

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$4,728.42 for the period August 18, 2016 through March 4, 2017 because he was incarcerated for a felony conviction; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment and, therefore, not subject to waiver of recovery of the overpayment.

FACTUAL HISTORY

On November 21, 1980 appellant, then a 20-year-old aircraft mechanic sheet metal worker, filed a traumatic injury (Form CA-1) alleging that he sustained low back injury when he slipped on water in a restroom while in the performance of duty.³ OWCP initially accepted the claim for lumbar strain, and in August 1983, expanded acceptance of the claim to include permanent aggravation of lumbar degenerative disc disease. Appellant underwent series of authorized surgical procedures including lumbosacral arthrodesis, lumbar fusion, and anterior osteotomy. OWCP paid him wage-loss compensation on the periodic rolls.

Beginning August 15, 1985, OWCP provided appellant a series of Form EN1032s requesting information with respect to employment activity, dependents, and receipt of any other federal benefits in the preceding 15 months.⁴ As of August 2, 2000, the EN1032 forms also requested information pertaining to fraud and felony offenses. The forms asked if the employee had been incarcerated for any period during the past 15 months for any felony offense.

On June 14, 2016 appellant submitted an EN1032 form and responded “no” when asked if he had been incarcerated for any period during the past 15 months for any felony offense that resulted in a conviction under state or federal law.

By letter dated September 26, 2016, appellant notified OWCP that he was unable to attend his scheduled medical appointment on October 4, 2016 because of a family exigency which was taking him out of town. He requested a 120-day extension.

On February 17, 2017 OWCP was contacted *via* telephone by a correctional counselor regarding appellant’s employment status and was notified that he was in prison.

By letter dated February 22, 2017, OWCP requested that appellant provide information regarding his period of incarceration and whether or not he had been convicted of a felony. Appellant did not respond.

Documents from the San Diego County Superior Court of California were submitted. In San Diego County Superior Court Case No. SCD257434, appellant pled guilty to evading police officers driving marked vehicles with lights and sirens on two separate occasions while driving

³ The present claim was assigned OWCP File No. xxxxxx294. Appellant has three prior traumatic injury claims involving low back injuries. OWCP has administratively combined OWCP File Nos. xxxxxx294, xxxxxx524, xxxxxx638, and xxxxxx052, with the present claim serving as the master file.

⁴ The cover letter is identified as a CA-1032 form, but the form requesting information is identified as EN1032.

recklessly and resisting an officer with force. His guilty plea was signed and submitted to the court on December 23, 2014. The charges, as noted in the Charge Summary, are felonies. The period of incarceration was from August 18, 2016 to November 14, 2017.

On May 11, 2018 OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$4,728.42 for the period August 18, 2016 through March 4, 2017 because he was incarcerated on August 18, 2016 for a felony conviction.⁵ It concluded that he was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known that he was not entitled to receive while incarcerated for a felony conviction. OWCP further noted that appellant failed to report his guilty plea to OWCP and had indicated that he could not attend a second opinion examination “due to family exigency” when he was actually incarcerated, having knowingly withheld that information.

OWCP explained that regulations provide that an employee forfeits all rights to compensation during the period of incarceration for a felony conviction. However, if the claimant has eligible dependents, it would pay compensation to such dependents at a reduced rate during the period of his incarceration by applying the percentages of 5 U.S.C. § 8133(a)(1) through (5) to the claimant’s gross current entitlement.⁶ OWCP explained that appellant’s wife was the only eligible dependent during the period of overpayment and compensation benefits should have been reduced to 50 percent because of his felony conviction.⁷ Effective March 5, 2017, it adjusted compensation benefits to reflect payment of 50 percent of gross entitlement payable to appellant’s spouse as a qualifying dependent. OWCP explained that from August 18, 2016 through March 4, 2017, appellant had been paid \$17,895.82 in temporary total disability at the 75 percent augmented compensation rate, amounting to a net payment of \$15,042.09. However, during that period, he was incarcerated and his spouse was therefore entitled to only \$14,167.40 compensation at the 50 percent reduced rate, resulting in \$10,313.67 net compensation. Taking the difference of \$10,313.67 owed from the \$15,042.09 appellant had received resulted in an overpayment of \$4,728.42 for the period August 18, 2016 through March 4, 2017. OWCP informed him of his appeal rights and instructed him to complete an enclosed overpayment recovery questionnaire

⁵ OWCP noted that the full period of incarceration was August 18, 2016 through November 14, 2017. The period of overpayment was August 18, 2016 through March 4, 2017 as compensation was adjusted beginning March 5, 2017 which reflected the 50 percent reduction of compensation for a dependent spouse as a result of appellant’s felony conviction.

⁶ Appellant’s spouse is entitled to 50 percent of gross entitlement if there is no eligible dependent child. 5 U.S.C. § 8133(a)(1).

⁷ By letter dated May 9, 2018, OWCP notified appellant that his previously qualified dependent children were over the age of 18. It informed him that, after the 18th birthday for an unmarried child, he must provide evidence that he contributed towards their support and they were enrolled in a qualified educational program as a full-time student beyond high school for each year between their 18th and 23rd birthdays. OWCP afforded appellant 30 days to submit the requested information after which a decision would be made on his entitlement to augmented compensation on the basis of a qualifying child. By decision dated August 15, 2018, it determined that he had not established entitlement to dependency based on the children listed. OWCP noted that appellant failed to provide evidence in response to its development letter.

(OWCP-20) form and submit supporting financial documentation within 30 days. Appellant did not respond.⁸

By decision dated June 22, 2018, OWCP finalized its preliminary overpayment determination. It found that appellant was at fault in the creation of a \$4,728.42 overpayment for the period August 18, 2016 through March 4, 2017, because he was incarcerated for a felony and knowingly accepted compensation which he was not entitled to receive. OWCP found him at fault because he failed to provide information which he knew or should have known to be material and because he accepted a payment he knew or reasonably should have known was incorrect. It directed recovery by requiring that appellant pay the full amount of the overpayment within 30 days.⁹

LEGAL PRECEDENT -- ISSUE 1

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.¹⁰

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.¹¹ However, no benefits shall be paid or provided to an individual during a 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

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 FECA provides for an exception when such individual has one or more dependents as defined under 5 U.S.C. § 8110(a).¹³ During the period of incarceration, benefits may be paid to such dependents based on

⁸ By decision dated May 31, 2018, OWCP suspended appellant's compensation benefits, effective June 24, 2018 for failing to submit the EN1032 form, affidavit of earnings and employment as requested by OWCP on April 11, 2018. It noted that, if he completed and returned an enclosed copy of the EN1032 form, his compensation benefits would be restored retroactively to the date they were suspended.

⁹ OWCP noted that appellant was in receipt of compensation benefits from OWCP. However, his benefits were to be suspended as of June 24, 2018 because he had failed to return the required Form CA-1032. OWCP advised that, as appellant had appealed the suspension, should appellant's compensation later be reinstated, it would review the claim to determine if withholding money to apply the debt from his continuing compensation payments would be warranted.

¹⁰ See 20 C.F.R. §§ 1.1-1.4.

¹¹ 5 U.S.C. § 8102(a).

¹² *Id.* at § 8148(b)(1). See *J.R.*, Docket No. 08-0767 (issued August 12, 2008).

¹³ *Id.* at § 8148(b)(3).

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).¹⁴

OWCP's procedure manual provides that, in cases involving convictions for felonies unrelated to claims under FECA, but which result in imprisonment, the claims examiner is to suspend or adjust compensation benefits effective the date of imprisonment.¹⁵ 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.¹⁶ Under such circumstances, direct payment may be made to the dependent for the periods of disability during the employee's imprisonment.¹⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received a \$4,728.42 overpayment of compensation for the period August 18, 2016 through March 4, 2017 due to his incarceration for a felony conviction.¹⁸

Section 8148(b) of FECA provides that no compensation shall be paid during a period a person is confined to a penal institution pursuant to conviction for a felony offense.¹⁹ The record in this case contains copies of court documents establishing that appellant entered guilty pleas to nine felonies with his sentence effectively beginning on August 18, 2016.²⁰ Appellant did not notify OWCP of his incarceration and he, therefore, received full compensation benefits from August 18, 2016 through March 4, 2017.²¹ Effective March 5, 2017, OWCP reduced his benefits by 50 percent for adjustment to compensation payable to his dependent spouse under 5 U.S.C. § 8148(b)(3).²²

The Board notes that the fact and amount of the overpayment are not in dispute.²³ The record reflects that from August 18, 2016 through March 4, 2017, no adjustment was made to appellant's compensation benefits while he was incarcerated.²⁴ OWCP properly explained that he

¹⁴ *Id.*

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.18 (February 2013).

¹⁶ *Id.* at Chapter 2.1400.18(e).

¹⁷ *Id.*

¹⁸ *R.S.*, Docket No. 17-1985 (issued March 23, 2018).

¹⁹ 5 U.S.C. § 8148(b).

²⁰ *C.f. T.P.*, Docket No. 13-2078 (issued September 25, 2014).

²¹ *See generally T.P.*, Docket No. 12-0097 (issued July 19, 2012).

²² *Supra* note 12.

²³ *E.V.*, Docket No. 17-2026 (issued July 11, 2018); *J.R.*, Docket No. 08-0767 (issued August 12, 2008).

²⁴ *S.H.*, Docket No. 14-0421 (issued August 27, 2014).

had received a net sum of \$15,042.09 in compensation benefits during that period. In accordance with the exception provided for individuals convicted of a felony unrelated to fraud in the receipt of benefits under FECA, appellant's spouse was entitled to only 50 percent of appellant's gross current entitlement as a dependent with no children.²⁵ OWCP noted its calculations and reported that appellant's dependent spouse was entitled to \$10,313.67 in net compensation during the period in question. It subtracted the \$10,313.67 from the \$15,042.09 received, resulting in an overpayment of \$4,728.42. Thus, the Board finds that an overpayment of compensation in the amount of \$4,728.42 was created for the period August 18, 2016 through March 4, 2017.²⁶

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA²⁷ provides that an overpayment of compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.²⁸ Thus, OWCP may not waive the overpayment of compensation unless appellant was without fault.²⁹ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is at fault.³⁰

On the issue of fault, section 10.433 of OWCP's regulations, provides that an individual will be found at fault if he or she has done any of the following:

- (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect;
- (2) failed to provide information which he or she knew or should have known to be material; or
- (3) accepted a payment which he or she knew or should have known was incorrect.³¹

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the

²⁵ *Supra* note 15.

²⁶ *H.G.*, Docket No. 08-1094 (issued November 21, 2008).

²⁷ 5 U.S.C. § 8129(b).

²⁸ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

²⁹ *Norman F. Bligh*, 41 ECAB 230 (1989).

³⁰ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

³¹ 20 C.F.R. § 10.433(a).

overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.³²

ANALYSIS -- ISSUE 2

The Board finds OWCP properly determined that appellant was at fault in the creation of the \$4,728.42 overpayment and, therefore, ineligible for waiver of recovery of the overpayment.³³

With respect to whether an individual is at fault in the creation of an overpayment, section 10.433(b) of OWCP regulations provide that whether OWCP determines that an individual was at fault with respect to the receipt of an overpayment depends on the circumstances surrounding the overpayment.³⁴ The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she was being overpaid.³⁵

Appellant has not contested the fact or amount of overpayment or the finding of fault. The Board notes that he is required to file EN1032 forms providing an affidavit of earnings and employment for the previous 15 months. Beginning August 2, 2000, these EN1032 forms requested information pertaining to fraud and felony offenses. Appellant last filed an EN1032 form on June 14, 2016 and responded "no" when asked if he had been incarcerated for any period during the past 15 months for a felony offense that resulted in a conviction under state or federal law. While he was not incarcerated at the time of his June 14, 2016 affidavit, he was aware or should have been aware that a felony conviction could impact his compensation benefits as this information was requested on the EN1032 forms beginning in August 2, 2000.³⁶ Following his incarceration on August 18, 2016, appellant submitted a September 26, 2016 letter informing OWCP that he was unable to attend his scheduled medical appointment on October 4, 2016 because of a family exigency which was taking him out of town. In this instance, he made an incorrect statement and withheld information that he knew or reasonably should have known to be relevant.³⁷ Appellant further failed to furnish information which he knew or should have known to be material to OWCP.³⁸ He did not contest the finding of fault or provide an explanation with respect to OWCP's overpayment determination. Thus, the Board finds that appellant is at fault in

³² *Id.* at § 10.433(b).

³³ *L.J.*, Docket No. 10-2322 (issued August 3, 2011).

³⁴ *See J.D.*, Docket No. 10-640 (issued December 17, 2010); *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

³⁵ *See G.Z.*, Docket No. 16-0892 (issued May 19, 2017).

³⁶ The Board notes that appellant did not submit the required April 11, 2018 EN1032 form for the prior 15 months, resulting in the suspension of his benefits effective June 24, 2018.

³⁷ *T.O.*, Docket No. 12-0426 (issued July 23, 2012).

³⁸ 20 C.F.R. § 10.433(a).

the creation of the overpayment and is ineligible for waiver of recovery of the overpayment.³⁹ OWCP is required by law to recover the overpayment.⁴⁰

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$4,728.42 for the period August 18, 2016 through March 4, 2017. The Board further finds that appellant was at fault in the creation of the overpayment and, therefore, ineligible for waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 15, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

³⁹ *J.C.*, Docket No. 13-0726 (issued September 23, 2013).

⁴⁰ With respect to whether OWCP properly required recovery of the overpayment of compensation by ordering appellant to pay the full amount of the overpayment within 30 days, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. *Cheryl Thomas*, 55 ECAB 610 (2004). As appellant's compensation benefits were suspended as of June 24, 2018, the Board lacks jurisdiction over the issue of recovery of the overpayment under the Debt Collection Act. *Robert Ringo*, 53 ECAB 258 (2001).