



EMPLOYEE: [Name Deleted]
CLAIMANT: [Name Deleted]
CASE ID NUMBER: [Number Deleted]
DOCKET NUMBER: 20230602-58887-5
DECISION DATE: August 16, 2023

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns your claim for benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, your claim for increased impairment benefits based on beryllium sensitivity (BeS), chronic beryllium disease (CBD), coronary artery disease (CAD), obstructive sleep apnea (OSA), ventricular arrhythmia and chronic shortness of breath is accepted under Part E. However, you are not entitled to receive an award of \$90,000.00 for your 36% increased impairment over your first award for a 30% whole-person impairment (WPI) because this \$90,000.00 must be coordinated with the \$94,072.31 that you received to settle your claim for state workers' compensation (SWC), which leaves you with a surplus of \$4,072.31 that will need to be absorbed before you can receive any future payments under Part E.

Also, the prior payment of \$74,100.00 that you received pursuant to FAB's October 23, 2019 final decision was made in error, and because today's final decision recalculates how much your current impairment has increased since your first award on February 28, 2008, this \$74,100.00 constitutes an overpayment under EEOICPA's regulations. Lastly, adjudication of your claim for multiple skin cancers and consequential COVID is pending additional development by the district office.

STATEMENT OF THE CASE

The history of your case shows that you are a covered Department of Energy (DOE) contractor employee who developed BeS and CBD as a result of your employment. In a final decision of February 28, 2008, you received a lump-sum impairment award of \$75,000.00 for a 30% whole-person impairment rating based on those accepted illnesses.

On December 8, 2010, the district office issued a letter decision accepting your CAD, OSA, ventricular arrhythmia and chronic shortness of breath under Part E as consequences of your accepted covered illness of CBD. On February 26, 2019, you submitted a claim for increased impairment benefits and selected Dr. Donald A. Lakatosh to perform your new impairment

evaluation. In a report dated April 15, 2019, Dr. Lakatosh assigned you an updated whole-person impairment rating of 57%, which represented a 27% increase from your prior impairment.

On July 9, 2019, you indicated that you had filed a claim for state workers' compensation benefits based on CBD. You provided a September 23, 2009 *Order Approving Compromised Settlement of Workers' Compensation Claim*, showing that your claim due to CBD was settled for \$121,000.00, less attorney fees of \$24,200.00 and expenses of \$2,727.64, resulting in a net payment to you of \$94,072.31.¹

On September 12, 2019, the district office issued a recommended decision to accept your claim for increased impairment benefits under Part E. FAB then issued a final decision on October 23, 2019 that awarded you increased impairment benefits based on the new whole-person impairment rating of 57%. Unfortunately, FAB did not take into consideration your previous impairment award for a 30% rating when it awarded you \$142,500.00 ($\$2,500.00 \times 57 = \$142,500.00$) instead of awarding you \$67,500.00 for the *actual* 27% increase in your whole-person impairment ($\$2,500.00 \times 27 = \$67,500.00$). FAB then determined, incorrectly, that your impairment award had to be apportioned, even though your consequential illnesses are causally related to your CBD and therefore did not necessitate apportionment. Based on that incorrect approach, FAB found that your increased impairment award was comprised of \$68,400.00 due to CBD, and \$74,100.00 due to your four consequential illnesses. And because there was only \$68,400.00 due to your CBD available to coordinate with your larger SWC settlement of \$94,072.31, FAB determined that there was a surplus of \$25,672.31 to be absorbed out of your future Part E payments. Lastly, FAB awarded you the \$74,100.00 due to your impairment for your consequential illnesses.

You subsequently submitted a second claim for increased impairment benefits on November 2, 2021, and you again selected Dr. Lakatosh to perform your impairment evaluation. In his assessment received on January 4, 2022, Dr. Lakatosh assigned a whole-person impairment rating of 66%. Following a review of the evidence, the district office issued a recommendation on May 6, 2022 to accept your second claim for increased impairment.

However, FAB issued a remand order on July 20, 2022, on the ground that the district office had incorrectly calculated the amount of your award for increased impairment and returned your case to the Jacksonville district office to reassess your claim. After completing additional development, the Jacksonville district office issued an October 12, 2022 recommended decision in which it again applied apportionment calculations (which were not necessary as noted above), and incorrectly found that you were entitled to increased impairment benefits of \$87,136.50, minus the \$74,100.00 that you had been awarded by FAB's October 23, 2019 final decision, leaving a payable balance of \$13,036.00.

Due to the complicated nature of the coordination that had occurred in your case and the other errors present, FAB forwarded your case to the national office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) for review. Subsequently, the Director of DEEOIC issued an order on January 24, 2023 that vacated the October 23, 2019 final decision that had awarded you Part E impairment benefits in the amount of \$74,100.00 because

¹ This amount is clearly incorrect, based on the figures provided, but appears to be the actual amount paid to you.

you were incorrectly awarded that amount and were also incorrectly determined (due to erroneous apportionment) to have a surplus of \$25,672.31. Consequently, FAB issued a remand order on January 26, 2023, consistent with the Director's order.

On June 2, 2023, the district office issued a recommended decision to accept your claim for increased impairment benefits under Part E. In its recommendation, the district office noted that while you would be entitled to \$90,000.00 for the increase in your impairment ($\$2,500.00 \times 36 = \$90,000.00$) over the amount you were awarded on February 28, 2008, DEEOIC is required to coordinate this amount with the \$94,072.31 that you received to settle your claim for SWC, leaving you with a surplus that needs to be absorbed out of future Part E benefits in the amount of \$4,072.31 ($\$90,000.00 - \$94,072.31 = -\$4,072.31$). Regarding the prior payment to you of \$74,100.00, the Director's Order established that this amount constituted an overpayment.

After carefully considering the entirety of the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. You are a covered DOE contractor employee with the covered illnesses of BeS and CBD, and the consequential illnesses of CAD, OSA, ventricular arrhythmia and chronic shortness of breath.
2. On November 2, 2021, you filed a second claim for increased impairment benefits.
3. You have reached maximum medical improvement and have a current whole-person impairment rating of 66%, which constitutes an increased impairment of 36% over the 30% impairment you were awarded in a final decision dated February 28, 2008.
4. After coordinating the amount of your increased impairment with the amount you received in SWC benefits, you are not entitled to any additional benefits at this time.
5. You have a surplus that must be absorbed out of future Part E benefits in the amount of \$4,072.31.
6. Because your entire increased impairment over your initial impairment of 30% is being determined in this final decision, the prior incorrect award to you of \$74,100.00 constitutes an overpayment.

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

CONCLUSIONS OF LAW

Part E provides that a "covered DOE contractor employee" with a "covered" illness shall be 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). The amount of impairment benefits to which an employee is

entitled is to be based on an impairment evaluation by a qualified physician. 20 C.F.R. § 30.901 (2019).

As found above, the record establishes that you are a covered DOE contractor employee with the covered illnesses of BeS and CBD, and the consequential illnesses of CAD, OSA, ventricular arrhythmia and chronic shortness of breath. Dr. Lakatosh, a qualified physician, determined that you have reached maximum medical improvement in relation to these illnesses and provided a well-rationalized medical opinion in which he concluded that your whole-person impairment rating for your illnesses using the 5th Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* is 66%.

A covered DOE contractor employee will receive \$2,500.00 for each percentage point of the impairment rating that is a result of a covered illness. 42 U.S.C. § 7385s-2(a)(1)(B). Also, a covered DOE contractor employee previously awarded impairment benefits may file a claim for additional impairment benefits based on the increase in the rating that is a result of a covered illness. 20 C.F.R. § 30.912. As noted above, FAB previously issued a February 28, 2008 final decision accepting your claim for impairment benefits under Part E due to your illnesses covered under Part E in the total amount of \$75,000.00, based on a 30% whole-person impairment rating. While you did receive a subsequent award of \$74,100.00 for increased impairment in an October 23, 2019 final decision, the Director of DEEOIC vacated that decision. Dr. Lakatosh concluded that your current rating is 66%, which represents a 36% increase from your prior award of a 30% impairment.

While you would be entitled to \$90,000.00 for this increase ($\$2,500.00 \times 36 = \$90,000.00$), Part E also provides that all benefits payable under that Part must be reduced by the amount of any benefit (other than medical benefits and benefits for vocational rehabilitation) that the claimant has received under a state workers' compensation system by reason of the same covered illness(es). 42 U.S.C. § 7385s-11. Thus, your potential award of \$90,000.00 must be coordinated with the \$94,072.31 that you received to settle your claim for state workers' compensation benefits. This means that you are not entitled to any additional impairment benefits at this time because a surplus exists in the amount of \$4,072.31 ($\$90,000.00 - \$94,072.31 = -\$4,072.31$), which will need to be absorbed out of any future Part E benefits.

Lastly, under § 30.511(b) of the regulations, an overpayment is defined as any amount of compensation paid to a beneficiary under EEOICPA that is in excess of the correct amount determined by the program. As discussed above, the \$74,100.00 that you were awarded pursuant to FAB's October 23, 2019 final decision was made in error, and because your entire increased impairment is being recalculated in this final decision, you were not entitled to that payment. Thus, your receipt of that payment for \$74,100.00 constitutes an overpayment of compensation. You will receive further notice about this matter in separate correspondence from DEEOIC.

Denver, Colorado

William J. Elsenbrock

Hearing Representative
Final Adjudication Branch