

FACTUAL HISTORY

On August 29, 1997 appellant, then a 49-year-old letter carrier, filed an occupational disease claim alleging that factors of employment caused a PTSD. He stopped work that day and did not return. On March 25, 1998 the Office accepted that appellant sustained employment-related aggravation of PTSD. It informed him that it was aware he may have been rated by the DVA for the same disability, noted that information was requested from the DVA, and that, if his DVA rating was raised based on the accepted condition, he would be asked to make an election of benefits between the two agencies. Appellant was placed on the periodic rolls effective September 7, 1997.

On March 25, 2008 the Office requested that the DVA provide updated information regarding DVA benefits for a service-related stress condition. A DVA rating decision dated April 17, 1997 indicated that, effective March 24, 1995, appellant received a 10 percent rating for PTSD that was raised to 30 percent effective June 28, 1996.² A February 11, 1998 DVA rating decision found that the VA rating for PTSD was raised from 30 to 50 percent, effective September 5, 1997, for a combined rating of 70 percent.³

Appellant submitted Office EN1032 forms on April 14, 2001, May 20, 2002, April 21, 2003 and March 1, 2005. In each of these, he advised that he was receiving DVA benefits for multiple conditions including PTSD. On May 3, 2002 the DVA informed the Office that on February 13, 1987, March 31, 1995, June 28, 1996, September 5, 1997, August 26, 1998 and January 26, 2001 he had filed claims for increases in his DVA benefits.

By letter dated May 12, 2006, the Office requested that the DVA provide information regarding appellant's DVA benefit for PTSD. In a June 5, 2006 response, the DVA stated that, by decision dated January 22, 1999, appellant's rating for PTSD was increased from 50 percent to 100 percent. In a July 17, 2006 letter, the Office noted appellant's DVA claim history and advised him that he must make an election between the entire amount of compensation received from the Office since September 21, 1997 and the amount of the increase he had received from the DVA since September 21, 1997, over the original percentage. It advised appellant that an overpayment existed that continued to grow and that it was imperative to make an election of benefits within 30 days.

On August 1, 2006 appellant responded that he did not have sufficient information to make an informed election, and asked a number of questions that were answered by the Office in a November 17, 2006 letter. The Office advised him that the amount of the overpayment would be calculated after it had received his complete compensation history. By letter dated November 29, 2006, it provided appellant an election of benefits form and advised that he had

² Appellant received additional DVA ratings of 20 percent for residuals of a cervical spine fracture, 20 percent for a residual chest burn scar, 10 percent for a residual tracheotomy scar, and 10 percent for the amputation of the tip of his right little finger, for a combined rating of 60 percent.

³ When appellant filed his FECA claim on August 29, 1997, he was receiving benefits from the DVA for 30 percent due to service-related PTSD. On September 5, 1997 he filed a claim with the DVA for an increase in benefits, and his rating was increased to 50 percent effective that day and to 100 percent effective September 21, 1997. Appellant's FECA claim was accepted on August 25, 1998, and he received FECA benefits beginning on September 7, 1997. Thus, his FECA benefits and increase in DVA benefits occurred almost simultaneously.

received a total of \$283,736.45 in wage-loss compensation from the Office for the period September 5, 1997 through December 23, 2006 and \$139,454.00 from DVA for the period September 5, 1997 through December 31, 2006, which constituted a prohibited dual benefit. The Office advised him to make an election within 30 days. Appellant elected to receive DVA benefits, effective December 24, 2006.

On January 17, 2007 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$278,776.45 had been created. It explained that the overpayment occurred because appellant received a prohibited dual benefit, receiving compensation under the FECA⁴ and from DVA for his PTSD condition. The Office found appellant at fault in the creation of the overpayment. On February 14, 2007 appellant requested a precoupment hearing, and submitted an overpayment recovering questionnaire in which he provided information regarding his income and expenses, and that he had \$15,000.00 in stocks and bonds.

At the June 12, 2007 hearing, appellant's union representative stated that the amount of the overpayment was not in dispute but argued that appellant was not at fault and the overpayment should be waived.

In an October 3, 2007 decision, an Office hearing representative affirmed the finding that an overpayment in compensation had been created and that appellant was at fault. The hearing representative compromised the amount of the overpayment, creating a new debt of \$108,512.43 and required repayment in the amount of \$350.00 a month.

LEGAL PRECEDENT

Section 8129 of the Act provides that an overpayment in 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."⁵

Section 10.433(a) of the Office's regulations provides that the Office:

"[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8129; *see Joan Ross*, 57 ECAB 694 (2006).

(3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”⁶

The fact that the Office was negligent in making payments to a claimant does not relieve the claimant of fault in accepting the incorrect payments.⁷ A recipient who has accepted a payment which he or she knew or should have known to be incorrect will be found at fault with respect to creating the overpayment.⁸ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of the benefits.⁹ In applying the tests to determine fault, the Office applies a “reasonable person” test.¹⁰ In determining whether a claimant is at fault in creating an overpayment, the Office will consider the circumstances surrounding the overpayment. The degree of care expected by a recipient of compensation may vary with the complexity of the circumstances and the individual’s capacity to realize that he or she is being overpaid.¹¹

ANALYSIS

The Board finds that the Office properly determined that appellant was at fault in the creation of the overpayment in compensation because he accepted payments he knew or should have known to be incorrect. In applying the third standard in determining that appellant was at fault, the issue is whether, at the time of acceptance of the compensation payment, appellant knew or should have known that it was incorrect.¹² Appellant was put on notice of the potential for dual benefits by the March 25, 1998 letter from the Office. This letter noted that, while the condition of aggravation of PTSD with disability beginning on or about August 29, 1997, was accepted as related to his civilian employment, he had also been rated for the same disability by the DVA for a service-related condition. It noted that if his rating increased he would have to make an election of benefits. In a DVA rating decision dated February 11, 1998, for PTSD from 30 to 50 percent, effective September 5, 1997. Thus, when the DVA raised appellant’s disability rating from 30 to 50 percent, the increase in DVA benefits was due to the same employment injury which formed the basis for entitlement under the Act.¹³ The Board finds that, on March 25, 1998, when appellant’s claim was accepted by the Office for aggravation of PTSD, he

⁶ 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

⁷ *Ricky Greenwood*, 57 ECAB 462 (2006).

⁸ *Tammy Craven*, 57 ECAB 689 (2006).

⁹ *J.S.*, 58 ECAB ____ (Docket No. 06-2113, issued May 10, 2007).

¹⁰ *L.D.*, 59 ECAB ____ (Docket No. 08-678, issued August 7, 2008).

¹¹ 20 C.F.R. § 10.433(b); *see Neill D. Dewald*, 57 ECAB 451 (2006).

¹² *See D.R.*, 59 ECAB ____ (Docket No. 07-823, issued November 1, 2007).

¹³ *See Kelvin L. Davis*, *supra* note 1. The Board also notes that appellant continued to seek increases in his DVA rating, filing claims on August 26, 1998 and January 26, 2001. Appellant also submitted a number of EN1032 forms acknowledging that he received DVA benefits for PTSD.

knew or reasonably should have known that he was in the receipt of prohibited dual benefits.¹⁴ Appellant accepted payments he knew or should have known to be incorrect. He was therefore at fault in the creation of the overpayment in compensation that ensued.¹⁵ Under section 10.433(a) of the Office's regulations, and section 8129 of the Act, as appellant was at fault in the creation of the overpayment, he is not entitled to waiver. With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation payments under the Act, and appellant elected DVA benefits in December 2006.¹⁶

CONCLUSION

The Board finds that the Office properly found appellant at fault in the creation of the overpayment in compensation and was thus not entitled to waiver.

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 7, 2009
Washington, DC

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

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

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

¹⁴ *Tammy Craven, supra* note 8.

¹⁵ *See Neill D. Dewald, supra* note 11.

¹⁶ *Ricky Greenwood, supra* note 7.