

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**Y.F., wife of R.F., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS HEALTH ADMINISTRATION,  
San Diego, CA, Employer**

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**Docket No. 10-1664  
Issued: March 11, 2011**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On June 8, 2010 appellant filed a timely appeal from a May 3, 2010 overpayment decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act,<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction of the overpayment in this case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$8,113.85 following adjustment based on her husband's felony conviction; (2) whether the Office properly denied waiver of the recovery of the overpayment; and (3) whether the Office properly set the rate of recovery from appellant's continuing compensation.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On July 29, 1986 the employee, then a 37-year-old nurse's aide and escort, sustained a back injury when moving a gurney in the performance of duty.<sup>2</sup> His claim was accepted for a ruptured disc, low back pain and radiculopathy.<sup>3</sup> The employee retired on disability and elected benefits under the Act as of March 20, 1990 and was placed on the periodic rolls in receipt of compensation for total disability.

In response to an EN1032 form, the employee advised the Office on October 20, 2008 that he had been incarcerated since June 13, 2008. The record reflects that, following a jury trial, he was convicted for a violation of California Penal Code 288(A) and was sentenced to a term of three years in state prison.<sup>4</sup>

As of the payment period commencing January 18, 2009, the Office adjusted compensation benefits to reflect payment of 50 percent of gross entitlement payable to appellant as the employee's dependent spouse until her husband was released from prison. The memorandum explaining the overpayment noted that the computer entry was erroneously processed "basing compensation on 50 percent of the pay rate, plus CPI's, rather than 50 percent of the gross current entitlement during the period January 18, 2009 through March 13, 2010." Compensation was paid by the Office in the amount of \$17,686.42 during this period before the error was corrected. Compensation due appellant for this period totaled \$9,572.57, resulting in an overpayment of compensation in the amount of \$8,113.85.

In a March 23, 2010 letter, the Office advised appellant of its preliminary determination that an overpayment of benefits was created in the amount of \$8,113.85. It advised her that she was found without fault in the creation of the overpayment and of her right to submit evidence if she disagreed with the fact or amount of the overpayment. Appellant's wife was provided a Form OWCP-20 overpayment questionnaire and notified of her right to request a precoupment hearing, a telephone conference or final decision based on the written record. She was asked to submit financial information in order that the question of wavier could be considered and notified that, under the implementing federal regulations, failure to submit the information within 30 days would result in the denial of waiver. Appellant's wife did not respond.

In a May 3, 2010 decision, the Office finalized the overpayment of compensation. It noted that there was no response from appellant's spouse upon notification of the preliminary determination. The Office found that she was without fault in the creation of the overpayment because she was not aware of her entitlement to the benefits received; but it denied waiver as there was no justification offered. It directed recovery of the overpayment by the deduction of

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<sup>2</sup> The employee previously sustained an electric shock injury to his right hand on September 2, 1984 and a bruise of his right knee on December 22, 1985. On April 16, 1986 his claim was accepted for a lumbar strain after moving a gurney.

<sup>3</sup> The record is not clear as to the site of any ruptured disc. Diagnostic testing obtained following injury, including computerized tomography scans, were interpreted as unremarkable or showing no abnormality in contemporary medical reports through 1989.

<sup>4</sup> The charge pertained to a lewd or lascivious act with a child under 14 years of age.

\$65.00 from future compensation payments, or approximately 10 percent of her net monthly entitlement.

On appeal, appellant contends that recovery of the overpayment should be reversed.

### **LEGAL PRECEDENT**

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>5</sup> 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.<sup>6</sup>

The limitation on the payment of compensation benefits to an employee convicted of a felony unrelated to fraud in the application for or the receipt of benefits under the Act provides for an exception when such individual has one or more dependents as defined under 5 U.S.C. § 8110(a).<sup>7</sup> During the period of incarceration, benefits may be paid to such dependents based on the percentage of benefits payable to such individual as computed according to the percentages set forth in 5 U.S.C. § 8133(a)(1) through (5).<sup>8</sup>

The Office's procedure manual provides that, in cases involving convictions for felonies unrelated to claims under the Act but which result in imprisonment, the claims examiner is to suspend or adjust compensation benefits effective the date of imprisonment.<sup>9</sup> When the employee has eligible dependents, payment is to be calculated by applying the percentages of 5 U.S.C. § 8133(a)(1) through (5) to the claimant's gross current entitlement, or 50 percent of gross current entitlement to the spouse if there is no child.<sup>10</sup> Under such circumstances, direct payment may be made to the dependent for the periods of disability during the employee's imprisonment.<sup>11</sup>

### **ANALYSIS**

The Board finds that the case is not in posture for decision. The evidence of record does not establish that the Office claims examiner properly followed the procedures established under section 8148(b)(1) in making adjustment to appellant's compensation benefits as a dependent

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8148(b)(1). See *J.R.*, Docket No. 08-767 (issued August 12, 2008).

<sup>7</sup> *Id.* at § 8148(b)(3).

<sup>8</sup> *Id.*

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(e)(2) (March 1997).

<sup>10</sup> *Id.* at Chapter 2.1400.12(g)(1).

<sup>11</sup> *Id.* at Chapter 2.1400.12(g)(2).

spouse. Therefore, the period and amount of overpayment in this case were not properly determined.

The Office was notified that the employee, appellant's husband, was incarcerated as of June 13, 2008 based on his conviction of a felony unrelated to the receipt of compensation benefits under the Act. Under section 8148(b)(1) the compensation benefits of such employee are to be suspended during the period of incarceration until such period ends. The benefits he received became subject to suspension under the Act as of June 13, 2008 upon his incarceration. The adjustment to compensation payable to appellant as the employee's dependent spouse under section 8148(b)(3) was not made effective until January 18, 2009, some seven months following her husband's incarceration. The Office claims examiner did not explain why benefits were not suspended or the adjustment made as of June 13, 2008, as required under the Act.<sup>12</sup> There is no explanation of record why benefits paid the employee for total disability were otherwise allowed from June 13, 2008 to January 18, 2009 during a period in which he was incarcerated in the California state prison. This is in contravention of section 8148(b)(1).<sup>13</sup> The payment made to appellant as the employee's dependent under section 8133 should be based on adjustment as of June 13, 2008. In this regard, the procedure manual clearly provides that the effective date in cases involving convictions for felonies unrelated to claims under the Act but which result in imprisonment is "the date of imprisonment."<sup>14</sup> Moreover, the claims examiner is advised to inform the employee of the action taken and the reasons for such action; but no such letter is of record.

For these reasons, the Board finds the Office did not properly determine the period or amount of overpayment in this case. The case is not in posture for decision as the amount of overpayment will need to be recalculated.<sup>15</sup> The case will be remanded to the Office for further action and an appropriate overpayment decision complying with the provisions of section 8148(b)(1).<sup>16</sup>

### CONCLUSION

The Board finds that the case is not in posture for decision as to the overpayment created based on the payment of adjusted benefits following the employee's incarceration for a felony unrelated to his benefits under the Act.

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<sup>12</sup> See *Owen P. Crossman*, Docket No. 04-766 (issued August 4, 2004) (the claims examiner is to suspend or adjust compensation benefits effective the date of imprisonment). See also *Lucille A. Pettaway*, 55 ECAB 228, 232 (2004).

<sup>13</sup> See *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>14</sup> *Supra* note 9.

<sup>15</sup> The issues of waiver and recovery are rendered moot.

<sup>16</sup> With regard to overpayments of compensation, the Office must provide findings of fact and a statement of reasons that clearly show how an overpayment was calculated. See *O.R.*, 59 ECAB 432, 437 (2008). Neither the Office's preliminary determination nor the final overpayment decision clearly explain how the amount of the gross current entitlement was determined.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 3, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action in compliance with this decision.

Issued: March 11, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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