



EMPLOYEE: [Name Deleted]
CLAIMANT: [Name Deleted]
CASE ID NUMBER: [Number Deleted]
DOCKET NUMBER: 20230607-77830-5
DECISION DATE: September 29, 2023

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning 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 stated below, your claim for increased impairment benefits based on beryllium sensitivity, occupational asthma, chronic beryllium disease (CBD), chronic obstructive pulmonary disease (COPD) and coronary artery disease is accepted under Part E of EEOICPA. However, you are not entitled to receive an award of \$20,000.00 for your 8% increased impairment over your previous award for a 74% whole-person impairment rating because this \$20,000.00 must be coordinated with the \$70,000.00 that you received to settle your claims for state workers' compensation, which leaves you with a surplus of \$50,000.00 that needs to be absorbed before you can receive any future payments under Part E.

STATEMENT OF THE CASE

On May 4, 2009 and April 11, 2019, FAB issued final decisions which concluded that you developed beryllium sensitivity, occupational asthma and CBD due to your exposure to toxic substances at the Y-12 Plant in Oak Ridge, Tennessee, a covered Department of Energy (DOE) facility, and that you are entitled to benefits under Part E of EEOICPA for these illnesses. On August 1, 2019, FAB issued a final decision accepting your claim for Part E impairment benefits and awarding you \$167,500.00 based on a whole-person impairment rating of 67% due to your covered illnesses of beryllium sensitivity, occupational asthma and CBD.

During the time that your impairment claim was with FAB, the district office issued a July 16, 2019 letter decision accepting your COPD and coronary artery disease as consequential illnesses of your CBD under Part E. Thereafter, you submitted a claim for increased impairment benefits following the acceptance of your two new consequential illnesses, and FAB concluded in a November 21, 2019 final decision that you were entitled to increased impairment benefits in the amount of \$17,500.00 due to your 7% increase over your prior 67% rating for your beryllium sensitivity, occupational asthma, CBD, COPD and coronary artery disease.

On June 15, 2022, you submitted a second claim for increased impairment benefits and requested that the impairment rating be performed by Dr. Rheanel A. Tolar. In an August 31, 2022 report, Dr. Tolar conducted a review of your medical records and activities of daily living, and

concluded that you had reached maximum medical improvement for your beryllium sensitivity, occupational asthma, CBD, COPD and coronary artery disease. Using the 5th Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA's *Guides*), Dr. Tolar calculated an updated rating of 82%. Based on Dr. Tolar's evaluation, the district office issued a September 28, 2022 recommended decision to award you \$20,000.00 for increased impairment benefits under Part E for your eight additional percentage points.

On November 14, 2022, your authorized representative notified the Division of Energy Employees Occupational Illness Compensation (DEEOIC) for the first time that you had settled your Tennessee workers' compensation claims for COPD, occupational asthma and CBD, and for the non-covered illnesses of depression and generalized anxiety. In this letter, your representative stated his belief that because your settlement addressed both covered and non-covered illnesses, the exception to coordination in 20 C.F.R. § 30.626(c)(3) (2019) should apply. Enclosed with the letter was a Form EN-16 in which you stated that you received a settlement payment of \$69,450.00, and a copy of a November 7, 2022 "Agreed Order Granting Motion to Clarify Conditions Dismissed in Settlement Agreement," which stated in pertinent part:

On July 20, 2020, David Vann, Consolidated Nuclear Security, and Ins. Co. of the State of PA, entered into a workers' compensation settlement agreement to settle David Vann's claims for chronic beryllium disease, COPD, depression, generalized anxiety and occupational asthma for \$87,500.00. \$87,500.00 is the consideration for the dismissal of all of the aforementioned conditions. The settlement of \$87,500.00 represents a permanent medical impairment of 74%. All conditions referenced above were fully dismissed with prejudice with regard to permanent partial impairment. There was a dispute as to anatomical impairments and this case was not settled on the value of any anatomical impairments.

In a follow-up letter dated November 23, 2022, your representative repeated his assertion that your state workers' compensation settlement included both covered and non-covered illnesses, and submitted additional documents, including the prior *Workers' Compensation Settlement Agreement* that was filed with the Tennessee Court of Workers' Compensation Claims on July 20, 2020, which stated in pertinent part:

While working for Employer, Employee states that continuous exposure to toxins and solvents arising out of and in the course and scope of employment caused lung dysfunction conditions of chronic beryllium disease, COPD, and occupational asthma.

Dr. Scott Davis opined with a reasonable degree of medical certainty that the employee's occupational exposures during his employment at the Department of Energy facilities in Oak Ridge, TN, were more likely related to the causation of COPD and occupational asthma. The Employee was also evaluated by Dr. Rheanel Tolar on September 27, 2019, for purposes of determining Employee's medical impairment with regard to COPD and occupational asthma [and she opined] that the employee retains a permanent medical impairment of 74% to the body as a whole in accordance with the [AMA's *Guides*].

The employer disputes the compensability of this claim and has provided no medical treatment. Additionally, a dispute exists a[s] to the impairment rating and whether it was appropriately assigned to the correct addition [*sic*] of the [AMA's *Guides*]. Based on these disputes, the parties have agreed to settlement [of] the employee's claims for chronic beryllium disease, lung dysfunction diagnoses of COPD and occupational asthma on a doubtful and disputed basis pursuant to Tenn. Code Ann. 50-6-240(e).

The employee made an additional claim for depression and generalized anxiety which the employer avers is not causally related to his employment. As there is no medical proof that said conditions are a result of any workplace exposures, it is hereby dismissed with full prejudice.

On December 9, 2022, FAB issued a remand order stating that coordination of your increased impairment award with your state workers' compensation settlement was required because "[t]he state workers' compensation settlement agreement documents [indicate] that your claims for depression and generalized anxiety were dismissed with full prejudice." FAB then returned your claim to the district office, which then sought guidance from DEEOIC's national office on the question of whether the amount you had received from your state workers' compensation claim was subject to coordination, among other questions. On January 30, 2023, your representative submitted an "amended" Form EN-16, in which you stated that you had received \$70,000.00 for your workers' compensation claim (after a 20% reduction in your gross award for attorney fees), not \$69,450.00 as previously reported.

Based on guidance it received from the national office, the district office sent you a May 25, 2023 letter in which it noted that the evidence was not clear as to when you filed your claim for the alleged illnesses of depression and generalized anxiety that was mentioned in your Tennessee workers' compensation settlement, or how these conditions arose out of and in the course of your occupational exposures at the Y-12 Plant. Accordingly, the district office requested information confirming how your alleged illnesses of depression and generalized anxiety were included in your state workers' compensation settlement and evidence supporting that these illnesses arose out of and in the course of your exposure to toxic substances, since 20 C.F.R. § 30.626(c)(3) waives coordination only if you received state workers' compensation benefits for both covered and non-covered illnesses arising out of and in the course of the same work-related incident.

In response, your representative submitted a May 31, 2023 letter enclosing another copy of the above-mentioned November 7, 2022 Order and stated, in part, as follows:

The Order clarifies the monetary award in the amount of \$87,500 settles Mr. Vann's claims for chronic beryllium disease, COPD, depression, generalized anxiety occupational asthma.

Under Tennessee Workers' Compensation Law, claims are settled for "consideration," or value, which is the money amount paid. These claims may be filed in the Petition or during the mediation. The Agreed Order. . .confirms that

the monetary settlement was given in full satisfaction for Mr. Vann's claims for conditions which include the non-covered conditions of generalized anxiety and depression.

* * *

In this case Judge Johnson clearly states that two non-covered DOL conditions were part of the consideration given for the monetary settlement to Mr. Vann. Thus, the settlement did in fact include a non-covered condition and falls within the exception to [coordination.]

After considering your representative's May 31, 2023 response, the district office issued a June 7, 2023 recommended decision in which it determined that while you are entitled to \$20,000.00 for the increase in your impairment rating ($\$2,500.00 \times 8 = \$20,000.00$) over the rating that formed the basis for your November 21, 2019 award, your current entitlement has to be coordinated with the \$70,000.00 that you received to settle your state workers' compensation for beryllium sensitivity, occupational asthma and CBD. Thus, the district office found that a surplus existed in the amount of \$50,000.00 ($\$20,000.00 - \$70,000.00 = -\$50,000.00$) that needs to be absorbed out of future Part E benefits payable to you.

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

FINDINGS OF FACT

1. You are a DOE contractor employee and were awarded benefits under Part E for the covered illnesses of beryllium sensitivity, occupational asthma and CBD, and the consequential illnesses of COPD and coronary artery disease.
2. By prior final decisions, the most recent dated November 21, 2019, FAB concluded that you had a 74% whole-person impairment rating.
3. You filed your current claim for increased impairment benefits on June 18, 2022.
4. You are at maximum medical improvement for your beryllium sensitivity, occupational asthma, CBD, COPD and coronary artery disease, and have a current rating of 82%, which is an 8-point increase over your prior rating.
5. You received a state workers' compensation settlement in the total amount of \$87,500.00, less attorney fees in the amount of \$17,500.00.
6. After coordinating the amount of your increased impairment with the amount you received in state workers' compensation benefits, no additional Part E benefits are payable to you at this time.

7. You have a surplus that must be absorbed out of future Part E benefits in the amount of \$50,000.00.

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 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 or illnesses. 42 U.S.C. § 7385s-2(a)(1). The amount of impairment benefits to which an employee is entitled is based on an impairment evaluation by a qualified physician. 20 C.F.R. § 30.901.

The record establishes that you are a covered DOE contractor employee who developed beryllium sensitivity, occupational asthma, CBD, COPD and coronary artery disease through exposure to toxic substances at a covered DOE facility. Dr. Tolar, 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 she concluded, using the 5th Edition of the AMA’s *Guides*, that your current rating for your illnesses is 82%.

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 or illnesses. 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 November 21, 2019 final decision accepting your claim for additional impairment benefits under Part E based on a 74% whole-person impairment rating. Dr. Tolar concluded that your present rating is 82%, which represents an 8-point increase from your prior award for a 74% impairment.

While you are entitled to \$20,000.00 for this increase ($\$2,500.00 \times 8 = \$20,000.00$), Part E also provides that all benefits payable under that Part must be reduced to reflect 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. The regulations at 20 C.F.R. § 30.626(c)(3) provide an exception to this requirement and state that “coordination of benefits will not occur if the beneficiary under a state workers’ compensation program receives state workers’ compensation benefits for both a covered and a non-covered illness arising out of and in the course of the same work-related incident.”

You have submitted documentation showing that you settled your Tennessee workers’ compensation claims for your CBD, COPD and occupational asthma (which are covered under Part E), and for your non-covered illnesses of depression and generalized anxiety. Although your representative argued that you are entitled to the exception to coordination in § 30.626(c)(3) of the regulations, you have not established your entitlement to this regulatory exception. Specifically, although the July 20, 2020 settlement agreement states that you “made an additional claim for depression and generalized anxiety,” your representative did not submit any other

documentation about this claim. In its May 25, 2023 letter, the district office provided you with an opportunity to provide additional evidence that might show that these non-covered illnesses were claimed as work-related. Your representative responded on May 31, 2023 that “[u]nder Tennessee Workers’ Compensation Law. . .claims may be filed in the Petition or during the mediation,” but he did not relay any information about your particular Tennessee workers’ compensation claim for depression and generalized anxiety.

Furthermore, while the settlement agreement refers to the medical reports of Drs. Tolar and Davis as support for your “lung dysfunction conditions of chronic beryllium disease, COPD, and occupational asthma,” neither physician diagnosed (or even just provided a history of) your alleged depression and generalized anxiety in any of their reports. Nor is there any other medical evidence in your file to substantiate either a history or diagnosis of those illnesses, or to show that they are related to your toxic exposures at the Y-12 Plant. Even the settlement agreement itself states that “there is no medical proof that [your depression and generalized anxiety] are a result of any workplace exposures.” Such medical evidence is required in your case because the regulatory exception to waive coordination can only be applied if your depression and generalized anxiety are related to your exposures at the Y-12 Plant. The district office notified you of this deficiency in its May 25, 2023 letter, but neither you nor your representative submitted any documentation on this point.

Based on the above, FAB concludes that the exception to coordination does not apply to your claim because the evidence of record is insufficient to make a determination as to whether your Tennessee workers’ compensation settlement included both covered and non-covered illnesses that *arose out of and in the course* of the same work-related exposures. Thus, your potential increased impairment award of \$20,000.00 must be coordinated with the \$70,000.00 that you received to settle your claims for state workers’ compensation. This means that you are not entitled to any additional impairment benefits at this time because a surplus exists in the amount of \$50,000.00 ($\$20,000.00 - \$70,000.00 = -\$50,000.00$), which will need to be absorbed out of any future Part E benefits.

Cleveland, Ohio

Debra Teitenberg
Hearing Representative
Final Adjudication Branch