United States Department of Labor
Employees' Compensation Appeals Board

R.P., Appellant	)	
and	)	**Docket No. 13-1415**
	)	**Issued: December 13, 2013**
DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, San Antonio, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 24, 2013 appellant filed a timely appeal from the February 12, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received a $95,863.85 overpayment in compensation; and (2) if so, whether he was at fault in creating the overpayment, thereby precluding waiver of recovery.

FACTUAL HISTORY

On January 4, 1990 appellant, a 37-year-old sheet metal mechanic (aircraft), sustained a traumatic injury in the performance of duty when he picked up a template. He reported

[1] 5 U.S.C. § 8101 *et seq.*

significant and severe back and leg pain.[2] Appellant underwent surgery on March 14, 1990, which was described as follows: Redo lumbar procedure, including subarticular decompression, foraminotomies of L5 and S1 nerve roots bilaterally, neurolysis of L5 and S1 nerve roots bilaterally, discectomy of L5 and S1 and posterior lumbar interbody fusion of L5-S1 using banked iliac bone, with removal of epidural masses, exploration of old posterior interbody fusion of L4-5.

OWCP accepted appellant's claim for lumbar strain and a herniated nucleus pulposus at L5-S1. It approved the surgery and paid compensation for wage loss on the periodic rolls. On December 14, 1992 appellant received a schedule award for a 13 percent permanent impairment of his right lower extremity. The impairment stemmed from sensory deficit and motor weakness involving due to the L5 and S1 spinal nerve roots.

The Department of Veterans Affairs (DVA) confirmed that appellant received compensation for a service-connected disability. At the time of his January 4, 1990 employment injury, appellant had a 10 percent disability rating for service-connected (aggravated) acne vulgaris. On January 27, 1993 he received a 40 percent rating upon evaluation of service-connected (incurred) degenerative joint disease lumbar spine status post lumbar fusion with radiculopathy. This increased appellant's total disability rating to 50 percent. On October 8, 2008 his rating increased to 70 percent with the addition of service-connected (secondary) sensory deficit and motor weakness, right and left lower extremities, associated with degenerative joint disease of the lumbar spine status post lumbar fusion with radiculopathy.[3] Effective October 8, 2008, appellant was granted individual unemployability status, raising his service-connected disability rating to 100 percent for permanent and total disability.

OWCP informed appellant that an increase in a veteran's service-connected disability brought about by an injury sustained while in federal civilian employment was considered a dual benefit. As he received a Veterans Affairs (VA) disability rating for his back/lumbar condition prior to his work-related injury on January 4, 1990 and his disability rating increased on October 8, 2008 to reflect additional impairment caused by the work-related injury, OWCP asked him to make an election of benefits. It advised that any failure to make the required election within 30 days would be considered an election for VA benefits.

On January 2, 2013 OWCP made a preliminary determination that appellant received an overpayment of $95,863.85 in workers' compensation from October 8, 2008 through December 15, 2012. Appellant received wage-loss compensation under FECA and an increased

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[2] Appellant had previously injured his back in November 1985 while delivering a refrigerator. He bent down to lift it over a curb and felt a lot of pulling in the left side of his back with an immediate onset of left leg pain. Appellant underwent surgery on March 7, 1986, including a lumbar laminectomy at L5, laminotomies at L4 bilaterally, a decompression and foraminotomies of the L5 and S1 nerve roots bilaterally and a discectomy and posterior lumbar interbody fusion at L4-5. Decompression of the L4 and L5 nerve roots was also noted. Appellant's leg pains completely resolved postoperatively. He developed a deep wound infection, which completely resolved by December 1986. Appellant was left with occasional tightness and spasm in his back but no leg pain or significant residual back pain.

[3] Appellant received a 20 percent rating for each lower extremity, but a bilateral factor increased his total rating from 50 to 70 percent.

VA annuity for his back condition. OWCP found that he was at fault in the creation of this overpayment because he accepted payment that he knew or should have known was incorrect.

In a decision dated February 12, 2013, OWCP found appellant at fault in creating a $95,863.85 overpayment of compensation. It noted that he failed to response to its preliminary determination.

On appeal, appellant contends that he did not receive dual benefits: "The injuries I sustained while serving in the military have absolutely nothing to do with the injuries that I sustained while working as a Civil Service Employee at Kelly AFB." He explained that he was not receiving VA benefits for his back/lumbar condition prior to the January 4, 1990 work injury. Appellant added that his service-connected disability was for an L3-4 and L4-5 injury during basic training in 1971, while his work injury in 1990, medically described as a new injury, was at L5-S1. He alleges other back incidents while in the Marine Corps and the Army, which took the VA 20 years to start compensating.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of FECA outlines limitations on the right to receive compensation and the necessity for an election between certain prohibited dual benefits. While an employee is receiving compensation under FECA, he or she may not receive salary, pay or remuneration of any type from the United States, with certain exceptions, including other benefits administered by the DVA unless such benefits are payable for the same injury or death.[4]

When a claimant is entitled to or is receiving a benefit from another agency, OWCP must determine if that benefit constitutes a prohibited dual benefit and requires an election or if it is an exception that will not affect the claimant's compensation entitlement.[5] When the record shows that an applicant for FECA benefits is receiving veterans' benefits, OWCP must determine the nature of those benefits.[6] If the reply shows that the veteran's award is other than "pension for service in the Army, Navy or Air Force," OWCP must determine whether the award is based on a finding that the same disability or death for which FECA benefits are payable was caused by the military service or whether the DVA increased an award or found an award was payable for service-connected disability, because of the civilian employment injury for which FECA benefits are claimed. If so, section 8116(a)(3) requires an election between these benefits.[7]

For example, a federal employee is receiving benefits from the DVA for a 20 percent disability based on a service-connected injury to the right knee. A subsequent injury to the same knee while in civilian employment results in a 25 percent disability of the leg, for which FECA benefits are payable. The DVA increases its award to 30 percent because of the civilian employment injury. An election is required between a schedule award for the full extent of the

[4] 5 U.S.C. § 8116(a)(3).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.3. (February 1995).

[6] *Id*. at Chapter 2.1000.8.a (December 1997).

[7] *Id*. at Chapter 2.1000.8.a(5)(a).

permanent loss of the use of the leg under FECA plus the amount received from the DVA prior to the employment injury, on the one hand and the total benefits provided by the DVA subsequent to its increase, on the other hand.[8]

ANALYSIS -- ISSUE 1

At the time appellant injured his low back on January 4, 1990 while in the performance of his civilian employment, he had a 10 percent disability rating for service-connected acne vulgaris. No election was necessary because his DVA benefits were not for the same injury.

Whether an election was necessary when appellant received an increased disability rating on January 27, 1993 is not clear. He injured his low back in civilian employment in 1990 and underwent a complex lumbar surgery two months later. In 1992 appellant received a schedule award under FECA for a 13 percent impairment of his right lower extremity due to permanent sensory deficit and motor weakness. When the DVA examined him in 1993 for his low back condition, the findings -- for limitation of motion of the lumbar spine, for example -- reflected, at least in part, the effects of his injury in civilian employment.

OWCP did not declare an overpayment dating back to 1993. It found an overpayment beginning October 8, 2008. It was on that date that appellant received an increased disability rating from the DVA, which included service-connected (secondary) sensory deficit and motor weakness of the right lower extremity associated with degenerative joint disease of the lumbar spine status post lumbar fusion with radiculopathy. Also effective October 8, 2008, the DVA granted individual unemployability status, increasing his rating to 100 percent for permanent and total disability.

The Board found that the increased disability rating reflected appellant's 1990 injury in civilian employment. FECA had already compensated him for permanent sensory deficit and motor weakness in his right lower extremity and was currently compensating him for his total disability for work. OWCP properly determined that the DVA increased appellant's rating for service-connected disability at least in part because of the civilian employment injury for which he was receiving FECA benefits.

Under these circumstances, section 8116(a)(3) of FECA requires an election between FECA benefits and DVA benefits appellant was receiving prior to the October 8, 2008 rating increase. These were dual benefits. When appellant did not make an election, an overpayment of compensation arose beginning October 8, 2008. A worksheet of all the compensation he received beginning October 8, 2008, which OWCP included in its January 2, 2013 preliminary determination, confirms the amount of the overpayment as $95,863.85. The Board will therefore affirm OWCP's February 12, 2013 decision on the issues of fact and amount of overpayment.

Appellant argued that the injuries he sustained in the military have nothing to do with the injuries he sustained working in civil service at the employing establishment. The question is whether the increased disability rating he received on October 8, 2008 had anything to do with his 1990 civilian injury. Appellant distinguishes the 1990 civilian injury to the L5-S1 level of

[8] *Id*. at Chapter 2.1000.8.b(2).

his spine from the injuries to the L3-4 and L4-5 levels, for which he received DVA benefits. The DVA's disability ratings do not show such apportionment. The rating appellant received for sensory deficit and motor weakness in his right lower extremity simply reflected the symptoms he demonstrated on examination, without regard to the precise level or levels of origin in the lumbar spine. As it is established that he received compensation under FECA for permanent sensory deficit and motor weakness in his right lower extremity caused by the 1990 civilian injury, as well as continuing compensation for total disability caused by the 1990 civilian injury, a portion of the increased DVA benefits he received beginning October 8, 2008 must be considered a dual benefit, as it overlaps the compensation he received under FECA.[9]

LEGAL PRECEDENT -- ISSUE 2

When an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 8129(b) of FECA describes the only exception:

> "Adjustment or recovery by the United States may not be made when incorrect payment had been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [FECA] or would be against equity and good conscience."[10]

Thus, OWCP may 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 with respect to 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; (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 to be incorrect.[11]

Whether an individual was at fault with respect to the creation of an overpayment depends on the circumstances. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he is being overpaid.[12]

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[9] *See Gary J. Bartolucci*, 34 ECAB 1569 (1983) (where the DVA paid benefits for a service-related herniated nucleus pulposus at L5-S1 and postoperative residuals and the claimant later slipped and fell in civilian employment, causing an acute back strain and temporary total disability and the DVA later increased the rating for his back condition and found individual unemployability, the Board held that the increased rating represented a dual benefit requiring an election).

[10] 5 U.S.C. § 8129(b).

[11] 20 C.F.R. § 10.433(a).

[12] *Id*. at § 10.433(b).

The fact that OWCP may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual also was at fault in accepting the overpayment.[13]

ANALYSIS -- ISSUE 2

OWCP found appellant at fault in creating the overpayment because he accepted payment that he knew or should have known was incorrect. It did not adequately explain this finding. OWCP based fault on appellant's knowledge at the time of acceptance.[14] It must establish that he knew or should have known beginning October 8, 2008 that he was accepting incorrect compensation payments. The Board finds that appellant had no such knowledge. The payments he received after October 8, 2008 were correct at the time he accepted them. They became "incorrect" only years later, retroactively, when appellant failed to make an election. Had appellant elected late in 2012 to receive FECA benefits, none of the payments would be considered incorrect.

The Board will set aside OWCP's February 12, 2013 decision on the issue of fault. On remand, OWCP must determine whether appellant is eligible for waiver of recovery of the overpayment and if he is not, OWCP must, by law, recover the debt. The Board will remand the case for further development of the evidence on appellant's current financial circumstances and for an appropriate final decision on the issue of waiver.

CONCLUSION

The Board finds that appellant received a $95,863.85 overpayment in compensation beginning October 8, 2008. The Board also finds that OWCP did not establish that he was at fault in creating this overpayment. Further development on the issue of waiver is therefore warranted.

[13] *Id*. at § 10.435(a).

[14] *Tammy Craven*, Docket No. 05-249 (issued July 24, 2006) (*order granting petition for reconsideration and reaffirming prior decision*).

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed on the issues of fact and amount of overpayment and is otherwise remanded for further action consistent with this decision of the Board.

Issued: December 13, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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