U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT C. GILLIAM and U.S. POSTAL SERVICE,
VEHICLE MAINTANCE FACILITY, Brooklyn, N.Y.

Docket No. 97-2588; Oral Argument Held June 3, 1998;
Issued April 14, 1999

Appearances: *Robert C. Gilliam, pro se*; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation, effective October 12, 1995; (2) whether appellant forfeited his right to compensation for the period April 1, 1991 to April 1, 1994; and (3) whether the Office properly found that appellant was at fault in the creation of an overpayment of $74,175.71, thus precluding waiver of recovery of the overpayment.

Appellant filed a claim on May 8, 1975 alleging on May 6, 1975 he injured his lower back in the performance of duty. The Office accepted appellant's claim for lumbosacral strain on July 14, 1975 as well as recurrences of disability and entered appellant on the periodic rolls on April 17, 1979. By decision dated November 28, 1995, the Office terminated appellant's compensation benefits finding that he had committed fraud. The Office issued a preliminary finding that appellant had received an overpayment of compensation in the amount of $74,175.71 on March 27, 1996. Appellant requested an oral hearing and by decision dated April 30, 1997, the hearing representative affirmed the Office's preliminary findings and the November 28, 1995 decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Section 8148 of the Federal Employees' Compensation Act[1] 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

[1] 5 U.S.C. § 8148.

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. Such forfeiture shall be in addition to any action taken under section 8106 or 8129 for recovery of an overpayment.

The Office's procedure manual states:

> "Before any action is taken to terminate or suspend compensation, the file must contain: a copy of the indictment or information; a copy of the plea agreement, if any; a copy of the document containing the guilty verdict; and/or a copy of the court's docket sheet. Such documents must not only contain evidence establishing that the person was convicted, but also that the conviction is related to the claim for, or receipt of, any benefits under the FECA."[2]

The record in this case contains a copy of the misdemeanor information and the plea agreement. The count one of misdemeanor information charged appellant with making a statement, knowing it to be false, that he was not self-employed during the period of January 6 through April 6, 1993 on an affidavit required by section 8106 of the Act. Count two charged appellant with making a statement, knowing it to be false that he was not self-employed during the period of May 3, 1992 through August 3, 1993. Count three of the misdemeanor indictment charged that appellant made a statement, knowing it to be false, that he was not self-employed during the period January 6, 1993 through April 6, 1994.

The plea agreement signed on October 12, 1995 listed the three counts and recommended sentencing guidelines. The agreement also stated that appellant "voluntarily terminated his receipt of benefits under the Federal Employees' Compensation Act ('FECA') and further waives any right to future FECA benefits." The United States' attorney, appellant and appellant's attorney signed the document.

The Board finds that these documents are sufficient to establish that appellant was convicted of fraud regarding the receipt of FECA benefits. Appellant voluntarily pleaded guilty to making false statements regarding his self-employment on Form 1032s. The fact that he was self-employed while receiving compensation for total disability relates directly to compensation under the FECA and, therefore, the Office met its burden of proof to terminate appellant's compensation benefits.

The Board further finds that appellant forfeited his right to compensation for the period April 1, 1991 to April 1, 1994.

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12 (March 1997).

Section 8106(b) of the Act provides in pertinent part:

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.... An employee who –
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> (1) fails to make an affidavit or report when required; or
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> (2) *knowingly omits* or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required."[3] (Emphasis added.)

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he "knowingly" failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.[4] The term "knowingly" is not defined within the Act or its regulations. The Board has adopted the common usage definition of "knowingly;" "with knowledge; consciously; intelligently; willfully; intentionally."[5]

The CA-1032s completed by appellant instructed him to report earnings from self-employment "such as farming, sales, service, operating a store, business, etc." The forms stated, "Report any such enterprise in which you worked, and from which you received revenue, even if it operated at a loss or if profits were reinvested. You must show as 'rate of pay' what it would have cost you to have hired someone to perform the work you did."

The investigative memorandum included in the record establishes that appellant owned and participated in the operation of several motor home rental companies during the period in question. The memorandum included evidence establishing that appellant was the president of Gilliam's Motor Home Rentals in 1992, that he incorporated Motor Company of America in 1993 and that he incorporated Motor Camping N.Y. in 1995. The memorandum included witness statements indicating that appellant performed physical labor in furtherance of the business. On October 4, 1991 an investigator observed appellant removing a window from a motor home. An investigator observed appellant washing a motor home on January 4, 1993 and working under the hood of another motor home on February 10, 1993. Appellant vacuumed a motor home on April 15, 1993. Investigators also telephoned the business in 1993 and 1994 and spoke to appellant regarding the rental of motor homes.

The Board finds that on the Form CA-1032s he signed on July 1, 1992, August 3, 1993 and April 6, 1994 covering the period from April 1, 1991 to April 6, 1994, appellant consciously omitted relevant information concerning his employment activities with various motor home rental companies. He responded, "No" to questions concerning employment or self-employment

[3] 5 U.S.C. § 8106(b).

[4] *Anthony A. Nobile*, 44 ECAB 268 (1992).

[5] *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

and answered "Yes" to the question inquiring whether he was unemployed for all periods during the previous 15 months covered by these forms. Even though appellant may have performed work on an irregular basis during this period, he knew that he was required to report any earnings produced from his work activities.[6] Nevertheless, in response to the Office's inquires, appellant signed the CA-1032 form certifying that all statements provided in response to the questions on the form were true, complete and correct to the best of his knowledge and belief. The clear weight of the evidence of record establishes that appellant knowingly failed to report his earnings from employment. Accordingly, the Board finds that appellant thereby forfeited his right to compensation received for this period.

The factual circumstances of record, together with appellant's certification to the Office on Form CA-1032s that he had no employment or earnings, provides persuasive evidence that appellant "knowingly" misrepresented and omitted his earnings and employment activities.[7] The Office, therefore, properly found appellant forfeited his compensation for the periods covered by the Form CA-1032 in the amount of $ 74,175.71.

Appellant has contended that he was totally disabled and therefore was not required to report his earnings because section 8106(b)(2) refers only to partially disabled employees. While that section refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally or merely partially disabled and not whether he received compensation for that period for total or partial disability.[8] The evidence from investigators shows that appellant was able to perform physical activities during the period at question. This evidence therefore shows that appellant was only partially disabled at best. He therefore was required to report his contribution to his family business in the CA-1032 reports.

The Board further finds the Office properly found that appellant was at fault in the creation of an overpayment of $74,175.71, thus precluding waiver of recovery of the overpayment.

Section 8129(a) of the Act[9] provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when 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

[6] *Charles Walker*, 44 ECAB 641 (1993).

[7] *Mamie L. Morgan*, 41 ECAB 661 (1990).

[8] *Alton L. Vann*, 48 ECAB ___ (Docket No. 96-158, issued December 31, 1996); *Ronald H. Ripple*, 24 ECAB 254, 259-60 (1973).

[9] 5 U.S.C. §§ 8101-8193, 8129(a).

against equity and good conscience."[10] Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations[11] provides in relevant part:

"An individual is with fault in the creation of an overpayment who:

> (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
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> (2) Failed to furnish information which the individual knew or should have known to be material; or
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> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."

In this case, the Office applied the first and second standards in determining that appellant was at fault in creating the overpayment. The evidence of record shows that appellant indicated on the CA-1032 forms that he was neither employed nor self-employed during the periods at issue. However, the evidence of record shows that appellant's statement was incorrect because he did not report his participation in a family business which was a material fact specifically noted on the CA-1032 forms. He therefore knew or should have known from a reading of the CA-1032 forms that participation in a family business was a material fact that should be reported. Appellant therefore failed to report a material fact, and presented information on employment which he knew or should have known to be incorrect. Appellant therefore was at fault in the creation of the overpayment. He is not entitled to waiver of the overpayment.

[10] 5 U.S.C. § 8129(b).

[11] 20 C.F.R. § 10.320(b).

The April 30, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
April 14, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member