

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

_____)	
D.G., Appellant)	
)	
and)	Docket No. 20-0201
)	Issued: October 22, 2021
DEPARTMENT OF THE AIR FORCE,)	
756TH AIR BASE GROUP, TYNDALL AIR)	
FORCE BASE, Panama City, FL, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
Appellant, pro se
Office of Solicitor, for the Director

ORDER REVERSING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

On October 23, 2019, appellant filed a timely appeal from a September 25, 2019 merit decision and an October 16, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 20-0201.¹

On December 3, 1969 appellant, then a 23-year-old shelf stocker, filed a Federal Employees' Compensation Act (FECA)² traumatic injury claim (Form CA-1) alleging that on that date he sustained a back injury when pulling a hand lift while in the performance of duty. He stopped work on December 4, 1969 and returned to work on December 8, 1969. OWCP accepted the claim for lumbosacral strain. It paid appellant wage-loss compensation on the periodic rolls, effective March 12, 1970, until he returned to work on April 3, 1972. He stopped work again on June 6, 1972 and did not return. The record reflects that OWCP resumed paying him wage-loss compensation on the periodic rolls, as of November 16, 1972.³

¹ The Board notes that, following the October 16, 2019 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

² 5 U.S.C. § 8101 *et seq.*

³ Appellant retired on disability from the employing establishment effective February 20, 1973.

The record contains a state Division of Corrections form noting that on May 28, 1978 appellant was convicted of three counts of murder in the first degree. He was sentenced to prison on August 18, 1978.

By decision dated November 13, 1978, OWCP terminated appellant's wage-loss compensation, effective that date, as it found he was not disabled from work and failed to report employment activities and earnings. On February 24, 1979 appellant requested reconsideration. By decision dated September 25, 1979, OWCP denied modification. Appellant thereafter requested a hearing before an OWCP hearing representative. By decision dated June 27, 1980, OWCP determined that appellant had abandoned his request for a hearing before a representative of OWCP's Branch of Hearings and Review. On February 4, 1983 appellant requested reconsideration. By decision dated February 24, 1983, OWCP denied appellant's request for reconsideration. On April 22, 1983 appellant again requested reconsideration. By decision dated August 18, 1987, OWCP determined that appellant had residual disability due to his December 3, 1969 employment injury. Appellant was advised that earnings and dependency information was needed to determine entitlement to FECA wage-loss compensation. He was provided a Form CA-1032 to complete and was asked to identify all earnings and status of dependents commencing November 12, 1978.

On June 17, 1988 OWCP informed appellant that his FECA compensation benefits would resume on July 30, 1988 and that in two weeks he would receive a check for retroactive compensation.

By decision dated March 16, 2005, OWCP informed appellant that his wage-loss compensation benefits were suspended due to his incarceration for a felony conviction. Appellant was advised that his benefits may be reinstated once written notification was received that he was no longer incarcerated.

By letter dated May 18, 2017, received on August 22, 2017, appellant notified OWCP that he was released from prison on May 2, 2017 and he requested reinstatement of his FECA wage-loss compensation benefits.

By notice dated August 16, 2019, OWCP advised appellant of its preliminary determination that appellant received an overpayment of compensation in the amount of \$248,076.47 for the period November 12, 1978 through March 19, 2005 as appellant had forfeited all right to compensation during the period of his incarceration for the felony convictions, pursuant to 5 U.S.C. § 8148(b).⁴ It found appellant at fault in the creation of the overpayment as he knew

⁴OWCP provided detailed calculations of its findings regarding appellant's entitlement to compensation for specific periods from November 12, 1978 through March 19, 2005. It found that he was paid a total of \$366,234.10 when he was only entitled to receive \$118,157.63. OWCP noted that, while he had eligible dependents, it was obligated to pay compensation to his eligible dependents only at a reduced rate during the period of incarceration by adjusting his compensation benefits. It indicated that on November 18, 1980 the dissolution of appellant's marriage was finalized and his spouse's entitlement ceased. Therefore, effective November 17, 1980, the correct entitlement for compensation was at the 55 percent reduced rate for appellant's two eligible children (40 percent for the elder daughter, and 15 percent for the son). OWCP indicated that appellant's daughter turned 18 on June 2, 1987 and graduated from high school on June 5, 1987, but did not attend college thereafter. Effective June 6, 1987, the correct entitlement for compensation was at the 40 percent reduced rate for the eligible son. OWCP noted that appellant's son (and last qualifying child) turned 18 on October 12, 1989, but did not attend college thereafter. On such date appellant no longer had any eligible dependents, but continued to receive compensation benefits at the 2/3 rate until March 19, 2005. It, therefore, concluded that he received an overpayment of compensation in the amount of \$248,076.47 overpayment.

or should have known that he received improper compensation payments for that period. It provided appellant with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, OWCP notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written record, or a prerecoumment hearing.

By decision dated September 25, 2019, OWCP finalized its preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$248,076.47 for the period November 12, 1978 through March 19, 2005 pursuant to 5 U.S.C. § 8148(b). It found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP required that appellant forward payment for the full amount of \$248,076.47.

On October 3, 2019 OWCP received an overpayment action request form dated September 25, 2019 and postmarked September 26, 2019, in which appellant requested a prerecoumment hearing before OWCP's Branch of Hearings and Review on the issues of fault and possible waiver of recovery of the overpayment. By decision dated October 16, 2019, OWCP denied appellant's request for a prerecoumment hearing as untimely filed.

The Board, having duly considered this matter, finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$248,076.47 for the period November 12, 1978 through March 19, 2005.

Congress amended FECA on September 30, 1994, to include "§ 8148. Forfeiture of benefits by convicted felons."⁵ Section 8148(b)(1) of FECA provides that 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.⁶ 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).⁷ 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)-(5).⁸

The legislative history of Section 8148 specifically provides: "The amendments made by this section shall take effect on the date of the enactment of this Act. The amendments made by

⁵ Pub. L. No. 103-333, § 101(a) (enacted September 30, 1994).

⁶ *Supra* note 2 at § 8148(b)(1). *See also J.G.*, Docket No. 18-1432 (issued March 15, 2019); *J.R.*, Docket No. 08-0767 (issued August 12, 2008).

⁷ *Id.* at § 8148(b)(3).

⁸ *Id.* OWCP's procedure manual further 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. 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, *i.e.*, 50 percent of gross current entitlement to the spouse if there is no child, or 45 percent to the spouse if there is a child (or children), with 15 percent to each child, not to exceed 75 percent of gross current entitlement. In the case of a minor dependent, payment should be made payable to the beneficiary or guardian. *See Federal (FECA) Procedure Manual, Part 2 -- Claims, Disallowances, Chapter 2.1400.18* (February 2013).

subsection (a) shall apply to claims filed before, on, or after the date of enactment of this Act, and *shall apply only to individuals convicted after such date of enactment.*”⁹ (Emphasis added.)

As appellant was convicted of felonies on May 27, 1978 and 5 U.S.C. § 8148(b) was not enacted until September 30, 1994, OWCP improperly applied the standards of 5 U.S.C. § 8148(b) to appellant’s case. Therefore, fact of overpayment is not established. The Board thus finds that, OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$248,076.47 for the period November 12, 1978 through March 19, 2005.

IT IS HEREBY ORDERED THAT the September 25, 2019 decision of the Office of Workers’ Compensation Programs is reversed.¹⁰

Issued: October 22, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees’ Compensation Appeals Board

Janice B. Askin, Judge
Employees’ Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees’ Compensation Appeals Board

⁹ *Supra* note 7 at §101(c).

¹⁰ In light of the Board’s disposition with regard to the September 25, 2019 merit decision, the October 16, 2019 nonmerit decision is set aside as moot.