

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

KELVIN L. DAVIS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Clearfield, UT, Employer**

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**Docket No. 04-1706
Issued: March 22, 2005**

Appearances:
David J. Holdsworth, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 28, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 3 and June 15, 2004 merit decisions finding that he was required to make an election of benefits between those received under the Federal Employees' Compensation Act and under statutes administered by the Department of Veterans Affairs (DVA) for the same injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that appellant was required to make an election of benefits because the benefits he received under the Act and under statutes administered by the DVA were for the same injury.

FACTUAL HISTORY

On March 19, 2002 appellant, then a 46-year-old postal clerk, filed an occupational disease claim alleging that he sustained an emotion condition due to incidents and conditions at

work.¹ Appellant claimed that in August 1998 two supervisors, Richard Muhlstein and Ken Barlow, wrongly divulged personal information to the public regarding his medical condition and work situation. He alleged that between 1998 and 2001 another supervisor, Annette Henman, harassed him by unfairly scrutinizing his work performance. Appellant asserted that several supervisors and coworkers subjected him to racially insensitive comments, including an occasion in April 2001 when Jerry Schneidewend used a racial slur when referring to him. He claimed that supervisors did not properly introduce him to coworkers and did not fully explain the expectations of his job.

At the time he filed his claim, appellant was receiving benefits from the DVA for a 70 percent disability due to a service-connected emotional condition, schizophrenia of a chronic undifferentiated type.² The record contains a May 9, 2002 decision in which the DVA determined that appellant continued to have 70 percent disability due to this condition.

In a report dated April 9, 2002, Dr. Leland Burns, an attending Board-certified psychiatrist, stated that he had treated appellant since 1999 and diagnosed chronic paranoid schizophrenia while he was in the military in the late 1970s.³ Dr. Burns indicated that appellant had been working for the employing establishment for approximately 22 years and stated that he reported having difficulty dealing with the pressures of his job, including his supervisor's discriminatory actions and lack of sensitivity concerning his medical condition.

In a report dated April 23, 2002, Dr. Burns stated that appellant was being treated for chronic paranoid schizophrenia, anxiety disorder and depression, which were life-long disorders. He indicated that appellant had filed suit against the employing establishment for discrimination at the Clearfield Post Office and stated that the thought of returning to work at that location caused appellant to experience fear, panic attacks, insomnia and social isolation. In a report dated May 8, 2002, Dr. Burns stated that discriminatory remarks made to appellant in the workplace had increased his anxiety and caused him to miss work.

In an August 29, 2002 decision, the DVA determined that effective March 26, 2002 the disability rating for appellant's schizophrenia should be increased from 70 to 100 percent. The DVA noted that it had reviewed recent medical evidence that indicated that his civilian work had exacerbated his chronic anxiety and paranoia. The DVA determined that the preponderance of the evidence indicated that his "service-connected schizophrenia has been exacerbated" and that his resulting inability to work met the criteria for 100 percent disability effective March 26, 2002.

Appellant's claim for an employment-related emotional condition was denied by the Office on several occasions. However, in a decision dated and finalized July 24, 2003, an Office hearing representative accepted several employment factors and remanded the case to the Office

¹ Appellant first became aware of his claimed condition in August 1998 and realized in February 1999 that it was related to his employment. He stopped work on March 21, 2002 and did not return.

² Appellant served in the U.S. Army from January 11 to July 8, 1976.

³ Dr. Burns indicated that appellant had a traumatic childhood and suffered a psychotic break in the military, which led to an early discharge from service.

for further development of the medical evidence. The Office hearing representative accepted that supervisors and coworkers made abusive remarks, including an occasion in April 2001 when Mr. Schneidewend used a racial epithet.⁴

In a report dated September 12, 2003, Dr. Steven L. Methner, a Board-certified psychiatrist, who served as an Office referral physician, determined that his schizophrenia condition had been aggravated by incidents and conditions at work to the extent that he was totally disabled from work.⁵ Dr. Methner indicated that this aggravation was caused by instances when supervisors and coworkers made abusive remarks, including an occasion April 2001 when Mr. Schneidewend used a racial epithet.⁶

On October 2, 2003 the Office accepted appellant's claim for a permanent aggravation of chronic undifferentiated schizophrenia with paranoia.

The Office requested that appellant make an election between benefits under the Act and benefits from the DVA. Appellant asserted that he was entitled to receive benefits both under the Act and under statutes administered by the DVA because the condition accepted by the Office was not the same condition accepted by the DVA.

In a letter dated February 19, 2004, Dr. Robert J. Hilton, a Board-certified psychiatrist and Office medical consultant, discussed the course of appellant's emotional condition. Dr. Hilton stated that appellant sustained his first psychotic illness while in the military and was diagnosed as having schizophrenia of a paranoid type. He asserted that appellant was diagnosed with various forms of schizophrenia over the years, but stated, "It is important to understand that these diagnoses all are describing the same basic illness of [s]chizophrenia and mean the same thing." He concluded, "The DVA accepted condition(s) is the same as the [Office] accepted condition. It is not necessary to expand or modify the accepted condition."⁷

By decision dated March 3, 2004, the Office determined that appellant was required to make an election of benefits under section 8116 of the Act because the benefits he received under the Act and the statutes administered by the DVA were for the same injury. The Office found that the medical evidence showed that the conditions accepted by the DVA and the Office were the same condition.

Appellant submitted additional evidence in support of his claim. By decision dated June 15, 2004, the Office affirmed its March 3, 2004 decision.

⁴ The Office also accepted that supervisors did not properly introduce appellant to coworkers and did not fully explain the expectations of his job.

⁵ Dr. Methner indicated that appellant's condition had an element of paranoia.

⁶ Dr. Methner posited that the employment-related aggravation of appellant's emotional condition probably began around April or May 2001 and led to his disability in 2002.

⁷ In a report dated January 12, 2004, Dr. Burns argued that the condition accepted by the Office was not the same condition accepted by the DVA because the condition accepted by the Office contained a "paranoia aspect" which was "new and different."

LEGAL PRECEDENT

Section 8116(a)⁸ 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 Department of Veterans Affairs unless such benefits are 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.⁹

The prohibition against an employee receiving both benefits under the Act and under statutes administered by the DVA for the same injury includes any increase in a service-connected disability award where the increase is brought about by an injury sustained while in civilian employment. This principle was applied in *Louis Teplitsky*,¹⁰ a case in which the employee was receiving a pension from the Veterans Administration for a 50 percent disability due to a service-connected emotional condition. It was later accepted by the Office that the employee sustained an inguinal ligament strain due to his civilian employment, which in turn caused a disabling aggravation of his service-connected emotional condition. The Veterans Administration then found that appellant was totally disabled due to this aggravation of his serviced-connected emotional condition and authorized a pension for 100 percent disability. The Board affirmed the Office’s determination that the employee had to make an election between benefits under the Act and the 50 percent increase in benefits under statutes administered by the Veterans Administration.¹¹

The Office’s procedural manual discusses when payments of both benefits under the Act and under statutes administered by the DVA 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

⁸ 5 U.S.C. § 8116(a).

⁹ 5 U.S.C. § 8116(b).

¹⁰ 29 ECAB 826 (1978), 22 ECAB 142 (1971).

¹¹ *Id.* See also *Allen W. Hermes*, 43 ECAB 435 (1992); *Gary J. Bartolucci*, 34 ECAB 1569 (1983). In these cases, it was also determined that the employee had to make an election between benefits under the Act and the increase in the Veterans Administration or DVA benefits caused by the injury sustained in civilian employment.

injury sustained while in civilian employment.”¹² The procedure manual provides an illustrative example in which a federal employee is receiving benefits from the DVA for 50 percent disability due to a service-connected emotional condition and then has a civilian employment injury, which the Office accepts as causing a totally disabling aggravation of the preexisting emotional condition. The example further provides that, subsequent to the employment injury, the DVA increases its award to 100 percent as a result of the aggravation by the civilian employment injury.¹³ The procedure manual states:

“An election between benefits is required in this case. The election will be between the amount of entitlement under [the Act] plus the amount received from the DVA for 50 percent prior to his civilian employment injury, on the one hand and the total amount of entitlement from the DVA for 100 percent, on the other hand.

“In other words, no election is required between the veteran’s benefit the claimant was receiving at the time of the civilian employment injury and the [Act] benefits to which the claimant is entitled for the civilian employment injury because these benefits are not payable for the same injury. When the DVA increased its benefits an election was required because the increased benefits were payable because of the same employment injury which formed the basis of entitlement to [Act] benefits.”¹⁴ (Emphasis in original.)

ANALYSIS

In the present case, appellant filed a claim on March 19, 2002 alleging that he sustained an emotional condition due to incidents and conditions at work, which occurred primarily between 1998 and 2002. He asserted that this employment-related condition caused him to stop work on March 21, 2002. When he filed his claim, appellant was receiving benefits from the DVA for a 70 percent disability due to a service-connected emotional condition, schizophrenia of a chronic undifferentiated type. The Office later accepted that appellant sustained an employment-related permanent aggravation of chronic undifferentiated schizophrenia with paranoia. In an August 29, 2002 decision, the DVA determined that the disability rating for appellant’s schizophrenia should be increased from 70 to 100 percent. Therefore, the issue is whether appellant must make an election to avoid the receipt of dual benefits under section 8116 of the Act.

The facts of this case are similar to those presented in the *Teplitsky* decision and the example from the Office procedure manual. Appellant was receiving benefits for a partially disabling 70 percent service-related emotional condition prior to sustaining an aggravation of that condition due to employment factors of his civilian employment. On August 29, 2002 the

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8b(1), (2) (February 1995). The procedure manual cites the *Teplitsky* case in support of this standard.

¹³ *Id.* at Chapter 2.1000.8b(2).

¹⁴ *Id.*

DVA determined that the disability rating for appellant's schizophrenia of a chronic undifferentiated type should be increased from 70 to 100 percent due to the aggravating effects of the civilian employment injury that was accepted by the Office on October 2, 2003. The DVA determined that the increase in appellant's disability rating from 70 to 100 percent would be effective March 26, 2002, *i.e.*, around the time that appellant claimed the emotional condition related to his civilian employment caused him to stop work. The DVA found that his civilian work had exacerbated his chronic anxiety and paranoia and determined that appellant's "service-connected schizophrenia has been exacerbated." It relied on some of the same medical evidence that the Office reviewed in accepting that appellant sustained an employment-related permanent aggravation of chronic undifferentiated schizophrenia with paranoia in 2002. The record therefore establishes that the increase in appellant's service-connected disability award was brought about by the same injury sustained while in civilian employment.

Therefore, no election is required between the veteran's benefit appellant was receiving at the time he sustained disability due to the civilian employment injury, *i.e.*, DVA benefits based on a 70 percent disability rating, and the benefits to which he is entitled for the civilian employment injury, because these benefits are not payable for the same injury. However, after the DVA increased its benefits from a 70 percent disability rating to a 100 percent disability rating, an election was required because the 30 percent increase in benefits was payable due to the same employment injury which formed the basis of entitlement to benefits under the Act.

Accordingly, appellant must make an election between his temporary total disability compensation under the Act plus 70 percent of his DVA benefits on the one hand and 100 percent of his DVA benefits on the other hand.¹⁵ However, in its March 3 and June 15, 2004 decisions, the Office improperly characterized appellant's choice for electing benefits as being between all of his benefits under the Act or all of his benefits under the statutes administered by the DVA. The Office's decisions will be modified to reflect that appellant has a choice of making an election of benefits between his temporary total disability compensation under the Act plus 70 percent of his DVA benefits on the one hand and 100 percent of his DVA benefits.

CONCLUSION

The Board finds that appellant must elect between his temporary total disability compensation under the Act plus 70 percent of his DVA benefits or 100 percent of his DVA benefits. The Office's March 3 and June 15, 2004 decisions are modified to reflect this circumstance.

¹⁵ See Gary J. Bartolucci, *supra* note 11 at 1579.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 15 and March 3, 2004 are affirmed as modified.

Issued: March 22, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member