

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL JOHNSON and DEPARTMENT OF VETERANS AFFAIRS,
PHILADELPHIA VETERANS HOSPITAL, Philadelphia, PA

*Docket No. 02-981; Submitted on the Record;
Issued April 25, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether appellant forfeited his right to compensation pursuant to 5 U.S.C. § 8148 of the Federal Employees' Compensation Act.

On October 9, 1985 appellant, then a 28-year-old patrolman, was injured at work in the performance of duty when he fell over a desk. Appellant was also involved in an automobile accident on October 9, 1985. The Office of Workers' Compensation Programs accepted his claim for cervical and lumbar sprains. Appellant stopped work on November 24, 1985 and began receiving compensation on the periodic rolls. He has not returned to work since that date.¹

On October 28, 1998 the Office scheduled appellant for an impartial medical examination for December 22, 1998 with Dr. Andrew J. Gelman, a Board-certified orthopedist, in order to resolve a conflict in the record as to appellant's capacity for work, his physical restrictions and any ongoing residuals from his accepted work injuries.

In a letter dated December 7, 1998, appellant advised the Office that he was unable to attend the December 22, 1998 examination due to his "temporary detainment" by the State of Delaware for a parole violation of crossing the state line of Delaware into Philadelphia, Pennsylvania, to rent a car, and for having a six pack of beer in the car when he was stopped by the police.

On December 28, 1998 the Office requested that appellant provide copies of the indictment, documents verifying the effective date of appellant's imprisonment, documents containing any guilty verdict and the court's docket sheet. Appellant was notified that benefits would be suspended during his incarceration but benefits payable as child support would continue.

¹ Appellant suffered a prior injury on November 11, 1984 when he hurt his left knee while in the performance of duty. The Office accepted the claim for an anterior cruciate ligament tear of the left knee.

Appellant subsequently submitted a copy of the notice of hearing on his parole violation charges and a copy of the order on hearing that revoked his parole.

In a decision dated April 1, 1999, the Office determined that appellant was not entitled to receive compensation benefits during the period of time he was incarcerated as, under 5 U.S.C. § 8148, benefits payable to beneficiaries imprisoned as a result of a felony conviction are to be forfeited.

Appellant requested a hearing, which was held on September 21, 1999.

In a January 7, 2000 decision, an Office hearing representative set aside the Office's April 1, 1999 decision, directing the Office on remand to determine the nature of the conviction for which appellant was on parole. The Office hearing representative noted that the Office had not confirmed whether appellant's parole violation was related to a "felony conviction."

In a February 22, 2000 letter, the Office wrote to the State of Delaware Department of Corrections requesting information as to the nature of the conviction for which appellant had been on parole and whether or not it constituted a felony.

On February 25, 2000 the records clerk for the Superior Court, J. Roberman, indicated that appellant had been convicted of one felony narcotics charge "Traffic Cocaine" on February 25, 1991. Appellant's parole for this conviction was revoked and he was sentenced to serve the suspended jail time from the original felony conviction. He was incarcerated on January 14, 1999.²

In a May 16, 2000 decision, the Office advised appellant that as his incarceration was due to a violation of a parole condition established as a result of a felony conviction according to section 8148 of the Act he forfeited his right, during the period of incarceration, to receive compensation benefits.

Appellant requested a hearing, which was held on June 27, 2001. Appellant appeared at the hearing and with counsel argued that, since the effective date of forfeiture statute, September 30, 1994, was after his date of felony conviction on February 25, 1991, the statute should not be applied retroactively to his case. Appellant further argued that his parole violation in 1998 also related back to the February 25, 1991 conviction such that appellant should not be subject to forfeiture.

In a decision dated October 11, 2001, an Office hearing representative affirmed the Office's May 16, 2000 decision.³

² Appellant was being held in custody at the county jail from May 18, 1998 until he was sentenced on January 14, 1999.

³ The last page of the Office hearing representative's decision is not in the record before the Board; however, since the Board has *de novo* review, the missing page is not deemed to be of consequence to the outcome of the appeal.

The Board finds that the Office properly determined that appellant forfeited compensation under section 8148.

Public Law No. 103-333, enacted on September 30, 1994, amended the 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.⁴

Section 8148(b) of the Act states:

“(1) Notwithstanding any other provisions of this chapter ... no benefits under this subchapter ... 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.”⁵

In this case, the record establishes that appellant violated his parole and returned to prison on January 14, 1999. His incarceration on or after January 14, 1999 stems from a felony conviction and therefore falls under section 8148. Although appellant’s counsel argues that this statutory provision⁶ could not be applied as it was instituted after appellant’s underlying felony charge, the Board does not agree. The statute does not limit its reach to only those incarcerations that stem from post-1994 felony convictions. As appellant was incarcerated after the enactment of the amendment and as it was as a result of a felony conviction, the Office properly found that appellant forfeited benefits.⁷

⁴ 5 U.S.C. § 8148; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12 (March 1997).

⁵ *Id.*

⁶ *Id.*

⁷ The forfeiture of benefits includes the period of time from May 18, 1998 through January 14, 1999 when appellant was being held in custody pending adjudication of this matter.

The decision of the Office of Workers' Compensation Programs dated October 11, 2001 is hereby affirmed.

Dated, Washington, DC
April 25, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member