



## **FACTUAL HISTORY**

This is appellant's third appeal before the Board. On May 22, 1985 the Board found that appellant was not entitled to a schedule award for loss of use, of his left hand and had 75 percent loss of use of the right hand, for which he received a schedule award.<sup>1</sup> The facts and circumstances of the case are detailed in the first decision and are hereby incorporated by reference.<sup>2</sup> On December 20, 2001 the Board issued an order remanding the case at the request of the Director for further development.<sup>3</sup> In the third appeal, the Board issued an order remanding the case for reconstruction of the case record.<sup>4</sup>

Following acceptance of his claim, appellant submitted Office Forms EN1032 indicating that he remained totally disabled and unable to work.

On November 28, 2000 the employing establishment investigative service advised the Office that appellant was observed from May 1998 to April 30, 1999 and that he engaged in activities such as manual labor, electrical work on rental properties and work on his automobile and home which were inconsistent with his medical limitations. It noted that he was also videotaped performing several hours of home renovation. The investigators showed these videotapes to appellant's treating physicians for their opinion on his continuing disability. On May 27, 1999 Dr. Vincent T. Basile, a Board-certified orthopedic surgeon, was interviewed, observed the surveillance tapes and opined that appellant did not demonstrate signs of a reflex sympathetic dystrophy and that he had not evaluated appellant since 1994. On May 27, 1999 Dr. Walter B. Blair, a Board-certified psychiatrist, was interviewed and reviewed the videotapes. He opined that appellant had misrepresented his symptoms and was capable of gainful employment and could return to work at the employing establishment.

The investigative report advised that on September 20, 2000 appellant appeared in United States District Court in the Western District of Virginia and pled guilty to a one count misdemeanor charge of violating 18 U.S.C. § 1003 for making a false claim under the Federal Employees' Compensation Act.<sup>5</sup> The agreement stated that appellant understood that the United States Attorney and his defense counsel had entered a plea negotiation of which he was fully aware and understood. In return, the Government moved to dismiss four felony counts pending under a criminal indictment.

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<sup>1</sup> Docket No. 85-917 (issued May 22, 1985).

<sup>2</sup> On August 3, 1978 appellant sustained injury to his right hand for which he underwent surgery on January 9, 1979. His claim was accepted for a trigger thumb of the right hand. The claim was subsequently expanded to include a major depressive reaction and sympathetic dystrophy of the right arm and hand.

<sup>3</sup> Docket No. 01-1800 (issued December 20, 2001).

<sup>4</sup> Docket No. 03-2004 (issued October 30, 2003).

<sup>5</sup> The record contains copies of the court records, including the plea agreement signed by appellant on September 1, 2000. On September 20, 2000 he appeared in court and pled guilty to one count of the information. On November 20, 2000 appellant was sentenced to three years probation, ordered to pay restitution in the amount of \$10,163.00 and assessed a \$1,000.00 fine.

The record reflects that appellant received compensation benefits for total disability from September 21 through December 30, 2000. By memorandum dated April 10, 2001, a claims examiner noted that under section 8148, an individual convicted of a violation related to the application for or receipt of benefits under the Act, forfeits his right to any benefits. He noted that compensation received after September 20, 2000, the date appellant pled guilty and was convicted, to December 20, 2000 constituted an overpayment of compensation.<sup>6</sup> In a subsequent memorandum of April 30, 2002, the Office noted that the District Court declared restitution in the amount of \$10,163.00 under the terms of the plea agreement. However, it was noted that the court order did not constitute a global settlement such that the Office was precluded from pursuing collection of the debt.

By decision dated April 29, 2002, the Office advised appellant that his compensation benefits were terminated based on his conviction for fraud effective September 20, 2000.<sup>7</sup>

On April 30, 2002 the Office advised appellant of its preliminary finding that he received an overpayment in the amount of \$7,370.97. The overpayment was created as appellant did not return the compensation he received after his entitlement to compensation ended after his fraud conviction was entered on September 20, 2000 and erroneous payment was made through December 30, 2000. The Office found him at fault in the creation of the overpayment as he knew or should have known that he was not entitled to compensation following his guilty plea to defrauding the compensation program. Appellant was advised of his right to a prerecoupment hearing before an Office hearing representative.

On May 20, 2002 appellant requested a prerecoupment hearing on the issues of fault and possible waiver of the overpayment and submitted financial documentation in support of his request. A hearing was held on February 25, 2003 at which appellant testified. He claimed that he did not know the law and that he would not have pled guilty if he knew it would result in the forfeiture of his compensation benefits. Appellant complained that he was misled and that he signed the plea agreement under duress. He acknowledged, however, that he was represented by counsel at the time he entered the plea agreement.

In a decision dated April 30, 2003, the Office hearing representative affirmed the fact and amount of the overpayment of \$7,370.97, due to his forfeiture of compensation for the period September 21 through December 30, 2000. Appellant was found at fault in the creation of the overpayment and not eligible for waiver. The Office hearing representative noted his argument that his income barely met his expenses, but noted that appellant provided no documentation to support his claimed expenses. He noted that a determination concerning the method of

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<sup>6</sup> The record reflects that appellant elected receipt of retirement benefits from the Office of Personnel Management effective September 21, 2000.

<sup>7</sup> The Office noted that it was issuing the termination decision in conformance with the Board's Order Remanding Case in Docket No. 01-1800 (issued December 20, 2001), as documentation supporting the forfeiture decision under section 8148(a) was not contained in the case record submitted on appeal.

repayment was deferred to the District Office to permit appellant an opportunity to document expenses and arrange an equitable repayment plan.<sup>8</sup>

On July 22, 2003 appellant appealed the April 20, 2003 decision to the Board. On October 30, 2003 the Board remanded the case for reconstruction of the case record and issuance of an appropriate new decision.<sup>9</sup>

By decision dated February 17, 2004, the Office reissued a decision on the overpayment, finding that an overpayment was created in the amount of \$7,370.97 as appellant received compensation from September 21 through December 30, 2000, following his September 20, 2000 guilty plea to fraud under the Act. The Office found that he was at fault in the creation of the overpayment as he was not entitled to compensation after his guilty plea of September 20, 2000 and that he accepted payments which he knew or should have known to be incorrect. It was further noted that appellant had collected dual benefits, as he was in receipt of payment from OPM as of September 21, 2000 and he was not entitled to benefits from both OPM and the Office. Appellant was advised that he had 30 days to refund the entire amount of the overpayment or contact the Office to make arrangements for recovery.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8148 of Title 5 of the United States Code, states, in part:

“(a) Any individual convicted of a violation of section 1920 of Title 18 or any other Federal or State criminal statute relating to fraud in the application for or a receipt of any benefit under [the Act], shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under [the Act] for any injury occurring on or before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 or 8129.”

Section 10.17 of the implementing federal regulations provides, as follows:

“When a beneficiary either pleads guilty to or is found guilty on either Federal or State criminal charges of defrauding the Federal Government in connection with a claim for benefits, the beneficiary’s entitlement to any further compensation benefits will terminate effective the date either the guilty plea is accepted or a verdict of guilty is returned after trial...”<sup>10</sup>

Public Law 103-112, 107 Stat. 1089, enacted on October 21, 1993, prohibits individuals who have been convicted of fraud related to their claims from receiving further benefits paid

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<sup>8</sup> On July 11, 2003 appellant was advised that the overpayment was due and owing and was provided 30 days to contact the Office about recovery of the debt.

<sup>9</sup> Docket No. 03-2004 (issued October 30, 2003). The Board noted that the case record submitted on appeal was incomplete.

<sup>10</sup> 20 C.F.R. § 10.17.

under the Act. Subsequently, Public Law 103-333, enacted on September 30, 1994, added section 8148, which provides for (a) the termination of benefits payable to beneficiaries who have been convicted of defrauding the program, and (b) the suspension of benefits payable to beneficiaries imprisoned as a result of a felony conviction.<sup>11</sup>

Office procedures require that, to support termination or suspension of benefits under section 8148, the case record must contain: a copy of the indictment or information; a copy of the plea agreement, if any; a copy of the document containing a guilty verdict; and/or a copy of the court's docket sheet. Further, this evidence must establish: (1) the individual was convicted and (2) the conviction is related to the claim for or receipt of benefits under the Act.<sup>12</sup> The effective date of termination in fraud cases under section 8148(a) is the date of conviction, which is the date of the verdict or in cases of a plea agreement, the date the claimant made the plea in open court (not the date of sentencing or when the court papers were signed).<sup>13</sup> Due to the nature of the termination involving fraud, no pretermination notice is required before issuing a final decision.<sup>14</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office properly determined that appellant received an overpayment of compensation for the period September 21 through December 30, 2000 in the amount of \$7,370.97.

Under section 8148(a), a claimant who is convicted of fraud in obtaining compensation benefits under 18 U.S.C. § 1920, or any other statute relating to fraud in the application for or a receipt of any benefit under the Act, will have his compensation terminated. Such a claimant is thereafter permanently barred from receiving any compensation under the Act. The fact of overpayment is established by the plea agreement entered on September 20, 2000 in which appellant pled guilty in open court to one count of the information charging him with fraud under 18 U.S.C. § 1003. The plea agreement noted that appellant's defense counsel informed him as to the nature of the charges brought against him, his acknowledgement of having had all his rights explained to him and that he was pleading guilty in to the charge because "I am, in fact, guilty...." Under the plea, appellant also acknowledged his responsibility for making restitution in the amount of \$10,163.00 and that the agreement made no representations or promises regarding the status of benefits paid to him by the Office.

The Board notes that, under the terms of the statute, appellant forfeited his entitlement to compensation benefits following his September 20, 2000 guilty plea. For this reason, the Office properly terminated appellant's compensation benefits under section 8148(a). However, as he

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<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(a) (March 1977). See 5 U.S.C. § 8148.

<sup>12</sup> *Id.* at Chapter 2.1400.12(d).

<sup>13</sup> *Id.* at Chapter 2.1400.12(e)(1).

<sup>14</sup> *Jorge E. Sotomayor*, 52 ECAB 105 (2000); see also *id.* at Chapter 2.1400.12(f)(2).

was in receipt of compensation benefits from September 21 through December 30, 2000, an overpayment of compensation was created as he was no longer a beneficiary entitled to receive benefits for his accepted injury. The Office properly determined that appellant received an overpayment of compensation as he was issued and kept compensation payments covering the period September 21 through December 30, 2000 despite the fact that he was no longer entitled to benefits following forfeiture under section 8148(a).

The record reflects that from the period September 10 through December 30, 2000, appellant received four payments of compensation from the Office each in the amount of \$2,003.76 or a total of \$8,015.04. As his compensation benefits were forfeited following September 20, 2000, he was not entitled to the full amount of compensation paid for the period September 10 to October 7, 2000. The Office deducted appellant's entitlement to \$644.07 from the \$8,015.04 paid, to find that the amount of overpayment was \$7,370.97. The Board will affirm the amount of overpayment as determined by the Office.

### **CONCLUSION -- ISSUE 1**

Appellant received an overpayment of compensation due to forfeiture under section 8148(a) in the amount of \$7,370.97 for the period September 21 through December 30, 2000.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.<sup>15</sup> The only exception to this requirement is a situation, which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."<sup>16</sup> No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is "without fault," section 10.433(a) of the Office's federal regulations provide, in relevant part:

"A recipient who has done any of the following will be found 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

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<sup>15</sup> 5 U.S.C. § 8129(a).

<sup>16</sup> 5 U.S.C. § 8129(b).

(3) Accepted a payment, which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)”<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

In this case, the Board finds that appellant was at fault under the third standard as he accepted payments of compensation from September 21 through December 30, 2000 which he knew or should have known to be incorrect.<sup>18</sup> As noted, on September 20, 2000 appellant appeared in open court and pled guilty to fraud in the receipt of compensation; under section 8148(a), he forfeited compensation after that date. He knew or should have known that he was not entitled to the receipt of further compensation benefits after pleading guilty to defrauding the Office related to obtaining benefits under the Act. Moreover, as noted by the Office, appellant had received and signed multiple Forms EN1032 which directed him to return any and all checks to which he was not entitled. He, however, accepted incorrect compensation payments for the period September 21 through December 30, 2000.<sup>19</sup> Therefore, he is at fault in creation of the \$7,370.97 overpayment, such that it was not subject to waiver.

### **CONCLUSION -- ISSUE 2**

Appellant entered a guilty plea in open court on September 20, 2000 to defrauding the Office regarding his receipt of compensation benefits. Therefore, he accepted compensation payments through December 30, 2000 which he knew or should have known to be incorrect. Therefore, he is at fault in the creation of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.<sup>20</sup> However, where no further compensation benefits are due an individual, the Board does not have jurisdiction and the recovery of an overpayment remains within the discretion of the Office. The Board’s jurisdiction over recovery is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.<sup>21</sup>

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<sup>17</sup> 20 C.F.R. § 10.320(b).

<sup>18</sup> See *Bob R. Gilley*, 51 ECAB 377 (2000).

<sup>19</sup> The fact that the Office may have been negligent in making the compensation payments to appellant following the September 20, 2000 guilty plea does not excuse his acceptance of payments he knew or should have known to be incorrect. See *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>20</sup> *Supra* note 16.

<sup>21</sup> *Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, *supra* note 19.

### ANALYSIS -- ISSUE 3

As appellant's right to compensation benefits was terminated under the forfeiture provision of section 8148(a), he is not entitled to continuing compensation benefits and the Board does not have jurisdiction to consider the method of recovery of the overpayment.

Appellant contends, however, that the court ordered restitution paid under the plea agreement should be in lieu of any recovery of the overpayment. The Office's procedure manual addresses the relationship between court ordered restitution in fraud cases and the Office's administrative debt collection process, stating:

*"18. Court Ordered Restitution in Fraud Cases.* When a debtor has been convicted in court of filing a false claim which resulted in an overpayment/debt due the government, the court often orders the defendant to make restitution to the United States as a condition of probation. The amount of restitution may or may not be the full amount of the debt owed to [the Office].

*"a. If the Court Order states that the restitution amount will be in full satisfaction of the debt owed the United States (a 'Global Settlement'), the Court Order takes precedence over the Office's administrative debt collection process....*

*"b. If the Court Order does not represent a 'Global Settlement,' [the Office] should continue to pursue collection of the full amount of the debt, taking credit for any restitution amounts received...."*<sup>22</sup>

Based on appellant's September 20, 2000 plea entered in U.S. District Court, he was ordered to pay restitution to the employing establishment in the amount of \$10,163.00. The Board finds that the settlement agreement in this case was not intended to constitute a global settlement. There is no specific language in the agreement stating that the \$10,163.00 payment was to be in full satisfaction of the debt due the United States. Rather, it states: "I agree that the amount referred to in section B of this agreement for plea purposes does not legally bind or foreclose separate civil claims by any victims of the offense to which I am pleading guilty. I also understand that no representations or promises have been made to me regarding the status of benefits paid to me by the Department of Labor." For this reason, the Office is not precluded from continuing to pursue recovery of appellant's overpayment debt.<sup>23</sup>

### CONCLUSION -- ISSUE 3

The Board finds that the plea agreement did not constitute a global settlement of the claim of the Office against appellant for the debt created by the overpayment of compensation.

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<sup>22</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.18 (May 2004).

<sup>23</sup> See *Robert Ringo*, 53 ECAB 258 (2001).

As to the method of recovery, the Board does not have jurisdiction over this issue as appellant has no entitlement to continuing compensation benefits.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 17, 2004 be affirmed.

Issued: May 23, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member