

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

-----)
W.U., Appellant)

and)

DEPARTMENT OF THE ARMY, PROVOST)
MARSHAL OFFICE, LAW ENFORCEMENT)
BRANCH, Fort Drum, NY, Employer)
-----)

**Docket No. 21-0530
Issued: August 6, 2024**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On February 22, 2021 appellant filed a timely appeal from a September 16, 2020 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.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$742,190.73 for the period November 29, 2002

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the September 16, 2020 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 additional evidence for the first time on appeal. *Id.*

through February 1, 2020, for which he was without fault, because he concurrently received Department of Veterans Affairs (VA) and FECA benefits for the same condition; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On September 5, 1996 appellant, then a 47-year-old supervisory police officer, filed a traumatic injury claim (Form CA-1) alleging that on July 20, 1996 he injured his lower back and right side when he tripped on furniture, and fell to the floor while in the performance of duty. He noted that he had a herniated disc and pinched nerves, which caused loss of mobility in his right leg. Appellant stopped work on July 24, 1996 and did not return. OWCP accepted the claim for lumbosacral sprain, as well as herniated discs at L3-4 and L4-5. It paid appellant wage-loss compensation on the periodic rolls as of September 1996.

On October 29, 2001 appellant completed a Form EN-1032, wherein he reported that he had a VA service-connected disability. On September 20, 2004 he completed a Form EN-1032 wherein he reported to OWCP that his VA service-connected award had increased on July 28, 2004, but that the increase was not due to his accepted employment injuries. From September 7, 2005 through July 24, 2008, appellant completed EN-1032 forms wherein he reported that his VA award was due to diabetes mellitus, degenerative arthritis, tinnitus, and traumatic arthritis. He listed the date of his increase of VA service-connected benefits as approximately May 2003, and/or July 28, 2003. In a September 1, 2009 Form EN-1032, appellant reported that he was receiving benefits due to service-related/connected disabilities from VA. He also listed the date of increased VA benefits as November 29, 2002. On a September 21, 2010 Form EN-1032 appellant reported that his VA benefits increased on June 23, 2004 due to a review of combat-related injuries. He denied any increase in VA benefits due to his FECA injury.

In an investigative memorandum dated July 18, 2018, the employing establishment provided documents from the VA which established that on August 8, 1969 while on active duty in Vietnam, appellant suffered injury to his lower back as a result of a jeep accident. He received 10 percent service-connected VA benefits beginning April 1, 1989 due to degenerative joint disease L3-4 and herniated lumbar disc with L5 radiculopathy, right leg.³ On November 29, 2002 appellant filed a claim for an increased VA rating due to these conditions. On May 9, 2003 the VA found worsening of his back condition and increased his service-connected benefits for degenerative joint disease L3-4 and herniated lumbar disc with L5 radiculopathy, right leg, from 10 percent to 60 percent effective November 29, 2002. It completed a questionnaire on September 3, 2019 and indicated by checking a line item marked “No” indicating that any increase in appellant’s monthly benefits was not the result of an on-the-job injury.

In an October 12, 2018 letter, OWCP requested that appellant provide the VA rating decision granting increased benefits for degenerative joint disease L3-4, and herniated lumbar disc with L5 radiculopathy effective November 29, 2002. It afforded him 30 days to respond.

³ Appellant also received VA service-connected benefits due to: a 1982 left knee injury, 10 percent from April 1, 1989; diabetes mellitus with hypertension, 20 percent from November 29, 2001; and tinnitus, 10 percent from November 29, 2002.

In an October 19, 2018 letter, appellant asserted that his VA benefits were based solely on his combat-related disabilities and had nothing to do with his July 20, 1996 employment injuries. He alleged that his combat injuries became progressively more painful and, as a result, he sought reevaluation by the VA.

Appellant submitted a July 28, 2003 VA rating decision granting his entitlement to benefits effective November 29, 2002. It noted that he had service-connected disabilities of 70 percent including 60 percent for his service-connected back disability.

On December 19, 2018 and January 28 and March 19, 2019 OWCP requested that the VA complete and respond to questions regarding appellant's military service awards, the nature of his disability, his monthly VA disability benefit rate, and the dates of any increases in disability benefits. The VA responded on August 21, 2019 and requested a signed consent from appellant prior to releasing the requested documents and information to OWCP.

On September 23, 2019 OWCP requested that appellant provide a signed request and consent to release of information for VA. Appellant provided the completed form on October 3, 2019.

On October 3, 2019 OWCP requested that appellant provide copies of all VA award letters from 2002. It afforded him 30 days to respond. Appellant resubmitted the July 28, 2003 VA rating decision on October 29, 2019.

In a November 14, 2019 letter, OWCP notified appellant that FECA prohibits dual benefits for a given federal civilian employment-related injury and advised 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 FECA wage-loss benefits. It noted that he was receiving a disability rating from the VA for his lumbar degenerative joint disease and lumbar herniated disc with radiculopathy prior to sustaining his July 20, 1996 work-related injury and that his disability with the VA was increased, effective December 1, 2001, to reflect the additional impairment caused the work-related injury. OWCP advised that, during the same time period, appellant was receiving wage-loss compensation from OWCP and that, therefore, he received a dual benefit. It requested that he make an election of benefits within 30 days and advised appellant that, once he had made his election, it was irrevocable.

On November 25, 2019 appellant contended that the increase in the VA disability rating was not based completely on his accepted July 20, 1996 employment injury.

In a letter dated January 9, 2020, appellant requested that OWCP terminate his FECA wage-loss compensation, effective February 2, 2020.

On February 19, 2020 appellant elected to receive Office of Personnel Management (OPM) retirement benefits in lieu of FECA benefits.

On February 21, 2020 OWCP again advised appellant that FECA prohibits dual benefits for a given federal civilian employment-related injury and advised 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 FECA wage-loss

benefits. It noted that he was receiving a disability rating from the VA for his lumbar degenerative joint disease and lumbar herniated disc with radiculopathy prior to sustaining his July 20, 1996 work-related injury and that his disability with the VA was increased, effective December 1, 2001, to reflect the additional impairment caused by the work-related injury. OWCP advised that appellant had received prohibited dual VA and FECA benefits for the period December 1, 2001 through February 1, 2020. It requested that he make an election of benefits within 30 days and enclosed an election of benefits form. OWCP again advised appellant that, once he had made his election, it was irrevocable.

On March 11, 2020 appellant completed an overpayment recovery questionnaire (Form OWCP-20) wherein he advised that he had total monthly income of \$8,883.03 VA and total monthly expenses of \$6,775.84. He listed his assets totaling \$34,077.27.

In a letter dated April 20, 2020, appellant asserted that his VA award was based solely on his combat service-related disability and had nothing to do with his accepted employment injuries of July 20, 1996. He contended that his combat injuries became progressively more painful, which caused him to seek reevaluation. Appellant asserted that the injury of July 20, 1996 was an additional injury and not related to the injuries received while in military service. He noted that he voluntarily terminated his FECA compensation effective February 1, 2020 and requested immediate retirement federal service through OPM.

On May 14, 2020 OWCP made a preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$742,190.73, for which he was without fault, because he received dual VA and FECA benefits for the same condition for the period November 29, 2002 through February 1, 2020. It provided a FECA compensation payment history listing his wage-loss compensation paid from December 1, 2002 through February 1, 2020, resulting in an overpayment of \$742,190.73. OWCP requested that appellant complete a Form OWCP-20 and submit supporting financial documentation to determine a reasonable recovery schedule and advised that he could request waiver of recovery. It further requested that he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a final decision based on the written record or a precoupment hearing.

By decision dated June 26, 2020, OWCP finalized its overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$742,190.73, of which he was without fault, for the period November 29, 2002 through February 1, 2020. It denied waiver of recovery. OWCP requested payment for the full amount of \$742,190.73 overpayment.

On June 29, 2020 OWCP received an overpayment action request form from appellant dated May 25, 2020. Appellant requested that OWCP make a decision on the written evidence and the previously submitted Form OWCP-20. He disagreed that the overpayment occurred, disagreed with the amount of the overpayment, and requested waiver of recovery of the overpayment.

In a June 1, 2020 letter, appellant described his February 1969 service-connected injury as a crash which ejected him from his vehicle and also submitted documents substantiating this

incident. He asserted that the VA did not attribute his increased disability rating to his July 20, 1996 employment injuries. Appellant alleged that he had telephoned the VA and was informed that his increased rating was based solely on the circumstances of his combat injury in February 1969. He provided a May 9, 2003 VA rating decision which noted that evaluation of degenerative joint disease, L3-4, herniated lumbar disc with L5 radiculopathy right leg, which had been 10 percent disabling, was increased to 60 percent disabling effective November 29, 2002 based on a March 17, 2003 VA medical examination. This examination found frequent episodes of low back pain, severely limited lifting, pushing, and pulling abilities with limited range of motion as well as muscle weakness in the right lower extremity. X-rays demonstrated herniated lumbar disc with L5 radiculopathy on the right.

On September 16, 2020 OWCP superseded the June 28, 2020 overpayment determination, and found that appellant had received an overpayment in the amount of \$742,190.73, for which he was without fault, for the period November 29, 2002 through February 1, 2020. It found that the overpayment occurred as he had not completed an election of benefits when the VA increased his benefits from 10 percent disability rating to 60 percent disability rating effective on November 29, 2002. OWCP noted that the election of benefits was necessary as the 50 percent increase in VA benefits was due to the same condition which formed the basis of benefits under FECA. It noted that appellant elected to receive OPM benefits effective February 2, 2020 and that on April 20, 2020 he elected to retain his VA benefits. OWCP denied waiver of recovery of the overpayment as he failed to provide financial documentation supporting the claimed expenses on the Form OWCP-20. It required recovery of the \$742,190.73 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.⁴ Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁵ 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 the VA, unless such benefits are payable for the same injury or the same death being compensated for under FECA.⁶

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 VA 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

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8b (December 1997), *J.C.*, Docket No. 16-1217 (issued October 11, 2017).

an injury sustained while in federal civilian employment.⁷ 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 VA 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.⁸ An election between these benefits is required under both scenarios to avoid an overpayment of compensation.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$742,190.73 for the period November 29, 2002 through February 1, 2020, for which he was without fault, because he received VA and FECA benefits for the same condition.

On July 20, 1996 appellant sustained lumbosacral sprain, as well as herniated discs at L3-4 and L4-5 due to his accepted employment injury. He stopped work and received FECA wage-loss compensation, effective November 29, 2002. Appellant also had been receiving VA 10 percent service-connected disability benefits from the VA as of April 1, 1989 for his service-connected back conditions of degenerative joint disease L3-4 and herniated lumbar disc with L5 radiculopathy, right leg. The VA increased appellant's disability benefits for his accepted service-connected back conditions to 60 percent effective November 29, 2002.

The Board notes that, on September 3, 2019, the VA clarified that any increase in service-connected benefits was not the result of an on-the-job injury. The Board further notes that the accepted OWCP injuries of lumbosacral sprain, as well as herniated discs at L3-4 and L4-5 are the not the same conditions as the service-connected VA injuries of degenerative joint disease L3-4 and herniated lumbar disc with L5 radiculopathy, right leg. OWCP, therefore, improperly determined that the VA increased appellant's award because of the civilian employment injury for which FECA benefits are claimed.¹⁰ Therefore, the Board finds that OWCP failed to meet its burden of proof to establish that an overpayment occurred.

⁷ *S.K.*, Docket No. 17-1573 (issued December 28, 2018); *J.C., id.*; *P.G.*, Docket No. 14-0227 (issued January 9, 2015); *Kelvin L. Davis*, 56 ECAB 404 (2005).

⁸ *Supra* note 6 at Chapter 2.1000.8a(5).

⁹ *Id.*

¹⁰ *Id.*

CONCLUSION

The Board finds that OWCP improperly determined appellant received an overpayment of compensation in the amount of \$742,190.73 for the period November 29, 2002 through February 1, 2020.

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 6, 2024
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board