U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY W. DICKERSON and DEPARTMENT OF THE NAVY, MARINE CORPS AIR GROUND COMBAT CENTER, Twentynine Palms, CA

Docket No. 01-242; Submitted on the Record;
Issued January 3, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on February 5, 1994; (2) whether the Office properly found that appellant forfeited his right to compensation in the amount of $103,005.07 for the period January 27, 1988 to May 15, 1993; (3) and whether the Office properly found that appellant was at fault in the creation of the overpayment resulting from the forfeiture and that, therefore, the overpayment was not subject to waiver.

On December 13, 1983 appellant, then a 39-year-old painter, filed a claim alleging that on that same date he sustained a shoulder injury in the performance of duty. The Office accepted his claim for a right shoulder rotator cuff tear and authorized acromioplasty surgery on April 12, 1984. Appellant stopped work on December 13, 1983 and received temporary total disability compensation upon the expiration of continuation of pay and did not return to work.

In support of his claim, appellant submitted a request for examination and treatment form indicating that he was being treated for a rotator cuff strain. The doctor noted that appellant could not lift or perform heavy work for five days.

Thereafter, appellant continued to receive temporary total disability.

The Office sent appellant a Form EN-1032 wage and compensation disclosure forms for verification of his wages and earning during several periods of time for which he was receiving temporary total disability. On January 26, 1988, January 9, 1989, April 24 and September 25, 1990, December 16, 1991 and October 21, 1992 appellant completed and signed a Form EN-1032 covering each 15-month period preceding it, which advised him that he must report all employment for which he received wages or other payment during the 15-month period covered by the form and it described the penalty if he fraudulently concealed or failed to report such income that would have a material effect on his benefits. He indicated that he was not employed, nor had he received any wages or income during these time periods.

In a memorandum dated June 15, 1988, the Office indicated that they would perform an activity check on appellant inquiring as to whether appellant earned any self-employment wages in a restaurant owned and operated by his wife.

In a closure report dated December 23, 1988, the vocational rehabilitation counselor indicated that the feasibility for returning appellant to competitive employment appeared to be poor. Appellant was unwilling to move out of the town he resided in with his wife who owns and operates a restaurant. The counselor indicated that appellant was very involved in his wife's restaurant business on a part-time basis as an order clerk; however, appellant never acknowledged official involvement in the operation of the business.

In a letter dated January 25, 1989, the Office requested that appellant clarify his statement that he worked at his wife's restaurant approximately six hours a week without payment of wages. There was no evidence in the record that appellant responded to this inquiry.

Appellant submitted a medical report from Dr. Anthony Smith, a Board-certified internist, dated April 19, 1989. He diagnosed appellant with a right rotator cuff tear. Dr. Smith noted that appellant's motion was not as good as in 1987 but believed this to due to irritation from the physical capacities evaluation test. He indicated that no particular treatment was noted at this point.

In a report dated May 9, 1989, the rehabilitation counselor noted that appellant had the potential to be placed in a paint or hardware store within a 30-mile commuting distance from his home. The counselor concluded that these positions were reasonably available to appellant. The counselor provided a labor market survey and additional employment opportunities in appellant's area. On July 21, 1989 the vocational rehabilitation counselor indicated that a position of optical instrument assembler was available for which appellant was a qualified applicant. The counselor indicated that appellant met the entry level requirement for the production trainee position at Hardin Optical, DOT 716.382-022.

In a letter dated August 1, 1989, the medical adviser indicated that appellant met the job requirements for the production trainee position at Hardin Optical with restrictions on the use of his right arm.

In a memorandum dated September 21, 1989, the Office issued a notice of proposed reduction of compensation on the grounds that the position of production trainee represented appellant's wage-earning capacity.

In a letter dated October 16, 1989, appellant responded to the Office's notice of proposed reduction of compensation. He indicated that he visited the site of employment and noted that they were not hiring at this time. Appellant noted that he objected to the reduction of compensation because the job did not exist and requested he be able to continue with vocational rehabilitation.

In a decision dated November 3, 1989, the Office reduced appellant's wages effective November 19, 1989 on the grounds that the weight of the evidence established that the position of entry level production trainee represented appellant's wage-earning capacity.

In a letter dated December 5, 1989, appellant requested an oral hearing before an Office hearing representative.

In a decision dated February 26, 1990, the Office vacated the decision dated November 3, 1989 on the grounds that the position was not reasonably available in appellant's commuting area.

In letters dated April 17 and May 14, 1990, the Office contacted appellant regarding continued participation in vocational rehabilitation.

In letters dated June 1 and 14, 1990, the vocational rehabilitation counselor indicated that appellant's wife had sold her restaurant in late 1989 and they were available to relocate for employment. The letter of June 14, 1990 suggested closure of the vocational rehabilitation case.

Appellant submitted a report from Dr. Steven Rabin, a Board-certified orthopedic surgeon, dated April 15, 1992 and a report from Dr. Sergio Ilic, a Board-certified orthopedic surgeon, dated April 28, 1993. Dr. Rabin noted a history of appellant's work-related injury and diagnosed appellant with a large rotator cuff tear and probable rotator cuff arthropathy. He noted that appellant's rotator cuff retore and became a major defect in the rotator cuff. Dr. Rabin recommended surgery to repair the injury. The report from Dr. Ilic noted a history of appellant's injury and diagnosed appellant with status post industrial injury dated December 13, 1983; rotator cuff tear of the right shoulder; status post repair of the rotator cuff tear in 1984; and retear of the rotator cuff of the right shoulder. He noted that appellant was unable to return to work since the original injury in 1983. Dr. Ilic indicated that appellant was temporarily totally disabled until June 30, 1993. He recommended surgery to repair appellant's shoulder injury and noted that appellant was a good candidate for retraining.

In an investigative report dated June 15, 1993, the employing establishment indicated that an investigation of appellant commenced for suspected compensation fraud. In an interview with a fraud investigator on May 14, 1993, appellant indicated that he had been employed as a painter for a contractor for the past year and a half; that he repaired and sold appliances currently and had done so previously while living in Oregon; and admitted to working in his wife's restaurant in Oregon; however, denied receiving compensation. The investigator concluded that appellant had been found to be continuously self-employed from January 1988 through May 15, 1993.

In a supplemental report dated June 25, 1993, Dr. Ilic indicated that upon receipt of the information that appellant had been employed as a painter his opinion regarding appellant's disability changed. He noted that appellant would not be disabled and would not have the limitations of the right shoulder as previously indicated in his report of April 28, 1993. Dr. Ilic noted that, if appellant was currently working as a painter 40 hours a week he would be able to continue to do so without medical restrictions.

On August 12, 1993 appellant was indicted by a federal grand jury for violating Title 18 U.S.C. § 1920 of the Federal Employees' Compensation Act for making false statements to obtain compensation benefits. On February 3, 1994 he was convicted of violating Title 18 U.S.C. § 1920 of the Act for making false statements to obtain compensation benefits.

In a decision dated February 8, 1994, the Office terminated appellant's wage compensation benefits effective February 5, 1994 on the grounds that appellant was convicted of violating Title 18 U.S.C. § 1920 of the Act for making false statements to obtain compensation benefits which would preclude him from entitlement to further benefits under Act.

In a decision dated February 17, 1994, the Office determined that appellant's monetary compensation for the period of January 27, 1988 to May 15, 1993 be forfeited on the grounds that appellant knowingly failed to report his work and earnings as required under 5 U.S.C. § 8106(b) of the Act.

In a letter dated February 17, 1994, the Office made a preliminary determination that an overpayment of compensation occurred in the amount of $103,005.07. The Office determined that the overpayment occurred because gross compensation for the period of January 27, 1988 to May 15, 1993 had been forfeited. The Office also determined that appellant was at fault in the creation of the overpayment of $103,005.07 as he knew or reasonably should have known of the requirements for reporting his earnings and deliberately failed to do so.

In a letter dated March 8, 1994, appellant requested a hearing before an Office hearing representative.

In a decision dated March 29, 1995, appellant's federal conviction for violating under 5 U.S.C. § 8106(b) of the Act had been reversed. He was tried again in November 1995 and in this proceeding appellant was again convicted for violating Title 18 U.S.C. § 1920 of the Act for making false statements to obtain compensation benefits on April 26, 1996. The court found that appellant falsely completed the EN-1032 form dated October 21, 1992.

In a decision dated April 30, 1996, the Office terminated appellant's wage-compensation benefits effective February 5, 1994 on the grounds that appellant was convicted of violating Title 18 U.S.C. § 1920 of the Act for making false statements to obtain compensation benefits which would preclude him from entitlement to further benefits under the Act. The Office found that as a result of appellant's conviction for violation of 18 U.S.C. § 1920 he was not entitled to further benefits after April 26, 1996 under the Act. The Office further found that there was no basis to pay additional monetary compensation for the period of February 5, 1994 to April 26, 1996 as appellant's treating physician, Dr. Ilic, in a report dated June 25, 1993, found no continuing work-related residuals and released appellant to perform his usual and customary employment duties.

On February 24, 1999 the Office held a hearing before an Office hearing representative as originally requested by appellant on March 8, 1994. Appellant testified that he was not compensated for work at his wife's restaurant and he only occasionally helped out in the kitchen and ran errands on her behalf. He noted that from 1993 to 1997 he did not work but concentrated on the criminal case against him. Appellant indicated that he was presently employed three days a week, eight hours a day at minimum wage. He also submitted a brief in support of his claim and an overpayment questionnaire. The overpayment questionnaire indicated that appellant and his wife have income of $4,000.00 per month from her appliance repair business; appellant earned $503.66 per month at a part-time job; and they net $565.00 from a rental property for a

total gross monthly income of $5,068.66. Appellant also noted expenses of $2,645.00 per month for disposable income over and above the usual and necessary expenses of $2,423.00.

In a decision dated June 22, 2000, the hearing representative affirmed the Office's decision of April 30, 1996. The hearing representative found that appellant's physician Dr. Ilic, in a report dated June 25, 1993, released him to perform his usual and customary employment duties and, therefore, there was no basis for the payment of wage-loss compensation for the period of February 5, 1994 to April 26, 1996. The hearing representative further found that as a result of appellant's conviction under 5 U.S.C. § 8148(a) of the Act and Title 18 U.S.C. § 1920 of the Act for making false statements to obtain compensation benefits appellant was not entitled to further benefits after April 26, 1996 under the Act.

The Board finds that the Office properly terminated appellant's compensation effective February 5, 1994.

Section 8148(a) of the Act[1] states:

> "Any individual convicted of a violation of section 1920 of [T]itle 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, 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 of this chapter 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 or 8129."

To terminate an employee's compensation under section 8148(a) of the Act, the evidence must establish that the individual was convicted and that the conviction is related to the claim for or receipt of, benefits. The termination is effective on the date of the verdict or on the date the guilty plea is accepted by the court. Because of the criminal basis for the termination, no pretermination notice is required before a final decision is issued.[2]

In this case, the record establishes that a jury found appellant guilty on February 3, 1994 of committing fraud in connection with his claim for benefits under the Act in violation of 18 U.S.C. § 1920. However, the record indicates that this conviction was reversed on March 29, 1995. Thereafter, appellant was tried and convicted of committing fraud in connection with his claim for benefits under the Act in violation of 18 U.S.C. § 1920 on April 26, 1996. The record reflects that the Office based it decision to terminate appellant's compensation benefits effective February 5, 1994 on the February 3, 1994 federal conviction for violating 18 U.S.C. § 1920; however, this conviction was later reversed, as noted above. Therefore, by specific terms of the statute, appellant forfeited his entitlement to all compensation benefits arising from his employment injuries effective the date of his conviction, April 26, 1996.

[1] 5 U.S.C. § 8148(a).

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

Congress has enacted this provision as an absolute forfeiture of compensation, without any provision for any waiver of the effects of this section of the Act.[3]

The Board further finds that appellant is not entitled to wage-loss compensation benefits for the period of February 5, 1994 to April 25, 1996, the interim period where appellant's conviction for fraud was on appeal and ultimately reversed. The Board notes that appellant's treating physician Dr. Ilic, in a report dated June 25, 1993, noted that on June 19, 1993 he was informed that appellant was working as a painter for a private contractor. He indicated that with this new information, his opinion would change regarding appellant's ability to perform work which involved the right shoulder as well as heavy lifting. Dr. Ilic noted that appellant "would not then be disabled and certainly he would not have limitations in the use of the right upper extremity." He further noted that "if [appellant] is already working as a painter 40 hours a week, then certainly his is able to continue doing so." Dr. Ilic concluded that appellant had no continuing disability. Therefore, the Board finds that based on this medical evidence the Office properly terminated appellant's benefits dated February 5, 1994 on the grounds that he had no continuing medical disability as a result of his work-related injury.

The Board finds that the Office properly found that appellant forfeited his right to compensation for the period January 27, 1988 to May 15, 1993 for knowingly failing to report earnings.

Section 8106(b) of the Act[4] 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 --
>
> (1) fails to make an affidavit or report when required; or
>
> (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. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section."

On Office Forms CA-1032 appellant completed and signed on January 26, 1988, January 9, 1989, April 24, September 25, 1990, December 16, 1991 and October 21, 1992 he indicated that he was not self-employed or involved in any business enterprise and was unemployed for all periods during the past 15 months. These forms clearly advised appellant what must be reported with regard to self-employment: "Self-employment (such as farming, sales, service, operating a store, business, etc.) must be reported. Report any such enterprise in

[3] *Supra* note 1; *see also Bobby Hughley*, Docket No. 00-17 (issued September 10, 2001).

[4] 5 U.S.C. § 8106(b).

which you worked and from which you received revenue, even if 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 performed."[5]

Appellant's conviction of a violation of 18 U.S.C. § 1920 was for making a false or fraudulent statement in order to obtain workers' compensation under the Act. This is persuasive evidence that appellant knowingly omitted his earnings for the periods covered by the Forms CA-1032 he submitted to the Office covering the period July 21, 1991 to October 21, 1992.

For the period of time from January 26, 1988 to May 15, 1993 not encompassed by the October 21, 1992 EN-1032 form, the Board looks to the record of events during this period and finds persuasive evidence that appellant was in fact employed in some fashion during this time frame. The record reflects that appellant, on January 25, 1989, indicated that he worked in his wife's restaurant six hours per week. A marine corporation investigator's June 15, 1993 letter revealed that appellant was involved in the daily operation of his wife's restaurant in Oregon from 1988 through 1989; repairing and selling appliances in Oregon as well as California from 1989 to 1993; and performing painting and contracting work for Jim Langerman from 1991 to 1993. A witness statement from Billy Barger indicated that he saw appellant cooking in the kitchen of the 4-D restaurant, the restaurant owned by appellant's wife, from 1988 to 1989; a police officer Ronald Wampole, in a statement dated July 9, 1993, indicated that he was a customer at the above-mentioned restaurant and knew appellant as the owner who performed duties at the restaurant such as fry cook, waiter and general maintenance work for the period of June 9, 1988 to July 30, 1988; and witness Raymond Perry, in a statement dated July 10, 1993, indicated that appellant was a full-time employee of the 4-D restaurant and noted seeing appellant cook and work in the kitchen and also perform side jobs for him including painting. Additional interviews performed by the investigator indicated that appellant filed a crime report dated June 9, 1988 indicating that he was the owner of the 4-D restaurant which was burglarized; an interview with appellant's son on May 13, 1993 indicated that his father had an appliance repair and sale business both in Oregon and California working and repairing appliances and was also working as a painter for Mr. Langerman in Fresno, California. A zoning enforcement officer indicated that appellant was cited in May 1993 for dealing, repairing and selling appliances at his home in California. In an interview with appellant on May 14, 1993, appellant indicated that he did work from 1991 to 1993 as a painter for Mr. Langerman; that he sold and repaired appliances in California and during his residence in Oregon; and worked in his wife's restaurant as a cook and delivery man from 1988 to 1989; however, he did not get paid. He, at the hearing dated February 24, 1999, indicated that he never admitted to the investigator that he worked in his wife's restaurant, was a painter or sold appliances, rather appellant indicated that his son and wife owned the appliance repair and sale business.

The Board has found unavailing appellant's argument that he was unemployed from January 27, 1988 to May 15, 1993, rather the investigative report and numerous witness statements support that appellant was employed in some manner during this period. Appellant completed Office Forms CA-1032 dated January 26, July 2, 1988, January 9, 1989, April 24 and

[5] This excerpt was taken from the EN-1032 form dated January 26, 1988; similar language is present in the EN-1032 forms prepared and signed by appellant dated January 9, 1989, April 24 and September 25, 1990, December 16, 1991 and October 21, 1992.

September 25, 1990, December 16, 1991 and October 21, 1992 showing his earnings from self-employment both before and after the forms on which he falsely reported no self-employment.

The Board notes the guilty verdict in the U.S. District Court matter constitutes persuasive evidence that appellant knowingly omitted his earnings when he completed the affidavits on Form EN-1032 on October 21, 1992 and that the provisions of 5 U.S.C. § 8106(b)(2), therefore, apply to the period covered by the affidavit and additionally finds that the record establishes that appellant was employed during the period of January 27, 1988 to May 15, 1993. The Board, therefore, finds that appellant has forfeited his compensation benefits from January 27, 1988 to May 15, 1993.

The Board finds that appellant was with fault in the matter of an overpayment of compensation in the amount of $103,005.07.

Section 8129 of the Act[6] provides that an overpayment must be recovered 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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.[7]

The implementing regulation[8] provides that a claimant is at fault in the creation of an overpayment when he or she: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he or she knew or should have known to be incorrect.

A conviction under 18 U.S.C. § 1920, under the terms of that section, can be obtained only if the defendant "knowingly and willfully" falsifies or conceals a material fact or makes a false or fraudulent statement in order to obtain workers' compensation under the Act. Appellant's conviction under this section and his false statements on his Forms CA-1032, show that he made an incorrect statement as to a material fact and that he failed to furnish information he knew was material. This establishes that he was with fault with regard to the portion of the overpayment resulting from his forfeiture of compensation from July 21, 1991 to October 21, 1992.

With regard to the portion of the overpayment resulting from the period January 27, 1988 to July 21, 1991 and October 21, 1992 to May 15, 1993, the Office apparently applied the second standard in determining that appellant was at fault in creating the overpayment. Appellant failed to furnish information which he knew or should have known to be material. By virtue of the instructions on the Form CA-1032 appellant should have known that this information was material as it is clear that appellant was advised of his obligation to report earnings from employment and self-employment for the period of January 27, 1988 to May 15, 1993 which

[6] 5 U.S.C. § 8129(a)-(b).

[7] *See Bonnye Mathews*, 45 ECAB 657 (1994).

[8] 20 C.F.R. § 10.433(a).

violated 5 U.S.C. § 8106(b). Appellant failed to furnish the Office with information which he knew or should have known to be material. Therefore, appellant was at fault in creation of the resulting $103,005.07 overpayment such that it is not subject to waiver.

The Board further finds that it does not have jurisdiction to review the Office's finding that the overpayment of compensation would be obtained through payments from appellant at the rate of $2,300.00 per month. Such method of recovery is within the discretionary authority of the Office under the Debt Collection Act of 1982.[9] The Board's jurisdiction to review recovery of an overpayment is limited to the situation where recovery is made from continuing Act benefits. This is not the situation with respect to the $2,300.00 per pay period payroll deduction.[10]

The decision of the Office of Workers' Compensation Programs dated June 22, 2000 is affirmed.

Dated, Washington, DC
January 3, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] U.S.C. § 5511 *et seq*.

[10] *See Lewis George*, 45 ECAB 144, 154 (1993); *Edward O. Hamilton*, 39 ECAB 1131, 1137 (1988); *Joyce Y. Wescott*, 30 ECAB 349, 362 (1988).