

On June 6, 2006 appellant's attorney calculated the amount of a third-party recovery owed to the Office as \$146,922.03 and submitted a check for this amount on June 20, 2006. He indicated that the surplus to be credited against future benefits was \$141,631.40.¹

On June 20, 2006 the Office acknowledged receipt of the payment of \$146,922.03 and related that it "satisfies the government's statutory right to repayment...."

In an October 26, 2009 memorandum, the Office indicated that appellant received wage-loss compensation of \$166,276.31 from June 7, 2006 through October 24, 2009. It further determined that it paid medical benefits of \$1,278.11 to find total compensation payments during this period of \$167,544.42.

On October 26, 2009 the Office notified appellant of its preliminary determination that she received an overpayment of \$167,544.42 because she received compensation from June 7, 2006 through October 24, 2009 when she had a surplus from a third-party recovery. It further advised her of its preliminary determination that she was without fault in the creation of the overpayment. The Office requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

On November 10, 2009 appellant requested waiver of the overpayment. She asserted that she would experience "severe financial hardship trying to repay this debt." In an accompanying overpayment recovery questionnaire, appellant provided information regarding her income, expenses and assets. She maintained that she was without fault in creating the overpayment as she believed that she was receiving disability retirement. Appellant further indicated that the Office made an error on her life insurance deductions.

By decision dated December 1, 2009, the Office found that appellant received an overpayment of \$141,631.40 from June 7, 2006 through October 24, 2009, because she received compensation and money from a third-party recovery. It indicated that the previous determination that she received an overpayment of \$167,544.42 was a typographical error. The Office found that appellant was not eligible for waiver based on the amount of her assets. It determined that she should forward a check for the entire amount of the overpayment as repayment.

On appeal, appellant argues that the amount she received for loss of consortium of \$36,250.00 should be deducted from the overpayment of \$141,631.40. She further maintained that she paid too much for life insurance premiums beginning 2001 and that the overpayment amount should be reduced by the amount that she overpaid for life insurance. Appellant

¹ Appellant's attorney calculated the amount due the Office and the surplus by taking the gross recovery of \$725,000.00 and subtracting the amount allocated for loss of consortium of \$36,250.00, attorney's fees of \$223,291.37 and court costs of \$16,664.13 to find an adjusted gross recovery of \$448,794.20. He deducted 20 percent of the adjusted gross recovery to find a balance of \$359,035.36. The attorney subtracted Office disbursements of \$217,403.96 from the government's attorney fee allowance of \$70,481.93, which yielded a refund amount of \$146,922.03. Subtracting the disbursements made by the Office from the adjusted balance yielded a surplus of \$141,631.40.

submitted updated evidence regarding her savings and checking accounts. She also requested that the Office allow her to repay the overpayment in installments rather than a lump sum.

LEGAL PRECEDENT -- ISSUE 1

Section 8132 of the Federal Employees' Compensation Act² provides that an employee who sustains an injury for which compensation is payable under circumstances creating a legal liability in a party other than the United States to pay damages, shall refund to the United States the amount of compensation paid once recovery is made against the responsible tortfeasor.³ The purpose underlying this obligation is to prevent a double recovery by the employee.⁴ Under this section of the Act, a claimant is obligated to reimburse the United State out of any third-party recovery for any disbursements made by the Office.⁵

With respect to the amount of any settlement of judgment that must be refunded, section 8132 provides that “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.”⁶ The Office’s regulations provide:

“(a) the refund to the United States is calculated as follows, using the [s]tatement of [r]ecovery 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 [Solicitor of Labor] to be reasonable, from the gross recovery (Subtotal A);
- (3) Subtract the costs of litigation, as allowed by [the Office] or SOL (Subtotal B);
- (4) Subtract one-fifth of Subtotal [A] from Subtotal B (Subtotal C);
- (5) Compare Subtotal C and the refundable disbursements as defined in § 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

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8132.

⁴ *Alvin Collins*, 54 ECAB 752 (2003); *Charles E. Davis*, 39 ECAB 322 (1987).

⁵ *Id.*

⁶ 5 U.S.C. § 8132.

more than the maximum amount of attorney's fees considered by [the Office] or SOL to be reasonable, to determine the Government'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 § 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.”⁷

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a concussion, broken tooth, cervical radiculitis and lower back syndrome due to a June 28, 2001 traumatic injury. It paid her compensation beginning August 13, 2001. On June 6, 2006 appellant's attorney calculated the amount of money that appellant owed the Office from a third-party recovery as \$146,922.03. He forwarded a check to the Office for this amount, the amount of compensation the Office had already paid. The attorney advised that there existed a surplus from the recovery to be credited against future benefits of \$141,631.40. The Office, however, continued to pay appellant compensation for total disability until October 24, 2009. Appellant's receipt of the compensation benefits from the Office created a double recovery for the same injury, as it did not utilize the surplus set aside for that person. As a claimant cannot receive a double recovery for the same injuries or conditions, she received an overpayment of compensation.⁸

Section 10.711 sets forth the formula for determining the amount to be refunded to the Office and credited against future benefits. On June 5, 2006 appellant's attorney subtracted from appellant's gross third-party recovery of \$725,000.00 loss of five percent consortium of \$36,250.00, attorney's fees of \$223,291.37 and associated court costs of \$16,664.13. This resulted in an adjusted gross recovery of \$ 448,497.20, from which he subtracted her statutory guarantee of 20 percent of the recovery, \$89,758.84, leaving an adjusted balance of \$359,035.36. The initial amount to be refunded to the Office was determined by reducing the disbursements made by the Office on behalf of appellant, \$217,403.96, by her allowance for attorney's fees, \$70,481.93. In accordance with the regulatory formula, appellant's attorney properly refunded the amount of \$146,922.03 to the Office. Reducing the adjusted balance by the disbursement made by the Office resulted in a surplus of \$141,631.40, which the government may offset against future compensation benefits until the surplus has been exhausted.

⁷ 20 C.F.R. § 10.711.

⁸ See *Alvin Collins*, *supra* note 4.

The Office determined that it paid appellant an overpayment of compensation in the amount of \$141,631.40 based on her surplus from the third-party recovery.⁹ The surplus of \$141,631.40 should have been credited against future benefits prior to her receiving compensation from the Office. Consequently, appellant received an overpayment of \$141,631.40.

On appeal, appellant contends that the amount she received for loss of consortium of \$36,250.00 should be deducted from the overpayment of \$141,631.40. Her attorney, however, properly subtracted loss of consortium of \$36,250.00 from the gross recovery of \$725,000.00 in determining the amount to be refunded to the Office and the amount of the surplus.

Appellant also argues that an underpayment exists because the Office failed to properly deduct her life insurance premiums. The Board's jurisdiction, however, is limited to reviewing final decisions of the Office.¹⁰ The Office has not issued a final decision on this issue.

LEGAL PRECEDENT -- ISSUE 2

The Board has recognized section 8132 of the Act as a mandatory provision by which the Office must offset the amount to which the government is entitled from future compensation payments.¹¹ This section provides that, if an employee makes a recovery against a responsible tortfeasor, the employee shall refund to the United States the amount of compensation paid.¹² The Board has explained that the purpose underlying this section of the Act is to prevent a double recovery by the employee.¹³ Neither the Office nor the Board may enlarge or modify the terms of the Act.¹⁴ 20 C.F.R. § 10.716 provides in pertinent part that the waiver provisions of section 10.432 through 10.440 do not apply to determinations regarding the process of collecting refunds due to third-party settlements.

ANALYSIS -- ISSUE 2

By decision dated December 1, 2009, the Office indicated that it was denying waiver of the overpayment. However, the waiver provisions of section 10.432 through 10.440 do not apply to collecting refunds from third-party settlements.¹⁵ The refund of amounts paid by the Office is mandatory under the Act and implementing regulations.¹⁶ Therefore, the issue of waiver does not apply and the entire amount of the overpayment is due to the Office.

⁹ It appears that the Office paid appellant \$167,544.52 in compensation from June 7, 2006 through October 24, 2009. The overpayment, however, is only \$141,631.40, the amount of the third-party surplus.

¹⁰ 20 C.F.R. § 501.2(c).

¹¹ *Supra* note 6.

¹² *See Alvin Collins, supra* note 4.

¹³ *Sammy L. High*, 55 ECAB 697 (2004).

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 10.716.

¹⁶ *Id.*

On appeal, appellant requests that she be permitted to repay the overpayment in installments rather than in a lump sum. The Board's jurisdiction over recovery of an overpayment, however, is limited to those situations where the Office seeks recovery from continuing compensation benefits under the Act.¹⁷

CONCLUSION

The Board finds that appellant received an overpayment of \$141,631.40 because she received compensation from the Office when she had a surplus from a third-party recovery. There can be no waiver of the overpayment as under 5 U.S.C. § 8132, when a claimant has received double recovery as a result of a third-party settlement, recovery of the refund due to the United States is mandatory.

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 16, 2011
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

¹⁷ *Terry A. Keister*, 56 ECAB 559 (2005); *Albert Pineiro*, 51 ECAB 310 (2000).