

FACTUAL HISTORY

On July 17, 1990 appellant, then a 54-year-old equipment specialist and a military retiree, filed an occupational disease claim alleging that work factors caused acute stress. He stopped work on March 26, 1990 and did not return. Appellant resigned from the employing establishment in 1991. On October 8, 1992 OWCP accepted major depression, single episode, without psychotic features. Appellant received wage-loss compensation and was placed on the periodic compensation rolls.²

Appellant reported that he was receiving federal retirement benefits and VA benefits for a cardiac condition on an OWCP 1032 form signed on June 18, 1998. In letters dated August 13 and November 11, 1998, he informed OWCP that he was in receipt of correspondence from the VA that he had been awarded a 30 percent disability rating for major depression. As a consequence, he would no longer receive military retirement pay because a VA benefit must be deducted and he would only receive a monthly payment from the VA. In correspondence to his representative, appellant expressed concern that he was not entitled to both VA and FECA benefits. By letter dated March 4, 1999, OWCP informed appellant that there was no prohibition against receiving military retirement pay and FECA benefits. It requested information regarding his VA benefits. Appellant responded that, to the best of his knowledge out of his receipt of a \$2,104.00 monthly VA benefit, \$1,545.00 was military retirement pay. The VA confirmed that he was entitled to disability at the 100 percent rate due to unemployability, 50 percent of which was due to major depression. Appellant received a monthly VA payment of \$2,104.00, effective December 1, 1998. On April 8, 1999 VA advised that there had been an increase in his monthly VA benefits attributable to his on-the-job injury, with the monthly payment increasing from \$626.00 to \$633.00 on December 1, 1998.

On June 29, 2001 appellant noted that, as of May 2001, he began receiving Social Security Administration (SSA) benefits.

Appellant continued to submit OWCP 1032 forms listing that he was in receipt of retirement pay and VA benefits for a heart condition and major depression. Beginning in 2001, he also reported receiving SSA benefits.

In a March 21, 2008 memorandum to OWCP, the employing establishment noted that appellant was in receipt of VA benefits for major depression and also in receipt of FECA benefits for this condition, which resulted in a dual benefit. Attached was a copy of an October 22, 1998 rating decision advising that his VA disability for depression was increased to 50 percent effective January 30, 1998. OWCP requested additional information from VA. In a May 13, 2008 response, VA stated that appellant was considered 50 percent disabled due to major depression and 30 percent disabled due to heart disease. He was paid at the 100 percent disability rate because he was considered to be unemployable due to his service-connected medical conditions. Appellant's current award was \$2,669.00 monthly. In a March 19, 1998 medical report, Dr. John L. Newcomb, a psychiatrist, performed a rating examination for VA.

² In 1995, appellant relocated from Virginia to Maine. In a June 21, 1995 report, Fritz C. Weidner, Ph.D., a licensed psychologist at the Veterans Administration Medical Center (VAMC) in Togus, Maine, indicated that appellant suffered with major depression, panic attacks and post-traumatic stress disorder and indicated that he could not work. On work capacity evaluations dated August 1, 1996 and August 4, 1997, Dr. Neal K. Anderson, a Board-certified internist, also at the Togus VAMC, reiterated the diagnoses and conclusions.

He described a past psychiatric history noting that appellant was hospitalized with depression in a VA hospital in 1975 and that his depressive symptoms began while on active military duty in the early 1970s. Dr. Newcomb noted that appellant had experienced depression much of the time since 1989 and was currently undergoing individual and group psychotherapy at a VA hospital. He diagnosed major depression due to and proximately the result of the service-connected heart condition.

On October 8, 2010 OWCP again asked the VA to provide information regarding appellant's military service benefits.

OWCP developed evidence that an overpayment of compensation had been created because appellant's SSA benefits included a Federal Employees' Retirement System (FERS) contribution. It reduced his wage-loss compensation on November 15, 2010 to reflect the FERS offset. OWCP informed him that the portion of SSA benefits earned as a federal employee was a prohibited dual benefit and his FECA compensation was to be adjusted accordingly.

On August 23, 2011 OWCP again asked VA to provide information regarding appellant's benefits. VA responded on August 29, 2011 and attached information that appellant had a 50 percent VA disability due to major depression and that his current monthly compensation was \$2,823.00.

In a September 7, 2011 decision, an OWCP hearing representative found a \$21,770.53 overpayment of compensation was created for the period June 1, 2001 to November 20, 2010 because appellant received dual benefits under FECA and SSA. She found him without fault, but denied waiver, noting that he agreed to a deduction of \$200.00 each benefit period to repay the overpayment.³ Appellant's FECA compensation was adjusted, effective September 25, 2011, to reflect this deduction.

On September 8, 2011 OWCP informed appellant that his receipt of VA benefits for major depression and FECA benefits for the same condition constituted a dual benefit for which an election was required. Appellant was informed that once he made an election, a copy would be forwarded to VA and an overpayment would be calculated.

By letter dated February 28, 2012, OWCP informed appellant that the portion of his VA benefit that he received for major depression was a prohibited dual benefit. Since an overpayment had been created and continued to grow, it was imperative that he make an election within 30 days. In letters dated March 9 and July 9, 2012, appellant's attorney requested information regarding the calculation of the dual VA/FECA benefits. In correspondence dated September 14, 2012, OWCP again advised appellant that he needed to make an election. It informed him that VA had informed OWCP that the receipt of prohibited dual benefits began on January 30, 1998, the date that his VA benefits were increased due to his work-related condition of major depression. OWCP advised appellant that, if he elected VA benefits retroactively to January 30, 1998, the overpayment of FECA benefits to date would be \$423,971.97. If he elected FECA benefits retroactively to January 30, 1998, the overpayment of VA benefits for the condition of major depression would be calculated by VA. OWCP advised that, as he had not yet made an election of benefits, it had not made any formal decision in this regard. It provided an election letter, advising that it was imperative that he respond within 30 days. Appellant's

³ Appellant did not file an appeal from this overpayment decision with the Board.

compensation was suspended effective October 21, 2012 because he failed to make an election of benefits.

On October 24, 2012 OWCP issued a preliminary finding that an overpayment of compensation in the amount of \$428,487.73 had been created because appellant received dual benefits under VA and FECA for the same condition from January 30, 1998 to October 20, 2012. It found him without fault. Appellant was provided an overpayment action request and overpayment recovery questionnaire. An overpayment calculation and computer printouts of record reflect that appellant received FECA compensation totaling \$428,487.73 for the period January 30, 1998 to October 20, 2012.

Appellant, through his attorney, requested a telephone conference. He disagreed with the amount of the overpayment and requested waiver. The attorney asserted that because only 50 percent of appellant's VA benefits were due to depression, only that portion would be subject to an overpayment. On February 24, 2013 appellant submitted an overpayment recovery questionnaire. He described monthly expenses but did not include income. By letter dated March 27, 2013, OWCP informed appellant's attorney that a conference could not be held until it received requested information concerning appellant's finances. On April 8, 2013 appellant provided another overpayment recovery questionnaire in which he listed SSA monthly income of \$1,708.00 and other benefits of \$4,930.00, for a total monthly income of \$6,638.00. He stated that, in addition to his wife, he supported his 56-year-old son and 46-year-old daughter and provided a list of monthly expenses totaling \$4,416.00.⁴ Appellant advised that the amount of additional funds and stocks and bonds was being determined. He maintained that he should be entitled to waiver of the overpayment because OWCP was the responsible party in creation of the overpayment.

A conference was held on April 26, 2013. OWCP explained that the dual benefit began when his VA benefits were increased due to major depression and advised that he needed to elect between receiving FECA compensation or his VA benefit. It advised that future OWCP actions would be dependent on whether appellant elected FECA or VA benefits, explaining that if he elected OWCP benefits, an overpayment with VA would occur and that department would calculate any overpayment. Conversely, if he elected VA benefits, an OWCP overpayment was created. OWCP also advised that he needed to forward complete and accurate financial information before waiver could be considered.

On June 6, 2013 appellant elected VA benefits, effective the "date of dual payments." On June 28, 2013 he completed an additional overpayment recovery questionnaire. Appellant's income and expenses were as previously reported. He stated that he was a 50 percent owner in a second home worth approximately \$75,000.00; had a checking account balance of approximately \$78,300.00, a savings account balance of approximately \$73,000.00 and other investment assets totaling \$441,200.00.

On June 20, 2013 OWCP requested clarification from VA regarding appellant's disability compensation for major depression to determine whether his VA benefits were for the same injury for which he had received FECA benefits. It inquired his increase in VA benefits effective January 30, 1998 was based on major depression due to the work-related injury he

⁴ This included \$1,200.00 a month support for appellant's dependent son, \$375.00 a month for appellant's daughter's legal fees and a \$200.00 monthly payment to OWCP.

experienced while employed by the employing establishment or to some other reason and, if so, he would need to make an election between OWCP and VA benefits.

VA forwarded a disability rating decision dated July 11, 1998. The decision noted that appellant had applied for VA benefits for an emotional condition. In addition to a 30 percent disability rating for heart disease since April 1, 1997, he also had a 30 percent disability rating for major depression, effective January 30, 1998. An October 22, 1998 VA rating decision noted that he had submitted a VA Form 21-8940, which was an application for an increase in VA compensation based on unemployability. Appellant's disability for major depression was increased to 50 percent, effective January 30, 1998.

On October 4, 2013 OWCP finalized the overpayment determination. It found that appellant was not at fault in the creation of the overpayment of \$428,487.73, created because he received dual benefits from FECA and the VA for the period January 30, 1998 through October 20, 2012. OWCP determined that he had sufficient financial assets such that recovery of the overpayment would not defeat the purpose of FECA. The evidence did not establish that recovery would be against equity and good conscience. OWCP directed appellant to forward a monthly check for \$500.00 to repay the overpayment.

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.⁵ Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁶ Section 8116(a) provides 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 VA, unless such benefits are payable for the same injury or the same death being compensated for under FECA.⁷

ANALYSIS -- ISSUE 1

Appellant's occupational disease claim was accepted by OWCP for major depression, single episode without psychotic features. Beginning in 1992, appellant was paid wage-loss compensation under FECA and was placed on the periodic compensation rolls. In 1998, he applied for VA compensation for major depression and on July 11, 1998 VA granted him a 30 percent disability rating, effective January 30, 1998. This was combined with a 30 percent rating for heart disease. Appellant thereafter applied for an increase in his VA rating, based on unemployability. On October 22, 1998 VA increased his rating to 50 percent, also effective January 30, 1998. At that time, under VA policies, he was rendered 100 percent disabled. Appellant also continued to receive FECA benefits for the accepted major depression until October 20, 2012 when his FECA compensation was suspended because he failed to make an election between FECA and VA benefits. He has not received FECA benefits since that time.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ *Id.* at § 8116(a).

There is a prohibition against an employee receiving benefits both under FECA and from VA for the same injury, including any increase in a service-connected disability.⁸ When VA raised appellant's disability rating for major depression, which is the condition accepted by OWCP, it represented an increase due to the same condition which formed the basis for his entitlement under FECA.⁹ The overpayment worksheet and computer printouts of record note that he received FECA compensation totaling \$428,487.73 from January 30, 1998, when he began receiving VA benefits, to October 20, 2012, when his FECA benefits were suspended.

As appellant received \$428,487.73 in FECA compensation while concurrently receiving VA benefits for the same condition, the Board finds an overpayment of compensation in that amount was created.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has 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."¹¹ Section 10.438 of OWCP regulations provide that 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 on an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹²

Section 10.436 of the implementing regulations provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship to a currently or formerly entitled beneficiary such that: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed the resource base of \$4,800.00 for an individual plus \$960.00 for each additional dependent.¹³ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).¹⁴

⁸ *Kelvin L. Davis*, 56 ECAB 404 (2005).

⁹ 5 U.S.C. § 8116(a); *see id.*

¹⁰ *See R.P.*, Docket No. 13-1415 (issued December 13, 2013).

¹¹ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

¹² 20 C.F.R. § 10.438.

¹³ *Id.* at § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.a.1 (June 2009).

¹⁴ *Id.*

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.¹⁵ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit, is not to be considered a loss.¹⁶

A finding that a claimant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of FECA or would be against equity and good conscience,” pursuant to the guidelines provided in the implementing federal regulations.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that appellant is not entitled to waiver of the overpayment. Appellant reported assets of at least \$500,000.00 on the overpayment recovery questionnaire. OWCP procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent.¹⁸ For waiver under the “defeat the purpose of FECA” standard, a claimant must show that he or she needs substantially all of his current income to meet current ordinary and necessary living expenses and that his or her assets do not exceed the resource base.¹⁹ Liquid assets include but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds and certificate of deposits. Nonliquid assets include but are not limited to the fair market value of an owner’s equity in property such as a camper, boat, second home and furnishings/supplies.²⁰ As appellant listed substantial financial assets, recovery of the overpayment would not defeat the purpose of FECA.

Other than asserting that it was unfair for him to be responsible for OWCP errors, there is no evidence that recovery of the overpayment would be against equity and good conscience. Appellant has not submitted any evidence that, in reliance on such payments or on notice that such payments would be made, he gave up a valuable right or changed his position for the worse.²¹

With respect to the recovery of the overpayment, the Board notes that its jurisdiction on appeal is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.²²

¹⁵ 20 C.F.R. § 10.437.

¹⁶ Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 6.200.6.b.3 (June 2009).

¹⁷ *R.J.*, Docket No. 10-1756 (issued May 3, 2011).

¹⁸ *Supra* note 13

¹⁹ *Id.*

²⁰ Federal (FECA) Procedure Manual, *see supra* note 13 at Chapter 6.200.6(a) (June 2009); *see W.F.*, 57 ECAB 705 (2006).

²¹ *R.J.*, Docket No. 10-1748 (issued May 3, 2011).

²² *D.R.*, 59 ECAB 148 (2007).

CONCLUSION

The Board finds that appellant was not at fault in the creation of an overpayment of compensation in the amount of \$428,487.73 and that the overpayment was not subject to waiver.

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 19, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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