

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

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**DANNY E. HALEY, Appellant**

**and**

**TENNESSEE VALLEY AUTHORITY,  
PARADISE STEAM PLANT, Drakesboro, KY,  
Employer**

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**Docket No. 04-853  
Issued: March 18, 2005**

*Appearances:*  
*Danny E. Haley, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On February 11, 2004 appellant filed a timely appeal from a merit decision of a hearing representative of the Office of Workers' Compensation Programs dated January 20, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit issues of this case.

**ISSUES**

The issues are: (1) whether the Office properly suspended appellant's compensation effective November 2, 1998 due to his imprisonment based on a felony conviction; (2) whether the Office properly terminated appellant's compensation effective January 11, 2000 on the grounds that he forfeited his entitlement pursuant to section 8148(a) of the Federal Employees' Compensation Act and was, therefore, no longer entitled to compensation benefits, including a schedule award; (3) whether the Office properly found that an overpayment in the amount of \$6,491.08 had been created because appellant did not report earnings for the period January 1, 1996 to December 31, 1997; (4) whether the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, it was not subject to waiver; and (5) whether the

Office properly determined that, as the court-ordered restitution was not global, appellant was not absolved of the overpayment.

On appeal appellant contends that he is entitled to a schedule award for his 1983 injury and that he should be entitled to wage-loss compensation until December 23, 1998, the date he was sentenced.

### **FACTUAL HISTORY**

On December 30, 1983 appellant, then a 33-year-old steamfitter, sustained an employment-related medial collateral tear of the right knee when he slipped and fell on ice while at work. He stopped work that day and did not return. He was placed on the periodic rolls and underwent a number of surgical procedures. The accepted right knee condition was expanded to include post-traumatic arthritis and, on March 12, 1991, he was granted a schedule award for a 39 percent impairment of the right leg. On January 28, 1992 appellant underwent a total knee replacement procedure. After expiration of the schedule award on February 13, 1992 he was returned to the periodic rolls.

The Office developed the claim and in January 1995 appellant was referred for vocational rehabilitation. Thereafter, he submitted Office EN1032 forms signed and dated November 4, 1996 and November 29, 1997, indicating that he had no earnings for the prior 15 months respectively.<sup>1</sup> The record indicates that appellant was arrested on March 31, 1998 for shooting his wife and was incarcerated in the Todd County Jail in Elkton, Kentucky. On an EN1032 form signed and dated on May 11, 1998 appellant indicated that from October 1997 until March 31, 1998 he had earnings of \$320.00 a week from McIntosh Welding. On June 16, 1998 the Office suspended his wage-loss compensation, stating that he had not submitted the requested financial information on Office EN1032 forms. Appellant's divorce became final on July 24, 1998 and he submitted an EN1032 form, signed and dated July 31, 1998, in which he again advised that he had been employed by McIntosh Welding, beginning in October 1997.

By letter dated September 9, 1998, the Office proposed to reduce appellant's compensation on the grounds that he had the capacity to earn wages as a desk clerk. By decision dated November 16, 1998, the Office adjusted his compensation rate based on his capacity to earn wages as a desk clerk.<sup>2</sup> An itemized statement of earnings from the Social Security Administration (SSA) received by the Office on October 23, 1998 indicated that appellant had \$2,652.50 in earnings for the year 1996 and \$4,628.00 for the year 1997. On January 12, 1999 the Office informed appellant that it made a preliminary determination that he had received an overpayment in compensation in the amount of \$6,491.08 for the period January 1, 1996 to December 31, 1997, because he did not report earnings while receiving wage-loss compensation for this period. The Office found that appellant had actual earnings of \$7,280.50 for this period which equaled average earnings of \$70.00 per week. The Office applied the *Shadrick* formula

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<sup>1</sup> The record indicates that on June 16, 1997 an overpayment in compensation in the amount of \$116.14 was waived.

<sup>2</sup> Appellant did not file an appeal of this decision.

and reduced that amount to \$6,491.08 to reflect his wage-earning capacity.<sup>3</sup> The Office found that appellant was at fault in the creation of the overpayment because he failed to report his earnings on the Office EN1032 forms, which he submitted covering the period in question. On January 25, 1999 appellant requested a prereducement hearing regarding the preliminary overpayment determination.

By letter dated January 27, 1999, the Office of the Inspector General of the employing establishment informed the Office that appellant pled guilty to a felony offense and forwarded a November 2, 1998 judgment of conviction, indicating that he entered a guilty plea for second degree assault, a second class felony, in the circuit court of the Commonwealth of Kentucky.<sup>4</sup> The employing establishment also forwarded a final judgment of imprisonment that was entered by the circuit court on December 23, 1998 which indicated that appellant was sentenced to 7 years imprisonment with credit given for 268 days of time served. The employing establishment informed the Office of appellant's conviction and sentencing and advised that the U.S. Attorney's Office was pursuing prosecution for fraud under the Act.

In a letter dated February 8, 1999, the Office informed appellant's attorney that, pursuant to Office procedures, appellant's compensation would be suspended as of the date of his imprisonment or March 31, 1998. The Office noted that appellant had received compensation through June 20, 1998. In a letter dated March 3, 1999, appellant's attorney contended that appellant was entitled to receive compensation until the date of his felony conviction, November 13, 1998.<sup>5</sup> By decision dated March 8, 1999, pursuant to section 8148 of the Act, the Office suspended appellant's compensation effective November 1, 1998 based on his guilty plea of a felony.

By letter dated January 25, 2000, the Office of the Inspector General of the employing establishment forwarded an indictment and a plea agreement dated January 11, 2000, in which appellant pled guilty to two counts of mail fraud pursuant to 18 U.S.C. § 1341 and two counts of making a false statement to obtain federal workers' compensation pursuant to 18 U.S.C. § 1920.

In a February 16, 2000 decision, the Office found that appellant was not entitled to further wage-loss compensation or medical benefits under the Act based on his January 11, 2000 guilty plea to fraud. On March 13, 2000 appellant requested a hearing on his claim. By letter dated June 6, 2000, the employing establishment forwarded a copy of a judgment entered May 25, 2000, in which appellant's January 11, 2000 guilty plea was noted. Restitution to the employing establishment in the amount of \$8,839.24 was ordered. Appellant was sentenced to 30 days in prison, to run consecutively with his state sentence. His hearing request was held in abeyance.

On November 4, 2002 appellant informed the Office that he had been released from prison on October 31, 2002 and wished to schedule a hearing, which was held on

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<sup>3</sup> See *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403.

<sup>4</sup> Ky. Rev. Stat. § 508.020.

<sup>5</sup> The Board notes that, at several places, the record contains references that appellant was convicted on November 13, 1998. The record, however, clearly indicates that his guilty plea was entered on November 2, 1998.

September 25, 2003. Appellant contended that, as he was sentenced on December 23, 1998, he should receive compensation until that date. Appellant further argued that, since he was paying restitution to the employing establishment, there was no overpayment in compensation. Appellant noted that he had filed a hearing loss claim and wanted a lump-sum schedule award because he needed further knee surgery. In a letter dated October 27, 2003, the employing establishment argued that appellant should not receive compensation and was not entitled to a schedule award.

By decision dated January 20, 2004, the Office hearing representative affirmed the February 16, 2000 decision, finding that appellant forfeited compensation effective January 11, 2000, based on his guilty plea and conviction for fraud pursuant to section 8148 of the Act, noting that this pertained to all compensation, including entitlement to a schedule award. The Office hearing representative further found that an overpayment in the amount of \$6,491.08 had been created because appellant did not report earnings and that he was at fault in its creation because he knew or should have known that he was not entitled to total disability compensation while working and, therefore, accepted payments that were incorrect. The Office hearing representative noted that, as the judgment of record did not indicate that restitution was global, appellant was not absolved from repaying the overpayment. The Office hearing representative found that appellant was entitled to wage-loss compensation up to the date he was convicted, from June 21 through November 1, 1998.

#### **LEGAL PRECEDENT -- ISSUE 1**

Public Law No. 103-333, enacted on September 30, 1994 amended the Act by adding, 5 U.S.C. § 8148, which provides for (a) the termination of benefits payable to beneficiaries who have been convicted of defrauding the program and (b) the suspension of benefits payable to beneficiaries imprisoned as a result of felony conviction.<sup>6</sup> Section 8148(b) specifically states that “Notwithstanding any other provision of this chapter ... no benefits under this subchapter or subchapter 3 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.”<sup>7</sup> The Office procedure manual provides 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 as of the date of imprisonment.<sup>8</sup> No pretermination notice is required.<sup>9</sup>

#### **ANALYSIS -- ISSUE 1**

Appellant was incarcerated in the Todd County Jail in Elkton, Kentucky, on March 31, 1998 and charged with domestic violence. On November 2, 1998 he pled guilty in the circuit

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<sup>6</sup> 5 U.S.C. § 8148.

<sup>7</sup> 5 U.S.C. § 8148(b).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(e)(2) (March 1997).

<sup>9</sup> *Id.* at Chapter 2.1400.12(g).

court of the Commonwealth of Kentucky to violating Kentucky Revised Statute 508.020, assault in the second degree, a felony offense. On December 23, 1998 a final judgment was entered in which he was sentenced to 7 years imprisonment with credit given for 268 days of time served.

Section 8148(b) of the Act provides that benefits of beneficiaries imprisoned as a result of felony conviction shall be suspended as of the date of imprisonment. In this case, the Board finds that the effective date of appellant's imprisonment was March 31, 1998. The record reflects that on December 23, 1998 when he was sentenced to seven years incarceration, appellant was given credit for time already served. The language of section 8148(b) does not permit discretion on the part of the Office. Appellant was not entitled to wage-loss compensation after March 31, 1998, and his entitlement to compensation benefits should have been suspended effective on that date.<sup>10</sup> It was therefore error for the Office to conclude that he was entitled to wage-loss compensation up to November 2, 1998.<sup>11</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Public Law No. 103-112, enacted on October 21, 1993 prohibits the Office from paying benefits to "any individual convicted of a violation of 18 U.S.C. § 1920 or of any felony fraud related to the application for or receipt of benefits" under the Act. This section also requires termination of all benefits.<sup>12</sup> The Office procedures 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. Further, this evidence must establish that the individual was convicted and the conviction is related to the claim for or receipt of compensation benefits under the Act.<sup>13</sup> The termination is effective on the date of the verdict or on the date the guilty plea is made in open court.<sup>14</sup> Because of the criminal basis for the termination, no pretermination notice is required before a final decision is issued.<sup>15</sup>

Section 8148(a) prohibits individuals who have been convicted of fraud related to their claims from receiving further benefits paid by the Employees' Compensation Fund. This section provides that an individual convicted of a federal or state statute relating to fraud in the application for or receipt of any benefits under the Act shall forfeit as of the date of such conviction any entitlement to any benefit such individual would otherwise be entitled to under

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<sup>10</sup> *Supra* note 7.

<sup>11</sup> As noted, the terms of section 8148(b) are specific as to the suspension of compensation during a period of incarceration pursuant to conviction for a felony. Neither the Office nor the Board has the authority to enlarge the terms of the Act nor to make an award of benefits under any terms other than those specified in the statute. *See Peggy R. Thompson*, 52 ECAB 393 (2001).

<sup>12</sup> *Bob R. Gilley*, 51 ECAB 377 (2000).

<sup>13</sup> Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1400.12d.

<sup>14</sup> *Id.* at Chapter 2.1400.12e(1).

<sup>15</sup> Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1400.12f(2).

the Act for any injury occurring on or before the date of the conviction. Such forfeiture shall be in addition to any action taken under section 8106 or 8129 for recovery of an overpayment.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

On January 11, 2000 appellant pled guilty in federal court to two counts of mail fraud pursuant to 18 U.S.C. § 1341 and two counts of making a false statement pursuant to 18 U.S.C. § 1920, related to the receipt of benefits under the Act. The case record before the Board contains copies of the indictment, the plea agreement and a copy of the judgment. The Board finds that this evidence establishes that appellant was convicted of mail fraud and making false statements to obtain compensation benefits under the Act.<sup>17</sup> The Office procedures provide that the termination is effective on the date the guilty plea is made in open court.<sup>18</sup> The Office properly terminated appellant's compensation benefits that day, January 11, 2000.<sup>19</sup>

Regarding appellant's contention that he remains entitled to a schedule award, the Board notes that on March 12, 1991 appellant was granted a schedule award for a 39 percent impairment of the right leg and received compensation from November 18, 1990 to February 13, 1992. Appellant pled guilty to violating both 18 U.S.C. § 1341 and § 1920. As noted, section 8148(a) of the Act provides that any individual convicted of a federal or state statute relating to fraud in the application for or receipt of benefits under the Act shall forfeit, as of the date of such conviction, any entitlement to any benefit such individual would otherwise be entitled to under the Act for any injury occurring on or before the date of the conviction.<sup>20</sup> The Office regulations define "benefits" as "the money [the Office] pays to or on behalf of a beneficiary from the Employees' Compensation Fund for lost wages, a loss of wage-earning capacity or a permanent physical impairment..."<sup>21</sup> The statute and implementing regulations clearly establish that appellant, who was convicted of a violation of 18 U.S.C. § 1920, is not entitled to schedule award compensation for any permanent impairment.<sup>22</sup> His conviction for fraud under the Act acts as a forfeiture of his entitlement to compensation.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8102(a) of the Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal

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<sup>16</sup> 5 U.S.C. § 8148(a); *Robert C. Gilliam*, 50 ECAB 334 (1999).

<sup>17</sup> Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1400.12d.

<sup>18</sup> *Id.* at Chapter 2.1400.12e(1).

<sup>19</sup> *Bob R. Gilley*, *supra* note 12.

<sup>20</sup> *See John L. Hoss, Jr.*, 54 ECAB \_\_\_\_ (Docket No. 01-404, issued December 16, 2002).

<sup>21</sup> 20 C.F.R. § 10.5(a).

<sup>22</sup> This is consistent with the preclusion of a schedule award following a refusal of suitable work; *see Stephen R. Lubin*, 43 ECAB 564 (1992); 20 C.F.R. § 10.517(b).

injury sustained while in the performance of his duty.<sup>23</sup> A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period.<sup>24</sup> Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.<sup>25</sup>

### **ANALYSIS -- ISSUE 3**

The record contains an SSA report indicating that appellant had earnings of \$2,652.50 in 1996 and \$4,628.00 in 1997. During this period, he received compensation benefits for wage loss. The Board finds that an overpayment in compensation was created. In calculating the amount of the overpayment, the Office determined that appellant's actual earnings of \$7,280.50 for this period equaled average earnings of \$70.00 per week. The Office then applied the *Shadrick* formula and reduced that amount to \$6,491.08 to reflect his wage-earning capacity.<sup>26</sup> Thus, as appellant was not entitled to receive compensation benefits after his return to work, the Office properly determined that an overpayment in compensation in the amount of \$6,491.08 had been created for the period January 1, 1996 to December 31, 1997.<sup>27</sup>

### **LEGAL PRECEDENT -- ISSUE 4**

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."<sup>28</sup>

Section 10.433(a) of the Office's regulations provides that the Office:

"[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew

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<sup>23</sup> 5 U.S.C. § 8102(a).

<sup>24</sup> *Donna M. Rowan*, 54 ECAB \_\_\_\_ (Docket No. 03-908, issued July 11, 2003).

<sup>25</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

<sup>26</sup> *Albert C. Shadrick*, *supra* note 3. The record indicates that appellant received compensation totaling \$64,816.28 for the period January 1, 1996 to December 30, 1997.

<sup>27</sup> *Donna M. Rowan*, *supra* note 24.

<sup>28</sup> 5 U.S.C. § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)”<sup>29</sup>

To determine if an individual was at fault with respect to the creation of an overpayment, the Office examines the circumstances surrounding the 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.<sup>30</sup>

#### **ANALYSIS -- ISSUE 4**

The Office found that appellant was at fault in creating the overpayment because he knew or should have known he was not entitled to wage-loss compensation after he returned to work in 1996. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.<sup>31</sup> Even if an overpayment resulted from negligence by the Office, this does not excuse the employee from accepting payment that the employee knew or should have been expected to know he or she was not entitled.<sup>32</sup>

By letter dated July 2, 1984, at the time appellant was placed on the periodic rolls, the Office informed him that in order to avoid an overpayment in compensation, he should notify the Office immediately upon a return to work. The SSA report clearly indicated that appellant was working in 1996 and 1997 the period which he submitted the Office EN1032 forms dated November 4, 1996 and November 29, 1997, in which he stated that he had no earnings. Appellant did not report any earnings until May 11, 1998, when he signed an EN1032 form indicating that he had returned to work in October 1997. The Board finds the fact that appellant did not report his earnings probative evidence that he was aware of the consequences of reporting. The Board, therefore, finds that appellant knew or should have known that he was not entitled to receive wage-loss compensation while he was working and was thus at fault in the creation of the overpayment in compensation.

#### **LEGAL PRECEDENT -- ISSUE 5**

Office procedures regarding court-ordered restitution in fraud cases and administrative debt collection processes note that when a debtor is convicted of filing a false claim that results in an overpayment or debt due the government, the court often orders the defendant to make restitution to the United States as a condition of probation. The restitution amount may or may not be the full amount of the debt owed to the Office. If the court order states that the restitution amount will be in full satisfaction of the debt owed the United States (a “Global Settlement”), the

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<sup>29</sup> 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

<sup>30</sup> 20 C.F.R. 10.433(b); *Duane C. Rawlings*, 55 ECAB \_\_\_\_ (Docket No. 02-2172, issued March 8, 2004).

<sup>31</sup> *Sinclair L. Taylor*, *supra* note 29.

<sup>32</sup> *Diana L. Booth*, 52 ECAB 370 (2001).



court order takes precedence over the Office's administrative debt collection process. In such cases, if the restitution amount is less than the outstanding debt principal balance, the principal balance must be reduced to the restitution amount set by the court. Also, interest may not be applied to such debts unless stipulated in the court order. However, should the probation period end and the debtor has failed to make full restitution of the court-ordered amount, the Office may collect the full original debt amount. If the court order does not represent a global settlement, the Office should continue to pursue collection of the full debt amount, giving credit for any restitution amounts received. Unless assessment of interest is stipulated in the court order, interest may not be applied to the restitution amount and any restitution payments received should be applied directly to the debt principal.<sup>33</sup>

### **ANALYSIS -- ISSUE 5**

Appellant alleged that, as he was ordered to pay restitution of \$8,839.24 to the employing establishment, he should not have to repay the overpayment to the Office. The court order that was imposed on May 25, 2000, however, does not provide that the recovery from appellant in restitution was meant to be in full satisfaction of the debt owed to the United States, *i.e.*, that it was meant to constitute a global settlement. The Office is not precluded from pursuing collection of the overpayment in compensation, with credit to be given to the restitution amounts received.<sup>34</sup>

### **CONCLUSION**

The Board finds that appellant was not entitled to wage-loss compensation after March 31, 1998, and his entitlement to compensation benefits should have been suspended effective on that date. The Board further finds that the Office properly terminated appellant's compensation benefits effective January 11, 2000 on the grounds that he forfeited his entitlement pursuant to section 8148(a) of the Act and was, therefore, not entitled to an increased schedule award after that date. The Board also finds that appellant was at fault in the creation of an overpayment in the amount of \$6,491.08 for the period January 1, 1996 to December 31, 1997. Finally, the Board finds that the court ordered restitution on that date does not constitute a global settlement.

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<sup>33</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.18 (May 2004); *Martin James Sullivan*, 50 ECAB 158 (1998).

<sup>34</sup> *Robert Ringo*, 53 ECAB 258 (2001). Lastly, the Board notes that its jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employees' Compensation Act. Where, as here, a claimant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act. *Albert Pineiro*, 51 ECAB 310 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 20, 2004 be affirmed.

Issued: March 18, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member