

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

M.F., Appellant

and

**U.S. POSTAL SERVICE, MAIL PROCESSING
ANNEX, Aurora, CO, Employer**

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**Docket No. 11-2106
Issued: September 12, 2012**

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

On September 23, 2011 appellant, with the assistance of counsel, timely appealed the August 17, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed the suspension of wage-loss compensation based on appellant's purported receipt of a dual benefit.¹ The Board docketed the appeal as No. 11-2106.

Appellant, a 55-year-old former mail handler equipment operator, has an accepted claim for aggravation of post-traumatic stress disorder (PTSD), which arose on or about November 5, 2003 (xxxxxxx905). He also has an accepted claim for an employment-related lumbar condition

¹ Pursuant to the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101-8193 (2006), and 20 C.F.R. §§ 501.2(c) and 501.3 (2011), the Board has jurisdiction over the merits of this case. The record includes evidence received after the August 17, 2011 decision. As this evidence was not part of the record when the Branch of Hearings & Review issued its August 17, 2011 final decision, the Board is precluded from considering it for the first time on appeal. 20 C.F.R. § 501.2(c)(1). The Board further notes that after the September 23, 2011 filing of the current appeal, OWCP issued a final overpayment decision concerning the same "dual benefit" issue presently before the Board. An OWCP decision issued while the Board has jurisdiction over the matter in dispute is null and void. *Lawrence Sherman*, 55 ECAB 359, 360 n.4 (2004). Because the Board had already obtained jurisdiction over the question of whether appellant received a dual benefit, the Branch of Hearings & Review could not simultaneously exercise jurisdiction over that same issue. Accordingly, the May 8, 2012 final overpayment decision shall be set aside as null and void, as well as the August 3, 2012 demand letter.

that arose on or about May 1, 1995 (xxxxxxx043).² OWCP combined the two claims under file number xxxxxx905. Appellant last worked on July 21, 2005. The Office of Personnel Management (OPM) paid him a disability annuity effective July 22, 2005. Appellant also received benefits from the Department of Veterans Affairs (DVA or VA).

With respect to appellant's emotional condition claim, OWCP placed him on the periodic compensation rolls and paid appropriate wage-loss compensation for the period May 13, 2007 - June 7, 2008.³ Effective June 7, 2008, OWCP suspended wage-loss benefits because it suspected appellant might have received a dual benefit.⁴

In a rating decision dated March 31, 2006, DVA determined that effective July 23, 2005, appellant's service-connected psychiatric disorder (schizophrenia, paranoid type) was totally disabling (100 percent).⁵ This condition had previously been rated only 30 percent disabling. Although DVA had specifically denied service connection for PTSD, OWCP suspected the increased rating was due to appellant's employment-related PTSD. OWCP advised appellant that he needed to make an election between his FECA benefits and the July 23, 2005 increase (70 percent) in his DVA disability benefits. In response, appellant's counsel argued that an election was not required because OWCP and DVA paid benefits for two separate psychiatric disorders. Counsel also submitted evidence from DVA explaining that appellant's increased disability rating effective July 23, 2005 was not a function of his PTSD. However, OWCP was not persuaded by counsel's argument or the evidence submitted.

The current appeal stems from the Branch of Hearings & Review's August 17, 2011 decision, which upheld OWCP's suspension/termination of wage-loss benefits effective

² OWCP accepted the claim for L4-5 disc bulging and disc space narrowing and L5-S1 disc herniation (ICD-9 Codes 722.10 and 722.52). On June 24, 2008 OWCP granted a schedule award for 14 percent impairment of the left lower extremity under claim number xxxxxx043. The award covered a period of 40.32 weeks from March 18 to December 25, 2008.

³ Following OWCP's March 27, 2007 acceptance of appellant's emotional condition claim, he elected to receive FECA benefits in lieu of his OPM disability annuity. Although OWCP found appellant eligible for wage-loss compensation dating back to July 22, 2005, it did not pay appellant and/or reimburse OPM for benefits covering the period July 22, 2005 to May 12, 2007. At the time, there was an unresolved issue regarding appellant's eligible dependents and OWCP was awaiting information regarding other federal benefits appellant may have received.

⁴ FECA provides certain limitations on the right to receive compensation. See 5 U.S.C. § 8116; *Kelvin L. Davis*, 56 ECAB 404, 407-09 (2005). Generally, a FECA beneficiary may receive compensation concurrently with other benefits administered by DVA. 5 U.S.C. § 8116(a)(3). However, there is a limitation imposed under FECA when DVA benefits are "payable for the same injury or the same death" for which OWCP is paying compensation. *Id.* 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 DVA has held that the same disability or death was service connected. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8b(1) (December 1997). 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. *Id.* at Chapter 2.1000.8b(2).

⁵ DVA selected the July 23, 2005 effective date because appellant was no longer working at the time. DVA believed he had last worked on July 22, 2005. The 100 percent rating required "total occupational and social impairment...." Therefore, appellant could not have received the 100 percent rating while employed. The primary DVA medical examination report that supported the increased rating was dated February 23, 2006.

June 7, 2008. Appellant also recently appealed OWCP's November 15, 2010 decision denying wage-loss compensation with respect to his lumbar condition (xxxxxx043).

By decision dated August 15, 2012, the Board found that a December 29, 2009 report from Dr. Christopher B. Ryan was sufficiently rationalized to support appellant's claim of disability due to his accepted lumbar condition commencing July 22, 2005.⁶ Accordingly, the Board set aside OWCP's November 15, 2010 decision. The Board remanded the case to OWCP to determine the exact period of entitlement to wage-loss compensation.

Regardless of the propriety of OWCP's "dual benefit" determination, whether appellant established a lumbar-related disability beginning July 22, 2005 must first be determined before any question of a dual benefit (or overpayment) with respect to his emotional condition claim can be decided. Appellant's DVA disability benefits do not encompass a service-connected lumbar condition. Thus, any of FECA's wage-loss compensation for his lumbar condition would not conflict with his receipt of disability benefits from DVA. OWCP has already combined the case records of the two claims, and it seems most prudent that OWCP avoid further piecemeal adjudication. Accordingly, the hearing representative's August 17, 2011 decision shall be set aside, and the case remanded to OWCP for further consideration in light of this order and the Board's August 15, 2012 decision regarding Docket No. 11-1273.

IT IS HEREBY ORDERED THAT the August 17, 2011 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded to OWCP for further action in conformance with this order of the Board.

Issued: September 12, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

⁶ Docket No. 11-1273. The Board's August 15, 2012 decision is incorporated herein by reference.