



factors of his federal employment beginning in 1983. He felt that he was successful at work from 1973 through 1983.

Appellant submitted medical reports from Dr. William A. Germer, a clinical psychologist, beginning in 1984 and diagnosing adjustment disorder with mixed emotional features. Dr. Germer attributed appellant's condition to his employment interactions. Dr. Victor L. Stevens, a Board-certified psychiatrist, examined appellant on August 8, 1996 and noted that appellant reported feeling like a failure because he was unable to return to work as a supervisor at the employing establishment. He noted that appellant was hospitalized from May 9 to 14, 1996 due to depression and was hospitalized again June 5 to 11, 1996 for a multiple drug overdose. Dr. Stevens diagnosed recurrent major depressive disorder. On November 17, 1996 Dr. Germer stated that appellant had had features of both a major depression and chronic post-traumatic stress disorder. He stated that appellant's current diagnosis was adjustment disorder with depressive mood as a result of occupational problems. The Office accepted appellant's claim for adjustment disorder and depression on December 24, 1996.

In a report dated June 24, 1997, Dr. David W. Gunzburger, a clinical psychologist, noted that appellant believed that he sustained a minor post-traumatic stress disorder due to his combat service in Vietnam. He diagnosed adjustment disorder, major depressive disorder and chronic post-traumatic stress disorder. Appellant applied for benefits from the Department of Veterans Affairs (VA) on August 26, 1997 and received an award of 30 percent disability effective April 1997 due to post-traumatic stress disorder.

In a letter dated August 26, 1997, the Office informed appellant that he must make an election between compensation under the Federal Employees' Compensation Act (FECA) and VA benefits. The Office stated that as appellant's accepted condition was adjustment disorder-depressive mood and depression and that as he was not previously receiving a service-connected disability for post-traumatic stress disorder he must elect which benefit he wished to receive. The Office requested information from the VA regarding appellant's claim. Appellant elected to receive FECA benefits on September 1, 1997 effective April 18, 1996.

In a letter dated January 5, 1998, appellant informed the Office that the VA awarded him 50 percent disability due to post-traumatic stress disorder effective April 1997. In a report dated August 3, 1998, Dr. Katharina Hathaway, a VA physician, examined appellant and diagnosed major depressive disorder, panic disorder and post-traumatic stress disorder. She noted that appellant reported a month history of increased depression, panic attacks, auditory hallucinations and sleep disturbances following notification that he was being terminated from the employing establishment after two years' workers' compensation leave due to post-traumatic stress disorder symptoms. Dr. Hathaway noted that appellant had a combat history in Vietnam from 1967 through 1969 and that he made three suicide attempts in 1996 overdosing twice and cutting his wrist once. Appellant reported auditory hallucinations in 1996 and July 1998.

Appellant completed an EN1032 on September 9, 1999 and reported that he was receiving VA benefits due to post-traumatic stress disorder. On April 7, 2001 he completed an EN1032 and indicated that he received 100 percent disability from the VA since December 1999. The VA completed a form on April 2, 2002 and indicated that appellant received disability benefits due to post-traumatic stress disorder, diabetes mellitus and peripheral neuropathy of

both lower extremities. The VA indicated that no increase had been made in appellant's monthly benefits as the result of an on-the-job injury.

Appellant completed an additional EN1032 on April 6, 2002 and indicated that he received 100 percent disability compensation from the VA due to post-traumatic stress disorder. The Office requested additional information from the VA on April 22, 2003 regarding the reasons that appellant's disability due to his emotional condition increased. The VA responded on October 15, 2003 and indicated that appellant received service-connected benefits from post-traumatic stress disorder at 50 percent from March 26, 1997 and at 100 percent from May 31, 1999.

In a letter dated November 12, 2003, the Office informed appellant that he must make an election between his service-connected disability award due to post-traumatic stress disorder from the VA and his FECA benefits. On November 22, 2003 appellant elected to receive VA benefits effective February 1, 2004. By decision dated December 18, 2003, the Office informed appellant that the date of his election of VA benefits had been changed to November 30, 2003 and compensation deleted. The Office also informed appellant that an additional election of benefits between VA and FECA benefits must be made for the period March 26, 1997 through November 29, 2003. In a letter dated December 18, 2003, appellant requested civil service retirement benefits. On December 29, 2003 appellant objected to the Office's finding that he was receiving dual benefits. He elected to receive VA benefits from March 26, 1997 through November 29, 2003.

The Office requested additional information from the VA on January 7, 2004 regarding whether appellant received service-connected benefits for an emotional condition prior to March 26, 1997. The VA responded on January 23, 2004 and indicated that appellant initially received 30 percent disability due to post-traumatic stress disorder on March 26, 1997. Appellant's condition was reevaluated on February 23, 2000 and he was granted an increase from 30 to 50 percent disability effective March 26, 1997 and from 50 to 100 percent disability effective May 31, 1999.

On February 17, 2004 appellant submitted a report dated October 2, 1998 from Dr. Robert L. Jimenez, a Board-certified psychiatrist, which noted that appellant had received workers' compensation benefits for three years from the employing establishment and that he was a Vietnam veteran with a diagnosis of post-traumatic stress disorder. He stated that appellant had been deteriorating substantially with resurgence of his post-traumatic stress disorder and psychotic depression. Dr. Jimenez described appellant's service in the military and his flashbacks and triggers for anxiety and depression. He stated that appellant carried "an enormous amount of survival guilt." Dr. Jimenez stated, "[Appellant] has also had substantial difficulties in the post office where he has worked as a result of drinking and the [post-traumatic stress disorder] issues, the rage and anger. For the last three years he essentially has been out on workmen's compensation because of the stress there." He diagnosed major depressive disorder with psychotic features in partial remission, post-traumatic stress disorder, chronic, secondary to the Vietnam War, panic attacks and generalized anxiety disorder. Dr. Jimenez stated, "The patient has been deteriorating substantially in the last three years with the resurgence of his [post-traumatic stress disorder] along with the psychotic depression."

On February 17, 2004 the Branch of Hearings and Review informed appellant that his case record was received from the Office. However, on February 24, 2004 the Branch of Hearings and Review stated that the transfer of appellant's record was in error. Appellant submitted a letter dated March 20, 2004 to the Branch of Hearings and Review and noted that he had requested an oral hearing and that he wished to provide testimony from two witnesses. In a letter dated October 24, 2004, appellant stated that he had previously requested an oral hearing regarding the December 18, 2003 decision finding that he was not entitled to compensation and VA benefits for his emotional conditions. In a letter dated June 3, 2005, the Branch of Hearings and Review found that there was no final decision issued in posture for an oral hearing.

In a September 22, 2005 memorandum to file, the Office stated that appellant's emotional condition claim was accepted by the Office for post-traumatic stress disorder. On September 22, 2005 the Office made a preliminary finding that appellant had received an overpayment of compensation in the amount of \$366,698.20 because he received augmented benefits from the VA for the period March 26, 1997 through November 29, 2003. The Office found that appellant was without fault in the creation of the overpayment. Appellant requested an oral hearing in a letter postmarked October 21, 2005.<sup>1</sup> He requested waiver of the overpayment and submitted financial documents. Appellant alleged that his two diagnosed emotional conditions were separate conditions with separate diagnoses and causes.

Appellant testified at the oral hearing on November 15, 2006 and submitted additional financial information. By decision dated February 12, 2007, the hearing representative noted that the Office accepted appellant's emotional condition claim for adjustment disorder and depression. She found that the VA awarded appellant benefits beginning in March 1997 for post-traumatic stress disorder. The hearing representative noted that the Office required appellant to make an election between his FECA benefits and his VA benefits. The hearing representative found that an overpayment of \$366,698.20 occurred for the reasons found by the Office. She stated, "In this case, the claimant's injury is an emotional one and therefore, one may not distinguish between separate diagnosed conditions all affecting the same area of the body, *i.e.*, the brain." The hearing representative noted that the Office found appellant without fault in the creation of the overpayment and she found that he was not entitled to waiver.<sup>2</sup>

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<sup>1</sup> The Office issued a final decision on October 24, 2005 affirming its preliminary determination and finding that appellant was not entitled to waiver of the overpayment. As appellant had previously requested an oral hearing this decision is null and void.

<sup>2</sup> Following the Office's February 12, 2007 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

### LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) 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, ... 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 [VA] unless such benefits are payable for the same injury or the same death. ...<sup>3</sup>”

Section 8116(b) provides that in such cases an employee shall elect which benefits he shall receive.<sup>4</sup> The Act prevents payment of dual benefits in cases where the Office has found that the injury was sustained in civilian federal employment and the VA has held that the same injury was caused by military service.<sup>5</sup>

The Office’s procedure manual discusses when payments of benefits under the Act and under statutes administered by the VA constitute forbidden dual payments of compensation, noting that the prohibition against receiving such payments includes an increase in a veteran’s service-connected disability award, where the increase is brought about by an injury sustained while in civilian employment.<sup>6</sup>

### ANALYSIS -- ISSUE 1

The Office accepted appellant’s emotional condition claim for adjustment disorder and depression on December 24, 1996. Following this decision, appellant requested benefits from the VA for his diagnosed condition of post-traumatic stress disorder on August 26, 1997.

The Board finds that the hearing representative did not provide an adequate explanation for determining that appellant’s FECA benefits and VA benefits were for the same injury. The sole analysis on the issue was the hearing representative’s conclusory statement: “In this case, the claimant’s injury is an emotional one and therefore, one may not distinguish between separate diagnosed conditions all affecting the same area of the body, *i.e.*, the brain.” This

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<sup>3</sup> 5 U.S.C. § 8116(a).

<sup>4</sup> 5 U.S.C. § 8116(b).

<sup>5</sup> *Richard A. Cerasale*, 56 ECAB 461, 464 (2005); *Sinclair L. Taylor*, 52 ECAB 227, 230 (2001).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8(b)(1), (2) (February 1995).

assertion is not supported by a plain reading of the Act, which requires the benefits for the “same injury” not for an injury to the same area of the body.

The Office must conduct an analysis of the medical reports of record to determine whether the same diagnosed condition or the same medical findings or treatment were used to support both the acceptance of an injury under FECA and an acceptance of benefits from the VA.<sup>7</sup> In this case, the Office did not offer a review of the medical evidence regarding the Office’s accepted condition of adjustment disorder and depression to determine whether it encompassed the same medical findings or treatment for the accepted VA condition of post-traumatic stress disorder. The Office did not offer a comprehensive medical report which opined that appellant’s diagnosed conditions were in fact the “same injury.” The Office simply concluded without a legal or factual investigation that since the conditions related to the same part of the body, *i.e.*, the brain, the diagnoses should be considered the “same injury.” Without a valid legal argument and findings of fact supporting that appellant was receiving benefits from the VA for the “same injury” for which compensation was being paid by the Office, it was error for the Office to find that an overpayment occurred.<sup>8</sup>

### CONCLUSION

The Board finds that the Office has not made sufficient findings of fact as to whether appellant was receiving benefits payable from the VA for the “same injury” for which compensation was being paid by the Office. Without such a factual determination, it was error for the Office to find that an overpayment had occurred. The Board will reverse the Office’s January 23, 2007 determination that an overpayment had occurred in the amount of \$366,698.20.

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<sup>7</sup> *R.M.*, Docket No. 06-949 (issued September 18, 2007) (the VA informed the Office that the claimant’s service-related rating increased after employment-related surgery); *Eric E. Toney*, Docket No. 05-1984 (issued May 2, 2006) (when the VA increased the claimant’s service-related emotional condition rating due to the impact of the deterioration of his physical condition following the employment injury and the Office accepted for a consequential emotional condition, the change in the emotional condition was a result of the injury accepted under FECA and therefore resulted in dual benefits); *Kelvin L. Davis*, 56 ECAB 404 (2005) (the VA compensated for service-related schizophrenia and the Office accepted for permanent aggravation of preexisting schizophrenia, appellant was not entitled to dual benefits as his physician confirmed the both agencies were compensating for the same injury); *Lawrence Sherman*, 55 ECAB 359 (2004) and *Martin L. Stringer*, Docket No 01-829 (issued June 24, 2002) (the Board found dual benefits as both the Office and the VA compensated the claimants for the same surgical procedures).

<sup>8</sup> *Fernando Chavez*, 51 ECAB 579 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 23, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 13, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board