

STATEMENT OF
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BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

July 26, 2011

Chairman Daniel Akaka, Ranking Member Ron Johnson, and Members of the Subcommittee:

My name is Gary Steinberg, and I am the Acting Director of the Department of Labor's (DOL) Office of Workers' Compensation Programs (OWCP). OWCP administers a number of workers' compensation programs, including the Federal Employees' Compensation Act (FECA), which covers 2.7 million Federal and Postal workers and is one of the largest self-insured workers' compensation systems in the world.

I appreciate the opportunity to discuss legislative reforms to FECA that would enhance our ability to assist FECA beneficiaries to return to work, provide a more equitable array of FECA benefits, and generally modernize the program and update the statute. Almost 95 years ago, on September 7, 1916, Congress enacted FECA to provide comprehensive Federal workers' compensation coverage to all Federal employees and their survivors for disability or death due to an employment injury or illness. FECA's fundamental purpose is to provide compensation for wage loss and medical care, facilitate return to work for employees who have recovered from their injuries, and pay benefits to survivors. The faces of FECA include the Postal worker whose mail truck is hit while delivering mail,

the Federal Bureau of Investigation (FBI) agent injured or killed in the line of duty, the Department of Veterans' Affairs nurse who hurts her back while lifting patients, and the Federal employee injured in the recovery efforts in Japan. All of these employees will receive benefits provided by this Act.

Since FECA has not been significantly amended in over 35 years, there are areas where the statute could be improved. Thus we have developed a number of proposals to reform and maintain FECA as the model workers' compensation program for the twenty-first century. In the 2012 Budget we estimated 10-year savings of around \$400 million, but we think the potential savings are likely higher. After briefly discussing the current status of the FECA program, I am pleased to outline possible changes to the statute for consideration.

Many of the proposals are based on the results of studies by the program, the Government Accountability Office (GAO), the Inspectors General, as well as discussions with stakeholder organizations over the past 20 years. Recently, we have shared these proposed changes with staff of this and other Congressional committees and various outside parties such as representatives of Federal employee unions and members of the disability community.

FECA Today

Benefits under the FECA are payable for both traumatic injuries (injuries sustained during the course of a single work shift) and occupational disease due to sustained injurious exposure in the workplace. If OWCP's review of the evidence determines that a covered employee has sustained a work-related medical condition, the FECA program provides a wide variety of benefits including payment for all reasonable and necessary medical treatment; compensation to the injured worker to replace partial or total lost wages (paid at two-thirds of the employees' salary or at three-fourths if there is at least one dependent); a monetary award in cases of permanent impairment of limbs or other

parts of the body; medical and vocational rehabilitation assistance in returning to work as necessary; and benefits to survivors in the event of a work related death.

FECA benefits are based upon an employee's inability to earn pre-injury wages with no time limit on wage loss benefit duration as long as the work-related condition or disability continues; the amount of compensation is based upon the employee's salary up to a maximum of GS-15 Step 10. More than 70% of FECA claimants are paid at the augmented (three-fourths) level. As workers' compensation benefits, they are tax free; long-term benefits are escalated for inflation after the first year of receipt.

FECA is a non adversarial system administered by OWCP. While employing agencies play a significant role in providing information to OWCP and assisting their employees in returning to work, the adjudication of FECA claims is exclusively within the discretion given to the Secretary of Labor by statute and is statutorily exempt from court review. Claimants are provided avenues of review within OWCP through reconsideration and hearing as well as an appellate forum, the Employees' Compensation Appeals Board (ECAB), a quasi-judicial appellate board within the DOL, completely independent of OWCP.

FECA benefits are paid out of the Employees' Compensation Fund and most are charged back to the employee's agency. During the 2010 chargeback year, which ended on June 30, 2010, the Fund paid more than \$1.88 billion in wage-loss compensation, impairment, and death benefits and another \$898.1 million to cover medical and rehabilitation services and supplies. These totals include outlays for non-chargeable costs for war risk hazards that total \$86.2 million, primarily for overseas Federal contractor coverage under the War Hazards Compensation Act (WHCA). Benefits paid have remained relatively stable at these levels for the past 10 years, with the exception of war risk hazard payments. In addition, the administrative costs to manage the program have consistently averaged a very modest 5% of total outlays.

Although the program is almost 95 years old, OWCP's administration of FECA is by no means antiquated. All new claims are electronically imaged into a sophisticated paperless claims management system. Video and teleconferencing options are available to claimants to expedite the OWCP appeals process. Electronic Data Interchange capabilities are utilized by many of the program's agency partners. A secure, web-based electronic document-filing portal is currently under development; this new access will be deployed later this year and for the first time will be available to all system stakeholders, including injured workers and their physicians. This new tool will further reduce reliance on paper documents and shrink data input and imaging costs while speeding claim processing and reducing administrative costs.

Maintaining Program Integrity

OWCP actively manages the FECA program so that benefits are properly paid. After a case is accepted as covered, OWCP monitors medical treatment for consistency with the accepted condition -- if more than a very brief disability is involved, OWCP often assigns a nurse as part of our early nurse intervention program to assist with the worker's recovery and facilitate the return-to-work effort. If disability is long-term, but the claimant can work in some capacity, a vocational rehabilitation counselor may be assigned to the case.

Once a claim is accepted for ongoing, periodic payments, injured workers are required to submit medical evidence to substantiate continued disability (either annually or on a two or three year schedule for those less likely to regain the ability to work). Injured workers must cooperate with OWCP-directed medical examinations and vocational rehabilitation, accept suitable employment if offered and annually report earnings and employment (including volunteer work) as well as the status of their dependents and any other government benefits. OWCP claims staff carefully review these submissions and can require claimants to be examined by outside medical physicians to resolve questions on the extent of disability or appropriateness of medical treatment such as surgery. OWCP also conducts monthly computer matches with the Social Security Administration (SSA)

to identify FECA claimants who have died so that payments can be terminated to avoid overpayments.

In addition, OWCP has conducted program evaluation studies to identify areas for process and policy improvements. I noted earlier some of our case processing improvements. Based on the resulting recommendations and our claims experience, we have also improved how the program approaches disability management and return to work. The program's early nurse intervention and quality case management initiatives are particularly noteworthy as the program evolves to reflect a renewed focus on return to work. We have partnered with the Occupational Safety and Health Administration (OSHA) and our federal agencies to improve timely filing of claims and reduce lost production days. As result of these efforts, the average number of days lost as a result of the most serious injuries each year has declined from 195 days in 1996 to 156 in 2010. By speeding the average time to return to work in these cases, OWCP saves the government millions of dollars just in the first year of the injury; this also helps to avoid long term disability that can last for years thereafter.

A History of Performance

Under most circumstances FECA claims are submitted by employees to their employing agency, which completes the agency information required on the form and forwards the claim to OWCP. Over the past 5 years, an average of 133,000 new injury and illness claims were filed annually and processed by OWCP. The acceptance rate for new injury claims was 85%. Eighty-four percent (84%) were submitted within program timeliness standards of 10 working days and approximately 95% were processed by OWCP within program timeliness standards which vary depending on the complexity of the injury. Fewer than 15,000 of the accepted claims per year involve a significant period of disability. Eighty-five percent (85%) of claimants return to work within the first year of injury and a total of 89% return to work by the end of the second year. Due in part to OWCP's efforts to return injured employees to work, less than 2% of all new injury cases remain on the long-term compensation rolls two years after the date of injury. Currently,

approximately 45,000 injured workers have long term ongoing disability benefits for partial or total wage loss, which they receive every 4 weeks. Some 15,000 are 66 years of age or older. (It should be noted however, that of this 15,000, over 7,000 have been determined to have no return-to-work potential, largely because of the substantial nature of their disability.)

FECA Reform

As I have discussed, OWCP has made significant administrative and technical changes to improve the administration of FECA. These changes were legally permissible within the existing statutory framework and had a demonstrable effect in advancing our progress. The current FECA reform proposal embodies certain reforms that can only be gained through statutory amendment that transforms FECA into a model twenty-first century workers' compensation program, increasing equity and efficiency while reducing costs. These amendments fall within three categories:

- Return to Work and Rehabilitation
- Updating Benefit Structures
- Modernizing and Improving FECA

Return to Work and Rehabilitation

The proposal that we have crafted for consideration would provide OWCP with enhanced opportunities to facilitate rehabilitation and return-to-work while simultaneously addressing several disincentives that may impact timely return to work by applying a new set of benefit rates prospectively to new injuries and new claims for disability occurring after enactment of the FECA amendments.

We propose additional statutory tools that would enhance OWCP's ability to return injured workers to productive employment. While FECA currently has the authority to provide vocational rehabilitation services and to direct permanently injured employees to

participate in vocational rehabilitation, we suggest removing the permanency limitation in the statute to make clear that such services are available to all injured workers and that participation in such an effort is required. It is generally accepted and consistent with our experience that the earlier the claimant is involved in a vocational rehabilitation and a Return-to-Work program, the greater likelihood of a successful and sustained return to work post injury.

The proposal would amend FECA to explicitly allow for vocational rehabilitation, where appropriate, as early as six months after injury. It provides OWCP the authority to require injured claimants unable to return to work within six months of their injury to participate with OWCP in creating a Return-to-Work Plan where appropriate. The Return-to-Work Plan would generally be implemented within a two-year period. This provision would send a strong signal to all Federal workers, whether injured or not, that the Federal government as a model employer is committed to doing everything it can to return employees to work as early as possible.

Our proposal would also amend FECA to provide permanent authority for what we call Assisted Reemployment. Assisted Reemployment is a subsidy designed to encourage employers to choose qualified rehabilitated workers whom they might otherwise not hire. As disabled Federal workers with skills transferable to jobs within the general labor market may prove difficult to place due to economic factors, Assisted Reemployment is designed to increase the number of disabled employees who successfully return to the labor force by providing wage reimbursement to potential employers. Recent DOL appropriations bills gave OWCP the authority to provide up to three years of salary reimbursement to private employers who provide suitable employment for injured federal workers. Our data from our currently limited private sector program show that when we enter into an Assisted Reemployment agreement with a private employer, the employee is permanently hired by that employer at or beyond the 3 year period over 55% of the time. Of the employees not working for the same employer, approximately half are working with other employers. Because most Federal employees desire continued employment with the Federal government, our proposal to expand this program to the Federal sector

would significantly increase its appeal and effectiveness. We are working closely with OPM and our partner agencies to actively seek re-employment opportunities for Federal workers who become disabled as a result of work related injuries or illnesses. These provisions would assist with that effort and comport with and support the President's Executive Order 13548 to increase hiring of individuals with disability in the Federal government. Under this proposal, OWCP would reimburse in part the salaries paid by Federal agencies that hire workers with work-related injuries.

Return to work following an injury is often a difficult, painful process, requiring physical, mental and emotional adjustments and accommodations. If a workers' compensation system contains disincentives to return to work, that difficult transition back to work will occur more slowly, or in some cases, not at all. Where the medical evidence of ability to work is ambiguous and returning to work would require an employee to overcome actual physical limitations, these disincentives will exact a high price. That high price means a more costly program, lost productivity to the employing agency, and, for the workers themselves, disrupted lives and diminished self-esteem.

As currently structured, FECA creates direct disincentives to return-to-work in two significant ways. The first and most far-reaching is that while the basic rate of FECA compensation, 66 2/3%, is comparable to most state systems, many Federal employees receive an augmented benefit, 75%, if they have at least one dependent. Computed at 75% tax free, FECA benefits often exceed the employee's pre-injury take home pay. Few state systems provide any augmentation for dependents, and none approaches the Federal level.

Since the 75% compensation rate can result in benefits greater than the injured worker's usual take home pay, we also suggest amending FECA to provide that all claimants receive compensation at one uniform level of 70%. This compensation adjustment would remove disincentive to return to work, respond to equity concerns, and significantly simplify administration by greatly reducing documentation requirements for claimants and eliminating potential overpayments that can occur due to changes in dependency

status. At this level compensation would remain quite adequate. A similar rate reduction is also proposed in death claims.

A second significant disincentive to return to work is created by the disparity that exists between the level of retirement benefits, provided by the OPM, received by most Federal employees and the level of long-term FECA benefits for retirement age FECA recipients. Under current law, the thousands of long-term FECA beneficiaries who are over normal retirement age have a choice between Federal retirement system benefits and FECA benefits, but they overwhelmingly elect the latter because FECA benefits are typically far more generous. OPM informs us that the average Federal employee retiring optionally on an immediate annuity under the Civil Service Retirement System will receive about 60% of their “high-three” average salary, most of which is taxable, compared to a tax free 75% or 66.66% FECA benefit. The newer Federal Employees’ Retirement System is designed to provide a comparable level of retirement replacement income from the three parts of its structure. Because returning to work could mean giving up a FECA benefit in favor of a lower OPM pension amount at eventual retirement, injured workers may have an incentive to consciously or unconsciously resist rehabilitation and instead, in certain cases, may cling to the self-perception of being “permanently disabled.” In any event, the considerable difference between FECA benefits and OPM retirement benefits results in certain FECA claimants receiving far more compensation in their post retirement years than if they had completed their Federal careers and received normal retirement benefits like their colleagues. This disparity also suggests that a statutory remedy is needed.

This proposal provides claimants with a “Conversion Entitlement Benefit” upon reaching regular Social Security retirement age (and after receiving full benefits for at least one year) that would reduce their wage-loss benefits to 50% of their gross salary at date of injury (with cost of living adjustments), but would still be tax free. This benefit more closely parallels a regular retirement benefit, as opposed to a full wage-loss benefit, so that FECA recipients are not overly advantaged in their retirement years compared to their non-injured counterparts on OPM retirement. An injured worker receiving this

retirement level conversion benefit would no longer be subject to several of the sanction provisions outlined in the FECA, such as forfeiture for failure to report earnings or the requirement to seek/accept suitable employment or participate in vocational rehabilitation. Even at this reduced rate, however, an injured worker would still be required to substantiate continuing injury-related disability or face suspension of compensation benefits.

Updating Benefit Structures

We also propose a number of changes to the current FECA benefit structure. One relates to the schedule award provision, which is designed to address the impact of impairment on an individual's life function, such as the loss of vision, hearing, or a limb. Impairment is permanent, assessed when an individual reaches maximum medical improvement, and is based upon medical evidence that demonstrates a percentage of loss of the affected member. Each member, extremity or function is assigned a specific number of weeks of compensation and the employee's salary is used to compute his or her entitlement to a schedule award. This payment structure results in considerable disparities in compensation: for example, a manager is paid far more than a letter carrier for loss of a leg even though the impact on the letter carrier may in reality be far more severe. In that instance, a GS-15 would receive twice what a GS-7 receives for the same loss of ability to get around, engage in recreational activities, etc., for this permanent impairment. Paying all schedule awards at the rate of 70% of \$53,630 (the equivalent of the annual base salary of a GS 11 step 3) adjusted annually for inflation would certainly be more equitable.

Similarly, allowing injured workers to receive FECA schedule award benefits in a lump sum concurrently with FECA wage loss benefits for total or partial disability would provide a more equitable benefits structure for claimants. The current process is complicated and convoluted, often leaving injured workers frustrated and confused. It also can generate substantial unnecessary administrative burdens, as schedule award payments cannot be paid concurrently with FECA wage-loss benefits. To avoid the

concurrent receipt prohibition some eligible claimants may elect OPM disability or retirement benefits, which they are allowed to receive for the duration of a schedule award. When the schedule award expires, they may elect to return to the more advantageous FECA wage-loss benefits. While they are collecting OPM benefits, OWCP and employing agency efforts to assist the employee in returning to work are stymied. In addition to switching to OPM benefits during the period of a schedule award, claimants can also switch back and forth between benefit programs over the life of a claim. As a result of these overly complex provisions and benefit streams, claimants sometimes do not return to work as early or as often as they could. By allowing concurrent receipt of these benefits, the claimant is timely compensated for the loss to the scheduled member and switching back and forth between OPM and OWCP benefits for this reason is eliminated. This allows a return-to-work or vocational rehabilitation effort to continue uninterrupted, thereby improving the chances of a successful return to employment.

Finally, this proposal increases benefit levels for funeral expenses and facial disfigurement, both of which have not been significantly updated since 1949, to bring FECA in line with increases in other workers' compensation statutes.

Modernizing and Improving FECA

Because FECA has not been amended in over 35 years, updates are needed to modernize and improve several provisions of the statute. One such change was made several years ago but only applied to workers employed by the U. S. Postal Service (USPS). In order to discourage the filing of claims for minor injuries that resolve very quickly, state workers' compensation programs generally impose a waiting period before an injured worker is entitled to wage-loss compensation. Because of the way in which the 1974 amendments to FECA adding the "Continuation of Pay" provisions were drafted, the waiting period under FECA for traumatic injuries was effectively moved after the worker has received 45 days of "Continuation of Pay," thus defeating the purpose of a waiting period. The Postal Enhancement and Accountability Act of 2006 amended the waiting period for Postal employees by placing the three-day waiting period immediately after an

employment injury; we suggest placing the three-day waiting period immediately after an employment injury for *all* covered employees.

Another longstanding concern addressed by the proposal relates to the application of FECA subrogation provisions to claims. Workers' compensation systems generally provide that when a work-related injury is caused by a negligent third party the worker who seeks damages from that third party must make an appropriate refund to the workers' compensation system. As a result of the way in which the 1974 "Continuation of Pay" provision was drafted, OWCP cannot include amounts paid for Continuation of Pay in calculating the total refund to OWCP when a recovery is received by a FECA beneficiary from a third party.

OWCP also seeks the authority to match Social Security wage data with FECA files. While the SSA collects employment and wage information for workers, OWCP presently does not have authority to match that data to identify individuals who may be working while drawing FECA benefits. OWCP currently is required to ask each individual recipient to sign a voluntary release to obtain such wage information. Direct authority would allow automated screening to ensure that claimants are not receiving salary, pay, or remuneration prohibited by the statute or receiving an inappropriately high level of benefits.

This proposal would also increase the incentive for employing agencies to reduce their injury and lost time rates. Currently the USPS and other agencies not funded by appropriations must pay their "Fair Share" of OWCP administrative expenses, but agencies funded by appropriations are not required to do so. Amending FECA to allow for administrative expenses to be paid out of the Employees' Compensation Fund and included in the agency chargeback bill, would increase Federal agencies' incentive to reduce injuries and more actively manage return to work when injuries do occur.

To improve access to medical care, we suggest a provision that would increase the authority and use of Physicians' Assistants or Nurse Practitioners. We suggest amending

FECA to allow Physicians' Assistants and Nurse Practitioners to certify disability during the Continuation of Pay period so that case adjudication is not delayed and treatment can be provided more rapidly. The provision allowing Physicians' Assistants and Nurse Practitioners to certify disability during the Continuation of Pay period would also reduce the burden of disability certifications in war zone areas because access to a physician may be even more limited in these circumstances.

To further address injuries sustained in a designated zone of armed conflict, FECA should be amended to provide Continuation of Pay for wage loss up to 135 days for such injuries. This increase from the standard 45 days would allow additional flexibility for claims handling in these challenging areas and is an outgrowth of a cooperative effort with OPM, the Department of State and the Department of Defense to address the needs of deployed civilian employees.

Conclusion

This proposal provides a fair and reasonable resolution to the disincentives and inadequacies that have arisen within the current FECA statute. Since any FECA reform should be prospective only, it would apply to new injuries and new claims of disability after enactment. Injured workers currently in receipt of disability benefits would see no changes in their benefit level. *This will allow all federal employees and federal agencies to embrace and adopt a more pro-active and progressive attitude about return to work and disability employment, and avoid any unfair interruption of benefits.* Even with this prospective approach, the ten-year cost savings are estimated to be around \$400 million, or potentially even higher.

We believe that our proposals, if adopted, would allow all Federal employees and Federal agencies to embrace and adopt a more pro-active and progressive attitude about return to work and disability employment, and avoid any unfair interruption of existing benefit streams.

The FECA program is at a critical juncture. We have done our best to keep the program current and responsive to the changing world we live in through administrative, technological and procedural innovations and investments. Without these statutory reforms, OWCP's best efforts may yield some further gains. However, we cannot overcome the fundamental disincentives in the current law and achieve the breakthrough improvements that we know are possible within the FECA program which will allow FECA to maintain its status as a model of workers' compensation programs.

The federal workforce comprises dedicated, hard working women and men that are committed to serving the public. OWCP is fully committed to ensuring that all injured workers receive the medical care and compensation they deserve, as well as the assistance needed to return to work when able to do so. FECA reform will enable OWCP to achieve those goals more effectively.

Mr. Chairman, I would be pleased to answer any questions that you or the other members of the Committee may have.