

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

J.M., Appellant

and

**U.S. POSTAL SERVICE, HILLDALE
STATION, Tampa, FL, Employer**

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**Docket No. 08-1075
Issued: December 8, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 27, 2008 appellant filed a timely appeal from an April 16, 2007 merit decision of the Office of Workers' Compensation Programs finding that he received an overpayment of compensation and denying waiver of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$43,846.23 for the period April 20, 2002 to October 4, 2003 because he received dual benefits from the Office and the Department of Veterans Affairs; and (2) whether he is entitled to wavier of the overpayment.

FACTUAL HISTORY

On May 17, 2001 appellant, then a 53-year-old letter carrier, sustained extreme anxiety and depression due to an altercation with his supervisor. He stopped work on May 21, 2001.

The Office accepted the claim for an anxiety and depressive reaction. It paid appellant compensation for total disability beginning July 2, 2001.¹

Appellant received treatment following his employment injury from Dr. Walter E. Afield, a Board-certified psychiatrist. On May 18, 2001 Dr. Afield diagnosed a severe depressive reaction and anxiety reaction and opined that appellant was disabled from employment. On June 19, 2001 he noted that appellant had post-traumatic stress disorder (PTSD). In a report dated August 16, 2001, Dr. Bala K. Rao, a Board-certified psychiatrist and Office referral physician, opined that appellant could return to work in his usual employment. The Office determined that a conflict existed between Dr. Rao and Dr. Afield regarding the extent of appellant's disability and referred him to Dr. Krishan K. Batra, a Board-certified psychiatrist, for resolution of the conflict. On January 7, 2002 Dr. Batra discussed appellant's history of PTSD following a gunshot wound in Vietnam. He diagnosed an adjustment disorder, possible bipolar disorder and a history of PTSD.

On August 12, 2002 Dr. Gary K. Arthur, a Board-certified psychiatrist, discussed in detail appellant's experiences in Vietnam. He diagnosed PTSD due to his Vietnam experiences. In a progress report dated August 21, 2002, Dr. Afield noted that appellant was "going into great detail about his Vietnam experiences, which apparently have been exacerbated by his situation at the [employing establishment]." He diagnosed overwhelming PTSD. In a letter to the Office of the same date, Dr. Afield related that appellant had been shot twice in combat in Vietnam and received two purple hearts. He diagnosed severe PTSD. Dr. Afield opined that appellant might harm someone if he returned to the employing establishment. In a report dated October 23, 2002, Dr. Gillian Karatinos, a Board-certified psychiatrist, discussed appellant's May 17, 2001 work injury. She noted that the Department of Veterans Affairs (DVA) had increased appellant's service-related disability to 50 percent and stated, "[Appellant] has flashbacks of people dying in Vietnam as well as almost being blown up himself. He has alternate psychic numbing and hyperarousal (panic) symptoms.... [Appellant] tries to avoid thinking of what happened in Vietnam." Dr. Karatinos diagnosed PTSD and recurrent major depressive disorder. She attributed his PTSD to his Vietnam experiences and found that the May 17, 2001 employment injury "appears to be the triggering factor for the recurrence of the PTSD." Dr. Karatinos opined that he was 100 disabled due to service-related PTSD.

By decision dated December 2, 2002, the Office terminated appellant's compensation effective November 30, 2002 on the grounds that the weight of the medical evidence showed that he had no further employment-related disability.

In a December 16, 2002 report, Dr. Arthur asserted that the May 17, 2001 work incident aggravated appellant's preexisting PTSD. In a January 13, 2003 supplemental report for the DVA, he diagnosed pervasive symptoms of PTSD and opined that appellant remained disabled.

¹ The Office accepted a May 17, 2001 altercation between appellant and his supervisor as a compensable employment factor.

On April 21, 2003 an Office hearing representative, following a preliminary record review, reversed the December 3, 2002 decision terminating appellant's compensation. The hearing representative noted that both Dr. Arthur and Dr. Karatinos opined that the May 17, 2001 work incident aggravated appellant's preexisting PTSD. He instructed the Office to obtain a second opinion examination regarding "whether the claimant does indeed suffer from [PTSD] and if so, whether this condition was aggravated by the May 17, 2001 employment incident."

On May 7, 2003 the Office referred appellant to Dr. Emmy Andri, a Board-certified psychiatrist, for a second opinion examination. It requested that Dr. Andri address whether appellant continued to experience anxiety and depression due to the May 17, 2001 work incident and the extent of any disability. The Office further requested that he determine whether appellant sustained an aggravation of preexisting PTSD due to the May 17, 2001 employment incident and, if so, whether the aggravation was temporary or permanent. On June 4, 2003 Dr. Andri discussed the May 17, 2001 work incident and noted that appellant had PTSD "while in [the] Vietnam War and has been on 100 [percent] disability." She diagnosed a history of PTSD, depression, anxiety and an adjustment disorder. Dr. Andri opined that appellant had "a chronic pathology that will interfere with appropriate behavior in a working situation that requires interpersonal dealings." She found that his condition was permanent and "not due to the one episode of May 17, 2001 although it affected him significantly." Regarding the question of whether appellant continued to experience anxiety and depression from his May 17, 2001 work injury, Dr. Andri responded "yes" and indicated that his "already existing pathology was activated."

In an EN-1032 form dated June 17, 2003, appellant related that the DVA increased his compensation for a preexisting condition of PTSD from 10 percent to 50 percent retroactive to October 7, 2002. On March 17, 2003 the DVA increased his PTSD award to 100 percent on March 17, 2003 retroactive to May 1, 2002. On May 5, 2003 the Office received a copy of a March 17, 2003 DVA decision increasing appellant's evaluation of PTSD to 100 percent effective April 30, 2002. The DVA cited Dr. Afield's treatment notes and October 16, 2002 report, the August 21, 2002 psychological evaluation by Dr. Arthur, the October 23, 2002 evaluation by Dr. Karatinos and September 5 and 8, 2002 and February 21, 2003 DVA evaluations in concluding that he was severely disabled due to PTSD.

By letter dated September 12, 2003, the Office noted that appellant had received a 10 percent award for PTSD from the DVA prior to his employment injury. The DVA increased the award to 100 percent on April 30, 2002. It informed him that he must elect between the DVA benefits and his workers' compensation benefits plus the 10 percent award for PTSD which the DVA awarded prior to his work injury. On September 22, 2003 appellant declined to make an election between benefits from the DVA and benefits from the Office. He asserted that his PTSD was not related to his civilian employment.

On October 2, 2003 the Office suspended appellant's wage-loss compensation effective October 5, 2003. It noted that the Federal Employees' Compensation Act² prohibited a claimant from receiving dual benefits for an employment injury. The Office notified him that the

² 5 U.S.C. § 8101-8193.

suspension of his benefits would continue until he made an election. By decision dated June 2, 2004, an Office hearing representative affirmed the October 2, 2003 suspension of compensation. She found that the medical evidence established that appellant was receiving dual benefits for the same injury.

On July 28, 2004 the Office notified appellant of its preliminary determination that he received a \$43,846.24 overpayment of compensation from May 30, 2002 through October 4, 2003 because he received benefits from both the Office and the DVA. It noted that on March 17, 2003 the DVA had increased his disability award due to PTSD from 10 percent to 100 percent beginning April 30, 2002. The Office concluded that the \$43,846.24 that appellant received from the Office from May 30, 2002 through October 4, 2003 constituted an overpayment of compensation as it was a dual benefit. It advised him of its preliminary determination that he was not at fault in the creation of the overpayment. The Office requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a preresoupment hearing.

Appellant requested a preresoupment hearing on August 8, 2004. He submitted supporting financial documents. On March 30, 2005 appellant requested that the Office reschedule the hearing. He again requested that the Office reschedule the hearing on January 5, 2007. Appellant related that he did not receive 30 days' advance notice. On March 15, 2007 the Office informed him that it had changed his request for an oral hearing to a request for a review of the written record. It requested current financial information supporting waiver. By letter dated April 4, 2007, appellant indicated that he was unaware of the laws regarding dual benefits when he received money from the Office and the DVA.³

By decision dated April 16, 2007, the Office hearing representative finalized the finding that appellant received a \$43,846.24 overpayment of compensation from May 30, 2002 through October 4, 2003 because he received benefits from both the Office and the DVA. She found that Dr. Andri opined in a report dated June 4, 2003 that appellant's May 17, 2001 employment injury permanently aggravated his PTSD. The hearing representative also noted that the DVA cited the reports from Dr. Afield and Dr. Arthur in its March 17, 2003 award. She finalized the finding that appellant was without fault in creating the overpayment. The hearing representative denied waiver after determining that appellant failed to submit supporting financial documents supporting waiver as requested by letter dated March 15, 2007. She found that appellant should repay the overpayment by forwarding the entire amount to the Office.

³ On April 2, 2007 appellant requested a copy of the case record.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Federal Employees' Compensation 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 [Veterans' Administration] unless such benefits are payable for the same injury or the same death....”⁴

Section 8116(b) provides that in such cases an employee shall elect which benefits he shall receive.⁵ The Act prevents payment of dual benefits in cases where the Office has found that the injury was sustained in civilian federal service and the Veterans' Administration has held that the same injury was caused by military service.⁶

The Office's procedure manual discusses when payment of 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 injury sustained while in civilian employment.⁷

Proceedings under the Act are not adversarial in nature nor are the Office a disinterested arbiter.⁸ While the claimant has the responsibility to establish entitlement to compensation, it shares responsibility in the development of the evidence. The Office has the obligation to see that justice is done.⁹ Accordingly, once it undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁰

⁴ 5 U.S.C. § 8116(a).

⁵ 5 U.S.C. § 8116(b)

⁶ *Richard A. Cerasale*, 56 ECAB 461 (2005); *Sinclair L. Taylor*, 52 ECAB 227 (2001).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8(b)(1), (2) (February 1995).

⁸ *Vanessa Young*, 55 ECAB 575 (2004).

⁹ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁰ *Melvin James*, 55 ECAB 406 (2004).

ANALYSIS -- ISSUE 1

The Office accepted appellant's emotional condition claim for an anxiety reaction and a depressive reaction. At the time of its acceptance, he received an award from the DVA for a 10 percent disability due to PTSD. The DVA increased appellant's award for PTSD to 100 percent effective April 30, 2002. The Office found that the increase in the award constituted a dual benefit as it resulted from the accepted work injury. It determined that appellant received dual benefits from the Office and the DVA from April 30, 2002 to October 4, 2003, the date it suspended his compensation because he refused to make an election of benefits.

The Board finds that the case is not in posture for decision. The Act prohibits payments from the Office and the DVA when the benefits are "payable for the same injury."¹¹ The Office did not sufficiently resolve the issue of whether appellant's benefits from the Office under the Act and the increase in his benefits from the DVA resulted from the same injury. In a decision dated April 21, 2003, a hearing representative instructed it to refer appellant for a second opinion examination to determine whether he sustained an aggravation of PTSD due to the May 17, 2001 work incident. The Office referred appellant to Dr. Andri and requested that the physician provide an opinion on whether appellant sustained an aggravation of preexisting PTSD due to the May 17, 2001 employment incident and, if so, whether the aggravation was temporary or permanent. In a report dated June 4, 2003, Dr. Andri noted that appellant had PTSD "while in [the] Vietnam War and has been on 100 [percent] disability." She reviewed the May 17, 2001 work incident and diagnosed a history of PTSD, depression, anxiety and an adjustment disorder. Dr. Andri opined that appellant had "a chronic pathology that will interfere with appropriate behavior in a working situation that requires interpersonal dealings." She found that his condition was permanent and "not due to the one episode of May 17, 2001 although it affected him significantly." Regarding the question of whether appellant continued to experience anxiety and depression from his May 17, 2001 work injury, Dr. Andri responded "yes" and indicated that appellant's "already existing pathology was activated." She did not adequately respond to the question regarding whether appellant's preexisting PTSD was aggravated or contributed to by the May 17, 2001 work injury. Dr. Andri's medical report is insufficient to show that the increase in appellant's DVA benefits resulted from the accepted civilian work injury. Further, it does not appear from the record that the Office accepted that appellant sustained a work-related aggravation of PTSD.¹² It thus had insufficient basis to conclude that appellant's compensation benefits from the Office constituted a dual benefit and thus an overpayment of compensation.

CONCLUSION

The Board finds that the Office improperly determined that appellant received an overpayment of compensation in the amount of \$43,846.23 for the period April 20, 2002 to October 4, 2003 due to his receipt of dual benefits.¹³

¹¹ 5 U.S.C. § 8116(a).

¹² See *Richard A. Cerasale*, *supra* note 6.

¹³ In view of the Board's disposition of the overpayment, the issue of the amount of overpayment and whether the Office properly denied waiver is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 16, 2007 is reversed.

Issued: December 8, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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