United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 08-378**
	)	**Issued: September 17, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Rigby, ID, Employer	)	

Appearances:
Paul B. Rippel, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 6, 2007 appellant, through his attorney, filed a timely appeal of an August 20, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative, finding an overpayment in the amount of $147,346.75 for which he was at fault and directing recovery of the overpayment by initial payment of $50,000.00 and thereafter monthly payments of $290.00. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), 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 $147,346.75 during the period April 19, 1996 through December 24, 2005 because he received dual compensation benefits from the Department of Veterans Affairs (VA) and under the Federal Employees' Compensation Act; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, ineligible for waiver of recovery of the overpayment.

FACTUAL HISTORY

On September 22, 1990 appellant, then a 40-year-old part-time flexible clerk/carrier, filed a traumatic injury claim alleging that on that date he hurt his back. He was unloading mail sacks when he fell backwards tripping over another mail sack. The Office accepted the claim for lumbosacral strain and herniated disc at L3-4 and L4-5. It authorized a laminectomy at L3-5 which was performed on February 14, 1994.

Prior to filing the instant claim, appellant filed a claim with the VA for a back injury he sustained while serving in the military from February 25, 1969 through December 8, 1972. On February 1, 1982 the VA awarded him compensation beginning September 14, 1981 for 10 percent disability for a recurrent lumbosacral strain.[1] On April 5, 1996 appellant requested an increase in his VA award. He submitted medical evidence regarding his February 14, 1994 back surgery. By decision dated July 15, 1996, the VA increased appellant's compensation to 60 percent disability and granted entitlement to individual unemployability effective April 19, 1996.[2] It found, among other things, that the evidence demonstrated an original injury sustained during service with industrial reinjury. Following the February 14, 1994 back surgery, the VA found that appellant was totally disabled.[3]

On January 22 and December 14, 2002 appellant completed EN1032 forms and noted under Part D(3), VA benefits, that he received benefits from the VA in file number 29028457, for a service-connected back injury. He also noted that he had not received an increase in his VA benefits since his employment-related injury for which he was receiving compensation from the Office. Appellant stated that he had only received a cost-of-living adjustment increase within the last 15 months.

By letter dated December 26, 2002, the Office advised appellant that it was adjudicating payment for his disability claim. As it had been reported that he was receiving disability compensation from the VA for a service-related injury, it requested that he complete an accompanying questionnaire regarding his VA claim. Appellant did not respond.

By letter dated March 19, 2003, the Office advised appellant that it was unlawful to receive compensation benefits from two different agencies for the same disabling injury. It stated that benefits must be coordinated and reduced by one agency or he must elect to receive benefits from one of the agencies and not both. The Office again requested that appellant complete a duplicate copy of its previously mailed questionnaire.

On March 26, 2003 the employing establishment provided the VA information requested by the Office. It stated that appellant received compensation benefits for a skeletal condition that rendered him 60 percent disabled effective April 19, 1996. Appellant received $2,247.00 from

[1] The VA's February 1, 1982 decision also awarded appellant compensation for 10 percent disability for a soft tissue injury to the right foot and leg and 20 percent disability for bursitis of the left shoulder.

[2] On March 6, 1996 the Office of Personnel Management approved appellant's application for disability retirement.

[3] In an October 8, 1996 decision, the VA denied appellant's request to change its July 15, 1996 decision.

December 1, 2001 through November 30, 2002 and $2,278.00 from December 1, 2002 through 2003.

On December 8, 2003 and December 18, 2004 appellant completed EN1032 forms regarding his VA benefits.

By letter dated August 18, 2005, the employing establishment advised the Office that the VA found appellant unemployable and awarded him compensation for 100 percent disability based on his 60 percent disability service-connected back injury. It requested that the Office provide him with an election form if it determined that he was receiving duplicate compensation benefits from the VA and under the Act for his back injury.

By letter dated November 17, 2005, the Office informed appellant that, since he was considered 100 percent disabled by the VA effective April 19, 1996, he must make an election between the compensation benefits payable to him under the Act and those from the VA. It advised him that benefits under the Act and from the VA were not payable for the same period. The Office stated that the election was for the period beginning April 19, 1996.

On December 14, 2005 appellant elected to receive disability benefits from the VA effective April 19, 2006 in lieu of compensation benefits under the Act.

On a December 15, 2005 appellant signed an EN1032 form stating that on April 19, 1996 the VA had increased his benefits to reflect a 60 percent service-connected back disability which represented 100 percent disability.

On September 14, 2006 the Office made a preliminary determination that appellant received an overpayment in the amount of $147,346.75 due to his receipt of dual benefits from the VA and under the Act during the period April 19, 1996 through December 24, 2005. It found that he was at fault in the creation of the overpayment. It stated that appellant should have reasonably been aware that he was receiving benefits from two agencies for the same disability. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

By letter dated September 18, 2006, appellant, through his attorney, requested an oral hearing before an Office hearing representative. In an OWCP-20 form dated September 12, 2006, appellant reported monthly income of $2,518.00 which represented his VA benefits. He also reported monthly expenses of $2,177.72. Appellant had $77,114.32 in cash, stocks, personal property and other funds. He submitted supporting financial documents.

During a May 23, 2007 hearing and in a June 22, 2007 letter, appellant contended that an overpayment of compensation had not occurred because he did not receive dual compensation. He stated that the injury for which he received compensation from the VA was different from the injury for which he received compensation under the Act.

By decision dated August 20, 2007, an Office hearing representative finalized the determination that appellant received an overpayment in the amount of $147,346.75 and that he was at fault in the creation of the overpayment because he had completed several EN1032 forms which asked him whether he had received any percentage or increase in his VA award since he sustained an injury under the Act. The hearing representative ordered repayment of the overpayment with an initial amount of $50,000.00 and thereafter in monthly payments of $290.00.[4]

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Act[5] states:

> "(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--
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> (1) in return for service actually performed;
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> (2) pension for service in the Army, Navy or Air Force;
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> (3) other benefits administered by the [VA] unless such benefits are payable for the same injury or the same death; and
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> (4) retired pay, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services...."[6]

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.[7]

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 veteran's service-connected disability award, where the increase is brought about by an injury sustained while in civilian employment.[8]

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[4] In the August 20, 2007 decision, the hearing representative stated that the repayment plan required waiver of $29,603.34 of the total balance due to reduce the period of the overpayment.

[5] 5 U.S.C. § 8116(a).

[6] *Id.*

[7] *Sinclair L. Taylor*, 52 ECAB 227 (2001); *Allen W. Hermes*, 43 ECAB 435 (1992).

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

ANALYSIS -- ISSUE 1

Appellant contended that an overpayment of compensation was not created in this case because he did not receive dual compensation as he received compensation from the VA and Office for two different injuries. On February 1, 1982 appellant was in receipt of 10 percent VA award for a back injury. However, the VA increased this award on July 15, 1996 to 60 percent to reflect the additional disability caused by the accepted employment-related back injury he sustained on September 22, 1990 and February 14, 1994 surgery. On December 14, 2005 appellant elected to receive benefits from the VA in lieu of benefits from the Office effective on April 19, 1996. He was not entitled to receive compensation benefits under the Act for his employment-related lumbar strain for any period following his election to receive benefits from the VA for the same condition. The Board, therefore, finds that appellant received dual benefits pursuant to section 8116(a) of the Act.

The record establishes that appellant received wage-loss compensation from the Office in the amount of $147,346.75 during the period April 19, 1996 through December 24, 2005. Fact of overpayment is established as an employee is not entitled to receive compensation under both the Act and statutes administered by the VA. The Board, therefore, finds that an overpayment was created in the amount of $147,346.75.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act[9] 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.[10] Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.[11] Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.[12]

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.[13]

[9] 5 U.S.C. § 8129(b).

[10] *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

[11] *Norman F. Bligh*, 41 ECAB 230 (1989).

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

[13] 20 C.F.R. § 10.433(a).

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations 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 complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."[14]

ANALYSIS -- ISSUE 2

The Office hearing representative evaluated appellant's testimony and the record, and applied the third standard in determining that he was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, it must establish that appellant accepted a payment that he knew or should have known was incorrect.[15] The Board finds that the record does not establish that appellant was at fault in the creation of the overpayment.

The Office found that appellant was at fault in the creation of the overpayment as he was aware or should have been aware that he was not entitled to dual benefits based on the EN1032 forms he completed. The forms advised appellant to notify the Office whether he had received any percentage or increase in his VA award since he sustained an injury under the Act, but did not notify him that he was not entitled to both VA benefits and workers' compensation. Therefore, the Board finds that the EN1032 forms were not sufficient to support the Office's finding that appellant should have been aware that he was not entitled to both workers' compensation and the increase in his VA benefits.

Appellant was first advised that he was not entitled to receive both VA and workers' compensation benefits in the Office's March 19, 2003 letter advising of its discovery that he was receiving disability compensation from the VA. He was not asked to make an election to receive either VA benefits or workers' compensation until November 17, 2005. The Board finds that appellant was not at fault in creation of the overpayment.

Since the Board has determined that appellant was without fault in the creation of the overpayment, the Office may only recover the overpayment in accordance with section 8129(b) of the Act[16] if a determination has been made that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.[17] The case will be remanded to the Office for further development with respect to whether appellant is entitled to

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[14] *Id.* at § 10.433(b).

[15] *Diana L. Booth*, 52 ECAB 370 (2001); *Lorenca Rodriguez*, 51 ECAB 295 (2000); *Robin O. Porter*, 40 ECAB 421 (1989).

[16] 5 U.S.C. § 8129(b).

[17] The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.434, 10.436, 10.437.

waiver of the $147,346.75 overpayment. After such further development as the Office may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of $147,346.75 during the period April 19, 1996 through December 24, 2005 because he received dual compensation benefits from the VA and under the Act. The Board, however, finds that the Office improperly found that appellant was at fault in the creation of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the August 20, 2007 decision of the Office of Workers' Compensation Programs is affirmed in part with respect to fact and amount of overpayment. The decision is set aside with respect to the fault determination and remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 17, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board