

married.¹ His wife died on March 7, 1993. On January 3, 1995 appellant was convicted and sentenced for two felony offenses. He received an 11-year sentence with credit for 303 days served; thus, the sentence began on March 5, 1994.²

By decision dated June 19, 1997, the Office suspended his compensation benefits, effective September 30, 1994, pursuant to section 8148(b)(1) of the Federal Employees' Compensation Act³ because he had been convicted of a felony offense. On September 12, 2000 it issued a preliminary determination that appellant was at fault in the creation of an overpayment in compensation in the amount of \$5,223.93 because he received augmented compensation following his wife's death on March 7, 1993 to September 29, 1994. On September 13, 2000 the Office issued a preliminary finding that appellant was at fault in the creation of an overpayment in compensation in the amount of \$54,304.93 for the period September 30, 1994 to March 1, 1997 because he continued to receive compensation benefits after his incarceration due to his felony conviction.⁴

Appellant requested a prerecoupment hearing that was held on January 31, 2001. He was represented by counsel at the hearing. By decision dated May 1, 2001, an Office hearing representative finalized the overpayments, finding that appellant was not at fault in their creation. He found that the debt should be compromised with a new overpayment balance of \$51,666.75 for both. The hearing representative denied waiver, finding that appellant's monthly expenses were \$250.00. He required repayment in the amount of \$350.00 from retirement benefits appellant was receiving from the Office of Personnel Management (OPM).⁵

On July 1, 2001 appellant requested reconsideration. He was released from prison on October 5, 2001. On December 5, 2001, appellant through his attorney, again requested reconsideration. Appellant telephoned the Office on February 19, 2002, requesting to be returned to the compensation rolls. He was told to submit updated financial information and that he would be sent an election form. On February 23, 2002 appellant elected benefits under the Act, effective October 6, 2001.

By letter dated June 20, 2002, the Office informed appellant that he was due retroactive compensation less deductions for payments to OPM for dual benefits, for health and life insurance, and for nine months of repayment of the overpayment. Appellant was placed on the

¹ Appellant had no other dependents.

² Circuit Court for Harford County Maryland records show that he pled guilty to manslaughter (for shooting his wife) and arson (for burning down his house).

³ 5 U.S.C. §§ 8101-8193.

⁴ The record contains computer print-outs that describe the compensation appellant received for these periods. An overpayment worksheet provides that for the period March 8, 1993 through September 29, 1994 appellant received \$34,965.47 in augmented compensation when he should have received \$29,741.54, yielding an overpayment in compensation of \$5,223.93; for the period September 30, 1994 through March 1, 1997, he received compensation totaling \$54,304.93.

⁵ The record does not indicate that the process of withholding repayment from appellant's OPM retirement benefits was instituted.

periodic rolls and, to repay the overpayment, deductions of \$350.00 would be made from each periodic payment.

On August 9, 2002, January 27, 2003 and October 23, 2004 appellant requested reconsideration. By decision dated February 9, 2005, the Office denied modification of the May 1, 2001 decision.

On March 24, 2005 appellant requested reconsideration and submitted a list of expenses. In a November 10, 2005 decision, the Office again denied modification, and on November 23, 2005, informed appellant that specific financial information requested had not been received.

On December 8, 2005 appellant again requested reconsideration and submitted financial and medical information. In a merit decision dated February 9, 2006, the Office again denied modification of the prior decisions. Appellant then appealed to the Board and requested oral argument. By order dated November 3, 2006, the Board granted the Director's motion to remand and cancel oral argument. The Director requested remand because appellant filed a petition under Chapter 7 of the Bankruptcy Code on July 19, 1995, and the Office needed to determine its impact on the overpayment.⁶

Subsequent to the Board's November 3, 2006 order, the Office developed the record regarding appellant's bankruptcy filing. On January 31, 2007 it issued a preliminary finding that an overpayment in compensation had been created in the amount of \$36,716.35 because during the period September 30, 1994 through March 1, 1997, while incarcerated, he continued to receive compensation benefits. The Office noted that appellant's overpayment in compensation had been reduced because the portion of the debt that occurred prior to the petition for bankruptcy on July 18, 1995 was not collectible; therefore the debt represented benefits paid from July 19, 1995 through March 1, 1997 only. It found appellant not at fault and that the amount of the overpayment debt was \$11,166.35.

In a March 1, 2007 report, Dr. Christiane Tellefsen, Board-certified in psychiatry and forensic psychiatry, advised that appellant continued to be totally disabled. She diagnosed depression due to chronic pain disorder, personality disorder, chronic foot and back pain, gastroesophageal reflux disease, and an obsession/paranoid preoccupation with his workers' compensation case. Dr. Tellefsen recommended supportive psychotherapy because appellant was at high risk for acting out his angry and rageful impulses.⁷

By decision dated March 5, 2007, the Office finalized the overpayment. Appellant had timely requested a hearing, and submitted an overpayment questionnaire and financial information. At the hearing, held on July 16, 2007, he conceded that he received an overpayment in compensation, requested waiver of the overpayment, and requested that he be refunded the \$25,550.00 previously deducted. Appellant testified regarding his income and expenses. In a January 28, 2008 decision, the Office hearing representative found appellant

⁶ Docket No. 06-986.

⁷ Appellant underwent foot surgery on March 21, 2007. Dr. W. Lima, a Board-certified orthopedic surgeon, provided a second opinion evaluation dated April 11, 2007 regarding appellant's physical condition.

without fault in the creation of the overpayment and waived the remaining overpayment of \$11,166.35.⁸

LEGAL PRECEDENT -- ISSUE 1

Section 8105(a) of the Act provides that, if the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his or her monthly pay, which is known as his basic compensation for total disability.⁹ Section 8110 of the Act provides that the basic compensation rate may be augmented by a rate of 8 1/3 percent, a total of 75 percent, provided the injured employee has an eligible dependent.¹⁰

Public Law No. 103-333, enacted on September 30, 1994 amended the Act by adding a new section, 5 U.S.C. § 8148.¹¹ Section 8148(b) specifically states that “Notwithstanding any other provision 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.”¹² Office procedures provide that benefits should be suspended or adjusted in cases involving convictions for felonies unrelated to claims under the Act but which result in imprisonment, effective the date of imprisonment.¹³ No pretermination notice is required.¹⁴ The procedures further state that in support of termination or suspension of compensation, the record must contain copies of the indictment or information, the plea agreement, if any, the document containing the guilty verdict and/or the court’s docket sheet. In cases involving convictions for felonies unrelated to claims under the Act, the termination is effective on the date of imprisonment.¹⁵ Because of the criminal basis for the termination, no pretermination notice is required before a final decision is issued.¹⁶

⁸ The hearing representative also noted that in March 2007 the Office began deducting \$250.00 from appellant’s compensation. By letter dated February 5, 2008, the Office informed appellant that, as no deductions were made beginning in March 2007, he was not due a refund.

⁹ 5 U.S.C. § 8105(a); *R.S.*, 58 ECAB ___ (Docket No. 06-1346, issued February 16, 2007).

¹⁰ 5 U.S.C. § 8110; *D.F.*, 58 ECAB ___ (Docket No. 07-248, issued June 11, 2007).

¹¹ 5 U.S.C. § 8148.

¹² 5 U.S.C. § 8148(b); *see Danny E. Haley*, 56 ECAB 393 (2005).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(e)(2) (March 1997).

¹⁴ *Id.* at Chapter 2.1400.12(g).

¹⁵ *Id.* at Chapter 2.1400.12e(2).

¹⁶ Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.1400.12f(2).

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in compensation in the amount of \$36,716.35. The Office initially determined that an overpayment of \$5,223.93 had been created for the period March 7, 1993 to September 29, 1994 because appellant's wife died on March 7, 1993, but he continued to receive augmented compensation to September 29, 1994. However, because appellant had filed bankruptcy on July 19, 1995, this debt was compromised.

Section 8148(b) of the Act provides that no compensation shall be paid during a period a person is confined to any penal institution pursuant to conviction for a felony offense.¹⁷ The record in this case contains copies of court documents establishing that appellant entered guilty pleas to two felonies with his sentence effectively beginning on March 5, 1994. Appellant was returned to the periodic rolls after his release from prison, and deductions of \$350.00 were made from each periodic payment beginning in October 2001. Based on his petition for bankruptcy on July 18, 1995, by decision dated March 5, 2007, the Office properly found that the portion of the debt that occurred prior to the petition for bankruptcy was not collectible; therefore, the debt represented benefits paid from July 19, 1995 through March 1, 1997 only. Computer printouts contained in the record show that for this period appellant received wage-loss compensation totaling \$36,716.35. The Board therefore finds that an overpayment in compensation in the amount of \$36,716.35 had been created.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁸ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of the Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.¹⁹

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.²⁰ Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.²¹ Recovery of an overpayment is also

¹⁷ 5 U.S.C. § 8148(b).

¹⁸ 20 C.F.R. § 10.433(a); *see Steven R. Cofrancesco*, 57 ECAB 662 (2006).

¹⁹ 20 C.F.R. § 10.434; *see Madelyn Y. Grant*, 57 ECAB 533 (2006).

²⁰ 20 C.F.R. § 10.436; *Madelyn Y. Grant*, *supra* note 19.

²¹ 20 C.F.R. § 10.437(a); *Madelyn Y. Grant*, *supra* note 19.

considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.²²

Office procedures note that the Act is social legislation intended to benefit entitled employees and that every effort should be made to accommodate the claimant's best interests and to ensure that all due process actions are completed in a timely and fair manner when specific collection actions must be enforced.²³

ANALYSIS -- ISSUE 2

The Board finds the case is not in posture for decision regarding whether the Office properly denied waiver of \$25,550.00 of the overpayment. At the time the Office initially denied waiver in its May 1, 2001 decision, appellant was still incarcerated and was not on the compensation rolls. The Office denied waiver, noting that he had few monthly expenses totaling \$250.00. Following his release from prison, on February 19, 2002 appellant notified the Office of his desire to return to the benefits rolls. While the record contains a telephone memorandum stating that he was advised to submit updated financial information, the record does not contain a letter memorializing the telephone conversation specifically informing him that, in order to be entitled to waiver, he would have to submit updated information regarding his income and expenses. Furthermore, there is no indication that appellant was furnished with an overpayment questionnaire at that time, as is required under Office procedures.²⁴ When appellant was returned to the periodic rolls in June 2002, effective upon his release from prison in October 2001, deductions were made from his continuing compensation to repay the overpayment. By the time the Office issued the January 28, 2008 decision, \$25,550.00 had been repaid.

The Board finds that appellant was denied administrative due process. At the time he was returned to the periodic rolls in June 2002, he had recently been released from prison. It is reasonable to assume that appellant's financial circumstances changed because his monthly expenses had increased. In February 2002, when he requested to be returned to the compensation rolls, he should have been given the opportunity to submit updated financial information and furnished with an overpayment questionnaire in order that the Office could determine if waiver was appropriate before continuing deductions from his compensation payments. There is no indication that appellant was provided with an overpayment questionnaire and the record does not include correspondence indicating that he was notified in writing that he should submit additional financial information. The case will therefore be remanded to the Office to obtain updated financial information to determine if he is entitled to waiver of the \$25,550.00 he has repaid, and to issue an appropriate decision.

²² 20 C.F.R. § 10.437(b); *Madelyn Y. Grant*, *supra* note 19.

²³ Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 6.200.1 (May 2004); *see A.G.*, 58 ECAB ____ (Docket No. 07-626, issued July 16, 2007).

²⁴ *Id.* at Chapter 6.200.6(a)(4)(b) (October 2004).

CONCLUSION

The Board finds that appellant received an overpayment in compensation in the amount of \$36,716.35 but the case is not in posture for decision regarding whether the Office properly denied waiver of \$25,550.00 of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 28, 2008 be affirmed, in part, and set aside, in part and remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: November 21, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board