

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERI CORTINAS, guardian of SAVANNAH SPEISER, claiming as child of
MICHAEL SPEISER and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, Missoula, MT

*Docket No. 02-363; Submitted on the Record;
Issued April 21, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of \$7,388.88 was created with respect to payments for Savannah Speiser, a dependent of the employee; and (2) whether the Office properly denied waiver of the overpayment.

The case was before the Board on a prior appeal with respect to whether the Office properly terminated the employee's compensation on March 12, 1996. The Board found that the medical evidence was not sufficient to meet the Office's burden of proof to terminate compensation. By decision dated January 11, 2001, the Board granted the Director's motion to remand on the issue of the employee's forfeiture of compensation under 5 U.S.C. § 8148(a).

By letter dated August 17, 2001, the Office advised appellant, the guardian of Savannah Speiser, that it had made a preliminary determination that an overpayment of \$7,388.88 had occurred. According to the Office, the guardian had received \$27,819.74 for the periods October 1, 1994 to November 18, 1995 and April 29, 1996 to January 4, 2001, although she was entitled to only \$20,430.86. The Office also made a finding that appellant was not at fault in creating the overpayment.

In a decision dated September 26, 2001, the Office finalized its preliminary determination with respect to the amount of the overpayment. The Office also denied waiver of the overpayment.

The Board finds that the case requires further development as to the amount of the overpayment.

Public Law No. 103-333, enacted on September 30, 1994, amended the Federal Employees' Compensation Act by adding section 8148, which provides for forfeiture of compensation benefits by an individual convicted of fraud with respect to receipt of

compensation and prohibits the payment of compensation benefits to an individual while incarcerated pursuant to a felony conviction. Section 8148(b) states:

“(1) Notwithstanding any other provisions of this chapter ... no benefits under this subchapter or subchapter III of this chapter 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.

“(2) Such individual shall not be entitled to receive the benefits forfeited during the period of incarceration under paragraph (1), after such period of incarceration ends.

“(3) If an individual has one or more dependents as defined under section 8110(a), the Secretary of Labor may, during the period of incarceration, pay to such dependents a percentage of the benefits that would have been payable to such individual computed according to the percentages set forth in section 8133(a)(1) through (5).”¹

Accordingly, during periods that an employee’s compensation is suspended under section 8148(b)(1) for a felony conviction, his dependents are entitled to a percentage of his compensation. The record in this case does indicate that an overpayment of compensation was made to appellant, the guardian of Savannah Speiser. The Office issued a payment dated June 17, 2000 for \$15,245.94 to appellant for a compensation period commencing in 1996. The Office had previously issued a payment dated March 19, 1999 for \$15,815.84 for a compensation period also commencing in 1996. This payment had been sent to the Montana Child Support Enforcement Division (CSED), as the Office apparently did not have a current address for the guardian. In a letter dated August 17, 2000, the CSED reported that \$10,050.00 of the \$15,815.84 payment had been provided to the guardian of Savannah Speiser, with the remaining \$5,765.84 refunded to the Office. The record, therefore, indicates that appellant received dual payments covering the same compensation period.

The exact amount of the overpayment, however, requires additional development of the evidence. The Board recognizes that this case is a difficult one involving an employee that has been incarcerated for significant periods of time since his employment. The Office attempted to provide a detailed calculation of the amount of the overpayment, but there are several findings that cannot be confirmed by the evidence of record.

Beginning with the amounts of compensation that appellant had received, the Office finds that she received a \$276.92 compensation payment through the CSED, as part of a \$2,821.32 Office payment sent to the CSED on April 19, 1996. The basis for this finding is a November 17, 2000 letter from the CSED to the employee, stating that \$276.92 was “credited to the state child support debt” of the employee. There is no further explanation and it is not clear

¹ See also 20 C.F.R. § 10.18.

from this letter whether any or all of this amount was actually sent directly to Savannah's guardian. On remand the Office should request clarification from the CSED on this issue.

The Office found that appellant received \$150.00 from the CSED as part of a \$417.20 Office payment dated March 27, 1999. The August 11, 2000 letter from the CSED states that all of the March 27, 1999 payment was refunded to the Office. The Office has not established that appellant received \$150.00 of the March 27, 1999 payment. The Board also notes that the Office credited appellant with receipt of a \$299.48 payment dated October 7, 2000, although it acknowledged that the payment was sent to the wrong address and it does not know if appellant ever received the payment. This payment cannot be included in the overpayment calculations unless it is determined that appellant received the payment.

With respect to the amount of compensation that appellant was entitled to, the Office has made some findings in the overpayment calculation that cannot be confirmed by the evidence of record. The Office found that appellant was entitled to some compensation for the period October 1, 1994 to November 18, 1995 because the employee was incarcerated during that period as a result of a felony conviction.² The Office did not identify the evidence on which it based this finding that the incarceration was due to a felony conviction. While there is evidence regarding the employee's incarceration in 1996, there does not appear to be evidence regarding incarceration in 1994 and 1995. A statement of accepted facts dated November 9, 1994 stated that the employee was usually incarcerated "for a new crime (drug related) or for parole violation," without further explanation. A June 13, 1994 letter from the Avenal State Prison indicated that the employee was incarcerated, without discussing any felony conviction. On remand, the Office should make a proper finding and identify or obtain evidence to support a finding that the employee was incarcerated from October 1, 1994 to November 18, 1995 due to a felony conviction.

In addition, the Office found that the employee was imprisoned due to a felony conviction as of April 29, 1996, the date the employee filed a motion to withdraw his plea of not guilty and entered a guilty plea to a felony theft charge. The date of the court judgment finding appellant guilty of the offenses charged, however, is June 7, 1996. Moreover, the judgment states that the employee would receive credit for time served since his arrest on January 3, 1996. The Office did not cite any relevant authority to explain why "the period of incarceration" under section 8148(b)(3) commences on April 29, 1996, as opposed to either January 3, 1996, the date he was first imprisoned for what ultimately was determined to be a felony, or June 7, 1996, the date he was actually convicted of a felony.

The Office also found that Eric Speiser was entitled to compensation during the period October 1, 1994 to November 18, 1995 as a dependent of the employee because he was not a full-time student. Again, the Office did not identify the evidence of record to support this finding.

Accordingly, the Board will remand the case to the Office for further development with respect to the amount of the overpayment in this case. The Office should clearly identify the evidentiary basis for each of its findings. After such further development as it deems necessary,

² October 1, 1994 was the effective date of Public Law 103-333.

it should issue an appropriate decision. As the case requires further development, the Board will not address the waiver issue at this time.

The decision of the Office of Workers' Compensation Programs dated September 26, 2001 is set aside and the case remanded for further development in accordance with this decision of the Board.

Dated, Washington, DC
April 21, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member