



employment-related traumatic injury for sciatica (xxxxxxx827). Appellant sustained another employment-related traumatic injury on February 8, 2000, which the Office accepted for lumbar strain and aggravation of degenerative disc disease (xxxxxxx362). On September 20, 2000 he underwent a laminectomy at L3-4 and L4-5 with interbody fusion, which the Office authorized. Appellant's latest traumatic injury occurred on July 30, 2002. This claim was accepted for left wrist sprain and aggravation of preexisting lumbar sprain (xxxxxxx277).<sup>2</sup> The Office also accepted that appellant suffered a recurrence of disability on May 27, 2003. Appellant was placed on the periodic compensation rolls effective September 7, 2003.

In June 2008, the Office learned that appellant's DVA disability rating had increased from 40 to 100 percent. In August 2003, the DVA increased appellant's disability associated with his L4-5 herniated disc from 20 percent to 60 percent effective June 10, 2003. The additional lumbar-related disability increased appellant's overall DVA disability rating from 40 to 70 percent. In March 2004, the DVA increased appellant's overall disability to 80 percent based on the additional diagnosis of major depressive disorder (50 percent).<sup>3</sup> Effective July 13, 2005, appellant received an additional rating of 40 percent for bladder dysfunction. However, the DVA reduced his L4-5 disability rating from 60 to 40 percent. As of July 13, 2005, appellant's combined disability was 90 percent.

In an August 24, 2007 rating decision, the DVA awarded an additional 10 percent disability for tinnitus and 10 percent each for left and right ankle ligament laxity. The additional disability ratings were effective March 6, 2007. The DVA found that due to appellant's numerous service-connected disabilities he was unemployable, thus entitling him to a disability rating of 100 percent. The August 24, 2007 rating decision noted that appellant's disability associated with his L4-5 herniated disc remained at 40 percent.<sup>4</sup>

By letter dated December 31, 2008, the Office advised appellant that he needed to file an election of benefits within 30 days, and if not, his wage-loss compensation would be suspended pending receipt of his election. Citing 5 U.S.C. § 8116, the Office explained that appellant was not entitled to receive wage-loss compensation and DVA disability benefits for the same injury. The Office advised appellant that it was aware that his DVA disability had been increased to 100 percent. Appellant was entitled to receive wage-loss compensation in conjunction with DVA benefits for any disability that predated his employment injury, however, any subsequent increase in DVA disability benefits for the same employment-related injury constituted a dual benefit. The Office noted that, effective June 10, 2003, the DVA increased appellant's disability rating from 40 to 80 percent. As of March 6, 2007 appellant was found to be 100 percent disabled, reportedly due to the "same condition" for which the Office had been paying him wage-loss compensation. The Office explained that the increase in his DVA disability represented a dual benefit. Appellant was given the option of receiving wage-loss compensation

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<sup>2</sup> The Office combined appellant's multiple lumbar injury claims under master file number xxxxxx362.

<sup>3</sup> As of March 2004, appellant's disability rating for his L4-5 herniated disc remained at 60 percent.

<sup>4</sup> The 10 percent right ear hearing loss also remained unchanged, as did the 10 percent disability for right eye diminished lacrimation, the 40 percent disability for bladder dysfunction, and the 50 percent disability for major depressive disorder. The sum of appellant's individual impairments totaled 180 percent.

along with his preinjury DVA disability of 40 percent or receiving 100 percent disability from the VA without any wage-loss compensation from the Office.

Appellant did not timely respond to the Office's December 31, 2008 election of benefits request. Therefore, the Office suspended his wage-loss compensation by decision dated March 6, 2009.

### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act (FECA) provides certain limitations on the right to receive compensation.<sup>5</sup> Generally, a FECA beneficiary may receive compensation concurrently with other benefits administered by the DVA,<sup>6</sup> but there is a limitation imposed under the Act when the DVA benefits are "payable for the same injury or the same death" for which the Office is paying compensation.<sup>7</sup> The prohibition against dual payment of FECA and DVA benefits applies to those cases where the disability or death of an employee has resulted from an injury sustained in federal civilian employment and the DVA has held that the same disability or death was service connected.<sup>8</sup> The prohibition also extends to an increase in a DVA service-connected disability award, where the increase is brought about by an injury sustained while in federal civilian employment.<sup>9</sup> An example of this latter scenario is where an employee is receiving benefits from the DVA for 50 percent disability due to a service-connected condition, and has a civilian employment injury which causes a disabling aggravation of the preexisting condition. The Office determines that the employee has a total loss of wage-earning capacity due to the accepted condition, and subsequent to the employment injury, DVA increases its award to 100 percent as a result of the aggravation by the civilian employment injury.<sup>10</sup> In this example an election of benefits is required. The election will be between the amount of entitlement under the FECA plus the amount received from the DVA for 50 percent disability prior to the civilian employment injury, on the one hand, and the total amount of entitlement from the DVA for 100 percent disability, on the other hand.<sup>11</sup> No election is required between the DVA benefit the employee was receiving at the time of the civilian employment injury and the FECA benefits to which the employee is entitled for the civilian employment injury because these benefits are not payable for the same injury.<sup>12</sup> When the DVA increased its benefits an

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<sup>5</sup> See 5 U.S.C. § 8116; *Kelvin L. Davis*, 56 ECAB 404, 407-09 (2005).

<sup>6</sup> 5 U.S.C. § 8116(a)(3).

<sup>7</sup> *Id.*

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8b(1) (December 1997).

<sup>9</sup> *Id.* at Chapter 2.1000.8b(2).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

election was required because the increased benefits were payable because of the same employment injury which formed the basis of entitlement to FECA benefits.<sup>13</sup>

In determining the amount of a DVA disability award that is subject to an election of benefits, the Office must be mindful of the fact that the DVA rating decision may include several kinds of disability with varying percentages assigned to each individual condition. When determining percentages for election, the Office should use the DVA's designated percentage for the work-related condition only.<sup>14</sup>

### ANALYSIS

The Board finds that the case is not in posture for decision. The Office's December 31, 2008 letter advising appellant of his rights and responsibilities with respect to the receipt of wage-loss compensation and DVA disability benefits did not accurately reflect the extent of the dual benefit appellant was receiving, and thus, the Office did not provide appellant with the opportunity to make an informed election. First, it incorrectly stated the extent of appellant's DVA lumbar-related disability prior to the September 26, 1998 employment injury. The Office noted that appellant had been drawing benefits from the DVA for 40 percent for the residuals of his back injury. While the 40 percent figure was accurate, this number represented the total DVA disability appellant had been receiving prior to his September 26, 1998 employment injury, not the percentage attributable to his service-connected lumbar condition. The record indicates that the DVA awarded appellant 20 percent disability for his lumbar condition and another 10 percent each for a right eye condition and right ear hearing loss. Thus, the starting point for measuring any future lumbar-related dual benefit would be 20 percent rather than 40 percent.

The Office also erred in calculating the percentage increase in appellant's DVA disability that was attributable to his lumbar condition. It represented that appellant's lumbar-related disability had increased from 40 to 100 percent. However, the actual increase was from 20 percent in August 1997 to 60 percent in July 2003, followed by a reduction from 60 to 40 percent as of July 13, 2005. Contrary to the Office's finding, appellant is not currently receiving 100 percent disability from the DVA for his lumbar-related condition. Although the DVA considered appellant 100 percent disabled, a substantial share of his combined overall disability rating was attributable to conditions other than his L4-5 herniated disc. Appellant does not have to forego all of his post-September 26, 1998 DVA disability increase in order to continue to receive wage-loss compensation from the Office. The dual benefit in this instance is represented by the DVA lumbar-related disability increase from 20 percent to 60 percent, effective June 10, 2003, which was followed by a reduction to 40 percent beginning July 13, 2005, that currently remains in effect.

As of March 6, 2009, appellant's dual benefit was the difference between his original pre-September 26, 1998 DVA lumbar disability of 20 percent and his then-current DVA lumbar-related disability of 40 percent. Because the Office improperly calculated the dual benefit, appellant was denied the opportunity to make an informed election of benefits. Consequently,

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at Chapter 2.1000.8b(5).

the March 6, 2009 decision suspending wage-loss compensation will be set aside. The case will be remanded to the Office for a proper calculation of the dual benefit appellant received as a result of the post-September 26, 1998 DVA disability increase attributed to his employment-related lumbar condition.

**CONCLUSION**

The case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 6, 2009 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: May 6, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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