

On September 30, 1991 appellant, then a 36-year-old painter, sustained an injury in the performance of duty: “I was coming down the ladder cage and as I stepped off the last rung, my foot twisted and I felt pain in my right lower leg. My right knee hasn’t felt right since I did it.”

The Office accepted his claim for right knee strain and a torn right medial meniscus. Appellant received compensation for wage loss on the periodic rolls.

On February 18, 1998 appellant was sentenced to three years hard labor for operating a motor vehicle under the influence (fourth offense), attempting to elude a police officer and speeding. On May 7, 1998 the Office informed him that he was not entitled to compensation while imprisoned:

“Section 8148 of the Federal Employees’ Compensation Act (FECA) provides for suspension of workers’ compensation benefits payable to beneficiaries imprisoned as a result of a felony conviction. Therefore, your workers’ compensation benefits are terminated effective February 18, 1998. Any checks received after that date must be returned.”

On May 26, 1998 the Office found that appellant was not at fault in creating a \$630.69 overpayment from February 18 through 28, 1998. It reasoned: “He was not aware, or could not have been reasonably aware, that, upon conviction of a felony, unrelated to his FECA claim, he was no longer entitled to FECA benefits.” The Office terminated further collection action because it was not deemed cost effective.

On February 23, 2006 appellant was sentenced to 20 years imprisonment for a Class B felony of attempted robbery in the first degree. While imprisoned, he received six compensation checks. The Office recovered five of these checks, but the May 13, 2006 check for \$1,982.00 -- representing compensation from April 16 to May 13, 2006 -- was cancelled on August 15, 2006. Appellant’s sister endorsed the check under his power of attorney.

On August 28, 2007 the Office made a preliminary determination that appellant received a \$1,982.00 overpayment of compensation from April 16 to May 13, 2006 because he was incarcerated on February 23, 2006 and was not entitled to that compensation.¹ The Office concluded that appellant was at fault in creating this overpayment because he knowingly accepted compensation to which he was not entitled.² The Office allowed him 30 days to contest the overpayment.

In a decision dated November 30, 2007, the Office finalized its preliminary determination. It found that appellant was at fault in creating a \$1,982.00 overpayment from April 16 to May 13, 2006 because he was incarcerated and knowingly accepted compensation to which he was not entitled.

¹ The Office mistyped the amount of the overpayment as \$1,682.00 on the cover letter, but the enclosed memorandum explaining the calculation of the overpayment made clear that the correct amount was \$1,982.00.

² The cover letter also indicated that appellant failed to provide information which he knew or should have known was material, but the Office did not finalize that finding.

On appeal, appellant argues that he intended no wrongdoing:

“As of Feb 23rd 2006 I was sentenced to 20 yrs. I had made Rebecca Garner Power of Attorney. I told her to just hold on to my (check)s until I knew exactly what was going to happen.

“I had spoken to an attorney in regards to an appeal bond, where I would have had my freedom until I got this matter settled.

“I told her to cash one of my checks, send me the money for the attorney.

“This was an honest mistake. I was trying to deal with a 20 yr prison sentence. The attorney advised me at the time, the best thing I could do was try to get out on an appeal bond, because it could take years in the appeal process. No one, in no form or fashion, intended to, or thought, I was doing any wrongdoing.”

Appellant noted that his sister held onto all the checks but one, which he figured was the one he had her cash. He asks the Board if there is any way “an honest mistake could be waived.”

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.³ But no benefits shall be paid or provided to any individual during any period during which such individual is confined in a jail, prison or other penal institution or correctional facility pursuant to that individual's conviction of an offense that constituted a felony under applicable law.⁴

When an overpayment has been made to an individual because of an error of fact or law,⁵ the Office may consider waiving the overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁶

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8148(b)(1) (with an exception for dependents).

⁵ *See id.* at § 8129 (recovery of overpayments).

⁶ 20 C.F.R. § 10.433(a) (1999).

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.⁷

ANALYSIS

Appellant does not contest the fact or amount of the overpayment. On February 23, 2006 he was convicted of a felony and sentenced to 20 years. By law, appellant was not entitled to compensation during the period of his confinement. He was therefore not entitled to the May 13, 2006 compensation check for \$1,982.00. When appellant's power of attorney cashed the check to send him the money, as he instructed, an overpayment arose in the amount of \$1,982.00. The question is whether appellant was at fault in creating this overpayment.

The Office found appellant at fault because he knowingly accepted compensation to which he was not entitled. The facts establish that appellant accepted this payment. He has explained to the Board that he made Ms. Garner his power of attorney and that he instructed her to cash one of the compensation checks he received while he was incarcerated. Appellant emphasizes the reason he wanted the money, but this is immaterial. He accepted the benefits regardless of the purpose for which he intended to use it. Once the check was negotiated, control over the funds passed from the U.S. Treasury to appellant, or to his agent, Ms. Garner. The Board has held that depositing or cashing a compensation check constitutes acceptance of the payment.⁸ The only question that remains is whether appellant knew or should have known that he was not entitled to that compensation.

This was not the first time appellant received compensation during imprisonment. In 1998, after he was sentenced to three years hard labor, the Office informed him that he was not entitled to compensation while imprisoned. It identified the relevant statute and its provisions and instructed him to return any checks received after the date of his imprisonment. The Office found that appellant was not at fault in creating the overpayment that arose because, at least in 1998, he was not aware, or could not have been reasonably aware, that upon conviction of a felony he was no longer entitled to compensation benefits.

Of course, having gone through that experience in 1998, it is now fair to say that appellant did have reason to know that he was not entitled to compensation after his February 23, 2006 incarceration. His initial instructions to his power of attorney are consistent with his experience in 1998. Appellant commendably told her "to just hold on to my (check)s." This prevented, for a time, any overpayment of compensation. That changed in August 2006 when his power of attorney negotiated one of the checks, under his direction, so that she could send

⁷ *Id.* at § 10.433(b).

⁸ *David E. Wilkinson*, Docket No. 93-322 (issued December 16, 1993). In *Wilkinson*, the Board found that the claimant accepted those checks by depositing them in his savings account. Further, the fact that he later returned the amount of the checks, although commendable, did not negate that he first accepted the compensation payments during a time when he was employed. The Board ruled that the claimant was at fault. *See also Victor R. Thurman*, Docket No. 96-1219 (issued November 13, 1998) (when the claimant received the checks, he deposited them and accepted payment).

him the money. Under the circumstances, given appellant's prior experience, the Board finds that appellant knowingly accepted compensation to which he was not entitled. Because the Office may consider waiving an overpayment only if the individual to whom it was made was not at fault, appellant is not entitled to waiver. The Board will affirm the Office's November 30, 2007 decision.

CONCLUSION

The Board finds that appellant was at fault in creating a \$1,982.00 overpayment of compensation.

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board