

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 January 2012

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In the Matter of:

THOMAS CATHEY,
Claimant,

v.

SERVICE EMPLOYEES INTERNATIONAL, INC. /
INSURANCE COMPANY of the STATE of PENN.,
Employer /Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party in Interest.

Case No.: 2012 LDA 00064
OWCP No.: 02-136363

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For Claimant: John M. Schwartz, Esq.
Titusville, Florida

For Employer: Grover E. Asmus, Esq.
Mobile, Alabama

Before: Stuart A. Levin
Administrative Law Judge

Summary Decision Dismissing a Challenge to the
Application of the
War Hazards Compensation Act

This matter involves the application of the War Hazards Compensation Act, 42 U.S.C. §1701, *et. seq.*, (hereinafter WHCA) to a claim arising under the Longshore Act, 33 U.S.C. § 901 *et. seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651, *et. seq.*, (hereinafter DBA). The Department of Labor (hereinafter Department) administers both the DBA and the WHCA.

Briefly, Claimant, while working in Iraq, allegedly sustained shrapnel wounds and other injuries when the truck in which he was riding came under enemy fire. Claimant subsequently received indemnity benefits under the DBA which were, on December 10, 2009, the subject of an approved settlement. His medical benefits, however, were not affected by the settlement agreement.

Following the settlement of Claimant's compensation benefits, Employer petitioned the Director, in accordance with the provisions of the WHCA, for relief from the obligation to cover the medical costs associated with Claimant's injuries. The Director granted Employer the relief which it sought and notified Claimant that the Department had accepted the responsibility under the WHCA to pay his medical expenses. The Director then advised Claimant of the procedure he should follow to secure the medical benefits to which he is entitled.

The record shows that Claimant now needs medical treatment and submitted a request for surgery to his Employer. His Employer declined to authorize the treatment because the Department has accepted the responsibility for his medical expenses under the WHCA. The Department has, in turn, advised Claimant of steps he should take to obtain his medical benefits, but Claimant has declined to follow the procedures established by the Director to implement the WHCA. Claimant, instead, insisted that the Director refer the matter for a hearing so that he may adjudicate his right to continue to demand medical benefits from his Employer under the DBA. Believing that it has no further obligation to Claimant, Employer has moved for summary decision dismissing this matter. The Employer's motion will be granted.

Summary Decision Procedure

The summary decision procedures applicable in this proceeding are set forth in the Rules of Practice published at 29 C.F.R. §§18.40 and 18.41. These rules provide that summary decision may be entered when the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact and the moving party is entitled to summary decision as a matter of law. 29 C.F.R. 18.40(d); *see also*, Celotex Corp. v. Catrell, 477 U.S. 317 (1986).

Procedurally, the rules provide that, within ten days after service of the motion, the opposing party: "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. §18.40(c). *See also*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Celotex Corp. v. Catrell, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. Anderson, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, all evidence and factual inferences are construed in favor of the party opposing the motion, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); U.S. v. Diebold, Inc., 369 U.S. 654 (1962); Held v. Held, 137 F.3d 998-99 (7th Cir. 1998), and summary decision should be entered only when no genuine issues of material fact need be litigated. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, (1962); Rogers v. Peabody Coal Co., 342 F.2d 749 (6th Cir. 1965). In this instance, the essential facts are not in dispute. *See*, Cl. Response at ¶ 2.

Claimant was injured by hostile fire on the job in Iraq and was found entitled to compensation and medical benefits for his injuries under the DBA. His Employer, thereafter, filed for relief under the provisions of the WHCA, and its petition was granted by the Department. Claimant's current need for the surgery recommended by his physician is not in dispute in this proceeding, nor is his entitlement to medical benefits. Consequently, no material

fact remains in dispute, and for the reasons discussed below, Employer must, as a matter of law, prevail in this matter.

Claimant's Arguments

In his Response to Employer's Motion for Summary Decision, Claimant complains that his Employer wrongfully refused to authorize the surgery recommended by his doctor, and the District Director improperly refused to convene an Informal Conference based upon the mistaken belief that his DBA claim must now be administered under the WHCA rather than the DBA. Cl. Response at 2-3.¹ In Claimant's view, he has a right under the DBA to continue submitting his medical claims to his Employer, and his Employer then has a right to seek reimbursement under the WHCA. According to Claimant, the protocols established by the District Director to facilitate the administration and management of his medical benefits under the WHCA are laborious and cumbersome and impermissibly deny him the right to a hearing and attorney's fees. Before addressing Claimant's arguments, a closer review of the WHCA seems warranted.

Application of the WHCA

The WHCA was passed in December, 1942, to supplement the DBA. The DBA continued to cover employees working overseas on U.S. military bases or on government contracts, and the WHCA did not alter DBA coverage. Rather, the WHCA addressed three types of situations: first, an employee covered under the DBA or the Nonappropriated Fund Instrumentalities Act (NAFIA) but whose injury was not compensable under the DBA or NAFIA was afforded a direct claim under the WHCA; second, an employee who was taken prisoner, hostage or otherwise detained by a hostile force or person was afforded a direct claim under the WHCA; and finally, and more pertinent to this proceeding, **Section 104(a)(3) provided, in part, that** any employer or insurance carrier required to pay benefits under the DBA for injuries or death caused by a war risk hazard was entitled to reimbursement for disability and ... medical expenses, and reasonable and necessary claims expenses incurred in processing claims. The regulation which implements Section 104(a)(3) is published at 20 C.F.R. §61.104(a). Thus, the WHCA granted insurance carriers or self-insured employers an entitlement to reimbursement for losses and expenses resulting from a war risk hazard, and the carrier in this proceeding successfully petitioned for relief in accordance with this WHCA provision.

Implementation of the WHCA

Once WHCA coverage is established, Section 104(a)(3) further provides the Department with an alternative to the reimbursement payment method. The statute states that the Secretary of Labor, as a matter of discretion: "may, under such regulations as he shall prescribe, pay such benefits, as they accrue and in lieu of reimbursement, directly to any person entitled thereto,..." To implement the direct payment option in Section 104(a)(3) of the WHCA, the Department promulgated and published regulations at 20 C.F.R. §61.105(a) and (b) which allow for the direct payment of benefits to medical providers once an employee's right to the benefits is established and the carrier's entitlement to reimbursement is accepted. In this instance, it appears

¹ The Director, OWCP, did not participate in this proceeding.

that the Director opted to administer Claimant's medical benefits using the direct payment method specifically authorized by Section 104(a)(3) of the WHCA.

As a result, in an effort to handle Claimant's medical needs, the Department let him know on July 28, 2011, what papers he needed to submit to obtain his medical benefits and asked him to inform his medical providers to submit their bills directly to the Department for payment. Apparently displeased with the process, Claimant decided to challenge the procedure which requires him to submit his requests for medical authorizations and payments to the Department rather than his Employer, and he believes the Department's WHCA procedures violate the rights afforded him by the DBA.

Claimant's Interpretation of the WHCA and its Regulations

In support of his objections to the process the Department uses for the purposes of providing the medical benefits afforded by the DBA, Claimant cites Section 61.105(e) of the regulation which states, in part, that: "the transfer of a case ... for direct payment does not affect the hearing or adjudicatory rights of a beneficiary or carrier as established under the Defense Base Act or other applicable workers' compensation law." Claimant seems to believe this provision places him beyond the purview of the procedures the Department employs when it administers the WHCA. Fortifying his argument, Claimant further relies upon the Board's decision in Smith v. Director, 17 BRBS 89 (1985).² As explained in Smith, when a Claimant is covered by the DBA, his or her substantive rights are determined by the DBA, not the WHCA. Yet, in the context of the circumstances he advances here, Claimant misconstrues the regulations and misinterprets the Board's decision in Smith. The Department diminishes none of Claimant's substantive DBA rights when it merely asks him to process his medical requests through the Department rather than his employer.

Claimant contends further, however, that: "Under the law a statute controls regardless of what is expressed by the Code of Federal Regulations," and in his view, the WHCA "exempts the claimant from being under the War Hazards Act...." Response at ¶¶ 8 and 9. He thus seems to suggest that a conflict exists between the statute and the regulations adopted by the Department to implement the WHCA, but his argument is flawed in several respects, and Smith does not suggest otherwise.

As Claimant reads Section 101(a)(1) of the WHCA, it excludes DBA claimants from WHCA coverage, and, therefore, he should not be subject to directives issued by the Department when it implements the carrier reimbursement provisions of the WHCA. In this respect, Claimant adopts an untenable interpretation of the statute. Section 101(a)(1) provides DBA employees a cause of action when they are injured by a war hazard but are unable to establish entitlement to compensation under the DBA. DBA claimants, such as Claimant in this matter,

² Claimant Response incorrectly cites Smith as Gorden v. Director, 17 BRBS 89 (1985). In Smith, claimant was awarded benefits under the DBA. Employer was reimbursed for these benefits pursuant to the WHCA, and Claimant later sought a lump sum payment of his future benefits. A lump sum commutation of the benefits was awarded under the WHCA and FECA, but the Board determined that the substantive provisions of the Longshore Act, not FECA, were controlling and that entitlement to commutation should have been considered under Section 14(j) of the Act, 33 U.S.C. §914(j) (1982) prior to the 1984 amendments.

who are able to establish entitlement to compensation under the DBA are, to prevent double recovery, excluded from filing a separate claim under the WHCA.³ Considered in context, the exclusion Claimant cites in WHCA Section 101 has nothing to do with the provisions in WHCA Section 104 which permit a shift in the source of funds used to pay DBA benefits.

Clearly then, there is nothing inconsistent between the provisions of the WHCA and the regulations promulgated by the Department to implement it. Furthermore, WHCA Section 104(a)(3) grants the Director the discretion either to reimburse a carrier for costs associated with a war hazard injury or "...under such regulations as he shall prescribe, pay such benefits, as they accrue and in lieu of reimbursement, directly to any person entitled thereto...." In direct compliance with Section 104 of the statute, 20 C.F.R. Section 61.104(a) provides: "A carrier may claim reimbursement for reasonable and necessary claims expense incurred in connection with a case for which reimbursement is claimed under the Act. Reimbursement may be claimed for allocated and unallocated claims expense." With respect to the direct payment option in WHCA Section 104(a)(3), 20 C.F.R. Section 61.105(a) provides that the Department: "may pay benefits, as they accrue, directly to any entitled beneficiary in lieu of reimbursement of a carrier." Claimant's contentions to the contrary notwithstanding, these regulations are firmly grounded in the language of the statute and are entirely consistent with the legislative intent.

Similar difficulties undermine Claimant's interpretation of Section 61.105(e) of the regulations. This provision states that: "The transfer of a case to the Office (i.e., Division of Federal Employees' Compensation) for direct payment does not affect the hearing or adjudicatory rights of a beneficiary or carrier as established under the Defense Base Act or other applicable workers' compensation law." Section 61.105(e). Obviously, Section 61.105(e) does no more than confirm the neutrality of the WHCA procedures on a claimant's DBA rights.

As such, Claimant's embrace of this provision as a justification for his refusal to cooperate with administrative procedures adopted by the Department for the purpose of managing the payment of his benefits is entirely unwarranted. Rather than support Claimant's contentions, Section 61.105(e) essentially dismantles his argument. It clarifies in the plainest terms that his rights under the DBA are expressly preserved in the event the Department were, for example, to deny an authorization for treatment or deny payment of medical expenses associated with his job-related injuries. Indeed, Claimant's objections to the procedure he has been asked to follow and the paperwork he has been asked to provide lack merit precisely because, as Section 61.105(e) makes abundantly clear, neither the application of the WHCA nor its regulations adversely affect his substantive rights under the DBA.

Claimant has thus failed to demonstrate either a substantive diminution of his DBA rights or an inconsistency between the DBA, the WHCA, or the regulations and policies adopted by the Department to administer these enactments. In summary, Claimant has failed to show either that the Department has misinterpreted or misapplied the statutes or regulations or that the Director

³An employee covered under the DBA or the Nonappropriated Fund Instrumentalities Act (NAFIA); but whose injury is not compensable under the DBA or NAFIA, has a direct claim under the WHCA, such as, for example, a war hazard injury that, notwithstanding the Zone of Special Danger, occurred outside the scope of employment.

has, in any way, abused his discretion in selecting the direct payment method of administering Claimant's benefits.

Claimant's Standing to Challenge the Application of the WHCA

Although the Department has not denied Claimant any medical benefits, he objects next to the Director's effort to manage his claim under the provisions of the WHCA. His challenge in this respect, however, is fundamentally flawed. As the Board observed in Smith, the WHCA "provides only a source of benefits." Upon reflection, the relief from financial responsibility afforded to an employer under the WHCA for war risk hazards seems strikingly similar to the relief afforded to employers that hire workers with pre-existing disabilities under Section 8(f) of the Longshore Act. In both situations, employers and carriers are, in certain circumstances, permitted to shift all or part of their financial responsibility for work-related injuries to a fund administered by the Department.

This is significant here because the Board has articulated the principle that, under circumstances in which only the source of funds for the payment of benefits is in issue, a claimant has no standing to challenge the applicability of the statutory provision that determines the funding source. *See*, Henry v. George Hyman Constr. Co., 749 F.2d 65, (D.C. Cir. 1984), *rev'g* 15 BRBS 475 (1983); Coats v. Newport New Shipbuilding & Dry Dock Co., 21 BRBS 77 (1988) at fn.2; Dove v. Southwest Marine, 18 BRBS 139, (1986); Price v. Greyhound Bus Lines, 14 BRBS 439, (1981) at fn.1, *dismissed for lack of subject matter jurisdiction*, No. 81-2210 (4th Cir.), *cert. denied*, 459 U.S. 831 (1982).⁴ In essence, the Board has held that, for purposes of applying Section 8(f) of the Longshore Act, a Claimant has no interest in the source of compensation, and as the Board observed in Smith: "The WHCA provides only a source of benefits." It would thus appear that the principle which denies standing to claimants when Section 8(f) is invoked is equally applicable with regard to funding-source issues when the WHCA is invoked.

In this instance, Claimant's substantive rights to compensation and medical benefits were determined under the provisions of the DBA. Only the ministerial aspects of funding his benefits are at issue; and it appears he lacks standing to challenge the Department's decision to take over responsibility for his medical benefits, notwithstanding any marginal increase in the paperwork burden the new manager of his claim may require.⁵

⁴ Claimant notes that he is unable to obtain attorney's fees under the WHCA; however, the inability to obtain attorney's fees would not seem sufficient to confer standing. To the contrary, in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits, Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1 (1987); Barclift v. Newport News Shipbuilding & Dry Dock Co., 15 BRBS 418 (1983), *rev'd on other grounds sub nom.*, Director v. Newport News Shipbuilding & Dry Dock Co., 737 F.2d 1295, (4th Cir. 1984); Scott v. Rowe Machine Works, 9 BRBS 198 (1978); Spencer v. Bethlehem Steel Corp., 7 BRBS 675 (1978), funeral expenses; Fineman v. Newport News Shipbuilding & Dry Dock Co., 27 BRBS 104 (1993); or a claimant's attorney's fees, Rihner v. Boland Marine & Manufacturing Co., 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, (5th Cir. 1995); however, the Board has never deemed these exclusions sufficient to grant a claimant standing to participate in the decision by the Director to take over compensation payments pursuant to Section 8(f).

⁵ As previously noted, Claimant apparently needs surgery for his DBA neck injuries, and the Department has accepted his neck injuries as covered conditions under the WHCA. Claimant has declined, however, to request the Department to provide authorization for the surgery. While Claimant lacks standing to challenge the source of funds that pay his benefits, should the Department ever deny him an appropriately filed request for medical benefits associated with his job-related injuries, he would,

Validity of Regulations

Beyond that, to the extent Claimant's Response challenges the validity of the WHCA regulations governing the processing of his benefit payments, he has, assuming he has standing, nevertheless, selected the wrong forum in which to pursue his cause of action. The validity of a final regulation is not appropriately challenged through administrative adjudicative processes. *See, e.g.*, Whitney Nat. Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965); Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990); Iran Air v. Kugelman, 996 F.2d 1253, 1260 (D.C.Cir.1993); Mullen v. Bowen, 800 F.2d 535, (6th Cir.1986) at fn. 5; Croplife America v. Environmental Protection Agency, 329 F.3d 876 (D.C. Cir. 2003); *see also*, Ass'n of Admin. Law Judges, Inc. v. Heckler, 594 F.Supp. 1132 (D.D.C.1984). Depending upon the type of rule under consideration, *i.e.*, legislative (or substantive) rules, interpretive rules, procedural rules, and statements of policy, *see*, 5 U.S.C. §553, and the stage of rulemaking when the challenge is filed, the avenues of review may vary.⁶ None, however, confer jurisdiction to adjudicate the validity of the Department's WHCA regulations in this proceeding.

Conclusion

For all of the foregoing reasons, I find and conclude that Claimant has failed to demonstrate the existence of a genuine issue of material fact for hearing. I further conclude that the Director has, pursuant to WHCA Section 104 (a)(3), elected to pay Claimant's medical providers directly rather than reimburse his employer for medical expenses and has advised Claimant of the procedure he should follow to secure his benefits. Claimant has identified no legal error in the decision-making process employed by the Director in reaching this decision and no abuse of discretion in the final selection of the direct payment method to manage his benefits. Director has applied the WHCA to relieve Employer of its obligations in this matter. Employer has thus established that it is no longer required to handle Claimant's medical claims and has, therefore, demonstrated its entitlement to Summary Decision as a matter of law. Accordingly;

ORDER

IT IS ORDERED that Employer's Motion for Summary Decision be, and it hereby is, granted, and;

as previously noted, be entitled to invoke his rights to a hearing under the DBA. *See*, 20 C.F.R. § 61.105(e). To date, however, the Department has not denied him any medical benefits.

⁶ For examples of procedural routes to challenge a regulation, consult the proceedings in Nat'l Mining Ass'n v. Department of Labor, 292 F.3d 849, 869, 23 BLR 1-24 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001); *see also*, Your Home Visiting Nurse Services, Inc. v. Shalala, 525 U.S. 449 (1999); Califano v. Sanders, 430 U.S. 99 (1977); Lujan, supra; Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967).

IT IS FURTHER ORDERED that this matter be, and it hereby is, dismissed, and;

IT IS FURTHER ORDERED that this matter be, and it hereby is, remanded to the District Director for further appropriate action.

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Stuart A. Levin
Administrative Law Judge