

FACTUAL HISTORY

This case has previously been before the Board on appeal. By decision dated June 30, 2003,¹ the Board found that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective January 2, 2000 as determined in a December 20, 1999 decision. The facts and the circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

On October 7, 1998 appellant completed and signed a Form EN1032 covering the prior 15-month period which advised that he must report all employment for which he received a salary, wages, income, sales commissions, piecework or payment of any kind. Appellant was also advised to report all self-employment or involvement in business enterprises including but not limited to: "farming, sales work, operating a business, including a store or restaurant; and providing services in exchange for money, goods, or activities such as carpentry, mechanical work, painting, contracting, child care, odd job, etc." The EN1032 required appellant to report activities such as keeping books and records or managing and/or overseeing a business of any kind, including a family business. Appellant was advised to report such activities even if part time or intermittent. In response to the question of whether he worked for an employment during the past 15 months, appellant responded "no." He also responded "no" to the question of whether he was self-employed or involved in any business enterprise in the past 15 months. Appellant answered "yes" to the question of whether he was unemployed for all periods during the past 15 months.

In an investigative memorandum dated August 17, 1998, Jeffrey Ferich, an employing establishment investigator, stated that appellant was gainfully employed as owner/operator of a cleaning business, cleaning Rebel Valley Cigar Superstores. Mr. Ferich submitted a telephone memorandum of a call with Steve Atlas, president of Rebel Valley Cigar Superstores, who indicated that he employed appellant to clean several of his stores from January 2 to November 6, 1998. Art Toll of Rebel Valley Cigar Superstores provided Mr. Ferich with a list of payments made to appellant from January 2 to August 7, 1998 totaling \$3,495.00. The record also included a record of payments made through November 1998. Mr. Ferich also submitted a report of an interview with Steve Bloomfield, manager of a Rebel Valley Cigar Superstore, who stated that appellant cleaned the business including dusting, mopping the floor and removing trash during September 1998.

On October 9, 2003 the Office issued a preliminary finding of overpayment noting that during the period November 28, 1992 to January 1, 2000 appellant received benefits from the Office for temporary total disability but that it failed to make appropriate deductions for basic life insurance coverage resulting in an overpayment in the amount of \$912.55. The Office found that appellant was not at fault in the creation of the overpayment and informed him that if he sought to waiver the overpayment he should complete the accompanying overpayment recovery questionnaire.

The record contains a worksheet calculating the appropriate basic life insurance deductions.

¹ Docket No. 01-1661 (issued June 30, 2003).

By decision dated October 15, 2003, the Office found that appellant had forfeited his compensation for the period July 7, 1997 to October 7, 1998 in the amount of \$28,928.26. The Office noted that appellant had earnings from self-employment which he failed to report as required on the October 7, 1998 Form EN1032.

In a preliminary overpayment determination dated October 15, 2003, the Office found that appellant received an overpayment in the amount of \$28,928.26 which occurred as he failed to report earnings on the EN1032 covering the period July 7, 1997 to October 7, 1998 resulting in the forfeiture of his compensation benefits paid during this period. The Office found that appellant was at fault in the creation of the overpayment and that it was not subject to waiver.

Appellant requested preresoupment hearings on these decisions. On June 23, 2004 appellant's attorney requested that the Office proceed with a review of the written record in regards to the forfeiture decision.

By decision dated October 26, 2004, the hearing representative addressed all the decisions issued in appellant's claim. He found that the Office had properly calculated the amount of the overpayment due to the failure to deduct basic life insurance payments. He further explained how the Office reached the amount of the overpayment and found that appellant was not at fault in the creation of this overpayment. However, the hearing representative concluded that, as appellant failed to provide the requested financial information by completing the overpayment recovery questionnaire, he did not qualify for waiver.

The hearing representative further found that appellant knowingly failed to report earnings from self-employment on the October 7, 1998 EN1032 as he completed the form and appeared intelligent enough to understand each of the questions posed. He concluded that appellant had forfeited his compensation for the period covered by the form from July 7, 1997 to October 7, 1998 and was therefore at fault in creating an overpayment. The hearing representative found that appellant received an overpayment in the amount of \$28,928.36 as a result of his forfeiture and explained how he reached this 10 cent difference with the Office's preliminary determination. As appellant was at fault in the creation of the overpayment, it was not subject to waiver.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employee's Group Life Insurance Program (FEGLI),² most civilian employees of the Federal Government are eligible to participate in basic life insurance and one or more of the options. The coverage of basic life insurance is effective unless waived and the premiums for basic and optional life coverage are withheld from the employee's pay. At separation from the employing establishment, the FEGLI insurance will either terminate or be continued under "compensation" status. If the compensation chooses to continue basic and optional life insurance coverage, the schedule of deductions made will be used to withhold premiums from his or her compensation payments. When an under withholding of life insurance premiums occurs, the entire amount is deemed an overpayment of compensation because the

² The law governing life insurance of federal employees is found at 5 U.S.C. §§ 8701-8706.

Office must pay the full premium to the Office of Personnel Management (OPM) upon discovery of the error.³

If the claimant is determined to be without fault, the Office must release a letter, along with an overpayment recovery questionnaire, within 30 days of the date the overpayment is identified. This letter advises the claimant of the fact and amount of the overpayment and of the preliminary finding that the claimant is without fault in the creation of the overpayment. Office procedures state, "The reason that the overpayment occurred must be clearly stated in the preliminary decision and the [Office] should provide a clearly written explanation indicating how the overpayment was calculated."⁴

ANALYSIS -- ISSUE 1

The Office found that appellant had received an overpayment of compensation as a result of an under withholding of premiums for basic life insurance coverage. The Office presumed that coverage was effective in this case, as coverage for basic life insurance is effective unless waived. Compensation logs throughout the case record document that the Office withheld no premiums for Basic life insurance during the period November 28, 1992 to January 1, 2000. As it appears that appellant received more compensation than that to which he was entitled, the Board will affirm the Office's October 26, 2004 decision on the issue of fact of overpayment due to under withholding of basic life insurance premiums.

The Board finds, however, that the Office did not follow its procedures when it released the October 9, 2003 letter notifying appellant of its preliminary findings. Specifically, the Office did not "provide a clearly written explanation indicating how the overpayment was calculated." The October 9, 2003 letter merely informed him that he was overpaid \$912.55 because the Office failed to deduct premiums for his basic life insurance from November 28, 1992 through January 1, 2000. The Office offered him no explanation as to how it arrived at this sum. The record does contain an internal worksheet showing some calculations, but there is no indication that the Office released this worksheet with the October 9, 2003 letter. Because the Office failed to follow proper procedures and denied appellant an opportunity to present relevant evidence and argument on the amount of the overpayment before issuing a final decision on the matter, the Board will set aside the Office's October 24, 2004 decision on the issue of amount and remand the case for further development.⁵

³ *Keith H. Mapes*, 56 ECAB ____ (Docket No. 03-1747, issued October 20, 2004). An under withholding of premiums results in a two-tiered liability. The claimant owes the agency the under withheld funds and similarly the agency owes the insurance fund/OPM. If this occurs, the Office must make OPM whole and remit the entire amount of the under withholding, even if the debt is eventually waived. Federal (FECA) Procedure Manual, Part 5 -- Benefit Payments, *Life Insurance*, Chapter 5.401.11.b(2) (August 2004).

⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4.a (May 2004).

⁵ *Rebecca F. Reed*, Docket No. 04-2011 (issued March 3, 2005); *Carlos L. Campbell*, Docket No. 04-2093 (issued March 1, 2005). As this new preliminary determination will allow appellant to request waiver and present financial information in support thereof, the Board will not address the issue of whether waiver was properly denied.

LEGAL PRECEDENT -- ISSUE 3

Section 8106(b) of the Federal Employees' Compensation 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 time 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.”⁶ (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.⁷ The term “knowingly” is defined in the regulations as “with knowledge, consciously, willfully or intentionally.”⁸

ANALYSIS -- ISSUE 3

The Office found that appellant forfeited compensation from July 7, 1997 to October 7, 1998. Appellant signed a Form EN1032 on October 7, 1998 covering the period July 7, 1997 to October 7, 1998. On that form appellant indicated that he was neither employed nor had earnings from self-employment during the period covered by the form.

The investigative memorandum, completed by Mr. Ferich on August 17, 1998, found that appellant was gainfully employed as owner/operator of a cleaning business, cleaning Rebel Valley Cigar Superstores. Mr. Ferich submitted a telephone memorandum of a call with Mr. Atlas, president of Rebel Valley Cigar Superstores, who indicated that he employed appellant to clean several of his stores from January 2 to November 6, 1998. Mr. Toll of Rebel Valley Cigar Superstores provided Mr. Ferich with a list of payments made to appellant from January 2 to August 7, 1998 totaling \$3,495.00. The record also included a record of payments made through November 1998. Mr. Ferich also submitted a report of an interview with Steve Bloomfield, manager of a Rebel Valley Cigar Superstores who stated that appellant cleaned the business including dusting, mopping the floor and removing trash during September 1998.

Appellant, through his attorney, argued that the Office had failed to establish forfeiture as it had not established that appellant “knowingly” failed to report his earnings on the October 7, 1998 Form EN1032. As noted above, the Office has the burden of proof to establish that the claimant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from employment. In this case, appellant signed the Form EN1032 form which advised him that he must report both all employment and self-employment including involvement in a

⁶ 5 U.S.C. § 8106(b).

⁷ *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

⁸ 20 C.F.R. § 10.5(n).

business enterprise. The Office form clearly states that “anyone who fraudulently conceals or fails to report income or other information which would have an effect on benefits, or who makes a false statement or misrepresentation of a material fact in claimant a payment or benefit under the [Act] may be subject to criminal prosecution, from which a fine or imprisonment, or both may result.” The evidence of record, including the statements from appellant’s employers and witnesses to his physical activities as well as his signing of the strongly-worded certification clauses on the Form EN1032, provides persuasive evidence that he “knowingly” failed to report his self-employment and business enterprise.⁹ His failure to provide a list of earnings and employment must be considered to have been made with knowledge of the reporting requirements. The Office, therefore, properly found that appellant forfeited his compensation from July 7, 1997 to October 7, 1998.

LEGAL PRECEDENT -- ISSUE 4

Section 10.529 of the Office’s implementing regulation provides as follows:

“(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

“(b) Where the right to compensation is forfeited, [the Office] shall recover any compensation already paid for the period of the forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”¹⁰

ANALYSIS -- ISSUE 4

If a claimant has any earnings during a period covered by a Form EN1032 which he or she knowingly fails to report, he or she is not entitled to any compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.¹¹ The Office paid appellant compensation from July 7, 1997 through October 7, 1998 in the amount of \$28,928.36. As appellant forfeited all compensation paid for this period because he failed to report earnings from self-employment on the Form EN1032 covering the period July 7, 1997 through October 7, 1998, there exists an overpayment of compensation in the amount of \$28,928.36.

LEGAL PRECEDENT -- ISSUE 5

Section 8129(b) of the Act¹² provides: 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

⁹ See *Cheryl Thomas*, 55 ECAB ___ (Docket No. 03-1848, issued July 6, 2004).

¹⁰ 20 C.F.R. § 10.529.

¹¹ *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

¹² 5 U.S.C. § 8129(b).

when adjustment or recovery would defeat the purpose of the Act of would be against equity and good conscience.”

The Office may 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 received 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 with respect to 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 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).¹³

ANALYSIS -- ISSUE 5

In this case, the Office found that appellant was at fault in the creation of the overpayment because he omitted earnings on his Form EN1032 dated October 7, 1998. The record establishes that appellant had unreported earnings from self-employment during the period of forfeiture and knowingly failed to furnish this material information to the Office. Appellant signed certification clauses on the Form EN1032 advising him that he might be subject to civil or criminal penalties if he knowingly made a false statement. Thus, by signing the form, appellant is deemed to have acknowledged his duty to fill out the form properly, including the duty to report any employment or self-employment activities and income. The evidence of record, therefore, shows that appellant was aware or should have been aware of the materiality of the information that he had earnings which he had not listed on the relevant form. As he failed to provide information to the Office regarding his employment during the period covered by the form, he is at fault in creating the overpayment and is not entitled to waiver of recovery of the amount of \$28,928.36.

CONCLUSION

The Board finds that appellant received an overpayment of compensation due to an under withholding of basic life insurance premiums from November 28, 1992 to January 1, 2000, but the case is remanded to the Office for issuance of a new preliminary determination that should include how the amount of overpayment was calculated. The Board further finds that appellant forfeited his compensation benefits from July 7, 1997 to October 7, 1998 because he knowingly failed to report earnings from self-employment during this period. The Board further finds that appellant received an overpayment of compensation in the amount of \$28,928.36 during the period of forfeiture. The Board finds that the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver.

¹³ 20 C.F.R. § 10.433(a).

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2004 decision of the Office of Workers' Compensation Programs is affirmed in part and remanded in part for further adjudication in compliance with this decision of the Board.

Issued: June 17, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member