

fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On June 14, 2005 appellant, then a 44-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that on May 24, 2005 he injured his right ankle, right knee, right wrist, and low back when he fell on the floor while in the performance of duty. He stopped work on May 25, 2005. OWCP accepted the claim for knee effusion and sprains of the cervical and thoracic spine. It subsequently expanded acceptance of the claim to include aggravation of lumbar radiculopathy. OWCP paid appellant wage-loss compensation for total disability beginning July 10, 2005.

On April 17, 2017 a grand jury for the U.S. District Court for the District of Puerto Rico indicted appellant for making false written statements to OWCP under 18 U.S.C. § 1001 by concealing his employment on EN1032 forms, for theft of government property under 18 U.S.C. §§ 641, for embezzling and stealing money from the Social Security Administration (SSA), and for concealing or failing to disclose an event to the SSA.

On May 19, 2017 a jury found appellant guilty on all counts.

By decision dated May 27, 2017, OWCP found that appellant had forfeited his entitlement to compensation beginning May 19, 2017 as he was found guilty of knowingly making false statements to OWCP in violation of 18 U.S.C. § 1001. It determined that, as a result of his conviction, and in accordance with 5 U.S.C. § 8148(a) and 20 C.F.R. § 10.17, he was not entitled to receive further benefits under FECA under this or any other file number.

On June 7, 2017 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP continued to pay appellant wage-loss compensation for disability until July 22, 2017.

On August 8, 2017 OWCP notified appellant of its preliminary determination that he had received an overpayment of wage-loss compensation in the amount of \$11,376.07 as it paid him compensation for the period May 19 through July 22, 2017 after it had terminated his compensation benefits. It calculated the overpayment by adding the net amount of compensation paid from May 19 through July 21, 2017. OWCP further advised appellant of its preliminary determination that he was at fault in the creation of the overpayment. It requested that he complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On September 1, 2017 appellant requested a telephone conference before OWCP on the issue of fault and possible waiver. He submitted a completed overpayment recovery questionnaire. No telephone conference was scheduled or took place regarding the issue of overpayment.

A telephonic hearing was held on November 7, 2017 regarding OWCP's May 27, 2017 decision terminating appellant's compensation under 5 U.S.C. § 8148(a). Appellant asserted that he had notified the employing establishment that he wanted to resume work.

By decision dated January 3, 2018, OWCP's hearing representative affirmed the May 25, 2017 decision. He determined that OWCP had properly terminated appellant's entitlement to compensation effective May 19, 2017, under section 8148(a), as a jury had found him guilty of making false written statements to OWCP.

By decision dated January 24, 2018, OWCP finalized its determination that appellant received an overpayment of compensation in the amount of \$11,376.07 as he continued to receive compensation until July 22, 2017 after it had terminated his compensation benefits on May 19, 2017. It further found that he was at fault in the creation of the overpayment of compensation and thus not entitled to waiver of recovery of the overpayment. OWCP instructed appellant to forward a check for the entire amount of the overpayment as recovery.

LEGAL PRECEDENT -- ISSUE 1

Public Law No. 103-333, enacted on September 30, 1994, amended FECA by adding 5 U.S.C. § 8148, which provides for the termination of benefits payable to beneficiaries who have been convicted of defrauding the program. Section 8148(a) specifically provides that an individual convicted of a violation of 18 U.S.C. § 1920 or any other federal or state criminal statute relating to fraud in the application for or receipt of a benefit under FECA, shall forfeit, as of the date of such conviction, entitlement to any benefit to which such individual would otherwise be entitled under FECA for an 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 8106³ (forfeiture) or section 8129⁴ (recovery of overpayments) of FECA.⁵

Section 10.17 of OWCP's implementing regulations provides that when a claimant pleads guilty to federal or state criminal charges of fraud in connection with receipt of Federal Government benefits, the claimant's entitlement to further compensation benefits will terminate effective the date the guilty plea is accepted. Termination of entitlement under this section is not affected by any subsequent change in or recurrence of the beneficiary's medical condition.⁶

OWCP's procedures provide that in support of termination or suspension of compensation the record must contain copies of the indictment or information and the plea agreement, if any, or the document containing the guilty verdict. Further, this evidence must establish that the individual was convicted and the conviction is related to the claim for or receipt of compensation

³ 5 U.S.C. § 8106.

⁴ *Id.* at § 8129.

⁵ *Id.* at § 8148; *see D.S.*, Docket No. 18-1173 (issued June 13, 2019).

⁶ 20 C.F.R. § 10.17.

benefits under FECA.⁷ The termination is effective on the date of the verdict or on the date the guilty plea is accepted and guilt adjudicated.⁸ Because of the criminal basis for the termination, no pretermination notice is required before a final decision is issued.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly terminated appellant's compensation, effective May 19, 2017, as he forfeited his entitlement to compensation pursuant to 5 U.S.C. § 8148(a).

On April 17, 2017 a grand jury for the U.S. District Court for the District of Puerto Rico indicted appellant on three counts of making false written statements to OWCP under 18 U.S.C. § 1001 by concealing his employment on EN1032 forms. On May 19, 2017 a jury found him guilty on all three counts of making false statements under 18 U.S.C. § 1001 when he concealed his employment on EN1032 forms. Under section 8148(a) of FECA, a claimant who is convicted of fraud in obtaining compensation benefits under 18 U.S.C. § 1920 or any other federal or state criminal statute relating to fraud in the application for or receipt of a benefit under FECA is permanently barred from receiving compensation under FECA.¹⁰

The record contains a copy of the indictment and the jury verdict. The Board finds that the evidence establishes that appellant was convicted of fraud for making false statements to OWCP under 18 U.S.C. § 1001. OWCP procedures provide that the termination is effective on the date of the verdict.¹¹ The Board thus finds that OWCP properly terminated appellant's compensation benefits on May 19, 2017.¹²

On appeal appellant contends that he informed the employing establishment of his activities and that he wanted to resume work. As discussed, however, pursuant to 5 U.S.C. § 8148, he forfeited his entitlement to compensation based on his conviction under a federal criminal statute for making false statements in the application for or receipt of benefits under FECA.¹³

LEGAL PRECEDENT -- ISSUE 2

OWCP is required to follow certain procedures in overpayment cases. 20 C.F.R. § 10.431 provides that, before seeking recovery of an overpayment, it will advise a claimant in writing that the overpayment exists, and the amount of the overpayment.¹⁴ The written notification must

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.17(c)(2) (February 2013).

⁸ *Id.* at Chapter 2.1400.17(d) (February 2013).

⁹ *Id.* at Chapter 2.1400.4(a)(6) (February 2013).

¹⁰ 5 U.S.C. § 8148(a); 20 C.F.R. § 10.17; *see R.M.*, Docket No. 17-0141 (issued March 28, 2018).

¹¹ *Supra* note 8.

¹² *See D.S.*, Docket No. 18-1173 (issued June 13, 2019).

¹³ *See supra* note 10.

¹⁴ 20 C.F.R. § 10.431(a).

include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.¹⁵ Additionally, OWCP is obliged to advise the individual of his or her right to inspect and copy the government records relating to the overpayment.¹⁶ Lastly, the preliminary notice must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.¹⁷ The recipient of the alleged overpayment may present evidence in response to OWCP's preliminary notice, either in writing or at a prerecoument hearing requested within 30 days.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision regarding the issue of whether appellant received an overpayment of compensation in the amount of \$11,376.07.

On August 8, 2017 OWCP notified appellant of its preliminary determination that he had received an \$11,376.07 overpayment of compensation and its finding that he was at fault in the creation of the overpayment. It further advised him of the actions that he could take, including the option to request a telephone conference with OWCP within 30 days.

On September 1, 2017 appellant timely requested a telephone conference before OWCP and submitted a completed overpayment recovery questionnaire. OWCP did not, however, conduct a telephone conference before issuing its final overpayment decision. Therefore, appellant was not provided the opportunity to provide testimonial evidence regarding the alleged overpayment.¹⁹

The case will be remanded to OWCP to provide appellant a telephone conference. After such further development as deemed necessary, it should issue a *de novo* decision regarding the overpayment issues.²⁰

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation, effective May 19, 2017, as he forfeited his entitlement to compensation pursuant to 5 U.S.C. § 8148(a). The Board further finds that the case is not in posture for decision regarding whether OWCP properly found that he received an overpayment of compensation in the amount of \$11,376.07.

¹⁵ *Id.* at § 10.431(b).

¹⁶ *Id.* at § 10.431(c).

¹⁷ *Id.* at § 10.431(d).

¹⁸ *Id.* at § 10.432.

¹⁹ *B.B.*, Docket No. 16-0495 (issued October 21, 2016).

²⁰ In light of the Board's disposition of the issue of fact and amount of overpayment, it is premature to address the issue of fault.

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed and the January 24, 2018 decision is set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 8, 2019
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board