



House Committee Reports FECA Reform Bill

In a rare moment of bi-partisan agreement, the House Education and the Workforce Committee on July 13th favorably reported HR 2465, the Federal Workers' Compensation Modernization and Improvement Act. The bill has the support of Chairman John Kline (R-MN), Ranking Member George Miller (D-CA), Subcommittee Chairman Tim Walberg (R-MI), and Subcommittee Ranking Member Lynn Woolsey (D-CA). The FECA program has not been significantly updated in almost 40 years, resulting in a number of weaknesses and inefficiencies.

The Federal Workers' Compensation Modernization and Improvement Act summary outlines the primary features of the Act:

Enhance Program Efficiency

- Ensures that Physician Assistants and Advanced Practice Nurses are reimbursed for their services and that these medical professionals can certify disability for traumatic injuries during an initial time period.
- Streamlines the claims process for workers who sustain a traumatic injury in a designated zone of armed conflict.

Improve Program Integrity

- Allows the Department of Labor to crosscheck a federal worker's earnings with information held by the Social Security Administration.
- Authorizes the department to collect administrative costs and expenses from the federal agency that employs the injured or ill worker, promoting greater accountability in the program.

Modernize Benefits for Today's Economy

- Ensures injuries or illnesses sustained as the result of terrorism are covered as a war-risk hazard. This will help guarantee federal workers injured abroad or in the line of duty are appropriately compensated.
- Provides additional support for funeral expenses (up to \$6,000) and for workers who sustain an injury that leads to facial disfigurement (up to \$50,000).

In addition to the measures contained in HR 2465, the Committee Chair and Ranking Member requested GAO through a letter dated July 8, 2011 (attached) to review a proposal from the US Department of Labor that would cut disability benefits under the program at an individual's retirement age. For more information click on the committee website at <http://edworkforce.house.gov/News/DocumentSingle.aspx?DocumentID=250784>

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By Jim Sams, Senior Editor

Medicare set-aside professionals are hoping that the federal government's selection of a new contractor to review settlement proposals will speed up reviews that are now taking up to 120 days, but they are going to have to wait a few more months to find out.

One of the unsuccessful bidders has filed a protest to the Centers for Medicare and Medicaid Services' decision last month to award a \$5,124,084 one-year contract to Provider Resources Inc. in Erie, Pa., alleging the agency's review process was flawed. That will trigger a review by the U.S. Government Accountability Office, which has up to 100 days to render a decision.

The current review contractor, Lifecare Management Partners, will continue conducting the reviews until the protest is resolved. Set-aside professionals say they don't expect the company's performance to improve, now that its contract with the government is about to expire. According to government documents, the workers' compensation review contractor must review 2,000 to 2,500 submissions per month.

Jennifer Jordan, an attorney with the Medval set-aside consulting firm in Baltimore, Md., said Lifecare has been taking longer and longer to finish its reviews ever since it learned its contract would not be reviewed.

"I just feel like they've been going through the motions for a month now," Jordan said in an interview with WorkCompCentral. "They can't be held in breach of contract, because they are out of contract. I don't think they have any incentive to alleviate the backlog."

Lifecare Managing General Partner Joseph C. Molina could not be reached for comment on Monday.

CMS' workers' compensation review contractor performs a function that is often vital for settling future-medical claims with injured workers who are eligible -- or soon will be eligible -- for Medicare benefits. Workers' comp carriers send proposed future-medical settlements to the contractor with hopes of receiving an acknowledgment that they have set aside enough money to pay for future medical costs caused by the claimant's work injury.

The reviews are voluntary, but the Medicare Secondary Payer Act allows CMS to file suit if it winds up paying for medical services for a Medicare beneficiary for injuries that should have been covered by a workers' compensation carrier.

Data and Analytics Solutions was one of four vendors that submitted bids to take over Lifecare's role as the workers' compensation review contractor, said CMS Contract Specialist Alan F. Fredericks. Lifecare has held the contract since 2005, but was ineligible to submit a bid for renewal because it no longer qualifies for Small Business Administration criteria that the government uses to steer business to qualified small businesses, he said.

Government documents show that Data and Analytics Solutions filed a protest to the contract award to its competitor on July 5. The Government Accountability Office has until Oct. 13 to make a decision on that protest.

Data and Analytics Solutions President Dawn Li declined to comment on the company's protest. Provider Resources Chief Executive Officer and President Shawn Keough-Hartz also declined to comment.

No matter which vendor ultimately wins the contract, Medicare set-aside professionals are hoping they'll get better service under a new regime. Earlier this month, news that CMS had awarded a new contract generated excited chatter on a Medicare set-aside message board that is a part of the Linked-in professional networking website.

"I think this new WCRC contract is really encouraging news for the MSA industry, because it shows that CMS is seriously trying to fix current problems and delays," said Doug Shaw, chief operating officer at Medivest Benefits Advisors in Orlando.

Shaw said other set-aside professionals are hoping for better service with Provider Resources, should the Erie, Pa.-company overcome the bid protest and actually win the contract.

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Shaw wrote in Medivest's blog that the company's president, Keough-Hartz, is a 22-year veteran of the health care industry with extensive experience in coding, billing, compliance, information technology systems and government contracting. The company's medical director, Dennis Agostini, has advanced degrees in chemistry and osteopathic medicine and has more than 30 years' experience in directing organizations' medical policies and programs.

The current contractor has given its successor plenty of room for improvement, critics say.

Scott LeCompte, senior vice president for the Blackburn Group in Baltimore, said in an interview that at one point set-aside professionals could count on the CMS contractor to complete reviews of submissions within 65 days, but now it's taking 90 to 150 days to get an answer.

LeCompte said even more annoying is the boilerplate questions that Lifecare sends when it seeks more information. The contract often sends "rubber stamp" form letters that don't ask for specific information, leaving the consultants working on the settlement to guess at what the contractor wants to know. He said professionals have learned to call employees at the CMS regional centers to find out what additional information is needed, because the contractor rarely gives straight answers.

"People are just jaded by this whole process," LeCompte said. "It seemed like the WCRC contractor got slower and slower, almost as if they had a staffing problem."

Medval's Jordan, however, said it's impossible to know whether Lifecare's slow response time in reviewing set-aside submissions is a result of its own internal problems or unrealistic demands by CMS. She said she suspects that the number of set-asides submitted for review has increased now that the government has passed rules that require workers' comp carriers and self-insured employers to report future-medical settlements with Medicare-eligible beneficiaries.

She said it is possible that so many submissions are flowing in that the current contractor simply doesn't have time to review all of them in the time frame allotted for the task.

"The wild card is whether the contractor was the problem, or if what CMS is telling them to do is the problem," Jordan said.

Set-aside professionals will have to wait a few months to find out whether a new contractor will speed up the reviews, but they are encouraged by another promising development. On Friday, CMS reported that it has begun testing of an electronic portal that will allow set-aside professionals to submit future-medical settlements directly to the agency instead of mailing paper forms or compact discs to a contractor.

Jordan said now she and other set-aside experts must mail documents or discs to a contractor, who passes the documents along to the workers' compensation review contractor.

"This new initiative will allow submitters of Workers' Compensation Medicare Set-Aside Arrangements (WCMSAs) to directly enter case information, upload documentation, and receive case status information through the use of a secure Web portal," CMS said in its announcement of the pilot project.

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July 8, 2011

The Honorable Gene Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street, NW
Washington, D.C. 20548

Dear Mr. Dodaro:

On May 12, 2011, the Subcommittee on Workforce Protections of the House Committee on Education and the Workforce held a hearing entitled "*Reviewing Workers' Compensation for Federal Employees.*" At the hearing, the Acting Director of the Office of Workers' Compensation Programs (OWCP) in the U.S. Department of Labor (DOL) outlined the administration's draft reforms (Draft Reforms) to the *Federal Employees' Compensation Act* (FECA), the federal statute that provides workers' compensation benefits to federal workers. Among its provisions, the Draft Reforms would: (1) convert benefits to a reduced level upon FECA beneficiaries reaching retirement age; (2) institute a uniform wage loss compensation level for all beneficiaries; and (3) require claimants to satisfy a waiting period before receiving "continuation-of-pay." We hereby ask the Government Accountability Office (GAO) to examine key questions associated with these three provisions.

I. CONVERSION OF BENEFITS UPON REACHING RETIREMENT AGE

Currently, FECA provides wage loss compensation benefits (66 2/3 percent of the wage at time of injury for individuals, or 75 percent of the wage at time of injury for those with dependents) up to and beyond retirement age, and in some cases, until death. A majority of FECA beneficiaries claim dependents and receive wage loss benefits at the "augmented" 75 percent rate. FECA benefits are tax-free and subject to a cost-of-living adjustment ("COLA") after the first year of benefits, which has averaged 2.3 percent over the past 10 years.

DOL receives 133,000 new FECA claims each year; on average, 2 percent of these claims involve permanent, long-term disabilities lasting 2 years or more. Of the 45,000 long-term

disability FECA beneficiaries, approximately 15,000 have reached “normal” Social Security retirement age. DOL, DOL's Office of the Inspector General, and other stakeholders have raised concerns that FECA benefits received by those beyond retirement age could be, on average, more generous than benefits received under the traditional federal retirement system, potentially creating inequities among FECA beneficiaries and retirement-aged federal workers.¹

In its attempt to address this issue, the Draft Reforms would reduce FECA wage loss benefits to 50 percent of a worker's wage at time of injury (adjusted for COLA) upon reaching regular Social Security retirement age. However, not all workers receive an “average” wage, and there are questions about whether some groups of workers could be unfairly impacted by the Draft Reforms. A 1988 GAO report showed that lower wage federal workers generally receive less in FECA benefits than their pre-injury after-tax wages, whereas higher income federal workers could receive more from FECA than their pre-injury after-tax wages.²

Testimony submitted in connection with the May 12 hearing suggests that FECA benefits, even when adjusted for cost of living, do not necessarily replace what would have been received by Federal Employees Retirement System (FERS) program participants had they not been injured on the job. For example, FECA does not permit Thrift Savings Plan (TSP) contributions (or an employer match), step increases, or pay increases greater than COLAs. As such, comparisons between FECA and what would be received under a normal retirement would need to be adjusted for variables such as these to ensure a valid comparison. The DOL Inspector General urged “careful consideration” to ensure this current proposal is fair to injured workers.

Given the many questions about whether the Draft Reforms would replace what retirees in the FERS program would have received had they not been permanently injured,³ it is timely for GAO to assess the DOL proposal. More specifically, we ask GAO to:

1. Assess the Draft Reforms' 50 percent conversion benefit with respect to the five questions outlined in GAO's testimony at the May 12 hearing⁴ and the related August 14, 1996 GAO report, as applicable.⁵

¹ To illustrate the disparity, DOL points to a simulation prepared by the Office of Personnel Management (OPM) which compares a CSRS retiree with a FECA beneficiary. The CSRS retiree would receive 60 percent of their average “high three” years of service pre-tax, compared with FECA which provides 75 percent (or 66-2/3 percent if an individual) tax free. At this point, OPM has developed only one simulation based on an employee with 32 years of service at age 60. Neither DOL nor OPM has developed any simulations for FERS participants.

² See GAO, *Federal Employees' Compensation Act: Percentages of Take-Home Pay Replaced by Compensation Benefits* GAO/(GGD-98-174, Aug. 17, 1988).

³ E.g., FERS annuity, TSP benefits, Social Security, and lost opportunities for promotions.

⁴ See *Reviewing Workers' Compensation for Federal Employees: Hearing Before the Sub. Comm. on Workforce Protections of the H. Comm. on Education and the Workforce* (May 12, 2011) (statement of Daniel Bertoni, Director of Education, Workforce, and Income Security Issues, U.S. Government Accountability Office (GAO-11-655T)).

⁵ See GAO, *Federal Employees' Compensation Act: Issues Associated with Changing Benefits for Older Beneficiaries* (GAO/GGD-96-138BR, Aug. 14, 1996).

2. Examine how benefits compare between (i) FECA at present; (ii) the Draft Reforms' 50 percent conversion benefit; and, (iii) the take home amounts received under full retirement under FERS, for at least the following:
 - a. Each income bracket from GS-2 through GS-15 (and an analysis of the equivalent levels in the U.S. Postal Service (USPS));
 - b. Individual workers versus those with dependents (of varying numbers);
 - c. Younger workers at a lower level on the GS scale versus older workers at a higher level on the GS scale;
 - d. Workers with long tenure in federal service (*e.g.*, 30 years) versus those with moderate tenure (*e.g.*, 10 years) and those with short tenure (*e.g.*, 3 years) at time of injury;
 - e. States with an income tax versus states with no or a very low income tax; and
 - f. Workers able to accrue/vest benefits under FERS, TSP, Social Security, and step increases, versus those without such ability who remain on FECA.
3. Examine how federal employee health benefits are maintained during the course of a FECA-covered injury and after FECA beneficiaries reach normal retirement age.
4. Identify policy options to ensure equitable treatment for all injured federal employees, so that those who are injured are not worse off or better off than those who had not been injured.

II. UNIFORM WAGE LOSS COMPENSATION LEVEL FOR ALL BENEFICIARIES

As noted earlier, FECA currently provides wage loss benefits of 66 2/3 percent of the wage at time of injury for individuals, or 75 percent of the wage at time of injury for those with dependents. Under the Draft Reforms, FECA would compensate all beneficiaries for wage loss benefits at a uniform level of 70 percent of the wage at time of injury, rather than provide an 8 1/3 percent augmentation for beneficiaries with dependents. We ask GAO to assess the potential impact of this change on the take home incomes of injured workers with and without this augmentation.

Specifically, while the Draft Reforms would reduce FECA wage loss compensation by 5 percent for beneficiaries with dependents, what would be the impact of this 5 percent reduction on beneficiaries' actual rate of wage replacement compared to workers' pre-injury take-home income? In an August 17, 1998 report, GAO noted that a number of factors can affect the actual rate of take-home wage replacement, including beneficiaries' length of time on the long-term rolls; beneficiaries' pay levels and progressive income tax rate structures; the absence or presence of dependents; and beneficiaries' states of residence.⁶ As a result, we ask GAO to assess how wage replacement rates would compare between current FECA rules, the Draft Reforms' uniform compensation level of 70 percent, and take home wages for comparable workers who were not injured.

⁶ See GAO, Federal Employees' Compensation Act: *Percentages of Take-Home Pay Replaced by Compensation Benefits* (GAO/GGD-98-174, Aug. 17, 1998).

III. PLACEMENT OF WAITING PERIOD BEFORE CONTINUATION-OF-PAY

FECA's continuation-of-pay provision authorizes payment of federal workers' full wages during the first 45 days of absence due to a work-related injury. Following the 45-day period, if a worker is still injured, the worker must wait three days before FECA's long-term wage loss benefits take effect. Injured federal workers must use accrued leave, if available, to satisfy this three-day waiting period.

However, since 2006 injured workers employed by USPS must wait three days (and use accrued leave, if available) *before* receiving continuation-of-pay benefits. In the event a USPS employee's FECA claim is approved, and the employee is absent from work for at least 14 days, the three days are reimbursed. One rationale for a pre-benefits waiting period is that workers with minor injury claims may be discouraged from filing for benefits and entering the program if they are required first to use their own accrued leave.

The Draft Reforms would adopt the USPS model by imposing a three day pre-benefits waiting period for all federal workers. However, to date, DOL has been unable to quantify the impact of the pre-benefits waiting period on USPS.

We ask GAO to assess the potential impact, if any, of this suggested change using the USPS as baseline. Specifically, has USPS experienced reductions in minor or questionable workers' compensation claims that are attributable to this 2006 change? If so, what specific savings have been identified with this new approach, and can GAO validate those savings? Further, in light of USPS's experience with the pre-benefits waiting period, what is the potential impact, if any, of extending the Draft Reforms' waiting period to all federal workers?

We would appreciate the opportunity to review this request in further detail with you and your staff. To facilitate this review, please contact Molly Salmi or Donald McIntosh with the majority staff at (202) 225-7101, or Richard Miller or Michele Varnhagen with the minority staff at (202) 225-3725.

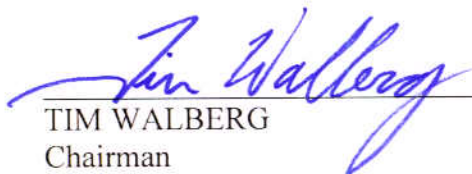
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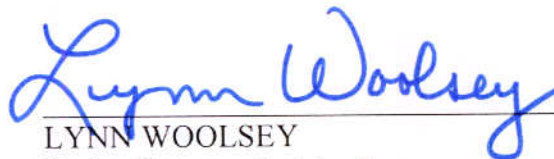
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