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MEMORANDUM FOR: Nancy Griswold, Acting Director – DFELHWC

Date: December 20, 2024

From: DLHWC

Subject: Analysis of Fraud Risk Related Primarily to Psychological Claims in DBA Litigation and WHCA Reimbursement Processes

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Introduction

In response to rising War Hazard reimbursement applications and the costs associated therewith, the Longshore Program was asked to prepare a memorandum analyzing the causes of same and identifying areas of potential fraud risk that may be attributing to the increase. This memorandum strives to explain the Defense Base Act and the War Hazards Compensation Act, including background, claims processing, and real-world context. It also identifies places where the Acts are susceptible to fraud or gamesmanship and provides potential options for addressing those areas of risk.

Nevertheless, regardless of whether some or all the options presented are implemented, it is important to note that the amount of WHCA claims (and the money paid for same) is likely to continue to increase over time. This is due to a confluence of factors: the nature of delayed expression PTSD; the improved marketing and soliciting skill of U.S. attorneys in finding additional claimants in foreign countries; delays in carriers submitting the reimbursement applications some years after the DBA claim is first made; increased privatization of the military leading to increased DBA claims, etc. Thus, even if some potentially weak or dubious claims were weeded out, it would be unlikely to go so far as to reverse the trend of rising WHCA payouts and the growing number of claims.

The Defense Base Act Generally

The Defense Base Act ("DBA") of 1941, Pub. Law No. 208 c. 357, 55 Stat. 622, codified at 42 U.S.C. § 1651-1655, is an extension of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, which incorporates and adopts most provisions of the LHWCA with but a few exceptions (primarily concerning which employees are covered).

Like the LHWCA, the DBA provides workers' compensation benefits in the form of disability and medical benefits to employees for work-related injuries and death benefits to eligible survivors for work-related deaths. The term "injury" includes occupational diseases. As with most workers' compensation schemes, the DBA is the employer's exclusive liability and the employee's exclusive remedy. One special feature of the DBA is its breadth of the scope of work-relatedness – a decision of the Supreme Court established a doctrine known as the "zone of special danger," which deems compensable virtually all injuries and deaths sustained during overseas deployment—all that is required is that the incident that cause the injury fall within foreseeable risks occasioned by the employment abroad. *O'Leary v. Brown-Pacific-Maxon, Inc.*,

340 U.S. 504 (1951) (“The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. … Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the ‘obligations or conditions' of employment create the ‘zone of special danger’ out of which the injury arose.”). Thus, the DBA provides that an employee living in a location required by their DBA-covered work can usually establish a sufficient connection to their employment to make an injury or death compensable, even if it occurs during off-duty hours and away from the job site.

The employees covered by the DBA include six specific categories of workers – but generally all persons working outside the United States under Federal Government contracts. In particular, the DBA covers employment:

1. at any military base acquired from a foreign government,
2. on any lands occupied or used by the US for military purposes in any territory or possession outside the US,
3. on any public work in any territory or possession outside the US,
4. under any contract entered into with the US when the contract is to be performed outside the US,
5. under any contract approved or financed by the US under the Foreign Assistance Act, and
6. certain USO employees.

The DBA extends coverage to not only US citizens but also to foreign nationals.

The insurance requirements for the DBA are identical to those found in the LHWCA. LHWCA Section 4(a) requires every employer to be liable for, and to secure the payment of, disability, medical, and death benefits to its employees in the event of injury or death. If a subcontractor of a covered employer fails to secure the payment of compensation, the contractor will be liable for, the payment of benefits for the subcontractor’s employees. LHWCA Section 32(a) of the Longshore Act provides two methods for a covered employer to secure the payment of benefits: (1) to procure insurance from an insurance carrier authorized to write LHWCA/DBA policies; or (2) to obtain authorization to self-insure. OWCP is responsible for the authorization of insurance carriers and self-insured employers. Thus, the DBA (by incorporation of the LHWCA) requires federal government agency prime contractors and subcontractors to obtain DBA insurance for their employees who work overseas. The claims procedures for DBA claims are also identical to those of the LHWCA. Thus, under LHWCA Section 30, 33 U.S.C. § 930, the employer must report all injuries causing lost time from work to OWCP. DBA employers generally do so by notifying its insurance carrier, or if it is self-insured, the claims administrator, as soon as it has knowledge of an injury. Medical treatment if needed should be authorized immediately. An Employer's First Report of Injury or Occupational Illness, Form LS-202, must be filed with the OWCP within 10 days of the injury, if it causes loss of one or more work shifts. Whether or not the employer has reported, injured workers may make claims for benefits on an Employee’s Claim for Compensation, Form LS-203. Time limits apply and generally require a claim to be made within one year from the date of injury or date of first-time loss in traumatic injury cases, or two years from the date the employee becomes aware of the relationship between the employment and the illness in occupational illnesses. These time limits only apply to compensation benefits. Medical treatment is never time-barred.

The OWCP district office monitors the payment of compensation and medical care to ensure compliance with the provisions of the Act. The OWCP staff provides technical assistance to employers, insurance carriers, and benefit claimants for the prompt delivery of benefits. In case of claims disputes, OWCP claims examiners may conduct informal conferences to help the parties resolve their disputes by way of mutual agreement or compromise without formal litigation. If the parties are unable to resolve their disputes informally, they may request the referral of the claim to the Office of Administrative Law Judges for formal hearing. Decisions of the administrative law judge are appealable to the Benefits Review Board (BRB), and thereafter (depending on the circuit of the United States Court of Appeals which has jurisdiction over the claim) to the U.S. District Court or directly to the U.S. Court of Appeals.

DOL ALJ's have independent decisional authority and are not permitted to know what OWCP has recommended in the informal conference proceedings. See 20 C.F.R. § 702.317(c). Proceedings before OALJ are de novo and on the record with the record consisting solely of the evidence introduced before the ALJ. 33 U.S.C. §§ 919(d) and 923(b); 20 C.F.R. §§ 702.338, 702.344. Under program regulations, the Director, OWCP is a party to each case before OALJ (20 C.F.R. § 702.333(b)), the BRB (20 C.F.R. § 802.201(a)), and the courts (Federal Rule of Appellate Procedure Rule 15(a)(2)(B)). However, unless the pecuniary interests of the LHWCA Section 44 Special Fund are implicated, the Director rarely appears in DBA cases before OALJ. Likewise, the Director, represented by SOL, only appears in a limited number of DBA cases which are appealed to the BRB and the courts. In these formal proceedings before OALJ, the BRB, and the courts, none of those adjudicators is obligated to accept the views of the Director.

The LHWCA and DBA allow the private parties to resolve disputes by reaching an agreed settlement. 33 U.S.C. § 908(i). The statute and regulations establish strict rules regarding settlement and no claim may be settled without obtaining formal approval of DOL. However, the statute and regulations provide that settlement applications may be submitted to either an OWCP Longshore District Director or to an ALJ. 33 U.S.C. § 908(i); 20 C.F.R. § 702.241. Further, the law provides that if any settlement application submitted by parties represented by counsel is not acted upon by a DOL adjudicator within 30 days of its submission, the settlement is deemed automatically approved.

When evaluating settlement applications, the district director must ensure the application is complete, and that the settlement is adequate and not procured by duress. The regulations identify specific criteria for assessing adequacy. 20 C.F.R. § 702.243(f). Getting a disapproval of a section 8(i) settlement agreement upheld (by an ALJ or the BRB) on the ground that the settlement proposal is "inadequate" is difficult because the term "inadequate" has generally been considered to describe the amount of monetary consideration to be paid and not the more general content of the terms of settlement. *See generally Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773 (5th Cir. 1988); *Maher v. Bunge Corp.*, 18 BRBS 203 (1986). Furthermore, in *Richardson v. Huntington Ingalls, Incorporated,* BRB 13-0476, the Board rejected an argument by OWCP that the actuarial value of a claim is something that must be considered in assessing the adequacy of settlement proposals. It emphasized that a settlement in cases without an existing final compensation order was, at bottom, a compromise in which the claimant and their attorney have

assessed the situation and arrived at a solution mutually acceptable to both them and the Employer/Carrier, and found that the settlement application was sufficient because it addressed the four factors outlined in 20 C.F.R. § 702.243(f)—the claimant's age, education, and work history; the degree of the claimant's disability or impairment; the availability of the type of work the claimant can do; and the cost and necessity of future medical treatment. *Richardson* also found that where a claimant is represented, the settlement should be given less scrutiny and significant deference given to the parties' proposed settlement.

In short, as memorialized in Longshore Bulletin 14-05, if a represented claimant expresses an unambiguous willingness to settle, complete agreement with and understanding of the settlement terms proposed, and there is no reason to question the claimant's counsel's competence or ethics, the District Director should ordinarily approve the settlement, keeping in mind that the settlement process requires compromise.

The War Hazards Compensation Act Generally

Under section 104(a) of the War Hazards Compensation Act ("WHCA"), the U.S. government reimburses insurance carriers for DBA benefits paid if the injury or death is caused by a "war-risk hazard" - a hazard arising during

1. a war in which the United States is engaged;
2. during an armed conflict in which the United States is engaged, whether or not war has been declared; or
3. during a war or armed conflict between military forces of any origin, occurring within any country in which a covered individual is serving (e.g., shrapnel wounds from an improvised explosive device).

42 U.S.C. § 1711(b); 20 C.F.R. § 61.4(e).

Reimbursement is only available, however, if the insurance carrier did not charge its customer a war-risk hazard premium. 42 U.S.C. § 1704(b). In addition to reimbursement payments for disability and death, war-risk hazard payments include funeral and burial expenses, medical expenses. Section 104(a)(3) of the WHCA authorizes reimbursement of insurance carriers for payment of detention benefits under an agreement to pay workers' compensation benefits for such detention. The WHCA also authorizes reimbursement of reasonable and necessary claims expenses incurred in determining liability, including expenses for attorneys' fees, court and litigation costs, witnesses and expert testimony, examinations, and autopsies. These types of costs are known as "allocated claims expenses," and the specific expenses must be itemized and documented. 20 C.F.R. § 61.104(b).

An insurance carrier may also claim "unallocated claims expenses" in an amount of up to 15% of the sum of the reimbursable medical, compensation, and burial payments. Unallocated claims expenses represent the cost incurred by the company handling the claim in its regular course of operations. These expenses cannot be specifically itemized or documented. 20 C.F.R. § 61.104(c); FECA Bulletin 13-01.

All WHCA reimbursements are paid from the Employees' Compensation Fund. The WHCA claim must be supported by copies of the forms, statements, and medical reports submitted by the employee (or his or her survivors) and the employer to establish a claim under the DBA, the compensation order awarding benefits under the DBA, and the insurance policy (or relevant portion thereof) under which the employee was covered. The claim for reimbursement must also be accompanied by documentation of the payments for which reimbursement is being claimed. Documentation of payment may take the form of receipts and copies of payment drafts, or a certified listing of payments which includes payee name, services rendered, amount paid, date paid, check or draft number, and signature of the certifier.

WHCA program claims examiners first review, and adjudicate, whether the relevant injury or condition was due to a "war-risk hazard." The claims examiners evaluate factual documentation, such as DBA claim forms, decisions, and orders, depositions and affidavits, and the medical evidence submitted to make this determination. Once allowing for any notice of claim deficiencies, and opportunity for the carrier to respond, WHCA program claims examiners issue decisions outlining what injuries or conditions were incurred due to a "war-risk hazard."

Once a case is accepted as having an injury or condition incurred due to a "war-risk hazard," WHCA program claims examiners then move to evaluating whether and which of the carrier's payments and expenses claimed for reimbursement are reimbursable because they were incurred due to the war hazard injury or condition. Generally, these claims examiners approve payments and expenses that are supported by documentation establishing payments were actually issued, and that those payments were made due to the war hazard injury or condition. They review DBA claim and settlement documents, orders, and decisions, invoices and payment receipts, as well as medical reports, orders, and prescriptions. They also calculate an allowable reimbursable amount for unallocated expenses.

These claims examiners will reduce the amount reimbursed from the amount the carrier claims if the payment records do not establish the amount claimed was actually paid; if the payments and expenses claimed are not due to the accepted war hazard injury or condition; or if the claim is otherwise missing documentation supporting the exact amount of the request. Moreover, for unallocated expenses, these claims examiners will reduce the amount reimbursed for unallocated expenses, generally, commensurate with other reduced reimbursable payments or expenses, or if the carrier claims unallocated expenses to include those payments or expenses excluded from consideration under FECA Bulletin 13-01, which addresses reimbursements in 8(i) settlement cases (this primarily includes settlement amounts meant to satisfy future liability). They will explain any deductions when the reimbursement Form SF-1034 is issued to the carrier for signature.

The Global War on Terror and the Contracting Out of Military Related Operations

With the advent of the Global War on Terror and the multi-decade wars in Iraq and Afghanistan, for the first time in history, the U.S. military privatized much of its essential functions and operations. The US military developed a growing dependence on private contractors — and for a wide range of functions traditionally handled by military personnel. As reported in the Los

Angeles Times in July 2007, more than 180,000 civilians consisting of 21,000 Americans, 43,000 foreigners and 118,000 Iraqis were working in Iraq under US government contracts as compared to 160,000 soldiers and a few thousand civilian government employees. By 2008, the US Department of Defense employed 155,826 private contractors in Iraq — and 152,275 troops. This outsourcing trend continued in Afghanistan, where there were 94,413 contractors in 2010, compared with 91,600 US troops. At times, there were hundreds of companies operating in Iraq and Afghanistan that employed more than 200,000 private contractors. They came from Nepal, Serbia, South Africa, Fiji, Chile, and neighboring countries in the Middle East and work as security contractors, translators, engineers, and communication and transportation personnel, among other functions.

This degree of privatization is unprecedented in modern warfare. The workers' compensation claims for those contractors are, of course, almost universally covered by the DBA, and given the conditions of employment, many involved war risks making the claims eligible for WHCA reimbursement.

The Interplay Between DBA and WHCA

The DBA provides workers compensation type insurance coverage for contractor employees performing under government contracts outside the United States. It is intended to be a counterpart to domestic workers compensation coverage and, as such, is the sole recourse for workers who suffer on-the-job injuries or death while engaged in work in foreign locations under government prime contracts and subcontracts. Under its companion law, the WHCA, the government essentially self-insures for those instances in which an injury to or death of a DBA-covered worker arises from a war risk hazard by reimbursing the employer or carrier for any payments made pursuant to the DBA.

Both the DBA and WHCA programs are overseen and administered by the OWCP. However, they are overseen and administered by different programs within the OWCP. Neither OWCP's Division of Longshore and Harbor Workers' Compensation (DLHWC) nor any of the DBA adjudicators (OALJ, BRB, and the courts) are involved with any part of the WHCA reimbursement process. The DLHWC's mission is limited to minimizing the impact of employment injuries and deaths on employees and their families that fall under the LHWCA and its extensions. It does this by overseeing the administration of claims and impartially assisting the parties to resolve any disputes that may arise. By contrast, the WHCA claim is filed with a special unit within the Division of Federal Employees' Compensation, given a war hazards number, and moved through the war hazards reimbursement process. The claimant, the main subject of the DBA claim, is not even a party to the WHCA claim (though OWCP does notify them that WHCA reimbursement has been allowed as a courtesy).

The BRB has held that the information and evidence necessary to process a WHCA reimbursement claim is completely irrelevant to the DBA claim and thus the DBA claims process cannot be used by an employer/carrier to generate the evidence it may need to make its WHCA reimbursement application. *Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012) (denying employer's request for a subpoena ordering claimant to attend a deposition so it could determine

if the injury was caused by a war-risk hazard because such information was irrelevant to the DBA claim). This can make it challenging to obtain more than sparse evidence regarding the elements DFEC needs to analyze to determine if a claim is reimbursable under the WHCA--such as medical evidence regarding whether or not the injury was caused by a war-risk hazard--as there is no mechanism to require or obligate a claimant to provide this information as part of the DBA process.

OWCP Bulletin 05-01

Employers, insurance carriers, and OWCP itself understood early after the U.S. invasions of Iraq and Afghanistan that there would be an explosion in the volume of claims under the DBA and for WHCA reimbursement. In anticipation of that flood of claims, OWCP determined that it should establish clear guidance on the procedures for processing reimbursement claims under the WHCA.

To that end, on October 18, 2004, OWCP Bulletin 05-01 was issued regarding "War Hazard Compensation Act-Claims for Reimbursement and Detention Benefit Procedures." The bulletin was issued because of the potential increase in DBA claims due to the large number of civilian contractors serving the military in Afghanistan and Iraq, and their exposure to war-risk hazards. OWCP sought to establish clear guidance on the procedures for processing reimbursement claims and detention benefit claims under the WHCA.

OWCP Bulletin 05-01 therefore set out, *inter alia*, the following policies:

- Carriers are encouraged not to file reimbursement claims until benefits have been paid and are strongly encouraged to obtain a DBA Compensation Order prior to filing a WHCA claim.
- Where the Compensation Order is approving a settlement agreement under Section 8(i) of the LHWCA, the settlement agreement should be carefully reviewed by carriers who believe they may seek reimbursement to ensure the settlement is not excessive.
- If this is done, absent extraordinary circumstances, the FECA Program will accept the findings in the Compensation Order (including a Compensation Order approving the 8(i) settlement)) regarding DBA compensability, presuming that all the elements needed to establish that the claim falls within the DBA are met.
- If a compensation order is not issued, either because the claimant declines to participate in the proceeding or because one or more parties do not agree to the issuance of such an order, the carrier or employer may obtain an OWCP recommendation on the compensability of the DBA claim by requesting an informal conference at the office of the DLHWC District Director. The carrier can file the Memorandum of Informal Conference with its WHCA claim, and, as with the Compensation Orders discussed above, absent extraordinary circumstances, the FECA Program will accept the recommendation made by the DLHWC District Director with regards to DBA compensability.

Note that even where a Compensation Order or Memorandum of Informal Conference is accepted on the issue of DBA compensability, the FECA Program still reviews the documentation provided by the carrier to ensure that the other elements for WHCA reimbursement—causation, exposure to a war-risk hazard—are met.

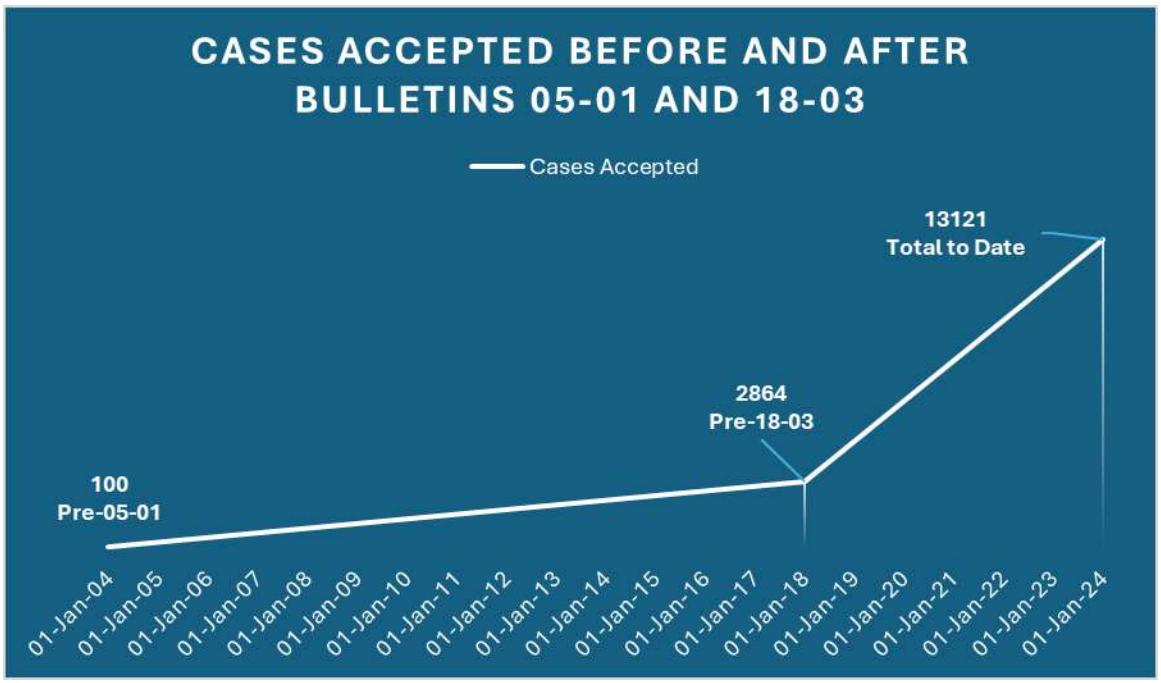
Thus, except in special instances, it is not until the DBA claim has reached a point of finality (ALJ order, settlement, stipulations, etc.) that a WHCA claim should be filed. Additionally, Bulletin 05-01 gave the DLHWC the authority to hold Informal Conferences and issue Memorandums of Informal Conference to serve in lieu of a compensation order for the purpose of seeking WHCA reimbursement of claims.

In these ways, and by requiring carriers to consider whether their settlements, which are often approved by DLHWC District Directors, will be considered excessive for WHCA purposes, the worlds of DBA and WHCA collided. It is simply not possible for a carrier or their representative to handle a claim with WHCA reimbursement potential without considering that aspect during the DBA litigation process.

The inherent conflict here is that carriers and their representatives also have a responsibility to handle WHCA reimbursement eligible claims as they would any other claim under the DBA, rather than treating claims that may be eligible for WHCA reimbursement differently than those that would not be.

FECA Bulletin 18-03

As the wars in Iraq and Afghanistan dragged on, the number of WHCA reimbursement eligible DBA claims increased, as predicted, followed by an increase in the number of WHCA claims filed for reimbursement. Stakeholders adhered to the policies addressed in OWCP Bulletin 05-01 claims and the process moved smoothly, albeit slowly, with compensation orders obtained in most instances.



However, while physical injuries were fairly simple for carriers to establish as caused by a war-risk given their nature, the DBA community saw an increase in claims for emotional injuries that were not as straight-forward. In the case of a WHCA-eligible compensable DBA emotional condition claim, the DFEC CE was required to review the record to determine (1) whether the carrier has established that exposure to at least one war-risk hazard in some way contributed to the development of the emotional condition; and (2) whether that exposure occurred during the covered insurance period. Carriers, their representatives, and DFEC CEs found it difficult to prove and determine, respectively, whether a war-risk caused the alleged emotional condition.

Because WHCA reimbursement of emotional DBA claims was a tenuous and lengthy process, it inadvertently served as a disincentive for carriers to pick up these types of claims. Contractors that were psychologically injured as a result of their employment faced more of an uphill battle to compensation than their physically injured counterparts. However, the impact of war on the emotional condition cannot be understated, as more and more of these types of claims were filed.

Given the rising occurrence of these types of injuries and the difficulty in processing WHCA reimbursement claims for same, FECA issued Bulletin 18-03 on June 6, 2018, to provide guidance to claims staff for developing and adjudicating reimbursement claims under the WHCA for emotional conditions due to exposure to a war-risk hazard. Essentially, FECA Bulletin 18-03 lowered the burden for establishing exposure to a war-risk hazard in emotional condition claims. The bulletin states:

> The evidence [needed to ascertain whether exposure to a war-risk hazard is established] need not be exact as to dates and times of the occurrence of the war-risk hazard(s); however the documentation must provide sufficient specificity of the employee's potential exposure to a war-risk hazard such that it is reasonable to conclude that the employee was actually exposed to the such war-risk hazard.

It goes on to state that "[w]here the documentation demonstrates that the employee in question was employed or working at a facility, etc., at the same time that such facility was subjected to the occurrence of one or more war-risk hazards, it is reasonable to conclude that the employee was personally exposed to such war-risk hazard, unless there is evidence to the contrary."

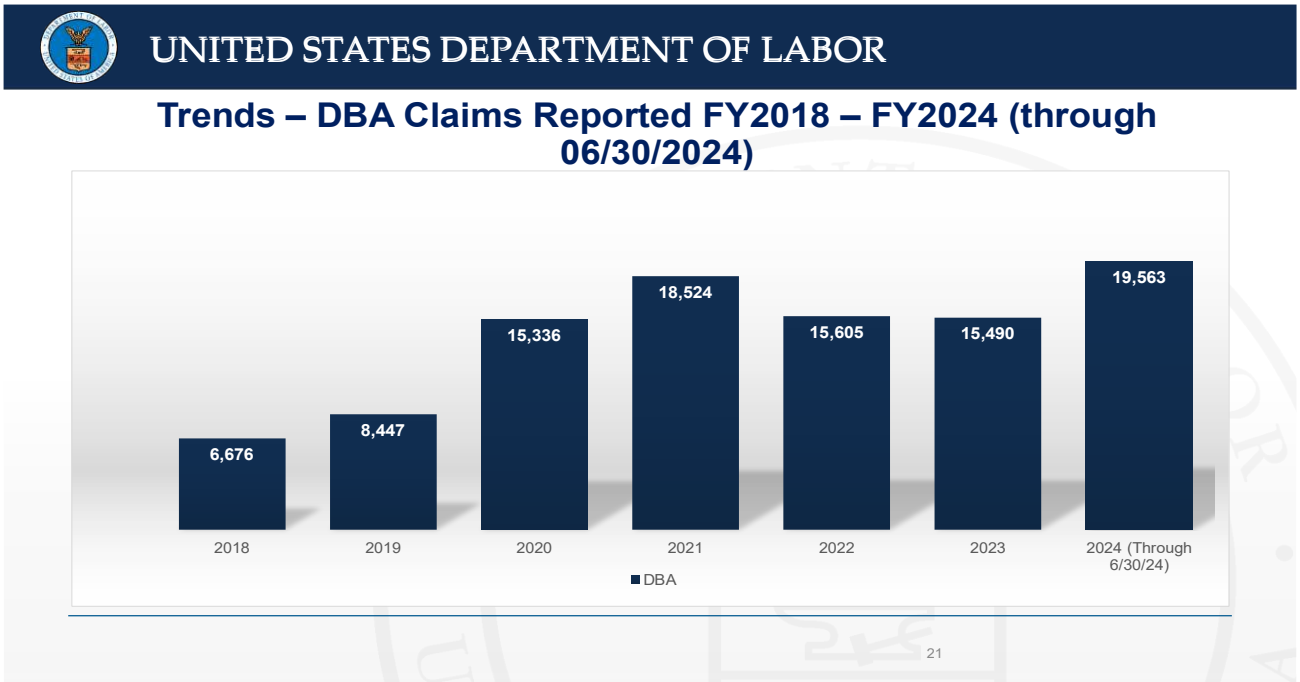
Finally, and perhaps most importantly for purposes of this memorandum, the bulletin eased the standard for what medical evidence would be deemed sufficient to establish that an injury was caused by a war-risk hazard, providing:

The medical documentation need not provide details of a specific war-risk hazard exposure or include a lengthy analysis of causality. However, to establish a causal connection, the evidence must, at a minimum:

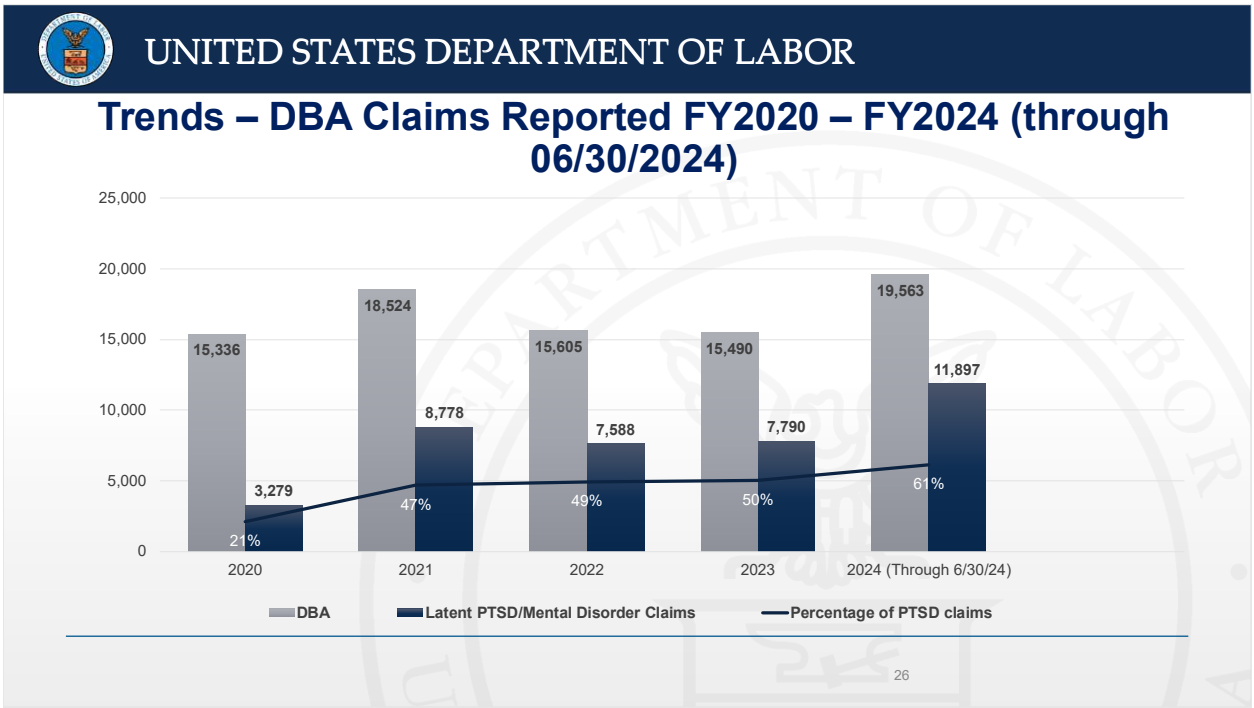
- Provide some reference of exposure to at least one war-risk hazard in the course of employment; and
- Establish that a war-risk hazard in some way contributed to the development of the emotional condition. There need not be detailed rationale; an affirmative statement as to causality is sufficient.

While the carrier seeking reimbursement must also provide evidence establishing that the emotional condition is causally connected to such war-risk hazard exposure and was not attributed exclusively to other factors of employment, FECA Bulletin 18-03 made it easier for carriers to establish emotional condition cases as related to war-risk hazards. In turn, the cases were easier to approve for WHCA reimbursement.

Following FECA Bulletin 18-03, the Longshore Program saw a marked increase in the total number of DBA claims it received:

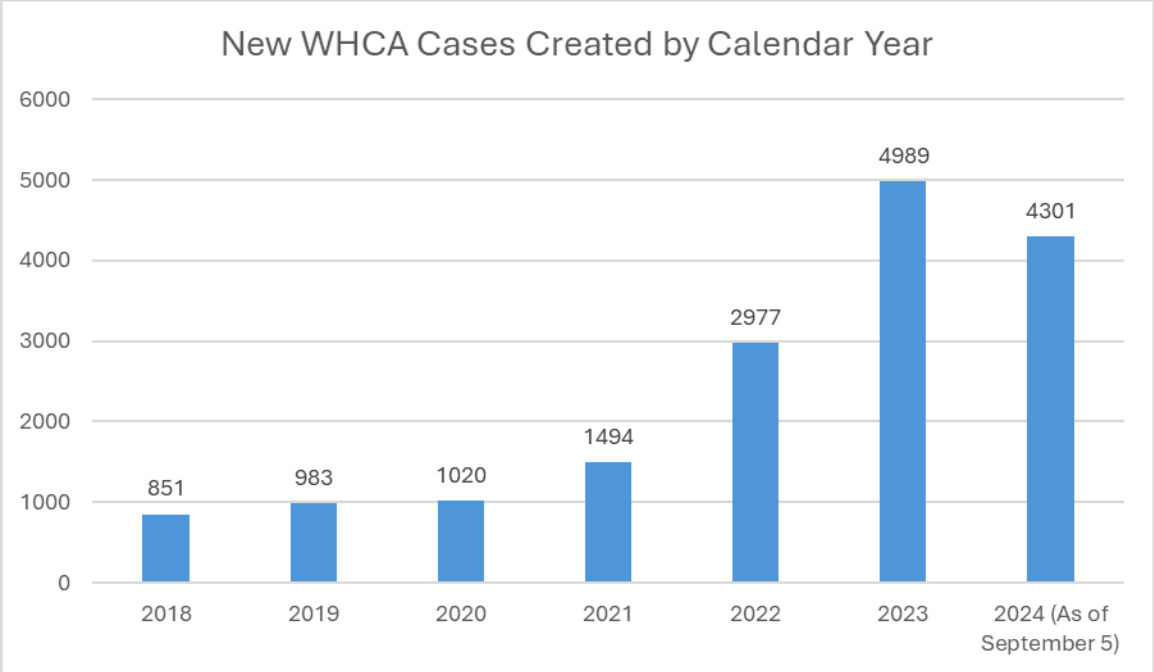


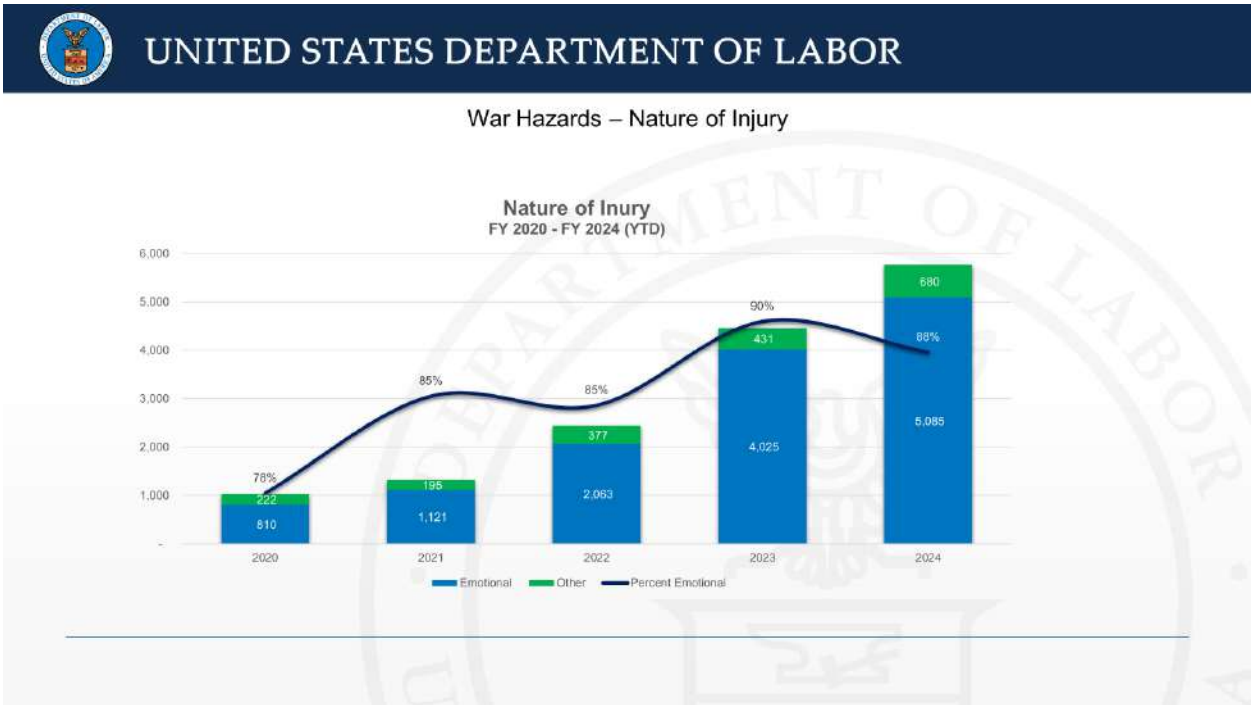
Additionally, an increased percentage of emotional condition cases comprised the increasing number of DBA cases.[1] Even where the total number of DBA claims decreased in 2022 and 2023, the percentage of emotional condition claims continued to increase.



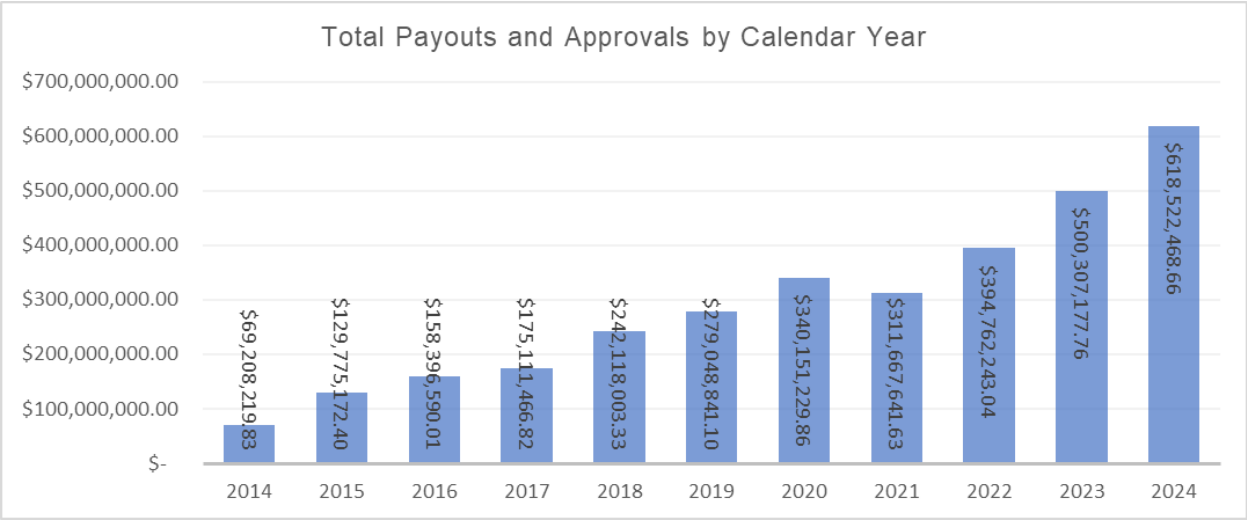
[1] The DLHWC did not start capturing the "nature of injury," of which "mental disorders" is a category, until 2020, with the roll out of OWCS. In the previous system, PTSD claims were generally coded as "Occupational Disease-Other," so emotional condition case data would be inaccurate prior to 2020.

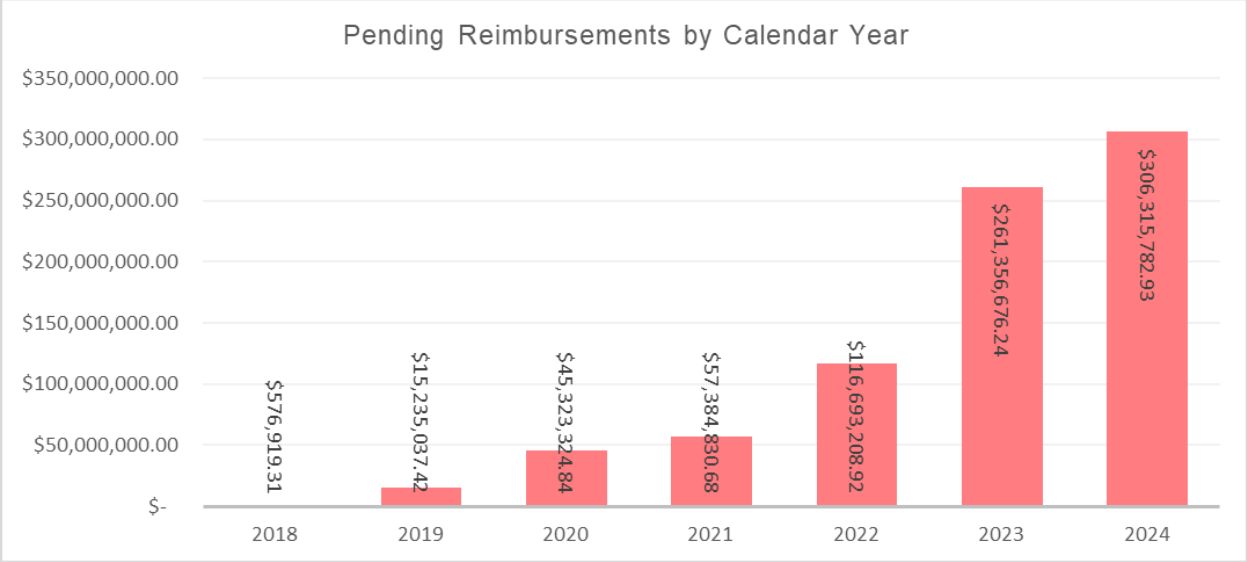
Unsurprisingly, this resulted in an increase in WHCA cases created, with emotional claims comprising a large portion of that increase.





Additionally, there was a significant increase in the amounts being paid out in WHCA reimbursements, and the total amounts pending reimbursement.





The OWCP Bulletin 05-01 requirement for a compensation order (except in special circumstances) resulted in an approximate two-year lag from the filing of the WHCA-eligible DBA claim to the filing of the WHCA claim. This can be seen in 2021, where DBA claims were at a high of 18,524, to 2023, where WHCA cases skyrocketed to 4,989, a 68% increase from the year before. This correlation indicates that there will be no respite from the filing of WHCA cases in the future as DBA claims hit an all-time high of 19,563 through July of 2024.

Potential Fraud Risks

Suffice it to say that OWCP administrators successfully predicted an increase in overall DBA claims and their accompanying WHCA cases. Unfortunately, the intrinsic nature of WHCA-eligible DBA claims – that the injuries happen in other countries, are often sustained by foreign nationals, occur during the fog of war, and are ultimately reimbursed (plus a 15% administration

uplift) by the U.S. government – make them ripe for potential fraud or, at the very least, gamesmanship for profit.

Lack of Investigation

With the influx of DBA claims, carriers saw a rise in not only emotional condition DBA claims generally, but "delayed onset" or "delayed expression" PTSD claims specifically. That is, claims for emotional condition injuries that allegedly occurred five, ten, and even up to over fifteen years prior.[2] These claims are not time-barred because, as discussed above, the statute of limitations does not start to run until the claimant is aware, or reasonably should have been aware, of the connection between the injury and their employment.

Thus, while these types of claims are permitted under the statute, they present unique challenges regarding investigation. The Section 20(a) presumption of compensability for DBA claims is already very low. The LHWCA contains a Section 20 presumption that requires a claimant only to prove that they suffered some harm or pain, and that an accident occurred or working conditions existed which *could have* caused the harm in order to make a *prima facie* case. In presenting their case, the claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, the claimant must show that working conditions existed which *could* have caused his harm. Once a *prima facie* case is established, the Section 20(a) presumption of compensability applies and the burden shifts to the employer/carrier to rebut the presumption that the injury was caused by claimant's employment. If rebutted, the presumption drops from the case and the ultimate burden of persuasion falls on the claimant to show entitlement by a preponderance of the evidence.

Given the similarly low burden for establishing that the claimant was exposed to a war-risk hazard for WHCA purposes for psychological claims per Bulletin 18-03, it is easy to see why resolving these types of claims as quickly as possible and submitting them for WHCA reimbursement is often the most business-savvy course of action for carriers. More and more often, we are seeing settlement applications with minimal medical documentation, little to no investigation, and negotiated amounts at what basically equates to a "market rate," where the case will likely be accepted for WHCA reimbursement.

The carrier has no incentive to incur the extra cost of in-depth investigation into compensability of the claim or litigation of same. This is because their prize for succeeding in discrediting the claimant or their expert at trial or establishing that their condition was not caused by their employment, is – yes, not having to pay any compensation to the claimant or their attorney - but also, not recouping any of the costs that were paid to date during the litigation. The carrier essentially ends up worse off than if they were to have just settled the claim.

Early settlement is also potentially beneficial for the claimant, who will likely see compensation for their injury far sooner than if additional investigation and litigation were to occur. However,

[2] Latent claims are not limited to emotional condition claims, but they are the most prevalent, at least as of late.

we cannot ignore the fact that many of these claimants may not be in a financial position to decline a settlement offer for less than their claim may be worth.[3]

Additionally, while it would potentially weed out blatantly fraudulent claims, extensive investigation by the carrier is not necessarily beneficial for the U.S. government either. This is because if, after investigation and/or trial, it is ultimately determined that the claim is compensable and the injury occurred as a result of a war-risk hazard, the Employees' Compensation Fund will end up paying out far more than it would have if the case was settled at the outset.

Minimal investigation by insurers during the course of DBA litigation has become standard practice in certain WHCA-eligible cases. This lack of investigation, which may at times result in payment and reimbursement of dubious claims, may be a violation of 20 C.F.R. section 61.102, which prevents reimbursement of carriers that failed to "make reasonable and adequate investigation…as to the right of any person to any benefit or payment" and "failed to take reasonable measures to contest, reduce, or terminate its liability by appropriate available procedure." However, although the regulation provides an avenue to scrutinize carriers' actions in settling a claim, DFEC CE's currently lack a metric or the expertise to assess whether a carrier's settlement has crossed the line into an "unreasonable" lack of investigation. Therefore, the tactic of settling without investigating is a potential fraud risk that may require further scrutiny given that the U.S. government is the ultimate payor. Additionally, this lack of investigation as a method to move the claim expeditiously and cost effectively towards WHCA reimbursement could be masking cases of actual fraud that would have otherwise been revealed through more thorough inquiry.

Settlements

A quick and early settlement of the WHCA-eligible DBA claim is often the most efficient road to resolution and reimbursement for carriers. However, as discussed above, that can mean a less than exhaustive investigation of the claim, claimant, and/or evidence. In an effort to reach a point of finality via compensation order, the carrier might offer an amount that is consistent with recent settlements for similarly situated claimants in the same area, or a settlement amount akin to those agreements previously reached with opposing counsel. This may be done despite scant or unreliable medical evidence and/or statements/testimony from an unbelievable claimant.

At the DBA litigation stage, there is little that can be done by Longshore Program staff to combat this issue. Under *Richardson*, considerable weight must be given to the views of the claimant and their counsel as to the adequacy of the settlement amount. In particular, District Directors are directed to respect their opinion regarding the risks of litigation and the "probability of success if

[3] We recognize that in some cases, settlements may actually *underpay* claimants compared to the full value they might be entitled to had the claim not settled. This is because some claimants may not be in a financial position to decline a settlement offer for less than their claim may be worth. However, even factoring in these instances, on balance, it appears that it is likely more common that carriers and claimants with dubious claims are overpaid (by means of settlements occurring in spurious claims where DBA compensability might not actually exist) than that claimants with strong claims are being underpaid.

the case were formally litigated" unless information in the file or application contradicts the parties' statements in the application.

Pursuant to Longshore Bulletin 14-05, where a represented claimant expresses an unambiguous willingness to settle, complete agreement with and understanding of the settlement terms proposed, and there is no reason to question the claimant's counsel's competence or ethics, the District Director should ordinarily approve the settlement, keeping in mind that the settlement process requires compromise. Further, both the Act, under section 8(i), and the regulations, at 20 C.F.R. section 702.243(b), provide that if the parties are represented by counsel, as defined under 20 C.F.R. section 702.241(h), the settlement shall be deemed approved unless specifically disapproved within thirty days after receipt of a complete application.

In this way, the authority of the Longshore Program is limited with respect to disapproving excessive or suspect settlements for claims headed towards WHCA reimbursement. By contrast, regarding the FECA Program's ability to scrutinize settlements for reimbursement purposes, OWCP Bulletin 05-01 provides:

> If the DBA claim has been settled under § 8(i) of the LHWCA, a copy of the settlement application and the compensation order approving settlement must be submitted to the DFEC when the employer or carrier is seeking reimbursement under the WHCA. The reimbursement claim should also include an explanation from the employer or carrier as to why the settlement was not excessive. Absent extraordinary circumstances, the DFEC will generally accept without further independent review the findings with regard to DBA compensability, including DBA coverage, injury, causal relationship, dependents and benefit rates, made in the compensation order approving the § 8(i) settlement by the District Director. *Settlement amounts that appear to be excessive will constitute extraordinary circumstances and DFEC will conduct its own independent review of the settlement, engage in any development it deems appropriate and if necessary determine the appropriate amount of benefits that should be reimbursed.*

Thus, the FECA program CEs that review WHCA reimbursement applications are afforded more leeway to scrutinize the settlements that are submitted for WHCA reimbursement than a DBA adjudicator is permitted in the context of the settlement approval process itself.

Similarly, while the Longshore Program has wide discretion to evaluate the reasonableness of attorney fees claimed in *disputed* attorney fee petitions, and even makes a determination as to the amount to be paid in those cases, *agreed* attorney fee petitions are generally submitted as part of an 8(i) settlement and are not afforded such examination. The Longshore procedure manual provides that, "[i]n the absence of collusion, when the parties in arm's length settlement negotiation have reached an agreement on the amount of the fee which is the responsibility of the employer/carrier, the District Director should approve the fee unless it is clearly excessive (*Ballard v General Dynamics*, 12 BRBS 966 (1980) and *Watkins v Ingalls*, 26 BRBS 179 (1993))."

A large majority of the WHCA-eligible, 8(i) settled, DBA claims fall into the latter category. In this way, it is only at the WHCA reimbursement stage that this particular category of settlement, including claimant and defense attorney fees, can truly be queried.

Medical Evidence

As discussed above at length, many WHCA-eligible DBA claims are settled early in the life of the claim with just enough medical evidence provided to establish causation under both the DBA and the WHCA. Even where the medical evidence may be minimal or unreliable, the Longshore Program has no latitude to question that evidence where it is part of an agreed settlement, and the parties are represented. Under the WHCA, the inquiry with regard to medical evidence is limited to whether the carrier seeking reimbursement provided evidence establishing that the condition is causally connected to such war-risk hazard exposure and was not attributed exclusively to other factors of employment.

As such, there is the potential for fraud when it comes to medical evidence and provider opinions on the cause of claimant injuries. Occasionally, the medical evidence comes from a foreign doctor, that does not adhere to the same medical standards that we use in the United States. The records typically must be translated, and it is rare that a foreign national claimant's doctor is deposed regarding their patient's condition.

While the Secretary of Labor is required, under section 7(b) of the LHWCA, to actively supervise medical services provided to injured employees, realistically, OWCP has very few resources to verify the credentials of the doctors involved in these cases or the veracity of their opinions. The LHWCA gives the Secretary, and the Secretary has delegated to local District Offices, the power to make determinations as to the necessity, character, and sufficiency of any medical care furnished. It further prescribes that such officials take the initiative to verify that injured employees are receiving proper medical services and, when required, available rehabilitation services. However, the legislators could not have fully contemplated the current situation where those medical services are being provided to foreign nationals on another continent.

The LHWCA does provide debarment procedures for physicians and health care providers that:

a. knowingly and willfully made, or caused to be made, any false statement or misrepresentation of a material fact for use in a claim for compensation or claim for reimbursement of medical expenses under the Act;

b. knowingly and willfully submitted, or caused to be submitted, a bill or request for payment under the Act containing a charge which the Director, OWCP finds to be substantially in excess of the charge for the service, appliance, or supply prevailing within the community or in excess of the provider's customary charges, unless the Director, OWCP finds there is good cause for the bill or request containing the charge;

c. knowingly and willfully furnished a service, appliance, or supply which is determined by the Director, OWCP to be substantially in excess of the need of the recipient thereof or to be of a quality which substantially fails to meet professionally recognized standards; or

d. been convicted under any criminal statute, without regard to any pending appeal thereof, for fraudulent activities in connection with federal or state programs for which payments are made to physicians or providers of similar services, appliances, or suppliers; or has otherwise been excluded from participation in such programs.

Debarred physicians and health care providers are not authorized to render medical care or provide medical services under the Act. However, even where evidence of potential medical fraud is provided early in the life of the claim, there is little that the DLHWC can do to truly investigate the alleged malfeasance in the case of overseas practitioners.

The debarment process consists of three distinct steps: (a) investigation and collection of evidence, 20 C.F.R. section 702.414; (b) a notice of initiation of debarment proceedings, 20 C.F.R. section 702.432(b); and (c) a notice of intent to debar, 20 C.F.R. section 702.432(e). Generally, when medical fraud is alleged, stakeholders will outline the alleged offense and provide documentation supporting it. Nevertheless, the Longshore Program faces challenges in carrying out each of those steps where the medical providers are located outside the United States.

Fraud allegations are seldom straightforward and standards for licensing, credentials, and treatment can vary from country to country. The DLHWC is located entirely in the United States and does not have the framework or bandwidth to determine whether a medical provider is properly operating under the laws and/or standards of their country. Even in a case of clear-cut medical fraud, there are obstacles to communicating to the foreign practitioners that they are being debarred, and with enforcing such actions. Additionally, in many foreign national cases, the provider utilized by the claimant may be the only one available to them at their location.

For these reasons, the Longshore Program refers assertions of medical fraud to the Office of the Inspector General (OIG) for investigation and handling. Where debarment is requested, the Longshore Program attempts to follow the debarment process but has not been successful in debarring a foreign medical provider to date.

Potential Options

There are many moving parts to the DBA/WHCA scheme that was created to ensure that employees working overseas for Department of Defense contracted employers are fairly compensated for their injuries that occur as a result of a war-risk hazard. It is fair to say that the drafters of this legislation likely did not contemplate many aspects of the current circumstances, including the location and citizenship of the claimants and their medical providers, the prevalence of PTSD and other emotional condition claims, or the volume at which these types of injuries would be occurring.

Certainly, no lawmaker in the 1940s and 1950s contemplated the Department of Defense privatizing and contracting out all the functions and operations that occurred during the Global War on Terror. Nor did they likely consider the areas where the law could be taken advantage of by enterprising claimants, attorneys/representatives, and carriers. However, the crux of the matter is that, by and large, the original objective is being met via reasonable processes.

Nevertheless, as illustrated above, the process still lacks safeguards in some areas, making it challenging for OWCP to weed out claims based on incomplete evidence and possibly resulting in over-reimbursement of carriers. The remainder of this memorandum discusses potential options for addressing some of the areas where potential fraud can occur, as well as the risks and challenges inherent in each of those options.

Legislative Reform

The most obvious and direct way to address the current situation is to enact legislation that would fundamentally change how the DBA and WHCA work now.

Such an idea has been considered before. For example, as early as April 29, 2005, the Government Accountability Office (GAO) issued a report entitled "Defense Base Act Insurance: Review Needed of Cost and Implementation Issues." Specifically, the report examined "the cost of workers' compensation insurance provided to contractor employees in Iraq under the Defense Base Act." GAO recommended that the Director of the Office of Management and Budget within the White House coordinate with USAID and the Departments of Defense, Labor, and State in "identifying cost-effective options for acquiring DBA insurance." In a report to Congress, the Department of Defense noted that it was "considering the pursuit of legislative authority to allow self-insurance for DBA coverage government-wide (that is, all agencies whose contractors and subcontractors may require such coverage). …. Because neither the Department [of Defense] nor DOL has the statutory authority to undertake a self-insurance initiative for DBA coverage, the Department will continue to work with DOL to determine the best way to proceed with a government self-insurance approach, particularly implementation and administration of the program, and to estimate the initial DOL start-up and program maintenance costs associated with a self-insurance alternative." DOD further noted that it "would like to continue working with DOL to develop a self-insurance approach, because it would also effectively eliminate the need to distinguish between DBA coverage and WHCA reimbursement and would virtually ensure that no prime or subcontractor employee would risk not having workers compensation coverage."

Later, a comprehensive legislative reform bill was drafted by DOL (in conjunction with the Departments of Defense, State, USAID, and other agencies) over several years and completed in 2015 which would have effectively repealed the WHCA altogether going forward and replaced the DBA with a government administered compensation program along the lines of FECA. The proposal, which bore the title, the "Overseas Contractors' Compensation Act," or OCCA, was intended to control costs and give the government more control over the process and substance of compensation for government contractors injured while working overseas. That opportunity was lost when the Department of Defense decided that such a reform would not save it money and when DOD declined to attach the OCCA proposal to the Defense Authorization Bill. OCCA did have in common the problem that other suggested legislative reforms would encounter – serious opposition from the insurance industry.

Thus, those legislation efforts never came to fruition.

Walk Back 18-03

Given the significant increase in psychological DBA claims and the accompanying WHCA reimbursement claims following the implementation of Bulletin 18-03, one option would be to withdraw or revise it. However, it is unknown whether this would result in a reduction of questionable emotional claims under the DBA. The reality of this situation is that psychological injury, and PTSD more specifically, is a very real consequence of war. While Bulletin 18-03 may have lowered the burden for establishing that an injury occurred as a result of a war-risk hazard under the WHCA, it did not impact the burden of establishing that an injury occurred under the DBA.

As previously discussed, under the LHWCA, to invoke the Section 20(a) presumption of compensability, the claimant must establish a *prima facie* case by proving that they suffered some harm or pain, and that an accident occurred or working conditions existed which could have caused the harm. See *Rose v. Vectrus Systems Corp.*, 55 BRBS (2022). In presenting their case, the claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused their harm; rather, the claimant need only show that working conditions existed which *could* have caused their harm. Once a *prima facie* case is established, the burden shifts to the employer/carrier to rebut the presumption that the injury was caused by claimant's employment. If the employer/carrier succeeds in rebutting, then the presumption disappears, and the claimant must prove entitlement by a preponderance of the evidence.

Given that a large majority of the employees that worked in Iraq and Afghanistan during a certain time period were likely exposed to elements of war, they are all potential claimants. If Bulletin 18-03 were withdrawn or revised, it would be more difficult for carriers to obtain reimbursement of psychological claims under the WHCA; for instance, the fact that the BRB has deemed evidence needed to establish DBA reimbursability "irrelevant" to the DBA adjudication poses a challenge to carriers obtaining the necessary documentation needed to make their WHCA claim, as there is no clear mechanism to force claimants to provide information like detailed medical reports on causation or deposition statements attesting to exposure to war-risk hazards.

However, without a quick and lucrative settlement, we could potentially create a situation where claimants' attorneys are less likely to take these claims because carriers are less likely to pay or settle them without litigation. Without representation, it may be difficult for foreign nationals to navigate the United States federal workers' compensation system, and they may be less likely to pursue compensation for their legitimate injuries. In fact, despite having symptoms, many employees are either not aware that they suffer from a compensable injury or not aware that their injury is related to their employment until they are advised of the possibility by an attorney or a fellow employee.

The data clearly shows an increase in psychological DBA and WHCA claims following the issuance of Bulletin 18-03. However, that does not mean the claims are not valid, regardless of the fact that some stakeholders may be taking advantage of the situation. If the goal is to reduce the total amount of WHCA claims by eliminating fraudulent psychological DBA claims, we would need to know what percentage or amount of the increased psychological claims are

actually illegitimate (which, for the reasons discussed above, is difficult and essentially beyond OWCP's control). Deterring some legitimate claims would likely be the unintended consequence of revising or withdrawing Bulletin 18-03, and in the absence of meaningful data, it is difficult to assess whether the trade-off in deterring weak or fraudulent claims at the cost of deterring some legitimate ones would be worth it.

Even if there was a reduction in the total number of psychological DBA claims filed due to the recall or revision of Bulletin 18-03, carriers would still seek WHCA reimbursement – it would just be harder and take longer to prove.

Substantive Scrutiny of WHCA Reimbursements

As discussed above, WHCA program claims examiners first review and adjudicate whether the relevant injury or condition was due to a "war-risk hazard." Once a case is accepted as having an injury or condition incurred due to a "war-risk hazard," FECA CEs then move to evaluating whether and which of the carrier's payments and expenses claimed for reimbursement are reimbursable because they were incurred due to that war hazard injury or condition.

The FECA CEs look at documentation, such as claim and settlement orders, decisions, invoices, payment receipts, medical reports, and prescriptions. They will generally approve payments and expenses that are supported by appropriate documentation. They will reduce the reimbursement amount requested if the payment records do not establish the amount claimed was actually paid; if the payments and expenses claimed are not due to the accepted war hazard injury or condition; or if the claim is otherwise missing documentation supporting the exact amount of the request. However, the FECA CEs rarely, if at all, evaluate the underlying settlement or attorney fee petition to assess whether those amounts are appropriate given the facts of the claim.

Unlike DLHWC CEs, a WHCA CE tasked with evaluating WHCA reimbursement applications has the authority, pursuant to Bulletin 05-01, to "conduct [their] own independent review of the settlement, engage in any development [they]deem appropriate and if necessary, determine the appropriate amount of benefits that should be reimbursed" where settlement amounts appear to be excessive.

One way that the program could potentially identify fraud, or at least areas where stakeholders are exploiting the process, would be for WHCA program CEs to carefully examine the underlying settlement terms of the requested WHCA reimbursement. For the reasons discussed above, claimants and carriers often agree to settlement terms with minimal information about the claim, and attorneys request fees on both sides for their work in facilitating these settlements. If the WHCA program CEs were required to review the submitted settlements and attorney fee petitions for excessiveness, we could scrutinize the expenditures that carriers and attorneys request for reimbursement and potentially reduce the questionable amounts. If it became known that reimbursement requests will not routinely be granted in full without scrutiny, there would be more incentive to investigate the validity of the underlying claim.

However, there is no current standardized WHCA process for WHCA program CEs to determine what appears to be an "excessive" settlement or attorney fee amount. Moreover, with a limited

pool of carriers and their attorneys, and thus little apparent variance in how they settle cases, it is difficult to identify what is “excessive” for a settlement without such particularized standards or expertise, at least without acting arbitrarily or inconsistently. As such, FECA program CEs have rarely, if ever, utilized this authority.

In order to facilitate this added level of scrutiny, financial resources and time would have to be directed toward establishing a standard for evaluating whether settlement and attorney fees are excessive and training FECA program CEs on same. Currently, there is over $300,000,000 in pending WHCA reimbursements. Due to complaints from carriers regarding the lag in payout of these amounts under the DBA versus reimbursement under the WHCA, available resources are currently being directed to processing the WHCA claims faster. Adding another layer of review would extend what is already a laborious process and likely result in fervent objection from carriers.

Nevertheless, if the goal is to identify and reduce fraudulent DBA claims that are being submitted for WHCA reimbursement, scrutiny of the underlying settlement and attorney fees at the reimbursement stage could ultimately accomplish that goal without affecting legitimately injured claimants. However, significant time and resources would need to be expended to arrive at a point where FECA program CEs have the knowledge and bandwidth to make those determinations. Additionally, it would likely take time for the reductions in reimbursements to have an impact on carrier and attorney behavior during the DBA litigation phase.

Adjust Unallocated Expenses

Under the WHCA, carriers are reimbursed for allocated and unallocated expenses incurred as a result of DBA claims caused by a war-risk hazard. Allocated expenses must be itemized and documented, and include disability and death payments, funeral and burial expenses, medical expenses, attorneys’ fees, etc. Unallocated claims expenses represent the cost incurred by the company handling the claim in its regular course of operations. These expenses cannot be specifically itemized or documented.

Pursuant to 20 CFR § 61.104(c), a carrier may receive reimbursement of unallocated claims expense[s] in an amount of [up] to 15% of the sum of the reimbursable payments made under the Defense Base Act or other workers' compensation law. Under FECA Bulletin 13-01, unallocated expenses are calculated by FECA program CEs as past compensation plus past medical plus past burial expenses multiplied by 15%, plus $1,000 (a flat settlement preparation expense) for a Section 8(i) settlement. Allocated expenses are not included in the calculation, nor are commutations of death or other benefits, or settlement amounts specifically identified to cover future expenses.

20 CFR § 61.104(c) also provides that “if this method of computing unallocated claims expenses would not result in reimbursement of reasonable and necessary claims expenses, the Office may, in its discretion, determine an amount that fairly represents the expenses incurred." Thus, while the regulations provide a general rule of thumb, ultimately the payment of unallocated costs should be a reasonable measure of unallocated expenses incurred. Under its terms, this regulation

may be applied to either increase or decrease the amount of unallocated expenses that would otherwise be reimbursable under the general rule.

Currently, the WHCA program CEs will reduce the amount reimbursed for unallocated expenses, generally, commensurate with other reduced reimbursable payments or expenses, or if the carrier claims unallocated expenses to include those payments or expenses excluded from consideration under FECA Bulletin 13-01. In addition to not applying the 15% to future liability paid via settlement, reduction of unallocated expenses in this way aims to reduce unjustified payment to the carrier, because they are not reasonably related to the expenses in handling the DBA claim.

Thus, while Bulletin 18-03 provides limits on how unallocated expenses are reimbursed, and the regulations provide discretion to reduce where appropriate, WHCA program CEs do not currently factor in the effort taken by the carrier to settle the claim. Presumably, in the case of early-settled emotional claims where there is no real investigation or administration of the claim by the carrier, they would potentially be entitled to less in unallocated costs where 15% is not commensurate with the actions taken. In this way, the program could feasibly incentivize carriers to engage in more investigation and/or negotiation at the DBA stage before submitting the claims for WHCA reimbursement.

However, the challenges to this approach are at least two-fold. First, carriers have already expressed that the current calculation used for unallocated costs is insufficient to cover their claims expenses. Reducing the percentage in certain cases and/or adding additional restrictions will almost certainly be met with protest from the affected stakeholders.

Second, the program would need to establish a new procedure for calculating unallocated costs that considers this additional factor so that it is applied consistently. It would likely be difficult to establish parameters regarding what amounts to “sufficient investigation” such that the carrier is reimbursed the entire 15%. This would nevertheless be necessary so that unallocated cost reductions do not occur arbitrarily. Then, we would need to train the WHCA program CEs and issue a bulletin replacing Bulletin 13-01, updating stakeholders on the new process.

Again, additional resources would need to be allocated to this endeavor, and adding another layer of review would extend an already arduous process. It is not clear whether this would even impact the filing of suspect settlements for WHCA reimbursement, and the ramifications would likely be delayed. However, this is one lever we could pull to potentially affect carrier behavior with regard to questionable claims without inadvertently dissuading claimants from filing legitimate claims. At least initially, the only affected party would be the insurance carrier.

Reporting of Fraudulent Medical Evidence

In some DBA cases where medical treatment is procured overseas, there are obstacles to verifying the legitimacy of the medical evidence that is produced. Unlike the other OWCP programs, the Longshore program does not have a branch or group dedicated to investigating fraud. Because the program is not generally the payor or adjudicator of claims, the onus is on the stakeholders to address allegations of fraud through litigation or negotiation.

As discussed above, there is a mechanism through which the Longshore program can technically "debar" a medical professional for certain infractions, including fraud. However, the reality of executing such debarment is near impossible when dealing with overseas doctors. Frankly, neither Longshore CEs nor national office employees have the knowledge or resources necessary to thoroughly investigate a doctor in, for instance, Uganda or Macedonia. Additionally, despite objective criteria for diagnosing emotional claims, such criteria can vary by country and in some respects is inherently subjective.

Currently, much of the suspected fraud in DBA claims is handled through credibility determinations at the ALJ level, or, where a clear pattern and practice is identified, referral to OIG for investigation. And, as addressed previously, questionable medical evidence is often overlooked in favor of a swift and economical settlement where the claim is WHCA reimbursement eligible.

Nevertheless, the Longshore program is working on developing a process to make it easier for stakeholders to report clear fraud, especially regarding doctors. However, such reports will ultimately (or directly) be referred to OIG as such investigations are beyond the ambit of Longshore program staff's responsibilities and abilities. It is the program's understanding that there are active OIG investigations into DBA fraud allegations, but we are not advised on the status of same.

In the long run, it is unlikely that pursuit of fraudulent overseas medical professionals would result in a decline in fraudulent DBA claims without legislative change. The burden to establish a work-related injury under the DBA is so low that it is not hard to imagine a resourceful claimant simply finding another doctor to provide the necessary diagnosis. And, if there was a change in the law resulting in a higher standard for medical evidence, the question becomes – what does that do to claimants with legitimate claims in remote countries without ample access to medical treatment?

Recommendations

In sum, an analysis of the DBA and WHCA, the interplay between them, the areas of potential risk, and options for addressing those risks, raises more questions than answers. The global political climate has changed drastically since 1941, without any significant change to the language of these laws. It is unlikely that there is an abundance of actual fraud occurring, but stakeholders can capitalize on certain areas of the overall scheme. Whether it is worthwhile to pursue remediation of these specific risks – either at the DBA or WHCA level – is the larger question.

Given the difficulty in identifying whether fraud is actually occurring, the costs and labor associated with any of the other options, and the fact that WHCA applications and reimbursement amounts will continue to increase regardless of any policy actions taken by the program, the first recommendation is **legislative reform**.

Per BLLLS, DOL went pretty far down this road in 2008-2010, and went so far as to get a legislative proposal introduced that would have made DBA claims totally self-insured by the

government. This reform bill would have effectively repealed the WHCA altogether going forward and replaced the DBA with a government administered compensation program along the lines of FECA. This proposal would have solved many of the problems explained here but the bill never moved forward because it lacked support from the Department of Defense and received significant opposition from the insurance industry. Thus, while it is a huge lift that may not be practical, it is the cleanest and most effective way of limiting the government outlays, which are only going to continue to increase.

Short of legislative reform, the recommendation is to either develop a process for WHCA CEs to **adjust unallocated expenses** down where 15% is not commensurate with the actions taken or eliminate unallocated expenses entirely.

As discussed above, where there is no real investigation or administration of the claim by the carrier, they would potentially be entitled to less in unallocated costs. In this way, the program could feasibly incentivize carriers to engage in more investigation and/or negotiation at the DBA stage before submitting the claims for WHCA reimbursement. However, additional resources would need to be allocated to this endeavor, and adding another layer of review would extend an already arduous process.

It is not clear whether this would even impact the filing of suspect settlements for WHCA reimbursement, and the ramifications would likely take years to realize. Nevertheless, this is one lever we could pull to potentially affect carrier behavior regarding questionable claims without inadvertently dissuading claimants from filing legitimate claims. At least initially, the only affected party would be the insurance carrier.

However, considering the difficulties in developing a process to adjust unallocated costs and the fact that WHCA reimbursement allocations and costs will continue to increase, one way to reduce overall costs under the WHCA would be to eliminate unallocated costs altogether. Per FEEWC, when Bulletin 13-01 was written, there may have been more costs that were considered unallocated or “overhead.” These days, most of the requested reimbursements can probably be allocated. While this would not immediately address the issue of potential fraud, it would reduce the overall outlays for WHCA claims. Eventually, it could also impact suspicious cases because carriers would have more incentive to investigate since they have more “skin in the game” (i.e. they are receiving less in reimbursement)

Overall, there is no perfect solution to the issues that are inherent in the DBA and WHCA statutes. While legislative reform is the only option that can rectify the innate pitfalls of which the industry takes advantage, it is also an onerous process and requires backing from other agencies and the appetite for change. Similarly, while the adjustment or elimination of unallocated costs would require less effort, it will take time to develop a process and/or revise Bulletin 13-01 and will certainly be met with opposition from the industry.