

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARNOLD MEZZONI and U.S. POSTAL SERVICE,
POST OFFICE, Hartsdale, NY

*Docket No. 99-2014; Submitted on the Record;
Issued March 2, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 18, 1997 due to his pleading guilty to two counts of violating 18 U.S.C. § 1920; (2) whether appellant received a \$5,245.28 overpayment of compensation; and (3) whether appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

On May 26, 1979 appellant, then a 30-year-old mail carrier, sustained employment-related lumbar disc syndrome.¹ Appellant last worked for the employing establishment in October 1979 and received compensation from the Office for periods of disability.

On December 18, 1997 appellant made a guilty plea in open court to two counts of violating 18 U.S.C. § 1920. Under the first count, appellant admitted that he "knowingly and willfully made false, fictitious and fraudulent statements and/or representations." Under the second count, appellant admitted "that such false, fictitious and fraudulent statements and/or representations were made in connection with the application for or receipt of compensation benefits."

By decision dated May 24, 1999, the Office terminated appellant's compensation, effective December 18, 1997, because he pled guilty to two counts of violating 18 U.S.C. § 1920. The Office determined that appellant received a \$5,245.28 overpayment of compensation and that he was at fault in the creation of the overpayment.

The Board finds that the Office properly terminated appellant's compensation effective December 18, 1997.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.² In terminating appellant's compensation

¹ In 1981 appellant underwent low back surgery which was authorized by the Office.

² William A. Kandel, 43 ECAB 1011, 1020 (1992).

in the present case the Office relied on 5 U.S.C. § 8148(a) which provides that a person convicted of a statute relating to fraud in the application for or receipt of benefits under the Federal Employees' Compensation Act shall forfeit future entitlement to benefits.

Section 8148(a) states:

“Any individual convicted of a violation of section 1920 of title 18, or any other Federal or State criminal statute relating to fraud in the application for or receipt of any benefit under this subchapter or subchapter III of this chapter [compensation for local police officers], shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under this subchapter or subchapter III for any 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 8106 [forfeiture] or 8129 [recovery of overpayments].”³

The Office's procedure manual states 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: (1) the individual was convicted; and (2) the conviction is related to the claim for, or receipt of, compensation benefits under the Act.⁴ The termination is effective on the date of the verdict or on the date the guilty plea is made in open court.⁵ Because of the criminal basis for the termination, no predetermination notice is required before a final decision is issued.⁶

On December 18, 1997 appellant made a guilty plea in open court to two counts of violating 18 U.S.C. § 1920. Therefore, under the explicit terms of 5 U.S.C. § 8148(a), the Office properly terminated appellant's compensation effective December 18, 1997. Congress has enacted section 8148(a) as an absolute forfeiture of compensation, without any provision for waiver of the effects of this section of the Act.⁷ Inasmuch as appellant was convicted on December 18, 1997, a date after section 8148 was enacted, and the Office properly followed its procedures, the Board finds that the Office properly terminated appellant's compensation effective December 18, 1997.⁸

³ 5 U.S.C. § 8148(a). Public Law No. 103-333, which amended the Act by adding 5 U.S.C. § 8148, was enacted on September 30, 1994. Subsection (b) of 5 U.S.C. § 8148, not relevant in this case bars receipt of compensation by any person imprisoned for a felony conviction during the period of such imprisonment. 5 U.S.C. § 8148(b).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12d (March 1997).

⁵ *Id.*; Chapter 2.1400.12e(1).

⁶ *Id.*; Chapter 2.1400.12f(2).

⁷ *Michael D. Matthews*, 51 ECAB ____ (Docket Nos. 98-2204 & 99-2508, issued December 23, 1999). This forfeiture is a permanent forfeiture which bars appellant from any further entitlement to compensation for any employment-related injuries or conditions which arose prior to December 18, 1997. *Jeff M. Burns*, 51 ECAB ____ (Docket No. 97-2058, issued December 21, 1999).

⁸ The record contains the appropriate court documents.

The Board further finds that appellant received a \$5,245.28 overpayment of compensation.

The record reveals that appellant received \$5,245.28 in compensation from the Office for December 18, 1997 to March 28, 1998. Appellant was not entitled to receive compensation for this period because his compensation was terminated effective December 18, 1997 when he pled guilty to two counts of violating 18 U.S.C. § 1920. Therefore, the Office properly determined that appellant received a \$5,245.28 overpayment of compensation.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment and that, therefore, the overpayment was not subject to waiver.

Section 8129(a) of the Act⁹ provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁰ 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 this subchapter or would be against equity and good conscience.”¹¹ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part that an individual is with fault in the creation of an overpayment who:

“(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 or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”¹²

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Section 10.433(c) of the Office’s regulations provides in relevant part that fault “depends on all the circumstances surrounding the overpayment.”¹³ The degree of care expected may vary

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ 5 U.S.C. § 8129(a).

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.433(a).

¹³ 20 C.F.R. § 10.433(c).

with the complexity of circumstances and the individual's capacity to realize that he or she is being overpaid.

On December 18, 1997 appellant pled guilty to two counts of violating 18 U.S.C. § 1920, an offense relating to false, fictitious and fraudulent statements made in connection with the receipt of compensation and then received benefits for periods on and after December 18, 1997. Therefore, the evidence supports that appellant knew or should have been expected to know that he received incorrect payments on and after December 18, 1997. Appellant has asserted that a court document indicated the Office terminated his compensation effective March 29, 1998, but a review of the record reveals that appellant's compensation was actually terminated December 18, 1997.¹⁴ Even though the Office may have been negligent in continuing to issue appellant checks for disability after the effective date of termination of his compensation, this does not excuse his acceptance of such checks which he knew or should have been expected to know should have been returned to the Office.¹⁵

The May 24, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.¹⁶

Dated, Washington, DC
March 2, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹⁴ Appellant's assertion in this regard highlights his apparent understanding that he could not continue to receive compensation checks after the effective date of termination

¹⁵ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁶ Appellant submitted additional evidence after the Office's May 24, 1999 decision, but the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).