2003 through 2005 in the amount of \$40,000.00 for the same reasons stated in FAB's February 6, 2008 final decision. Second, as for the employee's receipt of SWC benefits, the district office used the following evidence already in the employee's case file to calculate the amount of SWC benefits that he had received: (1) the January 10, 2022 letter from Helmsman Management Services stating that the employee had been paid a total of \$754,976.69 in SWC benefits as of that date; and (2) letters from prior insurers of his employer indicating that he received \$2,444.85 per month in permanent total disability payments. Based on this evidence, the district office assumed that the employee continued to receive nine months of SWC benefits from January 2022 through October 2022 totaling \$22,003.65 ( $\$2,444.85 \times 9 \text{ months} = \$22,003.65$ ). And adding this amount to the \$754,976.69 reported by Helmsman Management Services, the district office concluded that the employee had received \$776,980.34 ( $\$754,976.69 + \$22,003.65 = \$776,980.34$ ) in SWC benefits to date.<sup>1</sup>

Third, with respect to the costs involved in the employee's tort suit, the district office evaluated the nature of each cost listed in the August 25, 2022 submission to determine if any could be deducted. The district office noted that allowable costs include reasonable out-of-pocket costs and expenses involved in bringing a lawsuit, such as filing fees, travel expenses, record copy services, witness fees, court reporter costs for transcripts of hearings and depositions, postage and long-distance phone calls. On the other hand, unallowable costs include normal office expenses usually referred to as "overhead" costs, such as in-house record copying costs, as well as expenses that have been shared among multiple plaintiffs and not otherwise attributable to specific costs in an employee's own tort suit. The district office found that while all of those costs were itemized, some of them were not allowable deductions from the employee's settlement payments under DEEOIC's procedures. Specifically, the district office found that all entries for "Copying Charges" were not allowable because those costs were not explained and appeared to be in-house record copying costs. In addition, all other entries identified as "Shared costs" and "Group Charges" were unallowable because those costs were also not explained and appeared to be shared proportionally among multiple plaintiffs. Based on the above, the district office found that \$2,978.72 in costs were allowable. Using that figure, along with the gross settlement amount and the amount of attorney fees that the employee's law firm charged, the district office completed an Offset Worksheet and calculated the amount of offset required as \$86,965.18.

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<sup>1</sup> Since the employee did not report any attorney fees or other costs that he paid to obtain this state workers' compensation, it was not necessary to use a worksheet to determine the amount of the required coordination.

Fourth, the district office reviewed Dr. Fuortes' January 5, 2022 revised impairment evaluation and found that it met all of the criteria for an acceptable impairment rating. Fifth, the district office recommended acceptance of the employee's request for impairment benefits under Part E. As for the amount of impairment benefits, the district office stated that while the employee would be entitled to \$2,500.00 for every percentage point of impairment, his impairment benefits would have to be apportioned because his 87% whole-person rating included impairment arising from two covered illnesses that were subject to both offset and coordination. Following the steps in Chapter 21.12 of the Federal (EEOICPA) Procedure Manual (version 7.0), and to account for the employee's re-awarded wage-loss benefits, the district office could not use the "usual" figure of \$217,500.00 for an 87% whole-person rating ( $87 \times \$2,500.00 = \$217,500.00$ ) as the starting point for the apportionment calculations, because adding his \$40,000.00 wage-loss award would exceed the \$250,000.00 maximum cap on Part E monetary benefits. Thus, the district office used \$210,000.00 as the starting point ( $\$250,000.00 - \$40,000.00 = \$210,000.00$ ).

To determine the percentage of the combined impairment rating that each individual impairment represented, the district office first determined the sum of the individual impairment percentages as follows:  $45 + 21 + 25 + 60 = 151$ . Then, to calculate the relative percentage of impairment for each organ or body function, the district office divided each individual percentage by the sum as follows:

- For adenocarcinoma of the rectum:  $45 \div 151 = 29.80\%$
- For pulmonary illnesses (which includes asbestosis and asbestos-related lung disease)<sup>2</sup>:  $21 \div 151 = 13.91\%$
- For anemia:  $25 \div 151 = 16.56\%$
- For multiple myeloma:  $60 \div 151 = 39.74\%$

Then, to calculate the dollar amount attributable to each organ or body function, the district office multiplied the above relative percentages by \$210,000.00 as follows:

- For adenocarcinoma of the rectum:  $29.80\% \times \$210,000.00 = \$62,580.00$
- For pulmonary illness:  $13.91\% \times \$210,000.00 = \$29,211.00$
- For anemia:  $16.56\% \times \$210,000.00 = \$34,776.00$
- For multiple myeloma:  $39.74\% \times \$210,000.00 = \$83,454.00$

To make the total of these relative percentages equal to 100%, the district office adjusted the relative percentage for the employee's pulmonary illnesses by subtracting 0.01%, which resulted in an adjusted percentage of 13.90% (and thus an attributable dollar amount of \$29,190.00 because  $13.90\% \times \$210,000.00 = \$29,190.00$ ).

Next, the district office subtracted the offset and coordination amounts determined above from the dollar amount attributable to the employee's lung impairment ( $\$29,190.00 - \$776,980.34 -$

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<sup>2</sup> Separating out the level of pulmonary impairment for the employee's non-covered chronic silicosis from his other two covered pulmonary impairments for asbestosis and asbestos-related lung disease was not possible since the 5th edition of the AMA's *Guides* does not allow for this. All pulmonary impairments that do not involve removing a portion of the lung are evaluated together using pulmonary function tests.

\$86,965.18 = -\$834,755.52). In addition, because the \$40,000.00 in wage-loss benefits that was being recommended needed to be absorbed, the district office determined that an updated surplus of \$794,755.52 existed.

Finally, to determine the amount of the employee's current impairment award, the district office added together the monetary amount payable for impairment resulting from his adenocarcinoma of the rectum (\$62,580.00), anemia (\$34,776.00) and multiple myeloma (\$83,454.00), which resulted in its recommendation that the employee be awarded \$180,810.00 under Part E.

On December 5, 2022, FAB received the employee's waiver of rights to object to the district office's recommended decision. After carefully considering the entirety of the evidence in the case file, FAB hereby makes the following:

### **FINDINGS OF FACT**

1. The employee is a covered Department of Energy (DOE) contractor employee with the covered illnesses of asbestosis, asbestos-related lung disease, chronic silicosis, multiple myeloma, anemia consequential to multiple myeloma and adenocarcinoma of the rectum under Part E.
2. The employee has been found to be entitled to wage-loss benefits under Part E for the years 2003 to 2005.
3. The employee has reached maximum medical improvement and has a combined whole-person impairment rating of 87%. After apportioning this rating and taking into account the statutory cap on Part E benefits, the employee is entitled to an impairment award of \$180,810.00.
4. The employee's remaining surplus due to offset and coordination that must be absorbed out of future Part E benefits for asbestosis and asbestos-related lung disease is \$794,755.52.

Based on the above-noted findings of fact, FAB also makes the following:

### **CONCLUSIONS OF LAW**

Pursuant to the EEOICPA regulations, “[i]f the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted in § 30.310, or if the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. . . .” 20 C.F.R. § 30.316(a) (2019). The employee has waived his right to object to the December 1, 2022 recommended decision.

Under Part E of EEOICPA, a “covered DOE contractor employee” with a “covered” illness is entitled to wage-loss benefits if the employee sustained wage-loss as a result of a covered illness and meets certain qualifying criteria as to the percentage of the employee's wage-loss. 42 U.S.C.

§ 7385s-2(a)(2). That section of EEOICPA provides that for each calendar year prior to normal retirement age during which, as a result of a covered illness, the employee's wages exceeded 50% but did not exceed 75% of his average annual wage for the 36-month period immediately preceding the month in which the employee first experienced wage-loss as a result of the covered illness, the employee will receive \$10,000.00. It further provides that for each calendar year prior to normal retirement age during which, as a result of a covered illness, the employee's wages did not exceed 50% of his average annual wage, the employee will receive \$15,000.00. After reviewing the calculations made by the district office, FAB concludes that the evidence of record establishes that as a result of the employee's asbestosis and asbestos-related lung disease, his annual wage exceeded 50% of his average annual wage but did not exceed 75% in 2003, and that his annual wage did not exceed 50% of his average annual wage in 2004 and 2005. Thus, the employee is entitled to wage-loss benefits of \$10,000.00 for 2003 and \$15,000.00 for both 2004 and 2005, totaling \$40,000.00.

Part E also provides that a "covered DOE contractor employee" with a "covered" illness is entitled to impairment benefits based on the extent of whole-person impairment of all organs and body functions that are compromised or otherwise affected by the employee's "covered" illness. 42 U.S.C. § 7385s-2(a)(1). That section of EEOICPA further provides that for each percentage point of an impairment rating that is the result of a covered illness, the covered DOE contractor employee will receive \$2,500.00; therefore, the employee is entitled to impairment benefits totaling \$217,500.00 for his 87% whole-person impairment rating ( $87 \times \$2,500.00 = \$217,500.00$ ).

However, when an employee's impairment rating is comprised of multiple impairments and at least one of those impairments is subject to a tort offset and/or SWC coordination, the potential impairment award must be reduced proportionately. 20 C.F.R. § 30.902(b). Also, because adding the employee's potential awards for both wage-loss and impairment will exceed the maximum cap on Part E monetary benefits found in 42 U.S.C. § 7385s-12 of \$250,000.00 ( $\$40,000.00 + \$217,500.00 = \$257,500.00$ ), the calculations necessary to apportion the potential impairment award as noted above must use \$210,000.00 instead of \$217,500.00 ( $\$40,000.00 + \$210,000.00 = \$250,000.00$ ). See Federal (EEOICPA) Procedure Manual, Chapter 21.12.

After reviewing the calculations made by the district office, FAB agrees with those calculations and concludes that the employee is entitled to an impairment award of \$180,810.00. FAB also concludes that the employee's wage-loss award of \$40,000.00 must be used to reduce the amount of the surplus in this case, and therefore agrees with the district office's finding that the employee has a remaining surplus of \$794,755.52 that must be absorbed out of any future Part E benefits for his asbestosis and asbestos-related lung disease. 42 U.S.C. §§ 7385 and 7385s-11. Therefore, FAB awards the employee \$180,810.00 in impairment benefits under Part E of EEOICPA.

Jacksonville, Florida

Joel M. Geran  
Hearing Representative  
Final Adjudication Branch