

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM TAYLOR and DEPARTMENT OF THE NAVY,  
SEA SYSTEMS COMMAND, Long Beach, Calif.

*Docket No. 97-1540; Submitted on the Record;  
Issued February 1, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether appellant is entitled to compensation for temporary total disability for the period February 3 to September 6, 1994 while he was receiving separation incentive pay for that same period.

On January 18, 1994 appellant, then a 64-year-old welder, filed a claim for traumatic injury to his right knee on January 13, 1994 when he hit his knee on the side of a man hole as he was climbing up a ladder from the shaft alley on the USS Tarawa. This claim was assigned the number 13-1036162. Appellant stopped work on January 14, 1994 and continuation of pay was authorized. Appellant received continuation of pay until February 3, 1994 when he accepted voluntary separation incentive pay of \$20,702.00 and retired. Acceptance of separation incentive pay precluded appellant from returning to work for the employing establishment for one year.

On February 23, 1994 the Office of Workers' Compensation Programs accepted that appellant had sustained a right knee contusion. As there is no adverse final decision in this claim, the issue of appellant's entitlement to further continuation of pay benefits for that accepted injury is not now before the Board on this appeal.<sup>1</sup>

On March 23, 1994 appellant filed an occupational disease claim alleging that factors of his federal employment over the years contributed to permanent aggravation of his right knee degeneration. This claim was assigned number 13-1048830. Dr. Kevin Gohar, a Board-certified orthopedic surgeon, diagnosed severe osteoarthritis of the right knee, genu valgus deformity and enlargement of the right knee due to osteoarthritis. He recommended right knee replacement which was performed on April 7, 1994.

On February 8, 1995 the Office accepted appellant's occupational illness claim for permanent aggravation of right knee osteoarthritis. The subsequent right knee replacement surgery was also accepted. Thereafter appellant requested a schedule award.

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<sup>1</sup> See 20 C.F.R. § 501.2(c).

On June 14, 1995 the Office granted appellant a schedule award for a 50 percent permanent impairment of his right knee for the period March 17, 1995 to December 18, 1997, for a total of 144 weeks of compensation. Appellant elected to receive the bulk of his schedule award in a lump-sum amount of \$60,345.30 for a total schedule award granted of \$67,734.59.

In response to appellant's June 1995 request for compensation for the period February 4, 1994 to March 16, 1995 the Office advised appellant by letter dated October 4, 1995 that he had received separation incentive pay in the amount of \$20,702.00, that in accordance with the dual benefits clause of the Federal Employees' Compensation Act, he was "not entitled for one year of pay, as paid by [his employing establishment] and receive compensation for the same period."

Appellant additionally requested compensation through his Congressional representative, for the period February 4, 1994 through March 17, 1995. By letter to the representative dated October 18, 1995, the Office explained that appellant was not entitled to compensation for that period because he received separation incentive pay of \$20,702.00 after he voluntarily retired effective February 3, 1994. The Office advised that 5 U.S.C. § 8116 prohibited the payment of dual benefits while an employee is receiving compensation, 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.

After recurrent infections, a second surgical procedure was authorized and was performed on March 7, 1996 for removal of the right knee arthroplasty and insertion of a cement spacer.

By letter dated March 26, 1996, appellant argued that he had to leave the shipyard due to his "injury" and therefore was entitled to compensation. He argued that 5 U.S.C. § 8116 did not state anything about a lump-sum "incentive pay."

By response to appellant's Congressional representative dated June 25, 1996, the Office addressed appellant's argument that section 8116 did not mention or pertain to "incentive pay," by explaining that the Office based its decisions not only on the Act but on regulations and other written procedures as well. Attached was a copy of FECA Bulletin No. 95-24, issued August 23, 1995, which stated in paragraph 7 as follows:

"In instances where the employing agency has granted severance pay to employees who are involuntarily separated due to reduction in force, or where the employing agency has offered separation pay 'buyout,' compensation must be suspended. Both severance pay and separation pay constitute dual benefits."

The Office later restated the contents of FECA Bulletin No. 95-24 in an undated letter directly to appellant, noting specifically that where the employing establishment has offered separation pay, compensation benefits must be suspended, as separation pay constitutes a dual benefit.

By letter dated October 11, 1996, the Office explained to appellant that 5 U.S.C. § 8116 stated as follows:

“While an employee is receiving compensation ... he may not receive salary, pay, or remuneration of *any* type from the United States, except in the following situations:

- (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;  
and
- (4) retired pay, retirement pay, retainer pay, or equivalent pay for service in the Armed Forces or other uniformed services....”  
(Emphasis added.)

The Office explained that since appellant’s separation incentive pay did not fall into any of the above-noted categories which may be excluded, it must be considered remuneration subject to the above statutory section which governed dual benefits.

In an undated response to the Office, appellant contended that remuneration was defined as rewards or compensation and that it did not pertain to separation incentive pay or dual payments. Appellant claimed that he had not received compensation for his injury and he argued that he was entitled to continuation of pay under 20 C.F.R. §§ 10.200 through 10.204 and 5 U.S.C. § 8118 since his claim was accepted in February 1995.

By letter dated February 13, 1997, the Office addressed appellant’s contentions, explaining that an employee may not receive disability payments under the workers’ compensation program for the same period during which he received separation incentive pay, that appellant had indeed received compensation for his work-related condition in the form of a schedule award for the period March 17 to December 18, 1997, that the sections of 20 C.F.R. cited by appellant on continuation of pay pertained to traumatic injury claims only and that appellant’s claim accepted in February 1995 was for an occupational condition and not a traumatic injury, such that the cited sections did not apply to this case. The Office noted that appellant’s previous claim No. 13-1036162 was accepted for a traumatic injury and that continuation of pay was paid until February 3, 1994 when appellant voluntarily retired. The Office explained that for the claim No. 13-1048830, the claim accepted in February 1995 for permanent aggravation of right knee osteoarthritis and the subsequent surgeries, he was not by regulation entitled to continuation of pay because his claim was accepted for an occupational condition and not for a traumatic injury.

By letter to the Office dated February 21, 1997, appellant restated his prior contentions.

By decision dated March 12, 1997, the Office found that appellant voluntarily retired from his job on February 3, 1994, that the personnel action form showed that his reason for retiring was to obtain retirement benefits, that he received separation incentive pay from his employer in the amount of \$20,702.00 or 30.82 weeks, that his occupational illness claim was accepted for permanent aggravation of osteoarthritis of the right knee and that he received a schedule award for the period March 17, 1995 to December 18, 1997. The Office noted that appellant then claimed compensation for the period February 4 to March 16, 1995. It quoted the

5 U.S.C. § 8116 prohibition on an employee being allowed to receive salary, pay or remuneration of any type from the United States while he was receiving compensation under the Act, noted the exclusions and concluded that since appellant's separation incentive pay did not fall into any of the exclusions, it was considered to be remuneration subject to the statutory exclusion as a dual benefit. The Office explained that appellant was, therefore, not entitled to any disability compensation for the period February 3 to September 6, 1994 (for six hours on that day) because he received separation incentive pay for that same period.

The Board finds that appellant is not entitled to compensation for temporary total disability for the period February 3 to September 6, 1994 because he was receiving separation incentive pay for that same period.

In the instant case, appellant contends that he is entitled to both continuation of pay and compensation benefits from February 3, 1994 to March 16, 1995.

In the case presently before the Board on this appeal, No. 13-1048830, appellant's claim was accepted on February 8, 1995, not for a traumatic injury, but for an occupational condition, permanent aggravation of right knee osteoarthritis. "An occupational disease or illness means a condition produced in the work environment over a period longer than a single workday or shift by such factors as systemic infection; continued or repeated stress or strain ... or other continued or repeated conditions or factors of the work environment."<sup>2</sup> As appellant's condition was accepted for an occupational condition, in accordance with 5 U.S.C. § 8118(a) and 20 C.F.R. § 10.201(a)(2) appellant is not entitled to continuation of pay, as these quoted sections of the Act and implementing regulations preclude receipt of continuation of pay unless an employee has sustained a traumatic injury. Appellant's claim No. 13-1036162 was accepted on February 23, 1994 for a traumatic injury.

"Traumatic injury means a wound or other condition of the body caused by external force, including stress or strain, which is identifiable as to time and place of occurrence.... The injury must be caused by a specific event or incident or series of events or incidents within a single workday or work shift."<sup>3</sup>

Accordingly, he was paid continuation of pay from the date of disability until he voluntarily retired on February 3, 1994. Thereafter he received separation incentive pay for a period of 30.82 weeks. As there was no formal final adverse decision in that claim, the issue of entitlement to continuation of pay while receiving separation incentive pay is not now before the Board on this appeal, as noted above.<sup>4</sup>

When appellant voluntarily retired from the employing establishment on February 3, 1994 he accepted a lump-sum payment of separation incentive pay covering a period of 30.82 weeks. This separation incentive pay was remuneration from the United States in consideration of his voluntary retirement. This separation incentive pay, therefore, falls under both the category of "pay" and the category of "remuneration of any type" as specified in

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<sup>2</sup> 20 C.F.R. § 10.5(a)(16).

<sup>3</sup> 20 C.F.R. § 10.5(a)(15).

<sup>4</sup> See *supra* note 1.

5 U.S.C. § 8116. Section 8116 makes clear that an employee cannot receive both “pay” and compensation during the same period. As appellant received “pay” in the form of separation incentive pay for a period of 30.82 weeks after he retired, he is not eligible for compensation benefits during the period of that “pay.” Further, FECA Bulletin 95-24, paragraph 7, specifically addresses separation pay or “buyouts,” in instructing that an employee may not receive both separation pay and compensation for the same period. The FECA Bulletin specifies that receipt of both for the same period constitutes dual benefits, which the Board notes is precluded by section 8116. Consequently, as appellant accepted separation incentive pay for a period of 30.82 weeks after he retired, he is not eligible to receive compensation benefits for loss of wages during that same period.

Accordingly, the decision of the Office of Workers’ Compensation Programs dated March 12, 1997 is hereby affirmed.

Dated, Washington, D.C.  
February 1, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member