

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

D.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Austin, TX, Employer**

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**Docket No. 08-169
Issued: December 16, 2008**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 23, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' hearing representative's overpayment decision dated September 27, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$10,665.32 for the period February 17 through June 9, 2006 due to the receipt of dual benefits from the Office and the Department of Veterans Affairs; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment; thus precluding waiver of recovery.

FACTUAL HISTORY

This case has previously been on appeal before the Board.¹ In a February 15, 2008 decision, the Board found that the Office met its burden of proof to terminate appellant's compensation effective June 10, 2006 and that appellant did not establish that his refusal of suitable work was justified. Appellant's claim was accepted for lumbar strain, spondylolisthesis and displacement of lumbar intervertebral disc without myelopathy. The Office also authorized surgery for herniated nucleus pulposus at L5-S1 and spondylolisthesis on April 15, 2004. It also accepted his claim for disorder of the bladder and neurogenic bladder. The facts and history contained in the prior appeal are incorporated by reference.

Appellant completed a Form CA-7 for wage-loss compensation disability for the period from April 14, 2004. He indicated that he was receiving benefits from the Department of Veterans Affairs (VA) for a broken femur, short leg case and back pain in the amount of \$618.00 per month.

The record reflects that appellant began receiving compensation for wage loss on April 15, 2004 and was placed on the periodic rolls effective May 16, 2004. Appellant returned to limited-duty work on September 29, 2004. On November 15, 2004 he filed a Form CA-7 advising that he was receiving \$851.00 per month from the VA. Appellant filed subsequent claims for disability for wage loss on April 11 and May 13, 2005. He was placed on the periodic rolls effective April 18, 2005.

In a letter dated July 11, 2005, the Office requested that VA provide information regarding the disability benefits that appellant was receiving for his military service.

By letter dated September 13, 2005, the Office informed appellant's attorney that the VA had not responded to a request for information about his service-connected disability. It advised appellant's representative that he should try to obtain the requested information. Appellant provided an October 3, 2005 response indicating that he was receiving benefits from the VA for service-connected leg and back conditions since 1987 and that his payments were increased in May 2005 for service-connected disability and inability to work.

In a January 9, 2006 response, the VA indicated that appellant was receiving disability benefits for a neurogenic bladder, condition of the skeletal system and impairment of the femur in the amount of \$2,830.00 per month effective December 1, 2005. The VA indicated that no increase had been made in appellant's monthly benefits as a result of the on-the-job injury.

By letters dated February 6, 2006, the Office informed appellant that prior to his work-related disability he was receiving a service-connected disability award from the VA for disability due to neurogenic bladder, sprain lumbar, displaced lumbar intervertebral disc, acquired spondylolisthesis and other disorders of the bladder. It informed appellant that an election between benefits was required between the entire amount under the Federal Employees' Compensation Act and the entire amount of the VA award. The Office explained that the election was between the amounts of the entitlement to compensation under the Act plus the

¹ Docket No. 07-983 (issued February 15, 2008).

percentage of disability received prior to the work-related disability or for the total amount of entitlement to the increased VA award. Appellant was entitled to receive \$2,761.33 every four weeks. He was also advised that he continued to be entitled to medical benefits for the effects of his work-related injury.

Appellant elected to receive VA benefits effective February 16, 2006. He retired from the employing establishment on March 10, 2006.

In an April 24, 2006 memorandum of telephone call, appellant contacted the Office to stop his workers' compensation because he was getting retirement benefits.

By letter dated February 9, 2007, the Office issued a preliminary finding that an overpayment of \$10,665.32 was created for the period February 17 through June 9, 2006 because appellant received dual benefits from the VA and the Office at the same time. It found that he was at fault in creating the overpayment because he knew or should have known that he was accepting compensation to which he was not entitled. The Office advised that, if appellant disagreed with the fact or amount of overpayment, he could submit supporting evidence or arguments and request a prerecoupment hearing within 30 days. It provided an overpayment calculation worksheet which showed the rate that appellant was paid for the period February 17 to June 9, 2006 based on a weekly pay rate of \$849.64. Appellant received compensation of \$182.07 for February 17 to 18, 2006, \$2,548.92 for February 19 to March 18, 2006, \$2,638.00 for March 19 to April 15, 2006, \$2,638.00 for April 16 to May 13, 2006 and \$2,543.79 for May 14 to June 9, 2006. This resulted in a total overpayment of \$10,665.32.

On March 14, 2007 appellant requested a prerecoupment hearing, which was held on July 11, 2007. He contested the fact of overpayment and that he was without fault. Appellant contended that he did not know that he could not receive both VA benefits and workers' compensation benefits. He alleged that he reported on his CA-7 form that his benefits had increased. Appellant informed the Office on the telephone that he had elected to receive his VA benefits. He included financial information which revealed that his monthly income was \$5,590.00 and his expenses were \$4,953.00.

In an August 8, 2007 letter, Sharon Faust, an injury compensation specialist, stated that appellant was originally notified in March 2005 that there might be an overpayment because he was in receipt of dual benefits from the VA and the Office. She alleged that appellant was copied with the request concerning dual benefits in March 2005. Ms. Faust noted that appellant was not charged for the dual monies until he selected a choice of benefits.

By decision dated September 27, 2007, the Office hearing representative finalized the preliminary determination, finding appellant at fault in creating the \$10,665.32 overpayment of compensation.²

² The Office hearing representative determined that the overpayment should be recovered by requiring appellant to pay \$300.00 per month until the entire overpayment of \$10,665.32 plus interest should be recovered. She noted that appellant had excess monthly income of \$637.00 per month.

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...”³

Section 8116(b) provides that in such cases an employee shall elect which benefits he shall receive.⁴ 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.⁵

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 veterans’ service-connected disability award, where the increase is brought about by an injury sustained while in civilian employment.⁶

ANALYSIS -- ISSUE 1

The evidence reflects that appellant’s claim was accepted for lumbar strain, spondylolisthesis and displacement of lumbar intervertebral disc without myelopathy. The Office also authorized surgery for herniated nucleus pulposus at L5-S1 and spondylolisthesis on April 15, 2004. It also accepted the claim for disorder of the bladder and neurogenic bladder. The record also reflects that appellant received benefits from the VA for a broken femur, short leg case, back pain and neurogenic bladder. His VA benefits increased in 2005 after appellant sustained the accepted employment injury. After appellant elected VA benefits effective, February 16, 2006, he continued to receive payment from the VA and disability compensation from the Office from February 17 to June 9, 2006. The Board notes that the conditions accepted by the VA were also accepted by the Office. Because appellant concurrently received

³ 5 U.S.C. § 8116(a).

⁴ 5 U.S.C. § 8116(b).

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

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8(b)(1), (2) (December 1997).

compensation for total disability and VA benefits during this period for the same injury, the Board finds that he erroneously received dual benefits.

The Office worksheets showed the amount appellant received for the relevant period. He received compensation payments of \$182.07 for February 17 to 18, \$2,548.92 from February 19 to March 18, \$2,638.00 from March 19 to April 15, \$2,638.00 from April 16 to May 13 and \$2,543.79 from May 14 to June 9, 2006, a total overpayment of \$10,550.78. As appellant elected to receive VA benefits on February 16, 2006 but continued to receive benefits from the Office, an overpayment in this amount was created. The Board notes that the overpayment equates to \$10,550.78 instead of the \$10,665.32 calculated by the Office.⁷ The Board will affirm, as modified, the fact and the amount of the overpayment in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁸ provides that an overpayment of compensation shall be recovered by the Office unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.⁹ The Office may not waive the overpayment of compensation unless appellant was without fault.¹⁰ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.¹¹

On the issue of fault, section 10.433 of the Office's regulations, provides that an individual will be found at fault if he or she has done any of the following:

“(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”¹²

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulation provides in relevant part:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the

⁷ It appears to be a minor addition error with a difference of \$114.54 in appellant's favor.

⁸ 5 U.S.C. § 8129(b).

⁹ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹⁰ *Norman F. Bligh*, 41 ECAB 230 (1989).

¹¹ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹² 20 C.F.R. § 10.433(a).

complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."¹³

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. Thus, the issue is whether, at the time of acceptance of the compensation payment, appellant knew or should have known that it was incorrect.

Appellant alleged that he was not at fault because he did not know that he could not receive both VA benefits and workers' compensation benefits. However, the Board finds that appellant reported the increase in benefits to the Office by completing a Form CA-7 on several occasions, including April and November 2004. Appellant also elected to receive VA benefits effective February 6, 2006, after being advised by the Office that he must make an election between his VA benefits and workers' compensation benefits because he was not entitled to receive dual benefits. The Board also notes that appellant demonstrated his awareness that he was not entitled to receive dual benefits by contacting the Office on April 24, 2006 to advise that he had retired on March 10, 2006 and wanted to stop his workers' compensation benefits. The evidence establishes that appellant reasonably should have known that he was accepting payments beginning February 17, 2006 that were incorrect.

Consequently, the Board finds that appellant is at fault in the creation of the overpayment under the third criterion noted above. To the extent that appellant is arguing that he notified the Office and he should not be considered at fault, the fact that the Office may have been negligent in issuing the continuing compensation checks does not mitigate this finding.¹⁴ As the evidence establishes that he is at fault in the creation of the overpayment in compensation that occurred in this case, the Board finds that he is not entitled to waiver of recovery of the overpayment.¹⁵ As appellant is no longer receiving monetary compensation from the Office, the Board does not have jurisdiction over recovery of the overpayment.¹⁶

CONCLUSION

The Board finds that appellant received an overpayment in compensation in the amount of \$10,550.78 during the period February 17 through June 9, 2006 due to the concurrent receipt of VA benefits. The Board further finds that appellant was at fault in the creation of the overpayment and, therefore, is ineligible for waiver of the overpayment.

¹³ *Id.* at § 10.433(b).

¹⁴ *See* 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

¹⁵ *Sinclair L. Taylor*, 52 ECAB 227 (2001).

¹⁶ *See D.R.*, 59 ECAB ____ (Docket No. 07-823, issued November 1, 2007) (with respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act).

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2007 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: December 16, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board