



spinal stenosis and surgery was authorized. He received compensation for temporary total disability on the periodic rolls.

By letter dated June 23, 2011, OWCP advised appellant that he was required to make an election of benefits between his VA service-connected disability and his OWCP disability as of April 29, 2009. It noted that, prior to his work-related injury, he had been receiving a zero percent disability from the VA due to a back condition. Pursuant to an October 15, 2009 VA decision, however, his service-connected disability increased to 10 percent effective April 29, 2009 for spinal stenosis with degenerative disc disease of the lumbar spine, L2-L5-S1, status post laminectomy and discectomy. Appellant was also awarded a 20 percent service-connected disability of both the right and left legs secondary to spinal stenosis with radiculopathy. In a subsequent VA decision, appellant's 10 percent lumbosacral spine award was increased to 40 percent effective July 29, 2010 and the 20 percent rating for the left leg was also increased to 40 percent.

OWCP advised appellant that an election of benefits was required between his entitlement under FECA and the entire amount of the VA award beginning April 29, 2009. By letter dated August 15, 2011, it reiterated that he was required to make an election between FECA benefits and VA service-connected disability benefits. OWCP advised him that he had 30 days to make his election.

On September 12, 2011 appellant advised that he elected to receive VA benefits beginning April 29, 2009.

On September 16, 2011 OWCP issued a preliminary determination that an overpayment of compensation was created in the amount of \$86,650.93 from April 29, 2009, the effective date of appellant's election, to September 4, 2011 as he received dual benefits from OWCP and VA. It found that he was not at fault in the creation of the overpayment and advised him that he could submit financial information to support a request for waiver on an attached OWCP-20 form. OWCP advised appellant that if he disagreed with the fact or amount of the overpayment he could submit new evidence in support of his contention.

In a letter dated October 23, 2011, appellant requested an extension of time in which to complete the Form OWCP-20 and overpayment questionnaire. OWCP granted the extension through November 16, 2011 but no additional evidence was received.

By decision dated December 1, 2011, OWCP finalized the overpayment in the amount of \$86,650.93. It found that appellant received dual benefits from the VA and OWCP from April 29, 2009 to September 4, 2011. OWCP found that he was without fault in the creation of the overpayment but that it was not subject to waiver as he did not respond to the September 16, 2011 preliminary determination.

**LEGAL PRECEDENT -- ISSUE 1**

Section 8116(a) of FECA provides for certain limitations on the right to receive compensation.<sup>2</sup> While the employee is in receipt of compensation for disability arising from a personal injury sustained in the performance of duty,<sup>3</sup> he may not receive any salary, pay or remuneration, such as benefits administered by the VA,<sup>4</sup> if payable for the same injury or the same death for which OWCP provides compensation.<sup>5</sup> The prohibition against dual payment of FECA and VA benefits applies to those cases where the disability or death of an employee resulted from an injury sustained in federal civilian employment and the VA has held that the same disability or death was service connected.<sup>6</sup> The prohibition also extends to an increase in a VA service-connected disability award, where the increase is brought about by an injury sustained while in federal civilian employment.<sup>7</sup> For example, an employee who receives benefits from the VA for a 50 percent service-connected disability has a civilian employment injury which causes a disabling aggravation of the preexisting condition. If OWCP determines that the employee has a total loss of wage-earning capacity due to the accepted condition and, subsequent to the employment injury, VA increases its award to 100 percent as a result of the aggravation by the civilian employment injury,<sup>8</sup> an election of benefits is required. The election will be between the amount of entitlement under FECA plus the amount received from the VA for 50 percent disability prior to the civilian employment injury, on the one hand, and the total amount of entitlement from the VA for 100 percent disability, on the other hand.<sup>9</sup> No election is required between a VA benefit the employee was receiving at the time of the civilian employment injury and FECA benefits, to which the employee is entitled for the civilian employment injury, provided the benefits are not payable for the same injury.<sup>10</sup> When the VA increases its benefits, an election is required when the increased benefits are payable for the same employment injury which formed the basis of entitlement to FECA benefits.<sup>11</sup>

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<sup>2</sup> See *id.* at § 8116(a); *Kelvin L. Davis*, 56 ECAB 404, 407-09 (2005).

<sup>3</sup> *Id.* at § 8102.

<sup>4</sup> *Id.* at § 8116(a)(3).

<sup>5</sup> *Id.*

<sup>6</sup> *J.C.*, Docket No. 09-2096 (issued May 6, 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8b(1) (December 1997).

<sup>7</sup> *Id.* at Chapter 2.1000.8b(2)

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

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

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

## **ANALYSIS -- ISSUE 1**

Appellant's claim was accepted by OWCP for lumbar spinal stenosis for which it authorized surgery. He was found totally disabled and placed on the periodic rolls in receipt of compensation under FECA for total disability. The record establishes that, prior to the accepted injury, VA had accepted that appellant had a back condition for which he was rated at zero percent service-connected disability. Following his injury in civilian employment, the VA increased his disability to 10 percent as of April 29, 2009 for spinal stenosis with degenerative disc disease, status post laminectomy and discectomy. It thereafter increased appellant's service-connected disability ratings to 20 percent of both legs for radiculopathy secondary to spinal stenosis. On July 29, 2010 VA increased a 10 percent service-connected disability for the lumbosacral spine to 40 percent and increased the 20 percent left leg rating to 40 percent.

OWCP properly determined that appellant's VA benefits could not be received concurrently with FECA compensation for total disability. Appellant's VA disability rating was increased for the same spinal stenosis condition after acceptance of FECA claim. He elected to receive VA benefits in lieu of wage-loss compensation under FECA effective April 29, 2009. The wage-loss compensation appellant received under FECA from that date forward constituted an overpayment of compensation. The record shows that OWCP paid appellant until September 4, 2011; thus, the record establishes the fact of overpayment during this period.

With respect to the amount of the overpayment, OWCP determined that appellant received \$86,650.93 in compensation benefits from April 29, 2009 through September 4, 2011. The Board notes that the case record does not adequately establish the manner in which it calculated this amount. The memorandum of file, submitted to the record on September 16, 2011, stated; "The claimant was paid disability compensation from [OWCP] for the period April 29, 2009 through September 24, 2011 with deductions for basic and optional life insurance resulting in a net overpayment of compensation in the amount of \$83,650.33 for this period." The Board notes that OWCP did not adequately document how the amount was determined in this amount.

It is well established that OWCP, as part of its adjudicatory function, must make findings of fact and provide a statement of reasons for the decision reached.<sup>12</sup> In an overpayment situation, the Board has held that OWCP must explain the basis for its finding of overpayment with a clear statement addressing how the overpayment was calculated.<sup>13</sup> For this reason, the Board will remand the case to OWCP for additional development and reasons for the amount of overpayment found in this case. After such further development as it deems necessary, it shall issue an appropriate decision.

## **LEGAL PRECEDENT -- ISSUE 2**

Under section 8129 of FECA, 5 U.S.C. § 8129(b), and the implementing regulations, an overpayment must be recovered unless incorrect payment has been made to an individual who is

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<sup>12</sup> See *Robert N. Johnson*, 51 ECAB 480 (2000); see also 20 C.F.R. § 10.126.

<sup>13</sup> See *Jenny M. Drost*, 56 ECAB 587 (2005).

without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>14</sup> Waiver of overpayment is not possible if the individual is at fault in creating the overpayment.<sup>15</sup> OWCP must determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.<sup>16</sup>

The applicable regulations provide that recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet ordinary and necessary living expenses and the beneficiary's assets do not exceed a specified amount as determined by OWCP.<sup>17</sup> Additionally, recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>18</sup>

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

### **ANALYSIS -- ISSUE 2**

OWCP found that appellant was without fault in the creation of the overpayment, but denied waiver. It notified him that the election of benefits created an overpayment and asked him to submit financial information to support waiver in a September 16, 2011 letter. The Board notes, however, that appellant failed to submit such information, despite receiving a 30-day extension.

Section 10.438 of OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specific by OWCP. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.<sup>19</sup>

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<sup>14</sup> 5 U.S.C. § 8129(a)-(b).

<sup>15</sup> *Jorge O. Diaz*, 51 ECAB 124 (1999).

<sup>16</sup> 20 C.F.R. § 10.434.

<sup>17</sup> *Id.* at § 10.436.

<sup>18</sup> *Id.* at § 10.437.

<sup>19</sup> *Id.* at § 10.438(b).

OWCP determined that appellant was without fault in the creation of the overpayment. The fact that he was without fault does not preclude OWCP from recovering all or part of the overpayment. Appellant did not submit a response to OWCP's preliminary determination or submit an overpayment recovery questionnaire. Therefore OWCP acted properly in refusing his request for waiver of recovery of the overpayment under the implementing federal regulations. Absent the submission of such information, it was precluded from evaluating his eligibility for waiver of the overpayment. The Board finds that OWCP did not abuse its discretion by issuing its December 1, 2011 final decision denying waiver of recovery of the overpayment.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation from April 29, 2009 to September 4, 2011. The case is not in posture for decision with regard to the amount of the overpayment. The Board finds that OWCP properly found that appellant was not entitled to waiver of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 1, 2011 decision of the Office of Workers' Compensation Programs be affirmed in part and set aside and remanded on the issue of amount of overpayment.

Issued: April 15, 2013  
Washington, DC

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

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

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