



OWCP BULLETIN NO. 12-01

Issue Date: October 6, 2011

Subject: War Hazards Compensation Act (WHCA) and Defense Base Act (DBA) - Ongoing handling of DBA cases accepted for reimbursement under 42 U.S.C. § 1704(a)(1) in which the Division of Federal Employees' Compensation (DFEC) has chosen to pay benefits directly to the entitled beneficiary in lieu of reimbursing the DBA carrier ("direct payment") as authorized by 42 U.S.C. § 1704(a)(3) and described in 20 CFR 61.105.

References: This bulletin supplements the information contained in the Federal Employees' Compensation Act (FECA) Procedure Manual (PM) 4-0300 and OWCP Bulletin 05-01.

Background: After accepting a claim for reimbursement under 42 U.S.C. § 1704(a) of the WHCA, DFEC may pay benefits directly to an entitled beneficiary, in lieu of reimbursement to a carrier in accordance with 42 U.S.C. 1704(a)(3) and 20 CFR § 61.105. The regulations at 20 C.F.R. § 61.105(c) provide that DFEC will not assume direct payment unless the rate of compensation and the period of payment have become relatively fixed and known. OWCP has further determined in OWCP Bulletin 05-01, that only a formal compensation order by the Division of Longshore and Harbor Workers' Compensation (DLHWC) will meet the regulation's requirement of being relatively fixed and known (absent extraordinary circumstances). Even if DFEC assumes direct payment, under the regulations DFEC maintains the right to transfer any case back to the carrier for it to pay benefits. 20 C.F.R. §61.105(f). Nevertheless, as a practical matter, if a compensation order under the DBA awards continuing compensation benefits (either due to disability or death), and DFEC accepts the case for reimbursement under the WHCA, DFEC usually assumes direct payment of compensation.

20 CFR 61.105(d) outlines that in such direct payment cases, "medical care for the effects of a war risk may be furnished in a manner consistent with the regulations governing the furnishing of medical care under the Federal Employees' Compensation Act." Part (e), however, clearly specifies that, "the transfer of a case to the Office [DFEC] 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." The regulations reflect that direct payment cases continue to be DBA cases subject to all the provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA).

Due to the increased number of cases where benefits are being paid directly by DFEC to an injured worker or a survivor under 42 U.S.C. § 1704(a)(3) of the WHCA, generally pursuant to a compensation order issued under the DBA, it is necessary to outline a protocol for handling directly paid WHCA reimbursement cases.

Purpose: To provide specific guidance on the interplay between DFEC and DLHWC, and the responsibilities of each program in the administration of DBA/WHCA reimbursement cases with ongoing entitlement.

Applicability: All National Office staff and District Office claims personnel for the Division of Federal Employees' Compensation (DFEC) and the Division of Longshore and Harbor Workers' Compensation (DLHWC).

Actions:

I. Notification and Interaction between DFEC and DLHWC

1. The notification and interaction described in this bulletin will occur at the District Office level for both DFEC and DLHWC, but the District Offices may seek additional guidance from the respective Branches of Regulations and Procedures and appropriate Office of the Solicitor divisions as needed.
2. Any written clarification between the two divisions should be included in the applicable case files maintained by each office.

II. Clarification of DBA Decisions

On occasion, prior to DFEC accepting the claim for direct payment, clarification of the DLHWC Informal Conference Memorandum or Compensation Order may be required.

1. If clarification regarding the award amount is needed prior to assuming direct payment, the District Director for the DFEC Special Claims District Office will seek guidance concerning the terms of the order directly from the DLHWC District Director who filed the order. Such a request will be made in writing with copies provided to the claimant, the insured, and their legal representatives, if any. If a new order is issued, it will be made part of the case file maintained by DFEC, as well as DLHWC's case file.
2. If a compensation order awards benefits for more than one injury, and some, but not all of the injuries for which benefits are awarded qualify for reimbursement under the WHCA, DFEC will request clarification from the carrier submitting the reimbursement request to determine how much of the compensation due is attributable to each injury. The carrier will be asked to substantiate which portions of the compensation due are attributable to each injury. It is the carrier's responsibility to submit proof of how much of what was paid is directly attributable to the WHCA injury or injuries; this must be established to DFEC's satisfaction.

III. Disagreement with or Modification of a DBA Decision

As a general matter the findings in a compensation order are accepted and no additional review is done by DFEC. (20 C.F.R. § 61.102(c), OWCP Bulletin 05-01) However, if after a case has been assumed for direct payment DFEC has reason to believe that there was a mistake in determination of fact in the DBA compensation order or the circumstances existing at the time the DBA compensation order issued have changed, e.g. payment of total disability for a period in which earnings were present, DFEC, after appropriate development, should notify the DLHWC District Director that modification of the compensation order may be warranted [See Parts V and VI below for further discussion on changes in compensation after the case has been assumed for direct payment].

1. DFEC will notify DLHWC in writing and provide supportive documentation, if applicable.

2. If DLHWC agrees that modification is warranted, it will initiate modification proceedings under Section 22 of the LHWCA, as incorporated. If DLHWC disagrees with DFEC that modification is warranted, it will so notify DFEC.

3. Reimbursement for the stated period and/or assumption of direct payment may be delayed pending receipt of a response from DLHWC. If a modification proceeding is commenced, DFEC may consider terminating direct payment and transfer the case back to the carrier for it to pay subject to reimbursement.

IV. Medical Treatment

As outlined in 20 CFR 61.105(d), in reimbursement cases where DFEC takes over direct payment of DBA benefits, the furnishing of medical treatment may be provided in a manner consistent with the regulations governing the furnishing of medical treatment under the FECA. The DFEC Procedure Manual provides that it will utilize these regulations, and therefore, medical treatment in reimbursement cases where DFEC has taken over direct payment will be authorized and paid for by DFEC in accordance with its regulations and procedures in administering the FECA.

DFEC contracts its medical billing services and this system is premised on the conditions specifically accepted by DFEC in adjudicating a FECA claim. It is recognized that compensation orders and decisions issued under the DBA do not necessarily identify the specific medical conditions associated with the DBA claim. To the extent that stipulations can be reached to identify these conditions when carriers and claimants are seeking compensation orders from DLHWC District Directors or litigating cases before the Office of Administrative Law Judge, it is recommended that they do so. In addition, when an application for reimbursement is submitted which is likely to result in direct payment by DFEC, the applicant should include a list of conditions that it believes are related to the DBA claim. At the time of acceptance for direct payment, DFEC will list these conditions as those accepted for medical treatment which will be entered into its electronic claims processing system (iFECS) for the purpose of medical bill payments.

It is recognized that medical treatment and conditions are not static and that changes in treatment and conditions do occur. Because of this dynamic process, additional guidance is necessary. OWCP has identified the following circumstances and steps it will follow in these cases:

1. If the claimant requests treatment for a consequential condition (a condition that flows as a natural consequence from the covered injury), DFEC should develop the medical evidence to determine whether it is a consequential condition stemming from the compensable injury.

a. If such development substantiates that the new condition is related, DFEC may authorize necessary treatment without input from DLHWC, but DLHWC and the carrier will be notified of that determination along with the claimant.

b. If such development does not substantiate that the new condition is related to the already covered conditions, DFEC will outline the rationale for its determination in a letter to the claimant, attach any applicable medical documentation, and advise the claimant to seek an adjudicatory decision from DLHWC. DLHWC and the carrier will be notified of this determination as well.

Note — A condition that DFEC accepts as consequential for purposes of authorizing medical treatment may also give rise to a change in the level or duration of disability benefits. In such instance, DFEC should direct the claimant to DLHWC for initiation of modification proceedings. See Part V. 1.

2. If the claimant requests treatment for or acceptance of a completely new condition not readily identifiable in the DLHWC compensation order (e.g. DLHWC issued a decision finding an injury to the arm and the claimant seeks treatment for the ankle), DFEC will direct the claimant to file a claim for medical benefits or, if appropriate, seek a modification of the compensation order from DLHWC; DLHWC and the carrier will receive copies of this correspondence as well. DFEC will not take any development action in such a case and will await the outcome of claimant's request for modification. DLHWC will initiate modification proceedings under Section 22 of the LHWCA, as incorporated. The employer and/or the carrier, as well as the claimant, will be the parties to such proceedings. The carrier is reminded that a failure to present any and all viable defenses to such claim may result in a subsequent denial of its reimbursement claim under the WHCA. The carrier should also be put on notice that the new claim, if accepted, will not be covered under the WHCA absent a subsequent request by the carrier and determination by DFEC.

3. If the claimant requests a change in treating physician, DFEC will consider such factors as the reason for the request, the appropriateness of current care, and other circumstances (e.g. whether the current treating physician has retired, the claimant has moved, etc.).

a. If a change in the treating physician is clearly warranted (such as a change due to a geographical move or to an appropriate medical specialist), DFEC will authorize the change without input from DLHWC, and DLHWC and the carrier will be notified of such approval along with the claimant.

b. If it appears such change may not be warranted, DFEC will outline the rationale for its determination in a letter to the claimant, attach any applicable medical documentation, and advise the claimant to seek an adjudicatory decision from DLHWC. DLHWC and the carrier will be notified of this determination as well. DLHWC will take necessary action to resolve the medical dispute, including an informal conference and an independent medical examination as necessary. The DLHWC District Director may issue an Order for Medical Treatment under certain circumstances. If a factual dispute exists that cannot be resolved at the district office, the case will be referred to the Office of Administrative Law Judges for formal adjudication. The employer and/or the carrier, as well as the claimant, will be the parties to such proceedings.

V. Compensation for Disability and Permanent Impairment

In cases where DFEC has taken over direct payment and for which regular periodic payments are being made for disability, DFEC pays compensation as specified by the DBA compensation order. A change in benefit level or amount of the award cannot be made by DFEC without modification of the order.

1. If a claimant requests a change in benefit level, e.g. an increased schedule award or total disability benefits in lieu of partial disability benefits, DFEC will advise the claimant to seek such modification from DLHWC. DLHWC and the carrier will be copied on this notification. If DFEC disagrees with the claimant's request for change in the benefit level at that time, DFEC will outline the rationale for its disagreement and attach any applicable documentation.

Note -- If a claimant initially seeks modification directly from DLHWC, DLHWC should provide notice of the request to DFEC.

2. If DFEC obtains evidence that it believes warrants a change in benefit level (i.e. partial disability benefits in lieu of total disability benefits), DFEC will, after appropriate development of the case, notify DLHWC in writing that modification of the order may be warranted. DFEC will include any supporting documentation and request a review of the benefit level. If DLHWC agrees that modification is warranted, it will initiate modification proceedings. If DLHWC disagrees with DFEC that modification is warranted, it will so notify DFEC.

3. If an overpayment of compensation exists, DFEC will take no action without direction from DLHWC. As a general rule, payment at the rate prescribed by the compensation order must continue until a new or modified order is issued. **FECA overpayment procedures do not apply in these cases.** If DLHWC determines that an overpayment exists, DLHWC will determine whether and how a credit will be taken for DFEC to recoup the amount overpaid. [Under certain circumstances, such as where a surviving spouse receiving death benefits remarries or a child turns 18, DFEC can unilaterally stop or change the amount of compensation being paid. See Part VI below.]

4. DFEC can request periodic medical updates to substantiate continued disability. Generally, this will occur once every three years, unless more frequent reports are needed to monitor medical care and support the payment of medical bills. A yearly inquiry will also be sent to the claimant to verify the current address, continuing receipt of benefits, and employment.

If the claimant does not submit the requested medical evidence, DFEC may arrange for an examination under Sections 7 and 19(h) of the LHWCA, as incorporated. If the claimant fails to submit the required medical evidence, fails to attend the examination, or fails to return the yearly benefit verification statement, DFEC will provide written notice to DLHWC, with any supporting documentation, and request appropriate modification of the order, which may include suspension, reduction, or termination of benefits. The claimant and the carrier will also be advised of this request for modification of the benefit level.

5. DFEC will on a yearly basis send Form LS-200 to claimants receiving compensation for total or partial disability, requesting a report of their earnings from employment or self-employment. However, because disability compensation is payable under the DBA at a rate of two-thirds of average weekly wage (for total disability) and is not subject to augmentation of the compensation rate similar to that allowed under the FECA, information about a disabled employee's marital status or dependents need not be requested as the presence or absence of a spouse or dependent children has no effect on compensation rates for disability under the DBA. However, that information is germane and should be obtained in death benefit cases – see Part VI below.

VI. Compensation in Death Cases

In cases where DFEC has taken over direct payment and for which regular periodic payments are being made for the death of an employee, DFEC pays death benefits as specified by the DBA compensation order. DFEC cannot terminate such benefits without a modified award by DLHWC, except in certain specific circumstances.

1. In DBA reimbursement cases for which benefits are being paid to the spouse of a deceased employee, a yearly inquiry will be made to verify that there has been no change in the marital status of the widow or widower. DFEC will use Form LS-267 for this purpose. If the widow/widower fails to return the yearly benefit verification statement, DFEC will provide written notice to DLHWC, with any supporting documentation, and request a review of the ongoing benefit payments and/or consideration of suspension of benefits. The widow/widower and the carrier will also be advised of this request for a review of ongoing benefit payments.

Note - DFEC cannot stop benefit payments in this instance, but must await a determination by DLHWC. If benefits are ultimately suspended and the widow then submits the required information, DFEC will reinstate benefits and notify DLHWC.

2. If a widow/widower notifies DFEC that he/she has remarried, or if DFEC obtains evidence that a widow/widower has remarried, DFEC will immediately stop ongoing payments and compute a two-year, lump-sum payment representing two years of compensation. DFEC will pay the lump sum, taking credit for any amount paid since the remarriage in order to avoid an overpayment, and notify the beneficiary of the payment amount. DLHWC and the carrier will also be advised, but this action can be taken without input from DLHWC as the remarriage itself extinguishes any order issued by DLHWC. This procedure is currently set forth in the FECA Procedure Manual. See FECA PM 4-300-15(b).

Note - If the beneficiary has already received compensation in excess of the two-year, lump-sum amount at the time of notification/verification, DLHWC and the carrier should be advised along with the beneficiary, but no action can be taken with regard to any overpayment, as an overpayment under the FECA cannot be declared.

3. If benefits are being paid to a minor child, DFEC must monitor the age/status of that child and adjust beneficiary benefit levels in a timely manner to avoid any excess compensation payments. Compensation may continue after a child's 18th birthday if he/she meets the definition of a student. The requirements for student status are the same as those under the FECA, and DFEC should request the necessary documentation needed for verification of student status prior to the child's 18th birthday, and on a periodic basis thereafter. DFEC will use Form LS-266 for this purpose. DFEC should promptly terminate compensation payments for a child when he/she turns 18 years of age if full-time student status is not established or if the evidence on file no longer supports student status after initially established.

Note - If the beneficiary has already received excess compensation at the time of the cessation of compensation, DLHWC and the carrier should be advised along with the beneficiary, but no action can be taken with regard to any overpayment, as an overpayment cannot be declared. Credit can be taken, however, if the child subsequently becomes eligible again, based on the same injury or death, e.g. a student.

4. In DBA reimbursement cases where benefits are being paid to an employee who subsequently dies, DFEC will direct any potential survivor to file a death benefits claim with DLHWC; DLHWC and the carrier will receive copies of this correspondence as well. DFEC will not take any development action in such a case and will await a determination on the death benefits claim. The carrier's failure to present any and all viable defenses to such claim may result in a subsequent denial of its reimbursement claim under the WHCA. Upon approval of the death benefits claim, DLHWC should instruct the carrier of its responsibility to initiate timely payment on the DBA order. The carrier may subsequently seek reimbursement from DFEC under the WHCA.

VII. DLHWC Determinations and DFEC's Role

Once DLHWC receives a request for modification, either from the claimant or from DFEC, DLHWC will take appropriate action required under the DBA. Given that DFEC has assumed responsibility for direct payments, however, DFEC should maintain active oversight of that claim and will provide any information or assistance requested by DLHWC to determine claimant entitlement or resolve claim disputes.

1. DLHWC will seek input from DFEC, as it would from the claimant and the carrier, and DFEC will provide written or verbal input as requested.
2. The DFEC Special Claims District Director, or his/her designee, will usually be the point of contact for DFEC in proceedings before the DLHWC District Director. He/she may request assistance as needed from the Branch of Regulations and Procedures and/or the Office of the Solicitor. In some instances a representative from the Branch of Regulations and Procedures and/or the Office of the Solicitor will act as DFEC's point of contact in a DLHWC District Director proceeding, in lieu of or along with the Special Claims District Director, or his/her designee.

VIII. DBA Decisions

1. Generally, DLHWC may only issue an order resolving an issue based on the agreement of the claimant and the employer/carrier.
2. If no agreement is reached, any party may seek adjudication of the issue through formal hearing and the various levels of review established under the LHWCA/DBA -- Office of the Administrative Law Judge (OALJ), the Benefits Review Board (BRB) and federal courts. FECA appeal rights are not applicable in these cases.
3. Any of those adjudicatory bodies may issue a decision and order that is effective upon filing or issuance and which will become final once the time to appeal to a higher body has passed.
4. Once an order on an issue outlined in this bulletin is filed, it is binding and DFEC must proceed accordingly, e.g. increasing the benefit level, paying an additional award, accepting a new medical condition, etc.
5. If payment of compensation is due, it must be paid within 10 calendar days of the DLHWC District Director's filing of the order or additional compensation is also owed in the amount of twenty percent (20%) of the accrued amount of compensation due.
6. Any request for payment of additional compensation due to a late payment should be made to DLHWC. If DLHWC determines that additional compensation is payable, DFEC will be so notified along with the claimant and carrier, and DFEC will process any necessary payment.

IX. Attorney Fees

The LHWCA/DBA requires approval of any claimant's attorney fee by the body before whom the work was performed, e.g. the DLHWC District Director, the OALJ, the BRB, or the federal courts. Therefore, if a fee petition is received by DFEC due to an issue outlined in

this bulletin (or any other reason), DFEC will direct the representative to seek approval from the appropriate body. DFEC can object to the requested fee, and will submit its response to the fee request to the appropriate body when necessary. DFEC will not review such fee petitions in accordance with FECA standards.

X. Notice to the Employer/Carrier

Once DFEC takes over direct payment of reimbursement cases, any notice to the employer/carrier provided for in this bulletin should be given as follows:

- DFEC will send a letter to the employer/carrier, and to their attorney, containing all relevant information and/or proposed actions to be implemented.
- The letter should also contain the caveat that the employer/carrier will be deemed to have consented to the action proposed unless it files an objection to such action with the DLHWC within 15 days.
- If the employer/carrier does object, it is incumbent upon it to take the appropriate action in furtherance of its objection.

XI. Miscellaneous

1. DFEC requires, before acceptance of any WHCA reimbursement claim, that the employer/carrier has made only reasonable and prudent efforts in presenting all meritorious defenses against a DBA claim without regard to whether the case is eligible for WHCA reimbursement. An employer/carrier's inadequate or overly zealous representation in defending against a DBA claim may be grounds for denying all or some portion of a request for WHCA reimbursement.

2. DFEC'S development of any aspect of a claim may include communication with the claimant and his legal counsel, as the situation dictates.

Disposition: This bulletin is to be retained until the FECA and LHWCA Procedure Manuals have been updated.

CECILY A. RAYBURN
Director, Division of
Planning, Policy and Standards