

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**J.R., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Tampa, FL, Employer**

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**Docket No. 13-336  
Issued: May 16, 2013**

*Appearances:*

*Lenin V. Perez, for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge

ALEC J. KOROMILAS, Alternate Judge

JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 27, 2012 appellant, through his representative, filed a timely appeal of a November 1, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) finalizing overpayment of compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$89,062.79; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment and therefore not entitled to a waiver of recovery.

**FACTUAL HISTORY**

On June 6, 2002 appellant, then a 33-year-old letter carrier, sustained an emotional condition while in the performance of duty. He stopped work in March 2003. OWCP accepted

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

appellant's traumatic injury claim for aggravation of preexisting hypertension and post-traumatic stress disorder and paid disability compensation through November 19, 2011.

Appellant indicated in a Form EN1032 dated August 14, 2007 that he received benefits from the Department of Veterans Affairs (DVA) for service-related post-traumatic stress disorder. In March 19, 2010 and February 18, 2011 letters to DVA, OWCP requested further information. DVA advised in a March 4, 2011 letter that appellant was collecting \$2,849.00 per month in service-connected disability compensation effective December 1, 2008 and was determined to be 70 percent disabled.<sup>2</sup>

OWCP informed appellant in an October 6, 2011 letter that FECA prohibits dual benefits for a federal civilian employment-related injury and that he was required to elect either the entire amount of compensation paid by OWCP since December 1, 2008 or the amount of the increase in benefits paid by DVA since December 1, 2008. He was afforded 30 days to respond.

In a November 2, 2011 letter, appellant elected to receive retirement benefits retroactive to December 1, 2008. In subsequent letters to the Office of Personnel Management (OPM) dated December 12, 2011, February 21 and August 7, 2012, OWCP requested reimbursement in the amount of \$89,062.79 for disability compensation paid from December 1, 2008 to November 19, 2011. OPM did not respond.

On August 9, 2012 OWCP made preliminary findings that appellant received an overpayment of \$89,062.79 because he concurrently received FECA disability benefits and OPM retirement benefits for the period December 1, 2008 to November 19, 2011. Appellant was also at fault in the creation of the overpayment because he knew or should have known that he accepted payments to which he was not entitled. OWCP informed appellant of his options if he wished to contest the fact or amount of overpayment.

Appellant requested a conference call, which was held on September 18, 2012. His representative pointed out that "[appellant] was not yet in receipt of his retirement benefits from OPM and wondered why an overpayment had been declared."

By decision dated November 1, 2012, OWCP finalized the \$89,062.79 overpayment and found that appellant was at fault in its creation.

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

FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty. While an employee is receiving such compensation, however, he or she may not receive salary, pay or remuneration of any type from the United States, except in return for service actually performed or for certain payments related to service in the Armed Forces. The latter includes benefits administered by the DVA, unless such benefits are payable for the same injury being compensated for under FECA.<sup>3</sup> The prohibition against dual payment of FECA and veterans' benefits extends to cases in which: (1) the disability or death of an employee resulted from an

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<sup>2</sup> DVA did not provide appellant's original service-connected impairment rating before December 1, 2008.

<sup>3</sup> 5 U.S.C. §§ 8102(a), 8116(a). *See also S.G.*, Docket No. 12-779 (issued September 17, 2012).

injury sustained while in federal civilian employment and DVA held that the same disability or death was caused by military service; or (2) an increase in a veteran's service-connected disability award was brought about by an injury sustained while in federal civilian employment.<sup>4</sup>

If the case record demonstrates that a claimant is receiving compensation under FECA and a veteran's award other than pension for service in the Army, Navy, or Air Force, OWCP must determine whether: (1) the veteran's award is based on a finding that the same disability for which FECA benefits are payable was caused by the military service; or (2) DVA increased an award or found an award was payable for service-connected disability because of the civilian employment injury for which FECA benefits are claimed. An election between these benefits is required under both scenarios.<sup>5</sup>

An overpayment of compensation under FECA may occur when a claimant is not entitled to the amount already paid.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that the case is not in posture for decision.

OWCP accepted that appellant sustained aggravation of preexisting hypertension and post-traumatic stress disorder while in the performance of duty on June 6, 2002 and paid compensation accordingly. Appellant later indicated that he also received a veteran's award for service-connected disability, which was confirmed by DVA. OWCP advised appellant in an October 6, 2011 letter that he was required to make an election of benefits within 30 days. On November 2, 2011 appellant informed OWCP that he chose to receive retirement benefits retroactively. When a claimant is required to elect between FECA benefits and veterans' benefits paid by DVA, OWCP must obtain an election of benefits in narrative form.<sup>7</sup> In the present case, it only received appellant's November 2, 2011 letter, which did not address dual payment of FECA and veterans' benefits. At that moment, OWCP should have asked him to submit an election that was germane to the instant case.<sup>8</sup> Instead, following receipt of appellant's November 2, 2011 letter, it proceeded to make preliminary findings on August 9, 2012, detailing that he was concurrently paid FECA disability benefits and OPM retirement benefits for the period December 1, 2008 to November 19, 2011 and accrued an overpayment of \$89,062.79. OWCP then finalized the fact and amount of overpayment by decision dated November 1, 2012.

A final decision must include findings of fact and provide clear reasoning that allows a claimant to understand the precise defect of the claim and the kind of evidence that would tend to

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8(b) (December 1997).

<sup>5</sup> *Id.* at Chapter 2.1000.8(a)(5).

<sup>6</sup> *Id.* at Part 6 -- Debt Management, *Identification of Overpayments and Debts*, Chapter 6.200.2(d) (May 2004).

<sup>7</sup> *Id.* at Chapter 2.1000.8(f)(3).

<sup>8</sup> *See id.* at Chapter 2.1000.3 (February 1995) ("where receipt of dual benefits is prohibited, [OWCP] must advise the claimant of the entitlement as well as the need for and terms of the election appropriate to that case. [OWCP] should make every effort to obtain a timely election where necessary to ensure that the claimant does not suffer undue hardship while awaiting compensation payments").

overcome it.<sup>9</sup> With respect to overpayment decisions, OWCP must provide clear reasoning showing how the overpayment was calculated.<sup>10</sup> In the present case, it determined that appellant received an overpayment because he concurrently received FECA disability benefits and OPM retirement benefits for the same period. The case record, however, does not support that he even received retirement benefits. In view of the erroneous factual basis of OWCP's November 1, 2012 decision, the case must be remanded for OWCP to develop the evidence of record and make proper factual findings with regard to whether appellant received benefit payments from OWCP and DVA, for the same injury, and/or OPM simultaneously from December 1, 2008 to November 19, 2011. Following this and any other development deemed necessary, OWCP shall issue an appropriate decision.<sup>11</sup>

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 1, 2012 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further action consistent with this decision of the Board.

Issued: May 16, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>9</sup> S.C., Docket No. 10-1290 (issued April 7, 2011).

<sup>10</sup> O.R., 59 ECAB 432 (2008); *Sandra K. Neil*, 40 ECAB 924 (1989).

<sup>11</sup> Because overpayment has not yet been established, the Board need not address the issue of fault at this time.