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**RECENT GAO REPORTS ON
THE FEDERAL EMPLOYEES'
COMPENSATION ACT**

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Recent GAO Reports on the Federal Employees' Compensation Act

The federal government's workers' compensation program is authorized under the Federal Employees' Compensation Act (FECA). This program, which is administered by the Department of Labor, provides employees suffering from work-related injuries and occupational diseases with various types of benefits, depending on the nature and extent of the injury and their ability to return to work. In recent years, GAO has issued reports on three subjects that are being addressed in today's FECA oversight hearings: (1) recovery of "continuation of pay" (COP) benefits in third-party cases, (2) selected comparisons of FECA provisions with provisions of other workers' compensation laws, and (3) issues associated with changing benefits for older FECA beneficiaries.

In a June 1995 report, GAO recommended that FECA be amended to allow the government to obtain refunds of COP benefits when injured employees recover damages from liable third parties. Injured employees are to continue to receive their regular pay for up to 45 days when they are absent from work for traumatic injuries. Because of interpretations of FECA by the Employees' Compensation Appeals Board and a federal court, the government no longer has a legal basis to obtain refunds of injured employees' COP benefits in third-party injury cases. In effect, these employees receive a double recovery of income for their first 45 days of absence from work due to injury.

GAO's April 1996 report compared FECA provisions with those of other workers' compensation laws and identified three principal ways in which benefits under FECA could be greater than those under other workers' compensation laws. First, although the formula for calculating benefits under FECA was similar to most other laws, FECA's authorized maximum weekly benefit amount was greater. Second, unlike most states, FECA provides claimants with a spouse or a dependent with an additional benefit of 8-1/3 percent of salary. Finally, under other workers' compensation laws, employees must be out of work for a 3- to 7-day waiting period before they can receive wage-loss benefits. Under FECA, the 3-day waiting period is preceded by a period of 45 days in which employees with traumatic injuries continue to receive their regular pay.

GAO's August 1996 report provided information on (1) selected characteristics of individuals on FECA's long-term rolls, (2) views of proponents and opponents of changing FECA benefits for older beneficiaries, and (3) questions and issues that Congress might consider if crafting benefit changes. Of the \$1.28 billion in compensation benefits paid

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in 1995, about \$611 million was paid to beneficiaries on the long-term rolls who were age 55 and older.

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Dear Mr. Chairman and Members of the Committee:

I am pleased to be here today at this Federal Employees' Compensation Act (FECA) oversight hearing to discuss three reports we have completed in the last few years. These reports address (1) the recovery of continuation of pay (COP) benefits in cases where third-parties were liable for injuries, (2) selected comparisons of FECA provisions with provisions of other federal and state workers' compensation laws, and (3) issues associated with changing benefits for older FECA beneficiaries.

In the recovery of COP report, we recommended that Congress redefine COP to preclude injured employees from, in effect, receiving double recoveries by obtaining both COP benefits from the government and damages from third parties who were responsible for their work-related injuries. In the comparisons' report, we identified and compared the more significant FECA benefit provisions with the provisions of other federal and state workers' compensation laws. In our report on issues associated with changing FECA benefits for older beneficiaries, we identified the views of proponents and opponents of change and issues that we believe would merit consideration by anyone crafting legislation to change workers' compensation benefits for older beneficiaries.

Background

FECA was enacted in 1916 to provide federal employees with workers' compensation coverage for injuries and diseases sustained while performing their duties. One of the principal reasons for establishing workers' compensation programs was to provide adequate benefits to injured workers while at the same time limiting employers' liabilities strictly to workers' compensation payments. Payments were to be prompt and predetermined to relieve employees and employers of uncertainty over the outcome of court cases and to eliminate wasteful litigation.

Benefits authorized by FECA include payments for (1) loss of wages for an employee who cannot work because of a work-related disability, (2) occupational diseases, (3) schedule awards for loss of, or loss of use of, a body part or function, (4) vocational rehabilitation, (5) death benefits for survivors, (6) burial allowances, and (7) medical care for injured workers.

According to Labor's Office of Workers' Compensation Programs (OWCP), in fiscal year 1996, OWCP used the equivalent of 902 full-time staff in administering FECA. In addition, the agencies for whom injured employees

worked also used their staff to assist OWCP in managing claims. In fiscal year 1996, about 175,000 workers' compensation cases were created and 20,400 wage-loss claims were filed. For many employees whose injuries were not serious, the only FECA benefits that were paid were those that covered medical expenses.

Recovery of COP Benefits in Third-Party Cases

In June 1995, we reported to Senators Joseph I. Lieberman and Thad Cochran on additional refunds that the government could obtain in third-party cases if FECA were amended to change the definition of COP.¹ Under FECA, federal agencies are authorized to continue paying their employees regular salaries for up to 45 days when they are absent from work due to work-related traumatic injuries. Benefits paid for these 45 days are called COP benefits.

In the case of some injuries, federal employees can receive damages from third parties who are liable for the injury that caused them to be absent from work. Common injuries for which third parties might be liable include dog bites and automobile accidents.

Because of interpretations of FECA by the Employees' Compensation Appeals Board (ECAB) and a federal court, the federal government no longer has a legal basis to obtain refunds of COP benefits paid to injured employees when they recover damages from third parties who are liable for their on-the-job injuries. As a result, employees can receive regular salary payments (i.e., COP) from their employing agencies and reimbursement from third parties—in effect, a double recovery of income for the first 45 days that they are absent from work due to injury. In contrast, employees may not receive double recoveries for medical expenses or for wage-loss compensation benefits after the 45-day COP period has expired because FECA provides that the government can recoup funds for these payments from employees receiving third-party recoveries.

In a June 1985 decision, ECAB held that OWCP could not recover COP benefits when employees receive damages from responsible third parties, even though employees could in effect obtain double recoveries for work-related injuries. ECAB stated that FECA specifically provided that COP was not compensation, and FECA only required refunds of compensation benefits in third-party cases.² In August 1985, the U.S. Court of Appeals for

¹Federal Employees' Compensation Act: Redefining Continuation of Pay Could Result in Additional Refunds to the Government (GAO/GGD-95-135, June 8, 1995).

²Paul L. Dion, 36 ECAB 656 (1985).

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the Ninth Circuit held that FECA established the government's exclusive remedy for reimbursement from any damages that federal employees might recover from third parties and that no common law remedy, such as equitable subrogation,³ was available.⁴

After ECAB's and the Court of Appeals' decisions on COP benefits, federal employees who had previously refunded COP benefits to the government filed three class action suits to compel the government to repay these benefits. These lawsuits were either litigated or settled in favor of the employees. According to a Labor official, the lawsuits provided for the government to return over \$5 million to claimants who had previously refunded COP benefits to the government.

To preclude employees from, in effect, receiving double recoveries and to help reduce the costs to the federal government of employees' work-related injuries caused by third parties, we recommended that Congress amend FECA to expressly provide for refunds of amounts paid as COP when employees receive third-party recoveries. Subsection (e) of 5 U.S.C. 8118 of FECA could be amended to provide that COP shall not be considered compensation "except for the purpose of refunds to the United States from third-person recoveries pursuant to section 8132 of this title." Additionally, to ensure that refunds of COP benefits are returned to the employing agency that paid them, section 8132 could be amended to provide that amounts refunded shall be credited to the Employees' Compensation Fund "except for continuation of pay under section 8118 of this title, which shall be credited to the employing agency that paid it."

We estimated the government could recover from \$1 to \$2 million per year if FECA was amended to change the definition of COP to allow the government to obtain refunds of COP benefits in third-party cases. We also estimated that the Postal Service would realize about 70 percent of these recoveries.

³Equitable subrogation is a legal theory, developed in common law courts, which allows one person to acquire the rights of another person to bring a claim against a third party.

⁴*Janakes v. U.S. Postal Service*, 768 F.2d 1091 (9th Cir. 1985).

Selected Comparisons of Federal and State Workers' Compensation Laws

In April 1996, we issued another report on FECA to Senators Cochran and Lieberman.⁵ In this report, we compared monetary and other significant benefits authorized by FECA with those authorized under the Longshore and Harbor Workers' Compensation Act (the Longshore Act) and state workers' compensation laws.

In general, FECA provided the same types of benefits to injured federal workers as those provided to injured workers covered under other federal and state workers' compensation laws. The principal workers' compensation benefits paid under all of these laws were for wage loss and medical care. We identified three principal ways in which FECA benefits differed from those of other workers' compensation laws. In each of these cases, benefits available under FECA could be greater than those under the other workers' compensation laws.

First, although the formula for calculating benefits under FECA was similar to the formulas of most other laws (66-2/3 percent of salary), FECA's authorized maximum weekly benefit amount was greater. Under FECA, in 1995 the maximum weekly compensation benefit could not exceed \$1,274 (75 percent of the maximum base pay of a GS-15, step 10 employee). The maximum weekly benefit under the Longshore Act was \$761. State maximums ranged from \$253 to \$817. According to OWCP, as of September 30, 1995, less than 1 percent of the beneficiaries on the long-term compensation rolls⁶ actually received compensation benefits based on the authorized maximum benefit amount.

Second, FECA provides claimants who have a spouse and/or dependent with an additional benefit of 8-1/3 percent of salary. While seven states authorized additional dependent benefits, increased benefits are generally for a fixed amount ranging from \$5 to \$10 per week for a spouse and/or each child. Increased benefits for dependents are generally provided only when authorized maximum benefit levels are not exceeded. The Longshore Act and workers' compensation laws of the other 43 states and the District of Columbia do not provide increased compensation benefits for injured workers with dependents.

Finally, FECA provides eligible federal workers who suffer traumatic injuries with COP benefits for a period not to exceed 45 days. These are the

⁵Workers' Compensation: Selected Comparisons of Federal and State Laws (GAO/GGD-96-76, Apr. 3, 1996).

⁶Injured workers on the long-term (or periodic) rolls are those with permanent disabilities or with injuries that have lasted or are expected to last for prolonged periods (over 1 year).

COP benefits discussed earlier. After the 45th day, there is a 3-day waiting period before wage-loss benefits begin. Under the Longshore Act and all state workers' compensation laws, injured workers do not receive COP benefits but can receive wage-loss benefits after they are absent from work for a 3- to 7-day waiting period. If these workers continue to be absent from work for specified periods of time, ranging from 5 to 42 days, they are generally eligible for benefits retroactive to the date of injury. In cases where employees are not eligible for retroactive wage-loss benefits, some employers may provide their employees with salary continuation benefits or may allow them to receive paid sick leave or other types of leave for days absent from work.

Other differences and similarities exist between FECA and states' workers' compensation laws. However, in cases where there are differences, they do not appear to be as significant as those mentioned above. Examples of these differences and similarities are described as follows:

- Because FECA's maximum authorized benefit amount exceeded those of the other workers' compensation programs, income replacement rates for higher-paid federal employees could exceed 100 percent. For example, a married federal employee living in Virginia earning \$60,000 annually who is injured on the job would be eligible to receive nontaxable FECA benefits of \$45,000. For income replacement rate comparison purposes, this employee's take-home pay⁷ would be \$43,407 (\$60,000 less deductions for (1) FERS benefits (\$5,070), (2) state income taxes (\$2,813), and (3) federal income taxes (\$8,710). The income replacement rate (FECA benefits divided by take-home pay) in this case would be nearly 104 percent.
- For some injured federal workers, schedule awards for the permanent loss, or loss of use, of specific body parts could be higher than the awards under other workers' compensation programs because of the higher maximum weekly benefit amount authorized by FECA.
- In 1995, the maximum burial allowance authorized under FECA was \$800. This benefit was lower than all but one state's maximum burial allowance.
- Under FECA and in 25 states, injured employees may choose their physicians. In other states, employees or their employers may select physicians from state workers' compensation agency approved lists of physicians.

⁷Actual take-home pay could be different.

Issues Associated With Changing Compensation Benefits for Older Beneficiaries

In August 1996, we reported to the Chairmen of the House and Senate Appropriations Committees,⁸ on possible changes to FECA benefits for beneficiaries who are at or beyond retirement age. Our briefing report on this issue provided (1) a profile of beneficiaries on the long-term FECA rolls, (2) views of proponents and opponents of changing FECA benefits for older beneficiaries, and (3) questions and issues that Congress might consider if crafting benefit changes.

Older FECA beneficiaries make up a high percentage of cases on the long-term rolls and account for a substantial portion of the FECA benefits paid for long-term compensation. Sixty percent of the approximately 44,000 long-term beneficiaries receiving compensation benefits in June 1995 were 55 years of age or older; 37 percent were age 65 or older. Of the \$1.28 billion in compensation benefits paid in 1995, \$947 million went to long-term beneficiaries—those who would most likely be affected by a change in benefits for older beneficiaries. About \$611 million (64 percent) of the compensation benefits paid to these beneficiaries went to those age 55 and over. The specific number of older beneficiaries that could be affected if changes in workers' compensation benefits were made is not known because actual retirement eligibility information is not readily available from FECA records.

For our August 1996 report, we identified widely divergent views that were held by proponents and opponents of changing benefits for older FECA beneficiaries. Among the views held by proponents of change were that "lifetime" wage/salary replacement under FECA is too generous because it does not reflect the normal progression to lower income that typically occurs with retirement. Proponents also saw the government's FECA cost as being too high, thus putting a strain on agencies' program budgets.

Opponents of change, in contrast, believed that benefits that replace wages lost because of a work-related injury are justified because these benefits have traditionally been considered substitutes for tort action under the workers' compensation approach for compensating for work-related injuries. Under the workers' compensation approach, employers are generally liable for complete medical coverage and the replacement of a substantial portion of injured employees' wages, regardless of fault. Employees, in exchange for guaranteed benefits, give up their rights to sue for recovery of damages based on employers'

⁸Federal Employees' Compensation Act: Issues Associated With Changing Benefits for Older Beneficiaries (GAO/GGD-96-138BR, Aug. 14, 1996).

negligence. Employees also give up their rights to recover damages from the employer for pain and suffering.

The opponents of change also said that reducing benefits for older beneficiaries could be considered age discrimination, and reductions could cause beneficiaries economic hardships. To the extent that opponents would agree that FECA is costly, they believed that other cost-saving measures may be more appropriate, such as keeping employees off the rolls by implementing better safety programs to prevent injuries and by more effectively returning injured employees to productive employment.

Lastly, we identified the following questions and associated issues that we believe would merit consideration by anyone crafting legislation to change wage compensation benefits for older beneficiaries:

- What type of changed benefits would be provided? Converting beneficiaries from FECA to retirement benefits or providing beneficiaries with a FECA annuity are the two main options proposed in the past. One proposal for a FECA annuity would reduce FECA benefits by one-third when beneficiaries were 2 years beyond their retirement eligibility date.
- How would benefits be computed? Converting from FECA to retirement benefits might involve adjustments to retirement benefits based on factors such as credit for time on FECA rolls and increases in an employee's salary base since the time of injury. Calculating a separate FECA annuity would be relatively simple.
- Which FECA beneficiaries would be affected? That is, would change affect all beneficiaries, including those who do not participate in a federal retirement plan (e.g., Peace Corps volunteers)? Would change only affect workers injured after the effective date of change or would it also affect beneficiaries who are currently receiving compensation benefits?
- What criteria would initiate changed benefits? Would age or retirement eligibility alone trigger the change, or would secondary criteria need to be considered to protect some employees from economic adversity?
- How would other benefits be treated? The administration of benefits, such as medical benefits and survivor annuities, may need clarification.
- How would benefits be funded? If beneficiaries were converted from FECA to retirement benefits, alternatives for funding these benefits may have to be developed.

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Mr. Chairman, this completes my statement. I would be pleased to answer any questions.

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