

FACTUAL HISTORY

On November 7, 1977 appellant, then a 28-year-old sandblaster, filed a claim for a traumatic injury occurring on November 6, 1977 in the performance of duty. The Office accepted his claim for a fracture of the transverse process at L1, L2 and L3 on the right and a herniated disc. Appellant underwent a discectomy and foraminotomy on February 28, 1978 after which he returned to light-duty work on August 14, 1978. He stopped work again shortly thereafter. He received compensation for temporary total disability until he began working as a tax examiner on December 31, 1980. The Office accepted that appellant sustained a recurrence of disability beginning April 6, 1983 and returned him to the periodic rolls.

The Office required appellant to complete periodic EN1032 form questionnaires regarding whether he had any earnings from employment or self-employment for the period of 15 months. The EN1032 forms advised appellant that he must report all employment for which he received a salary, wages, income, sales commissions, piecework or any payment of any kind, that he must report self-employment and that he must report any such enterprise in which he worked. The forms requested that he report employment and earnings for the 15 months prior to the completion of any given form. The Office advised appellant on the EN1032 forms that he was obligated to “immediately” report any employment to the Office and that fraudulently concealing or failing to report income could subject him to criminal prosecution. Appellant completed and signed EN1032 forms on June 21, 1984, December 23, 1986, January 13 and December 20, 1988, May 12, 1990, April 9, 1992, February 2, 1994, January 27, 1995, February 10, 1996, March 4, 1998, March 4, 1999 and April 16, 2000. He further completed but did not sign an EN1032 form originally dated February 16, 1993 and resent to him on April 6, 1993. On each form, he indicated either that he was not engaged in any employment or self-employment or that the question was “not applicable.”

Records from the Social Security Administration (SSA) reveal that appellant received earnings from employment from 1984 through 2000. He earned \$2,927.40 in 1984 and \$536.76 in 1985 working for Harbor Hill Associates. Appellant earned \$11,878.00 in 1986 and \$3,536.77 in 1987 working for New Pathways, Incorporated. He earned \$2,401.64 in 1988 and \$15,172.40 in 1989 working for Piedmont Hospital. In 1988 appellant also earned \$312.00 working for Dress Barn, \$4,702.62 working for ADF Services, and \$2,420.00 working for Park Lane Limited Partnership. In 1990 appellant earned \$525.83 working for Fair Lanes Georgia Bowling, \$1,486.75 working for Premium Roofing Service and \$1,249.25 working for Abatement Services, Incorporated. In 1991 he earned \$3,674.25 working for Premium Roofing and \$3,010.25 working for Abatement Services. Appellant earned \$14,770.52 in 1993 \$4,529.70 in 1994 and \$15,571.29 in 1995 working for the Devereaux Foundation.¹ He earned \$2,974.25 in 1995 and \$9,695.89 in 1996 working for Resources & Residential Alternatives, Incorporated. In 1996 he also worked for Maxim Healthcare Services with earnings of \$4,196.45, Caremaster Medical Services with earnings of \$5,922.75 and Lafayette Health Care Center with earnings of \$321.00. In 1997 appellant earned \$2,087.50 and in 1998 he earned \$544.00 working for Maxim Healthcare. He additionally earned \$20,777.08 in 1997, \$21,554.44 in 1998 and \$44,689.52 in 1999 working for Caremaster Medical Services.

¹ In 1994 appellant also earned \$1,912.00 working for Pacific Rail Services.

In a report dated August 28, 2001, an investigator with the Office of the Inspector General (OIG) of the United States Department of Labor indicated that appellant worked from January 1 to December 31, 1989 for Piedmont Hospital and earned \$15,172.40. She further noted that from March 1, 1993 to December 31, 1995 appellant earned \$10,417.55 working for the Devereaux Foundation and earned an unknown amount working from March 8, 1993 through March 24, 1994 for Primerica. The investigator stated that appellant earned \$1,912.00 while working from January 1 through December 31, 1994 with Pacific Rail Services and earned \$12,670.14 working from June 14, 1995 through May 5, 1996 with Resources & Residential Alternatives. He further worked for unknown wages from January 1 through December 31, 1996 for Lafayette Health Care Center and worked from July 16, 1996 through December 31, 1998 for Maxim Healthcare Service earning \$6,827.95. From July 2, 1996 through May 31, 1999, the investigator reported that appellant earned \$31,410.90 working for Caremaster Medical Services.

In a letter dated March 24, 1999, an official with Resources & Resident Alternatives verified that appellant worked from June 14, 1995 through May 5, 1996 as a staff employee and a house manager caring for developmentally disabled adults. In a separate letter dated March 24, 1999, an official with Caremaster Medical Services verified that appellant worked from July 2, 1996 to the present working as a certified nurse assistant (CNA) for “quadriplegic patients [and] patients with traumatic brain injur[ies].” An official with the Devereaux Foundation, in a letter dated March 24, 1999, indicated that appellant worked as a mental health technician from March 1, 1993 through April 7, 1994 and January 5 through November 21, 1995.

By decision dated November 10, 2004, the Office determined that appellant forfeited entitlement to compensation for the periods June 21, 1983 through June 21, 1984, September 23, 1985 through December 30, 1988, February 12, 1989 through May 12, 1990, February 4, 1991 through February 16, 1993, October 27, 1993 through February 10, 1996 and December 4, 1996 through April 16, 2000. The Office found that appellant had omitted reporting his earnings and employment from EN1032 forms covering these periods.

On November 12, 2004 the Office notified appellant of its preliminary determination that an overpayment of compensation existed in the amount of \$221,758.23 because he forfeited compensation for the periods June 21, 1983 through June 21, 1984, September 23, 1985 through December 30, 1988, February 12, 1989 through May 12, 1990, February 4, 1991 through February 16, 1993, October 27, 1993 through February 10, 1996 and December 4, 1996 through April 16, 2000. The Office further made a preliminary determination that appellant was at fault in the creation of the overpayment and that, consequently, it was not subject to waiver.

On November 12, 2004 appellant requested a review of the written record. In a decision dated June 13, 2005, a hearing representative affirmed the Office’s November 10, 2004 decision and finalized the overpayment of compensation in the amount of \$221,758.23 for the periods that appellant forfeited compensation and that he was at fault in the creation of the overpayment. The hearing representative found that, as appellant had not submitted financial information, the entire amount was “due and payable.”

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the Federal Employees' Compensation Act provides that an employee who "fails to make an affidavit or report when required or 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."²

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. Appellant can be subjected to the forfeiture provisions of 5 U.S.C. § 8106(b) only if he "knowingly" failed to report employment or earnings.³ The term "knowingly" as defined in the Office's implementing regulation, means "with knowledge, consciously, willfully or intentionally."⁴

ANALYSIS -- ISSUE 1

The Office determined that appellant forfeited his entitlement to compensation for the periods June 21, 1983 through June 21, 1984, September 23, 1985 through December 30, 1988, February 12, 1989 through May 12, 1990, February 4, 1991 through February 16, 1993, October 27, 1993 through February 10, 1996 and December 4, 1996 through April 16, 2000. Regarding the period June 21, 1983 through June 21, 1984, the Board finds that the Office has not met its burden to show that appellant omitted earnings from employment on the applicable Form EN1032 signed on June 21, 1984. Records from the SSA establish that in 1984 appellant received \$2,927.40 in earnings from employment working for Harbor Hill Associates. There is no evidence, however, that he received any earnings prior to June 21, 1984. Consequently, the evidence of record is currently insufficient to establish that appellant forfeited his entitlement to compensation for the period June 21, 1983 through June 21, 1984.

Regarding the period September 23, 1985 through December 30, 1988, appellant signed a Form EN1032 on December 23, 1986 covering the period September 23, 1985 through December 23, 1986, a Form EN1032 signed on January 13, 1988 covering the period October 3, 1986 through January 13, 1988 and a Form EN1032 signed on December 30, 1988 covering the period September 30, 1987 to December 30, 1988. On the EN1032 forms, appellant indicated that he was not employed or self-employed. The SSA records, however, reveal that appellant earned \$11,878.00 in 1986 and \$3,536.77 in 1987 working for New Pathways, Incorporated. In 1988 he earned \$2,401.64 working for Piedmont Hospital, \$312.00 working for Dress Barn, \$4,702.62 working for ADF Services, and \$2,420.00 working for Park Lane Limited Partnership. The Board thus finds that appellant had undisclosed earnings on EN1032 forms covering the periods September 23, 1985 through December 30, 1988.

Appellant signed a Form EN1032 on May 12, 1990 covering the period February 12, 1989 through May 12, 1990 on which he indicated that he was not employed or self-employed

² 5 U.S.C. § 8106(b).

³ *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁴ 20 C.F.R. § 10.5(n).

during that period. In a memorandum dated August 28, 2001, however, an investigator with the OIG noted that appellant earned \$15,172.40 working from January 1, 1989 to December 31, 1989 for Piedmont Hospital.⁵ Consequently, the evidence clearly shows that he had unreported earnings during the period covered by the Form EN1032 signed May 12, 1990.

Regarding the period February 4, 1991 through February 16, 1993, appellant signed a Form EN1032 dated April 9, 1992 covering the period January 9, 1991 through April 9, 1992. He returned an EN1032 form on April 6, 1993 which the Office received on April 26, 1993 covering the period January 26, 1992 through April 26, 1993 and an EN1032 form on February 2, 1994 covering the period November 2, 1992 through February 2, 1994.⁶ Appellant indicated on the EN1032 forms that he was not employed during the above listed periods. The SSA records, however, reveal that appellant earned \$3,010.25 in 1991 working for Abatement Services and \$3,674.25 working for Premium Roofing Service. In a letter dated March 24, 1999, an official with the Devereaux Foundation related that appellant worked a mental health technician from March 1, 1993 through April 7, 1994. Appellant, thus, failed to report earnings on his EN1032 form for the period February 4, 1991 through February 16, 1993.

For the period October 27, 1993 through February 10, 1996, appellant signed a Form EN1032 on February 2, 1994 covering the period November 2, 1992 to February 2, 1994. He further signed an EN1032 form on February 10, 1996 covering the period November 10, 1994 to February 10, 1996. Appellant related that he had no earnings from employment during those periods. The SSA records and the OIG report reveal, however, that in 1993 appellant received \$14,770.52 for the Devereaux Foundation. In a letter dated March 24, 1999, an official with the Devereaux Foundation indicated that appellant was employed from March 1, 1993 through April 7 1994. He consequently had earnings which he did not disclose on the February 2, 1994 Form EN1032.

Regarding the period December 4, 1996 through April 16, 2000, appellant signed a Form EN1032 dated March 4, 1998 covering the period December 4, 1996 through March 4, 1998, a Form EN1032 dated March 4, 1999 covering the period December 4, 1997 through March 4, 1999 and a Form EN1032 dated April 16, 2000 covering the period January 16, 1999 through April 16, 2000. He reported no earnings or employment on the EN1032 forms. In a letter dated March 24, 1999, an official with Caremaster Medical Services stated that appellant was employed as a nurse assistant from July 2, 1996 to the present. The SSA records and the findings of the OIG inspector support that he worked for Caremaster during this time. Appellant, therefore, clearly had unreported earnings for the period December 4, 1996 through April 16, 2000.

Appellant can be subject to the forfeiture provision of section 8106(b) only if he “knowingly” failed to report earnings or employment. The Office has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.⁷ In this case, appellant completed EN1032 forms which

⁵ The SSA records support that appellant earned \$15,172.40 in 1989 working for Piedmont Hospital.

⁶ The Office apparently overlooked the Form EN1032 signed by appellant on February 2, 1994.

⁷ 20 C.F.R. § 10.5(n).

advised him that he must report both all employment and all earnings from employment and self-employment. The EN1032 forms clearly stated that he could be subject to criminal prosecution for false or evasive answers or omissions. The factual circumstances of record, including appellant's signing of strongly worded certification clauses on the EN1032 forms, provide persuasive evidence that he "knowingly" understated his earnings and employment information.⁸ The Office, therefore, properly found that appellant forfeited his compensation for the periods September 23, 1985 through December 30, 1988, February 12, 1989 through May 12, 1990, February 4, 1991 through February 16, 1993, October 27, 1993 through February 10, 1996 and December 4, 1996 through April 16, 2000.

LEGAL PRECEDENT -- ISSUE 2

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 forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes."⁹

ANALYSIS -- ISSUE 2

As noted above, Office regulations provide that the Office may declare an overpayment of compensation for the period of a given forfeiture of compensation. If a claimant has any earnings during a period covered by a Form EN1032 which he knowingly fails to report, he 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.¹⁰ The Office paid appellant compensation in the amount of \$13,069.92 for the period June 21, 1983 through June 21, 1984; \$46,870.18 for the period September 23, 1985 through December 30, 1988; \$18,955.82 for the period February 12, 1989 through May 12, 1990; \$33,347.64 for the period February 4, 1991 through February 16, 1993; \$41,989.79 for the period October 27, 1993 through February 10, 1996; and \$67,524.88 for the period December 4, 1996 through April 16, 2000, for a total amount of \$221,758.23. As discussed above, however, the Office did not establish that appellant forfeited compensation for the period June 21, 1983 through June 21, 1984. For the relevant period September 23, 1985 through April 16, 2000, the Office paid appellant compensation in the amount of \$208,688.31. As the Office properly found that appellant forfeited his entitlement

⁸ See generally *Robert C. Gilliam*, 50 ECAB 334 (1998).

⁹ 20 C.F.R. § 10.529.

¹⁰ *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

to compensation during this time because he failed to report earnings from employment on EN1032 forms, there exists an overpayment of compensation in the amount of \$208,688.31.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act¹¹ provides that “[a]djustment 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.” Section 10.433 of the Office’s implementing regulation¹² provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. 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.”

ANALYSIS -- ISSUE 3

The Office properly determined that appellant was at fault in the creation of the overpayment because he failed to provide information which he knew or should have known to be material on EN1032 forms covering the periods September 23, 1985 through December 30, 1988, February 12, 1989 through May 12, 1990, February 4, 1991 through February 16, 1993, October 27, 1993 through February 10, 1996 and December 4, 1996 through April 16, 2000. The record establishes that appellant had unreported earnings from employment during these periods and knowingly failed to furnish this material information to the Office. Appellant signed a certification clause EN1032 forms which advised him in explicit language that he might be subject to civil, administrative or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. 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. Appellant failed to furnish information which he knew or should have known to be material to the Office. As he is not without fault in creating the overpayment, it is not subject to waiver.¹³

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.433.

¹³ In his June 13, 2005 decision, the hearing representative found that the overpayment was due and payable but did not decide the rate of recovery. The Board has noted that, when, as in this case, an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly. *Gail M. Roe*, 47 ECAB 268 (1995).

CONCLUSION

The Board finds that appellant forfeited his entitlement to compensation for the periods September 23, 1985 through December 30, 1988, February 12, 1989 through May 12, 1990, February 4, 1991 through February 16, 1993, October 27, 1993 through February 10, 1996 and December 4, 1996 through April 16, 2000. The Board further finds that he received an overpayment of compensation in the amount of \$208,688.31 and that he was at fault in the creation of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 13, 2005 and November 10, 2004 are affirmed as modified.

Issued: February 8, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board