



## **FACTUAL HISTORY**

This is the third appeal before the Board. The Board, by decision dated April 10, 2001, set aside the Office's denial of appellant's request for the purchase of a whirlpool spa tub due to a conflict in the medical opinion.<sup>2</sup> The Office had accepted that appellant sustained cervical and lumbosacral strains, internal derangement of the left knee and subluxation at L5 when he slipped on a truck step on December 4, 1986.<sup>3</sup> In an October 5, 1999 decision, the Office denied appellant's request for a spa tub, but authorized massage therapy. In an October 29, 2004 decision, the Board reversed the Office's September 15, 2003 decision terminating compensation on the grounds that appellant had no disability or residuals due to his accepted back condition.<sup>4</sup> The findings of fact and conclusions of law from both decisions are hereby incorporated by reference.

By letter dated February 12, 2003, the Office requested information from the DVA regarding the increase in appellant's disability benefits for his post-traumatic stress syndrome.

On March 11, 2003 the DVA faxed the completed questionnaire. The DVA noted that appellant received an increase for his post-traumatic stress syndrome from 60 percent disability to a 100 percent disability effective April 1, 1990 and detailed his monthly rates including the effective dates of the changes in his pay. With regard to whether the increase was a result of his employment injury, the DVA checked "no."

By letter dated March 12, 2003, the Office noted that appellant received an increase in his disability rating for his post-traumatic stress disorder effective April 1, 1990 from 60 percent to 100 percent. The Office advised appellant that the increase in DVA benefits constituted a dual benefit not allowed under the Act. Appellant was informed that the increase from the DVA benefits for the period April 1, 1990 to February 28, 2003 amounted to \$252,882.00. The Office advised appellant that he was required to elect to receive compensation benefits through the Office or disability benefits from the DVA. The Office stated that, if appellant failed to return an enclosed election form, his benefits could be suspended. No election was submitted.

By letter dated April 15, 2003, the Office reinstated appellant's suspended benefits and informed him that he was required to complete a form to elect between benefits under the Act and his DVA benefits. He was advised that he had 15 days to complete and return the election form to the Office and if no form was received a decision would be issued suspending his benefits.

In a decision dated October 17, 2003, the Office suspended appellant's compensation effective October 4, 2003 based upon his refusal to elect between benefits under the Act and his increased DVA benefits.

---

<sup>2</sup> Docket No. 00-1203 (issued April 10, 2001).

<sup>3</sup> On the nonfatal summary sheet, the Office lists appellant's post-traumatic stress syndrome under concurrent disabilities not due to the employment.

<sup>4</sup> Docket No. 04-253 (issued October 29, 2004).

In a preliminary decision dated October 17, 2003, the Office found an overpayment in the amount of \$294,512.52<sup>5</sup> resulted from his receiving dual benefits for the period April 1, 1990 through October 4, 2003. The Office found that appellant was not entitled to waiver of the overpayment as it determined he was at fault in the creation of the overpayment. Appellant did not respond.

In a decision dated June 23, 2004, the Office hearing representative affirmed the suspension of appellant's compensation and the overpayment determination.<sup>6</sup> The hearing representative set aside the preliminary finding of fault. He found that appellant was not entitled to waiver as recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience. He determined that appellant was capable of repaying the overpayment in a monthly payment of \$500.00.

### **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 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>

---

<sup>5</sup> In determining this amount the Office based its calculation on all monies paid to appellant for the period April 1, 1990 through October 4, 2003.

<sup>6</sup> The hearing representative noted that appellant requested an oral hearing regarding the suspension of his benefits and the overpayment determination, which was held on March 30, 2004. Neither the transcript from the hearing nor appellant's request is contained in the record. The record reveals, however, that the Office reinstated appellant's benefits following the suspension based on his refusal to elect between benefits under the Act and DVA benefits as appellant was not afforded appeal rights.

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

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

In the instant case, the Office accepted appellant's claim for cervical and lumbosacral strains, internal derangement of the left knee and subluxation at L5 as a result of his December 4, 1986 employment injury. Appellant's post-traumatic stress disorder, which was accepted by the DVA, was not a condition accepted by the Office. The issue is whether appellant's increase in his disability benefits from the DVA for his post-traumatic stress disorder effective April 1, 1990 constitutes a dual payment of benefits and thus required an election by appellant. The Board finds that the Office erred in its determination that appellant received dual benefits for the period April 1, 1990 through October 4, 2003. Appellant's post-traumatic stress syndrome is not a condition accepted by the Office as due to or aggravated by the December 4, 1986 employment injury. The record notes that the Office indicated that it was a concurrent disability unrelated to the employment injury. The DVA, in response to the Office's inquiry, checked "no" to the question as to whether the increase on its disability rating was a result of his employment injury. In order to constitute a dual payment under the Act, appellant must be in receipt of benefits paid for the same injury accepted by the Office under the Act. The DVA stated the increase in appellant's disability VA benefits for his post-traumatic stress syndrome was unrelated to his employment injury and his post-traumatic stress syndrome was not a condition accepted by the Office. As appellant is not in receipt of dual benefits, an overpayment of compensation for the period April 1, 1990 through October 4, 2003 does not exist.

### **CONCLUSION**

The Board finds that the Office improperly determined that appellant received an overpayment in the amount of \$294,515.52 for the period April 1, 1990 through October 4, 2003 as he was not in receipt of dual benefits paid under statutes administered by the Act and the DVA.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 23, 2004 is reversed.

Issued: April 18, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member