



## **FACTUAL HISTORY**

On July 19, 1999 appellant, then a 36-year-old custodian and laborer, filed a claim for occupational disease alleging that he developed a right foot condition due to walking on concrete flooring in the performance of duty. Appellant began his employment with the employing establishment on April 17, 1997, and stopped work on June 15, 1999. Appellant returned to modified duty with the employing establishment, without wage loss, on August 28, 2000.<sup>2</sup> Appellant submitted medical evidence which established that he had preexisting, congenitally abnormally long second and third metatarsal bones, and had undergone prior surgery for bilateral foot complaints. On March 13, 1998 appellant underwent right foot surgery at the Veterans Affairs (VA) Hospital. The surgery consisted of an extensor tendon lengthening of the second and third toes of the right foot and arthrodesis of the proximal interphalangeal joint of the right second toe. On April 9, 1998 the VA awarded appellant a 20 percent disability for bilateral hammertoes and bunionectomies and a 10 percent disability for a right shoulder condition, for a total combined award of 50 percent disability. On August 18, 1999 appellant underwent additional right foot bone and tendon surgery at the VA Hospital. On August 5, 1999 the Office accepted appellant's claim for aggravation of metatarsalgia of the right foot, and subsequently accepted the March 13, 1998 and August 18, 1999 right foot surgeries. On July 19, 1999 appellant filed a claim for wage-loss compensation beginning June 23, 1999. On the form appellant acknowledged his receipt of VA benefits for a degenerative disc condition, but did not acknowledge his benefits for his right foot condition.

The Office awarded appellant compensation for wage loss commencing June 24, 1999, and placed appellant on the periodic compensation rolls. The Office did not become aware that appellant might have received compensation benefits for the same conditions from the VA until approximately May 2000, when an Office second opinion physician noted appellant's VA award in his report.<sup>3</sup>

On September 21, 2000 appellant filed a claim for a schedule award for an impairment related to his accepted right foot conditions. Following a period of medical and factual development, in a decision dated February 12, 2003, the Office noted that in a separate Office decision appellant had been found to be entitled to a schedule award for a nine percent permanent impairment of his right lower extremity, which equated to 25.92 weeks of compensation for the period May 31 to November 27, 2001.<sup>4</sup> The Office further found, however, that appellant was not entitled to payment of compensation for his approved schedule

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<sup>2</sup> In a decision dated November 1, 2000, the Office determined that appellant's actual earnings as a modified clerk fairly and reasonably represented his wage-earning capacity.

<sup>3</sup> The Office first requested information from the VA on October 2, 2001.

<sup>4</sup> While the Office stated in its February 12, 2003 decision that the percentage of the schedule award rating had been adjudicated separately, the Board notes that, at the time of the Office's February 12, 2003 decision, the Office had not yet issued a formal schedule award. The record reflects that a formal schedule award decision was issued on November 18, 2003, subsequent to appellant's appeal to the Board. Under the principles discussed in *Douglas E. Billings*, 41 ECAB 880 (1990), the Office's November 18, 2003 decision, issued while the Board had jurisdiction over the matter in dispute, is null and void. *Linda Thompson*, 51 ECAB 694 (2000); *Cathy B. Millin*, 51 ECAB 331 (2000).

award, as he had already received compensation benefits from the VA for the same period and for the same injury. The Office explained that, by letter dated March 21, 2001, the VA had notified the Office that, since May 1, 1999, it had made the following payments to appellant in connection with his bilateral hammertoes and bunionectomies conditions: \$184.00 per month from May 1 to September 1, 1999, representing the 20 percent right foot disability; \$2,366.00 per month from September 1, 1999 to March 1, 2000; \$188.00 per month from March 1 to December 1, 2000; \$194.00 per month from December 1, 2000 to December 1, 2001; and \$199.00 per month from December 1, 2001 to December 1, 2002.<sup>5</sup> The Office determined that, for the period June 24, 1999 to August 27, 2000, appellant had received dual benefits from the Office and the VA, resulting in an overpayment of compensation in the amount of \$15,713.74. The Office further calculated that the value of appellant's schedule award, which ran for 25.92 weeks between May 31 to November 27, 2001 equated to \$10,536.48, but offset the amount owed to appellant by the \$5,028.48 he received in VA benefits for this same period, to arrive at a balance of \$5,508.00 still payable on the schedule award. The Office concluded, however, that, as appellant still had an outstanding overpayment in the amount of \$15,713.74 as a result of having received dual benefits for the period June 24, 1999 to August 27, 2000, the remaining schedule award balance of \$5,508.00 had to be offset against the overpaid amount, leaving appellant with a net overpayment of \$10,205.74. Therefore, the Office determined that appellant was not entitled to receive any monetary compensation for his approved schedule award.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8116<sup>6</sup> of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides in pertinent part as follows:

“(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, *he may not receive salary, pay, or remuneration of any type from the United States, except --*

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) *other benefits administered by the Veterans Administration unless such benefits payable for the same injury or the same death....*” (Emphasis added.)

Section 8116(b) provides that in such cases an employee shall elect which benefits he shall receive. Thus, the Act prevents payment of dual benefits in cases where the Office has

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<sup>5</sup> In a separate letter dated January 9, 2002, the VA informed the Office that, with the exception of cost-of-living adjustments, appellant's percentage of disability and disability payments had not changed since the initial disability entitlement determination in 1998.

<sup>6</sup> 5 U.S.C. § 8116.

found that the disability was sustained in civilian federal employment and the VA has held that the same disability was caused by military service.<sup>7</sup>

### ANALYSIS -- ISSUE 1

The Board initially finds that appellant was required to make an election of benefits under section 8116 of the Act for the period June 24, 1999 through August 27, 2000 as his benefits under the Act and under statutes administered by the VA were for the same injury.

The record indicates that appellant received benefits from the VA in connection with his bilateral hammertoes and bunionectomies conditions in the amounts of: \$184.00 per month from May 1 to September 1, 1999, representing the 20 percent right foot disability; \$2,366.00 per month from September 1, 1999 to March 1, 2000; \$188.00 per month from March 1 to December 1, 2000; \$194.00 per month from December 1, 2000 to December 1, 2001; and \$199.00 per month from December 1, 2001 to December 1, 2002.<sup>8</sup> Based on this information, the Office properly calculated that, between June 24, 1999 and August 27, 2000, appellant received \$15,713.74 in VA benefits. In addition, the VA specifically stated that it had raised appellant's compensation to 100 percent for the periods of total disability connected with his March 18, 1998 and August 18, 1999 surgeries. While appellant also received compensation from the VA for other conditions, the above information pertains only to appellant's right foot condition.

On August 5, 1999 the Office accepted that appellant's claim for aggravation of metatarsalgia of the right foot, and subsequently accepted the March 13, 1998 and August 18, 1999 right foot surgeries. The Office awarded compensation commencing June 24, 1999, and paid appellant benefits in the amount of \$23,450.88 until he returned to work on August 28, 2000. While appellant asserts that his VA benefits are for bunionectomies and hammertoes, not metatarsalgia, and, therefore, are not for the same injury for which he received compensation from the Office, the record reflects that the accepted conditions are in fact the same, as evidenced by the fact that both the Office and the VA compensated appellant for the same surgical procedures. The Board finds that, for the periods June 24, 1999 through August 27, 2000, the date appellant returned to work and FECA benefits ceased, as appellant had received benefits from the VA and was entitled to receive benefits from the Office "for the same injury," the Office properly required that he make an election of benefits.<sup>9</sup>

Because appellant did not elect to receive FECA benefits until June 4, 2002, and, prior to his election concurrently received VA benefits and FECA benefits for the same injury, the Board finds that he erroneously received a dual benefit. As a result an overpayment of \$15,713.74 in compensation occurred for the period June 24, 1999 through August 27, 2000. At the time of the

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<sup>7</sup> *Sinclair L. Taylor*, 52 ECAB 227 (2001); *Allen W. Hermes*, 43 ECAB 435 (1992).

<sup>8</sup> In a separate letter dated January 9, 2002, the VA informed the Office that, with the exception of cost-of-living adjustments, appellant's percentage of disability and disability payments had not changed since the initial disability entitlement determination in 1998.

<sup>9</sup> *Id.*

Office's February 13, 2003 decision, appellant was still receiving VA benefits, despite his election of FECA benefits.

### **LEGAL PRECEDENT -- ISSUE 2**

In *Califano v. Yamasaki*,<sup>10</sup> the Supreme Court held that due process required the Social Security Administration to defer any measures to recover suspected overpayments until, *inter alia*, it informed the claimant of the grounds for waiver under the Act. The wording of the waiver provision in the Social Security Act is similar to that in the Federal Employees' Compensation Act, and the Director of the Office has determined that the holding of the Supreme Court in *Califano v. Yamasaki* is applicable to the recovery of overpayments under FECA.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

Following its determination that appellant had received an overpayment in compensation, the Office found that appellant was entitled to receive a schedule award for a nine percent permanent impairment to his right lower extremity.<sup>12</sup> The Office calculated that the value of appellant's schedule award, which ran for 25.92 weeks between May 31 to November 27, 2001 equated to \$10,536.48, but offset that amount by the \$5,028.48 appellant received in VA benefits for this same period, to arrive at a balance of \$5,508.00 still payable on the schedule award. The Office concluded, however, that as appellant still had an outstanding overpayment in the amount of \$15,713.74 as a result of having received dual benefits for the period June 24, 1999 to August 27, 2000, the remaining schedule award balance had to be offset against the overpaid amount, leaving appellant with a net overpayment of \$10,205.74. Although such an offset appears administratively straightforward, the Board finds that it circumvents established legal procedures and protections. Extensive due process rights attach to any attempt by the Office to recoup benefits already paid, even if paid in error.<sup>13</sup> As noted above, in *Califano v. Yamasaki*,<sup>14</sup> the Supreme Court held that due process required the Social Security Administration to defer any measures to recover suspected overpayments until, *inter alia*, it informed the claimant of the grounds for waiver under the Act. The wording of the waiver provision in the Social Security Act is similar to that in the Federal Employees' Compensation Act, and the Director of the

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<sup>10</sup> 442 U.S. 682 (1979).

<sup>11</sup> This policy was announced in FECA Bulletin No. 80-35, issued October 20, 1989 and is presently incorporated into the Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Overpayment Overview*, Chapter 6.100.3i (September 1994).

<sup>12</sup> While the Board has not adjudicated the issue of appellant's entitlement to a schedule award, the Board notes that Dr. Eddie Davis, upon whose opinion the Office relied to resolve a conflict in medical opinion, was improperly selected by the Office to serve as an impartial medical examiner. Dr. Davis is a podiatrist and is not a physician who is Board-certified. Office procedure provides that an impartial medical examiner must generally be a physician who is Board-certified in an appropriate specialty. *Marlene M. Hartley*, 49 ECAB 588 (1998); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(1) (March 1994).

<sup>13</sup> See generally FECA Circular No. 82-48, "Overpayments and Waiver" (December 1, 1982).

<sup>14</sup> *Supra* note 10.

Office has determined that the holding of the Supreme Court in *Califano v. Yamasaki* is applicable to the recovery of overpayments under FECA.<sup>15</sup>

The Office's offset practice precludes the proper consideration of waiver of the entire amount of the overpayment, which in this case is \$15,713.74. The Office's practice also permits an unrestricted recovery of the offset portions of the overpayment without regard to the relevant factors set forth in 20 C.F.R. § 10.441. The Board finds that such a practice denies administrative due process with respect to the amounts offset.<sup>16</sup>

The Board will accordingly modify the Office's February 12, 2003 decision to find that an overpayment of \$15,713.74 occurred in appellant's case, representing the compensation for temporary total disability erroneously paid from June 24, 1999 through August 27, 2000. On remand the Office should first issue a formal schedule award decision.<sup>17</sup> The Office shall then afford appellant due process with respect to this overpayment, by issuing a preliminary overpayment decision, followed by an appropriate final overpayment decision.

Appellant remains entitled to any amounts for which he is found eligible pursuant to his claim for a schedule award.

### CONCLUSION

The February 12, 2003 decision of the Office is affirmed insofar as it found an overpayment of \$15,713.74 occurred in appellant's case for the period June 24, 1999 through August 27, 2000. The February 12, 2003 decision is set aside insofar as it determined that appellant had a net remaining overpayment in the amount of \$10,205.74 and, therefore, was not entitled to receive payment for his approved scheduled award.

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<sup>15</sup> See *supra* note 11.

<sup>16</sup> *Michael A. Grossman*, 51 ECAB 673 (2000).

<sup>17</sup> As noted above, the Office's November 18, 2003 schedule award decision was issued subsequent to appellant's appeal of this case and, as it pertained in part to the same issues contained in the instant case, is null and void. See *supra* note 4.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office dated February 12, 2003 is affirmed in part and set aside in part, and this case is remanded for further action consistent with this opinion.

Issued: March 2, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member