

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

L.B., Appellant

and

**DEPARTMENT OF THE NAVY, NAVY
PUBLIC WORKS DEPARTMENT,
San Diego, CA, Employer**

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**Docket No. 13-448
Issued: June 19, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2012 appellant, through his attorney, filed a timely appeal of the November 19, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 an overpayment of compensation in the amount of \$220,155.28 for the period August 28, 2007 through October 20, 2012 because he concurrently received increased benefits from the Department of Veterans Affairs (DVA) and wage-loss compensation from OWCP; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, counsel contends that the November 19, 2012 decision is contrary to fact and law.

FACTUAL HISTORY

This case has previously been before the Board. In an April 9, 2010 decision, in Docket No. 09-1989, the Board set aside a June 29, 2009 OWCP decision on the grounds that it improperly denied further merit review of appellant's request to expand his claim to include additional conditions causally related to his accepted employment-related injuries.² The Board found that he submitted pertinent new medical evidence relevant to the underlying issue in the case. The case was remanded for further merit review. In a May 4, 2010 decision, Docket No. 09-2183, the Board affirmed the above-noted June 29, 2009 decision, finding that OWCP properly denied further merit review.³ On June 22, 2010 the Board issued an order granting the Director's petition for reconsideration, vacating its May 4, 2010 decision and dismissing appellant's appeal in Docket No. 09-2183.⁴ In a July 25, 2011 order, the Board set aside OWCP's July 15, 2010 decision regarding the expansion of appellant's claim to include additional conditions causally related to his accepted injuries and remanded the case for issuance of an appropriate decision.⁵ The Board found that it failed to properly address and make findings with respect to the medical evidence of record. The facts of the case, as set forth in the Board's prior decisions and orders, are hereby incorporated by reference. The relevant facts are as follows.

OWCP accepted that on January 28, 2004 appellant, then a 48-year-old painter, sustained an open right wrist distal radial fracture, aggravation of a herniated disc at L4-5, left-sided sciatica, internal complication of an orthopedic right wrist implant, traumatic tenosynovitis of the right wrist and left wrist osteoarthritis when he was knocked off a ladder at work. He underwent right wrist surgery on January 28 and December 10, 2004 and back surgery on September 27, 2004 and October 30, 2006. OWCP paid appellant compensation for wage loss commencing August 22, 2005 and placed him on the periodic rolls.

On December 4, 2011 appellant completed a Form EN1032 and indicated that he received benefits from the DVA in file number xxxxxx914. He stated that these benefits had not increased since the injury for which he was receiving benefits under FECA.

By letter dated January 31, 2012, OWCP requested that the DVA submit additional information regarding the disability benefits that appellant was receiving for his military service.

On February 24, 2012 the DVA informed OWCP that appellant was receiving disability benefits for a fusion of a left scaphoid, degenerative joint disease of the left metatarsal joint and

² Docket No. 09-1989 (issued April 9, 2010).

³ Docket No. 09-2183 (issued May 4, 2010).

⁴ *Id.*, *Order Granting Petition for Recon., Vacating Decision and Dismissing Appeal*, Docket No. 09-2183 (issued June 22, 2010).

⁵ Docket No. 10-277 (issued July 25, 2011).

residuals of a fractured left tibia. Appellant received a 0 percent disability rating on January 17, 1981, a 30 percent disability rating on August 28, 2007 and a 40 percent disability rating on December 1, 2008. The DVA checked the box marked “no” in response to the question whether his monthly benefits had increased due to an on-the-job injury.

In a March 9, 2012 letter, OWCP advised appellant that prior to his work-related injury he was receiving a service-connected disability award from the DVA for disability due to a fusion of a left scaphoid, degenerative joint disease of the left metatarsal joint and residuals of a fractured left tibia. It noted that his disability with the DVA was increased on December 1, 2008 to reflect additional impairment caused by the work-related injury. During this same period, appellant was receiving wage-loss compensation from OWCP which constituted a dual benefit. OWCP informed him that an election of benefits was required between the entire amount he had received under FECA since December 1, 2008 and the amount of the increase he received from the DVA over the original impairment amount, since December 1, 2008. Appellant was entitled to receive \$3,476.00 every four weeks or \$3,765.67 every month. OWCP noted that he had received an overpayment of compensation.

By letter dated April 9, 2012, OWCP informed appellant that the correct date he received an increase in his DVA benefits due to additional impairment resulting from the accepted employment injuries was August 28, 2007 and not December 1, 2008 as previously stated.⁶ It again requested that he make an election between FECA and DVA benefits.⁷

In a May 21, 2012 letter, OWCP advised appellant that it had not received his response to its April 9, 2012 letter. Appellant was afforded 20 days to submit the requested information. OWCP advised that, if he failed to respond within the allotted time, it would assume that he had elected DVA benefits and that it would stop FECA benefits. It further advised that an overpayment of OWCP benefits would be calculated retroactive to August 28, 2007.

In an October 11, 2012 letter, OWCP informed appellant that it assumed he had elected DVA benefits since he failed to respond to its May 21, 2012 letter. It advised that his benefits would be terminated effective October 21, 2012.

In a notice dated October 11, 2012, OWCP advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$220,155.28 from August 28, 2007 through October 20, 2012 because he received increased benefits from the DVA while receiving compensation under FECA during this period. It noted that he did not make the required election and, thus, it assumed the election was for DVA benefits. Appellant was found without fault in creating the overpayment because he was not aware or could not have been reasonably expected to know that OWCP had paid compensation incorrectly. OWCP requested that he complete an enclosed Form OWCP-20 and submit supporting financial

⁶ The Board notes that OWCP actually stated that appellant received an increase in DVA benefits due to the accepted employment injuries on October 1, 2008 rather than December 1, 2008. This appears to be an inadvertent error as OWCP previously stated in its March 9, 2012 letter that appellant received increased DVA benefits on December 1, 2008.

⁷ OWCP informed appellant that his election of DVA benefits would not affect his entitlement to medical benefits under FECA.

documents within 30 days if he sought waiver of the overpayment. It noted that waiver would be denied if appellant failed to furnish the information requested on the enclosed OWCP-20 form with supporting documentation within 30 days. OWCP further informed him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoument hearing.

An overpayment computation worksheet indicated that, from August 28, 2007 through October 20, 2012, appellant received gross FECA wage-loss compensation totaling \$220,155.28.

Appellant did not respond to the October 11, 2012 preliminary determination.

In a June 14, 2012 letter, received by OWCP on October 29, 2012, appellant elected to receive DVA benefits.⁸

In a November 19, 2012 decision, OWCP finalized the preliminary overpayment determination of \$220,155.28 and found that appellant was without fault in creating the overpayment. It denied waiver of recovery of the overpayment as he failed to submit any information to show that recovery would defeat the purpose of FECA or be against equity and good conscience. OWCP directed recovery of the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁹ Section 8116(a) states that, while an employee is receiving workers' compensation benefits, he or she may not receive salary, pay or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the DVA, unless such benefits are payable for the same injury or the same death being compensated for under FECA.¹⁰

Section 10.421(a) of OWCP's implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.¹¹ The beneficiary must elect the benefit that he or she wishes to receive.¹²

Section 8116(b) provides that in such cases an employee shall elect which benefits he shall receive. Thus, FECA prevents payment of dual benefits in cases where OWCP has found

⁸ In an October 5, 2012 letter, the employing establishment advised OWCP that appellant had already returned a letter, in which he elected DVA benefits, in response to its April 9, 2012 letter.

⁹ 5 U.S.C. § 8102(a).

¹⁰ *Id.* at § 8116(a).

¹¹ 20 C.F.R. § 10.421(a).

¹² *Id.*

that the disability was sustained in civilian federal employment and the DVA has held that the same disability was caused by military service.¹³

OWCP procedures discuss when payments of benefits under FECA and under statutes administered by the DVA constitute forbidden dual payments of compensation, noting that the prohibition against receiving such payments includes an increase in a veteran's service-connected disability award, where the increase is brought about by an injury sustained while in civilian employment.¹⁴

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for an open right wrist distal radial fracture, aggravation of a herniated disc at L4-5, left-sided sciatica, internal complication of an orthopedic right wrist implant, traumatic tenosynovitis of the right wrist and left wrist osteoarthritis. Appellant underwent right wrist surgery on January 28 and December 10, 2004 and back surgery on September 27, 2004 and October 30, 2006. His fusion of a left scaphoid, degenerative joint disease of the left metatarsal joint and residuals of a fractured left tibia, which were accepted by the DVA, were not conditions accepted by OWCP. The issue is whether appellant's increase in his disability benefits from the DVA for his fusion of a left scaphoid, degenerative joint disease of the left metatarsal joint and residuals of a fractured left tibia effective August 28, 2007 constitutes a dual payment of benefits and, thus, required an election by him.

The Board finds that OWCP erred in its determination that appellant received dual benefits for the period August 28, 2007 through October 20, 2012. Appellant's fusion of a left scaphoid, degenerative joint disease of the left metatarsal joint and residuals of a fractured left tibia are not conditions accepted by OWCP as due to or aggravated by the accepted January 28, 2004 employment injuries. The DVA, in response to OWCP's inquiry, checked no to the question as to whether the increase in his monthly disability benefits was a result of an employment injury. In order to constitute a dual payment under FECA, appellant must be in receipt of benefits paid for the same injury accepted by OWCP under FECA.¹⁵ The DVA stated that the increase in his monthly disability DVA benefits for his fusion of a left scaphoid, degenerative joint disease of the left metatarsal joint and residuals of a fractured left tibia were unrelated to his employment injury and these conditions were not accepted as employment-related by OWCP. As appellant is not in receipt of dual benefits, the Board finds that an overpayment of compensation for the period August 28, 2007 through October 20, 2012 does not exist.¹⁶

¹³ *Sinclair L. Taylor*, 52 ECAB 227 (2001); *Allen W. Hermes*, 43 ECAB 435 (1992).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8(b)(1), (2) (December 1997).

¹⁵ See cases cited, *supra* note 13.

¹⁶ *Richard A. Cerasale*, 56 ECAB 461 (2005).

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$220,155.28 for the period August 28, 2007 through October 20, 2012 as he was not in receipt of dual benefits paid under statutes administered by FECA and the DVA.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 19, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁷ In view of the Board's disposition of the issue regarding fact of overpayment, the issues of the amount and denial of waiver of the overpayment are moot.