United States Department of Labor
Employees' Compensation Appeals Board

S.K., Appellant	)	
and	)	**Docket No. 17-1573**
	)	**Issued: December 28, 2018**
U.S. POSTAL SERVICE, POST OFFICE, St. Petersburg, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 12, 2017 appellant filed a timely appeal from a January 17, 2017 decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] The Board notes that following the January 17, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective December 14, 2014, because appellant elected to receive disability benefits from the Department of Veterans Affairs (DVA).

FACTUAL HISTORY

On August 5, 2002 appellant, then a 39-year-old retired acting city carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained bilateral conditions of the lower extremities as a result of duties of his federal employment including standing, walking, carrying, and delivering mail.[3] He noted that he first became aware of his condition on June 1, 1982 during his time with the United States Marine Corps, and of its relationship to his federal employment on January 1, 1998.

By decision dated December 2, 2004, OWCP accepted appellant's claim for aggravation of bilateral pes planus, aggravation of bilateral ankle degenerative arthritis, and aggravation of left knee degenerative arthritis.

By letter dated February 24, 2005, OWCP requested information from the DVA as to whether appellant was receiving disability benefits based on his military or naval service.

On March 31, 2005 the DVA responded, confirming that appellant was in receipt of disability benefits from the DVA, but that no increase in his benefits had been made as a result of an on-the-job injury.

By letter dated June 22, 2005, appellant elected FECA benefits in lieu of federal retirement benefits.

[3] By decision dated November 7, 2002, OWCP denied appellant's claim finding that his claim was untimely filed. By decision dated May 2, 2003, an OWCP hearing representative found that OWCP's November 7, 2002 decision was premature, as appellant alleged that he had worked at the employing establishment until June 1999. The hearing representative remanded the case for further development as to appellant's last date of employment to be followed by a *de novo* decision. By decision dated July 7, 2003, OWCP again denied appellant's claim, finding that it was untimely filed. It noted that it received a leave analysis document from the week of May 14, 1999 as the last week he was exposed to employment factors, and that he submitted his claim on August 2, 2002. By decision dated October 15, 2004, an OWCP hearing representative vacated the July 7, 2003 decision, finding that OWCP had failed to properly develop the claim, as appellant alleged that evidence under File No. xxxxxx503 would show that he provided timely notification of the injury under the current claim, File No. xxxxxx065.

On September 9, 2005 the DVA noted that appellant was in receipt of disability benefits. It indicated that appellant's monthly benefits had increased as a result of an on-the-job injury effective December 1, 2004.[4]

By letter dated October 4, 2005, OWCP outlined appellant's entitlement to wage-loss compensation under his claim. The letter explained that appellant needed to report compensation benefits from any federal agency to OWCP.

A review of OWCP's payments to appellant reveals that he was first paid $2,475.10 on October 7, 2005, for the period September 1 through October 1, 2005. He received additional payments on October 14, 2005 of $54,250.01 for the period June 15, 1999 through June 15, 2002; $33,580.42 for the period June 15, 1999 through June 15, 2002; and $99,830.75 for the period June 16, 2002 through August 31, 2005. Appellant's first payment on the periodic rolls was paid on October 29, 2005 for the period October 2 through 29, 2005, and his last payment on the periodic rolls was paid on December 13, 2014 for the period November 16 through December 13, 2014.

On December 9 and 12, 2005 the DVA noted that appellant was in receipt of disability benefits. It checked a box indicating that no increase had been made in appellant's monthly benefits as a result of an on-the-job injury, but on the December 9, 2005 correspondence it noted that he had received a cost-of-living adjustment.

On May 17, 2006 OWCP accepted the additional condition of bilateral plantar fibromatosis.

By letter dated August 31, 2011, OWCP notified the DVA that it had been advised that appellant was receiving benefits under FECA, while simultaneously receiving disability benefits from the DVA. It requested that the DVA verify whether appellant was currently receiving DVA disability benefits, the nature of the disabilities, and changes in appellant's monthly benefits subsequent to January 1, 1998.

The DVA responded on September 7, 2011. Attached to its letter confirming receipt of OWCP's request for records, the DVA attached a rating decision dated March 3, 2000, in which it had increased appellant's percentage of disability for his bilateral pes planus from 30 to 50 percent; left knee arthritis for 10 percent; pain disorder for 50 percent; and individual unemployability. The rating decision noted that appellant's last date of work with the employing establishment was May 13, 1999 and that he was unable to perform his duties due to the disabilities. It noted that a service connection for his left knee arthritis had been established as related to his disability of pes planus. An official from the DVA confirmed that appellant was receiving disability benefits since 1995 and that payments had not been discontinued. The official checked a box noting that

[4] The Board notes that while the DVA did not check a box indicating that an increase had been made in appellant's monthly benefits as a result of an on-the-job injury, the DVA did indicate the amount and effective date of a monthly increase in the next question, which was to be provided only if appellant's monthly benefits had increased as a result of an on-the-job injury.

appellant's disability benefits had increased since the initial rating for his feet, ankles, and knees, but it did not indicate that the increase was due to an on-the-job injury.

By letter dated September 21, 2011, OWCP advised appellant that FECA prohibits dual benefits for accepted employment-related injuries, noting that an increase in a veteran's service-connected disability brought about by an injury sustained while in federal civilian employment is considered a dual payment when the veteran is also receiving workers' compensation benefits. It noted that appellant received a disability rating from the DVA for his feet and knees, which were increased subsequent to his employment with the employing establishment. OWCP requested that appellant make an election of benefits within 30 days, as an overpayment continued to grow.

By letter dated September 14, 2011, the DVA clarified that appellant's initial rating was issued on September 1, 1995 and that his most recent rating was on March 3, 2000.[5] By letter dated May 22, 2012, a DVA official confirmed that appellant was still in receipt of DVA disability benefits, amounting to $3,037.00 per month, effective December 2011. The DVA official noted that no increase had been made due to an on-the-job injury.

In a Form CA-1032 dated June 5, 2012, appellant stated that he received disability benefits from the DVA due to being permanently and totally unemployable.

By letter dated October 4, 2012, OWCP again advised appellant that FECA prohibits dual benefits for accepted employment-related injuries, noting that an increase in a veteran's service-connected disability brought about by an injury sustained while in federal civilian employment is considered a dual payment when the veteran is also receiving workers' compensation wage-loss benefits. It noted that appellant received a DVA disability rating for his bilateral pes planus, left knee arthritis, and bilateral ankle arthritis prior to his injury of January 1, 1998, and that his disability rating with the DVA was increased on May 25, 1999 to reflect additional impairment due to his work-related injury. OWCP again requested appellant make an election of benefits within 30 days, and that an overpayment continued to grow. It advised him that failure to make the required election within 30 days would be considered an election of benefits from the DVA.

By letter dated October 10, 2012, appellant stated that OWCP incorrectly determined that his disability had increased due to additional impairment related to his accepted work-related injury. He noted that he was granted individual unemployability in June 1999, and that as it was a service-connected disability, the prohibition on dual benefits did not apply. In an undated letter received on October 30, 2012, appellant stated that he had not received wage-loss benefits until 2003. He noted that he was employed full-time during the period referenced in OWCP's letter, and that wage loss was paid retroactively to June 1999 after he retired. Appellant requested a review of the written record by or a hearing before an OWCP hearing representative.

[5] Prior letters also documented ratings of impairment from the DVA. A letter dated July 24, 1995 from the DVA determined that appellant had zero percent disability rating for bilateral pes planus. A letter dated January 23, 1997 from the DVA determined that appellant had 10 percent disability for his bilateral pes planus, and outlined his monthly compensation. A letter dated August 4, 1998 from the DVA determined that appellant had 30 percent disability for his bilateral pes planus and 10 percent disability for left ankle synovitis status post ligament repair, and outlined his monthly compensation.

By letter dated October 30, 2014, OWCP again advised appellant that FECA prohibits dual benefits for accepted employment-related injuries, noting that an increase in a veteran's service-connected disability brought about by an injury sustained while in federal civilian employment is considered a dual payment when the veteran is also receiving workers' compensation wage-loss benefits. It noted that he had received a DVA disability rating for his bilateral pes planus, bilateral arthritis of the knees, and bilateral arthritis of the ankles, prior to his work-related injury of January 1, 1998. OWCP stated that these were the same conditions which were accepted as aggravated by duties of his federal employment. It noted that his percentage of disability with the DVA was increased on March 3, 2000 retroactive to May 25, 1999 to reflect additional impairment caused by the work-related injury, and that during the same time period, he received wage-loss benefits from OWCP. OWCP again requested appellant make an election of benefits within 30 days, and that an overpayment continued to grow. It advised him that failure to make the required election within 30 days would be considered an election of benefits from the DVA.

By decision dated December 8, 2014, OWCP terminated appellant's wage-loss compensation, effective December 14, 2014.[6] It noted that he had stopped working on May 14, 1999 and retired as of November 8, 1999. OWCP found that appellant had been afforded multiple opportunities to make an election of benefits, with the latest notification dated October 30, 2014, but that he had not responded to OWCP notifications. As such, it found that appellant had elected DVA benefits, but that his claim remained open for medical benefits under FECA.

On December 22, 2014 appellant requested reconsideration of the December 8, 2014 termination decision. On January 9, 2015 he requested a telephonic hearing before an OWCP hearing representative. The hearing was held on July 16, 2015.

By decision dated September 21, 2015, the hearing representative affirmed OWCP's December 8, 2014 decision. She found that OWCP's termination of his benefits effective December 14, 2014 was proper, as appellant had not provided evidence that he was not in receipt of FECA and DVA benefits concurrently, that there was no evidence that the benefits were not for the same conditions, and as appellant had testified that he had not requested discontinuation of his DVA benefits.

On October 29, 2015 appellant requested reconsideration. He argued that OWCP had been using an incorrect date of injury for his claim, that the DVA had advised OWCP on February 24, 2005 that there had been no increase in DVA benefits as a result of his on-the-job injury, and that his increase to 50 percent disability for his feet was the result of a failed DVA surgery. Appellant further argued that he had not sustained an injury in the course of his employment, but rather an aggravation of an injury dated to 1982. He noted that the DVA disability determination of March 3, 2000 did not mention duties of his federal employment causing the increase in disability for his conditions. Appellant argued that the issue of receipt of dual benefits had already been resolved in his favor in 2004 or 2005. He noted that he was not at fault for receiving OWCP benefits, and that he had not received any OWCP benefits until 2005 or later.

[6] The notice of decision dated December 8, 2014 later lists the effective date of termination as November 16, 2014. OWCP issued a corrected notice of decision on December 10, 2014, correcting this inconsistency and listing the effective date of termination as December 14, 2014.

Appellant again requested reconsideration of OWCP's September 21, 2015 decision on October 17, 2016.

In support of reconsideration appellant submitted the first page of a letter dated November 16, 2005, in which the employing establishment noted that OWCP had recently paid appellant retroactively to June 15, 1999, which totaled over $187,000.00, and thereafter placed him on the periodic rolls. It stated that appellant had received dual benefits from the DVA and OWCP for the same conditions, as appellant had indicated that when he was first employed at the employing establishment, his DVA disability was 0 percent, and that by the time he had retired, it was 100 percent, due to walking.

By decision dated January 17, 2017, OWCP reviewed the merits of appellant's claim, but denied modification of its September 21, 2015 decision. It noted that his disagreement with the date of disability was not relevant to his receipt of dual benefits. OWCP stated that it had not ignored a DVA determination that appellant's benefits had not increased due to his injury. It further noted that his DVA benefits had increased dramatically after his injury at work.

LEGAL PRECEDENT

FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty. While an employee is receiving such compensation, however, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return for service actually performed or for certain payments related to service in the armed forces.[7] The latter includes benefits administered by the DVA, unless such benefits are payable for the same injury being compensated for under FECA.[8] The prohibition against dual payment of FECA and veterans benefits extends to cases in which: (1) the disability or death of an employee resulted from an injury sustained while in federal civilian employment and the DVA held that the same disability or death was caused by military service; or (2) an increase in a veteran's service-connected disability award was brought about by an injury sustained while in federal civilian employment.[9] An election between these benefits is required under both scenarios.[10]

ANALYSIS

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective December 14, 2014, because he elected to receive disability benefits from the DVA.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8b (December 1997). *See J.C.*, Docket No. 16-1217 (issued October 11, 2017).

[8] 5 U.S.C. §§ 8102(a), 8116(a). *See also S.G.*, Docket No. 12-0779 (issued September 17, 2012).

[9] *Supra* note 5.

[10] *See id.* at Chapter 2.1000.8a(5).

In a March 3, 2000 rating decision, the DVA increased appellant's percentage of disability for his bilateral pes planus from 30 to 50 percent; left knee arthritis for 10 percent; pain disorder for 50 percent; and found individual unemployability. The rating decision noted that appellant's last date of work with the employing establishment was May 13, 1999 and that he was unable to perform his duties due to the disabilities. It indicated that a service connection for his left knee arthritis had been established as related to his disability of pes planus. An official from the DVA confirmed that appellant had received disability benefits since 1995 and that payments had not been discontinued. The official further noted that appellant's disability benefits had increased since the initial rating for his feet, ankles, and knees.

The Board finds that the evidence of record supports that appellant was provided a rating from the DVA, that he had received monthly benefits, that the benefits had been increased since they were first awarded, and that the payments have not been discontinued.

In *Louis Teplitsky*, the Board found that appellant was required to make an election of benefits between DVA benefits and FECA benefits.[11] The Board held that a claimant was required to make an election between FECA and DVA benefits because both benefits were payable for the same injury.

Herein, appellant's accepted aggravation of his preexisting service-related lower extremity conditions by OWCP constituted the same injury as had been accepted for DVA disability benefits. Like *Teplitsky*, appellant's accepted condition is an aggravation of a service-connected condition. The accepted conditions under FECA are aggravations of conditions accepted by DVA. The DVA noted in its September 9, 2005 letter that appellant's DVA disability rating had increased as a result of on-the-job activities. While the DVA did not check the box in relation to this question, it did fill out the next field regarding the amount and effective date of the increase, which was only to be filled out if the answer to the previous question was that his disability rating had increased as a result of on-the-job activities. Filling out this field indicated that the increase in appellant's DVA disability compensation was due to an on-the-job injury. As such, the Board finds that DVA determined that an increase in appellant's service-connected disability award was brought about by an injury, namely aggravation of his lower extremity conditions, sustained while in federal civilian employment

OWCP sent appellant several notices regarding his responsibility to make an election between the receipt of DVA or FECA benefits. In these notices, it informed him that, if he did not submit an election of benefits within 30 days, it would assume that he had elected DVA benefits in lieu of FECA benefits as receipt of both was a prohibited dual benefit.[12] As appellant did not respond, OWCP properly determined that he made an election for receipt of DVA benefits.

As such, the Board finds that the hearing representative's decision[13] of September 21, 2015 properly found that appellant had elected to receive DVA benefits in lieu of FECA compensation

[11] 22 ECAB 142 (1971).

[12] *R.P.*, Docket No. 13-1415 (issued December 13, 2013).

[13] The Board notes that at the July 16, 2015 hearing, appellant indicated that he wanted to continue to receive his DVA benefits.

benefits. OWCP therefore has met its burden of proof to terminate appellant's FECA wage-loss compensation, effective December 14, 2014.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective December 14, 2014, because appellant elected to receive disability benefits from the DVA.

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 28, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board