United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	**Docket No. 07-564**
	)	**Issued: October 10, 2007**
DEPARTMENT OF VETERANS AFFAIRS, MINNEAPOLIS VETERANS ADMINISTRATION MEDICAL CENTER, Minneapolis, MN, Employer	)	

Appearances:
William J. Mavity, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 22, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 22, 2006 which affirmed the termination of his compensation benefits. He also appealed a September 28, 2006 decision finding an $11,593.89 overpayment of compensation for the period August 24, 2004 to April 16, 2005, and a September 28, 2006 decision finding a $71,448.55 overpayment of compensation for the period January 11, 1998 to April 11, 1999 and from November 19, 1999 to February 19, 2001. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective August 24, 2004 under 5 U.S.C. § 8148; (2) whether the Office properly found that he received a $11,593.89 overpayment of compensation from August 24, 2004 to April 16, 2005; (3) whether the Office properly determined that appellant was at fault in creating the overpayment; (4) whether the Office properly found that he received a $71,448.55 overpayment

of compensation from January 11, 1998 to April 11, 1999 and from November 19, 1999 to February 19, 2001; (5) whether the Office properly found that appellant was at fault in creating the overpayment.

FACTUAL HISTORY

On April 12, 1996 appellant, then a 41-year-old air conditioning maintenance mechanic, injured his low back when he slipped on a pipe and fell. The Office accepted his claim for lumbar strain and permanent aggravation of degenerative disc disease. Appellant stopped work on April 12, 1996 and did not return to work. He received appropriate compensation benefits. Appellant was referred for vocational rehabilitation. In a report dated January 29, 1999, the rehabilitation counselor noted that appellant was studying computers at a technical college, as part of a vocational rehabilitation plan. However, he was considering stopping classes and helping his son start a heating and air conditioning business.

The Office sent appellant a CA1032 form, wage and compensation disclosure form, for verification of his wages and earnings during several time periods for which he was receiving temporary total disability. On April 11, 1999 he completed and signed a Form CA1032 covering the preceding 15-month period, which advised him to report all employment for which he received wages or other payment during the period covered by the form. It described the penalty if he fraudulently concealed or failed to report such income that would have a material effect on his benefits. The CA1032 provided: "A false or evasive answer to any question, or the omission of an answer, may be grounds for forfeiting your compensation benefits and subject you to civil liability. A fraudulent answer may result in criminal prosecution…." Appellant responded indicating that he was not employed, nor had he received any wages or income during these time periods.

In an Office e-mail dated November 30, 1999, the claims examiner advised that she had information that appellant may have been working and was referring the matter to the Office of the Inspector General for investigation.

The Office sent appellant a Form EN1032 for verification of his wages and earnings during periods of time for which he was receiving temporary total disability. On February 19, 2001 appellant completed and signed a Form EN1032 covering the 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. Under "Part A -- Employment," appellant responded to question 2, whether he was self-employed or involved in a business enterprise, with a "?." He stated that "my son had a heating and air conditioning business and I have helped him by picking up supplies. I volunteered to do this and I have received no pay."

In a telephone log dated July 24, 2001, appellant contacted the Office and indicated that he did not understand the CA1032 form and was not aware that he had to report his earnings from working with his son's heating and cooling business. He indicated that he consulted an attorney who advised him that his employment should have been reported.

The Office sent appellant a Form EN1032 wage and compensation disclosure form for verification of his wages and earnings during several periods of time for which he was receiving temporary total disability. On March 29, 2002 and March 25, 2003 appellant completed and signed each Form EN1032 covering the 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 each 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 worked for his son and ran errands, picked up supplies, made repair calls and provided estimates on air conditioning jobs.

In a report dated September 30, 2002, the rehabilitation counselor noted that appellant completed half of the two-year computer training program, dropped out in November 1998 and was considering assisting his son with his heating and air conditioning business.[1]

On April 8, 2004 a federal grand jury indicted appellant on two counts of making false statements to obtain compensation benefits under 18 U.S.C. § 1920.

An April 13, 2005 investigative memorandum from the Office of the Inspector General advised that appellant was investigated for making false and fraudulent representations on CA1032 forms to obtain disability benefits from the Office. The investigator noted that appellant had reported on an April 11, 1999 CA1032 form that he had not been self-employed or involved in any business enterprise during the preceding 15 months, well knowing that he had been involved in a heating and air conditioning business and received income and payments relating to that business. For the time period January 11, 1998 to April 11, 1999, appellant received $625.00 in income from his involvement in a heating and air conditioning business and for the same period appellant received $35,025.68 in workers' compensation benefits. The investigator further noted that appellant reported on a Form CA1032 dated February 19, 2001, that he had been voluntarily helping his son with his heating and air conditioning business and that he received no pay, well knowing that he received income and payments relating to the heating and air conditioning business during the 15-month period preceding February 19, 2001. For the period November 19, 1999 to February 19, 2001, appellant received $2,177.00 in income from his involvement in a heating and air conditioning business and for the same time period he received $36,568.36 in workers' compensation benefits.

On August 24, 2004 a jury convicted appellant on two counts in violation of 18 U.S.C. § 1920 for making false statements to obtain compensation benefits. On April 11, 2005 he was sentenced to 24 months probation and he was ordered to pay restitution of $2,907.46 to the Office.

In a decision dated April 26, 2005, the Office terminated appellant's compensation benefits effective April 11, 2005 on the grounds that appellant was convicted of violating

[1] On April 20, 2004 the Office proposed to reduce appellant's compensation on the grounds that he had the capacity to earn wages as a customer complaint clerk. In a July 23, 2004 decision, effective July 11, 2004, the Office finalized the wage-earning capacity determination.

18 U.S.C. § 1920 for making false statements to obtain compensation benefits which precluded him from further benefits under the Federal Employees' Compensation Act.

On May 20, 2005 appellant requested an oral hearing before an Office hearing representative. The hearing was held on January 18, 2006.

In a decision dated March 22, 2006, the hearing representative affirmed the April 26, 2005 Office decision, as modified. The hearing representative noted that appellant's entitlement to further compensation benefits ceased as of August 24, 2004, the date the jury returned a verdict of guilty on both counts of violating 18 U.S.C. § 1920 and not April 11, 2005, the date appellant was sentenced, as previously determined by the Office.

In a letter dated August 2, 2006, the Office made a preliminary determination that an $11,593.89 overpayment of compensation occurred because, under section 8148 of the Act, a claimant who is convicted under 18 U.S.C. § 1920 of fraud in obtaining compensation benefits will permanently forfeit his entitlement to further compensation benefits, effective the date of the conviction. As the date of conviction was August 24, 2004, no further benefits were due effective that date but appellant received wage-loss compensation for the period August 24, 2004 to April 16, 2005. The Office noted that appellant was entitled to partial payment of benefits for the period August 8 to 23, 2004. The Office found that appellant was at fault in creating the overpayment of $11,593.89 as he knew or reasonably should have known that he was no longer entitled to benefits after his conviction.

In an August 24, 2006 letter, the Office made a preliminary determination that an overpayment of compensation occurred in the amount of $71,448.55. The Office determined that the overpayment occurred because appellant failed to report his earnings for the period January 11, 1998 to April 11, 1999 and from November 19, 1999 to February 19, 2001. The Office also determined that appellant was at fault in the creation of the overpayment of $71,448.55 as the Form CA1032 clearly advised him to report his earnings from employment.

In a decision dated September 28, 2006, the Office finalized its preliminary determination with regard to the $11,593.89 overpayment. The Office determined that the overpayment occurred because under section 8148 a claimant who is convicted under 18 U.S.C. § 1920 of fraud in obtaining compensation benefits will permanently forfeit his entitlement to further compensation benefits, effective the date of the conviction. The Office noted that the date of conviction was August 24, 2004 and no further benefits were due effective that date such that appellant was overpaid compensation for the period August 24, 2004 to April 16, 2005. The Office noted that appellant was entitled to partial payment of benefits for the period August 8 to 23, 2004. The Office found appellant at fault in creating the overpayment as he knew or reasonably should have known that he was no longer entitled to benefits after his conviction. The Office requested that appellant remit the entire overpayment immediately or contact the Office to make appropriate arrangements.

In a decision dated September 28, 2006, the Office finalized its preliminary determination with regard to the overpayment of $71,448.55. The Office determined that the overpayment occurred because appellant failed to report his earnings for the period January 11, 1998 to

April 11, 1999 and from November 19, 1999 to February 19, 2001. The Office advised that pursuant to 20 C.F.R. § 10.525(b) the failure to report income results in a forfeiture of all benefits paid during the reporting period. The Office found appellant at fault in creating the overpayment as the CA1032 form clearly indicated that appellant should report his earnings. The Office requested that appellant remit the entire overpayment immediately or contact the Office to make appropriate arrangements for recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

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, 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 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]

Section 10.17 of the Office's implementing federal regulation provides:

> "When a beneficiary either pleads guilty to or is found guilty on either federal or state criminal charges of defrauding the Federal Government in connection with a claim for benefits, the beneficiary's entitlement to any further compensation benefits will terminate effective the date either the guilty plea is accepted or a verdict of guilty is returned after trial, for any injury occurring on or before the date of such guilty plea or verdict. Termination of entitlement under this section is not affected by any subsequent change in or recurrence of the beneficiary's medical condition."[4]

Office procedures state 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

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

[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] 20 C.F.R. § 10.17.

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.[5] The termination is effective on the date of the verdict or on the date the guilty plea is accepted and guilt adjudicated.[6] Because of the criminal basis for the termination, no pretermination notice is required before a final decision is issued.[7]

ANALYSIS -- ISSUE 1

On August 24, 2004 appellant was convicted on two counts of violating 18 U.S.C. § 1920 when he knowingly and willfully made false, fictitious and fraudulent statements on CA-1032 forms he signed on April 11, 1999 and February 19, 2001 regarding his employment and earnings during the period January 11, 1998 to April 11, 1999 and November 19, 1999 to February 19, 2001. Under section 8148(a) of the Act, a claimant who is convicted of fraud in obtaining compensation benefits under 18 U.S.C. § 1920 will have his compensation forfeited. The claimant is thereafter permanently barred from receiving any compensation under the Act.[8] The Office's procedure manual states that in support of termination of compensation the record must contain copies of the indictment or information, the plea agreement, if any, the document containing the guilty verdict or the court's docket sheet establishing that the individual was convicted and that the conviction is related to the claim for, or receipt of, compensation benefits under the Act.[9]

In this instance, the record contains a judgment dated April 11, 2005 which noted that a jury found appellant guilty to two counts of violating 18 U.S.C. § 1920, making false statements in obtaining federal employee's compensation on April 11, 1999 and February 19, 2001. Since appellant was convicted under section 1920, the Office properly terminated his compensation benefits.[10] 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. 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.[11]

---

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

[6] *See Paul Hanley*, 53 ECAB 424 (2002); 20 C.F.R. § 10.17; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(e) (March 1997).

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

[8] Congress has enacted 5 U.S.C. § 8148(a) as an absolute forfeiture of compensation, without any provision for waiver of the effects of this section of the Act. *Michael D. Matthews*, 51 ECAB 247 (1999). This forfeiture is a permanent forfeiture which bars appellant from any further entitlement to compensation for any employment-related injuries or conditions. *Jeff M. Burns*, 51 ECAB 241 (1999).

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

[10] The record contains the appropriate court documents specified by Office procedure.

[11] *Jorge E. Sotomayor*, 52 ECAB 105 (2000).

LEGAL PRECEDENT -- ISSUE 2

Section 8148(a) 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 [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]."[12]

ANALYSIS -- ISSUE 2

On August 24, 2004 appellant was convicted on two counts of violating 18 U.S.C. § 1920 when he knowingly and willfully made false, fictitious and fraudulent statements on CA1032 forms he signed on April 11, 1999 and February 19, 2001 regarding his employment, self-employment and income during the period January 11, 1998 to April 11, 1999 and November 19, 1999 to February 19, 2001. Under section 8148(a) of the Act, a claimant who is convicted of fraud in obtaining compensation benefits under 18 U.S.C. § 1920 is thereafter permanently barred from receiving any compensation under the Act.[13]

The record reveals that appellant received wage-loss benefits after his conviction on August 24, 2004 for fraud in obtaining compensation benefits under 18 U.S.C. § 1920 for the period August 8, 2004 to April 16, 2005. The Office determined that for the period August 7, 2004 to April 16, 2005 appellant received $12,292.18 in compensation. The Office showed that appellant was issued compensation payments in the amount of $1,222.00 on August 7, September 4, October 2, October 30, November 27 and December 25, 2004, January 22, February, 19 and March 19, 2005; $29.18 on April 8, 2005 and $1,265.00 on April 16, 2005, for total payments of $12,292.18 for the period August 8, 2004 to April 16, 2005. The Office indicated that appellant was entitled to a partial period of entitlement to compensation for the period August 8 to 23, 2004 in the amount of $689.29. Therefore, the amount of the overpayment for the period August 24, 2004 to April 16, 2005 is $11,593.89.

The Office explained the basis of the overpayment and appellant does not dispute that he received a compensation payment that covered the period August 24, 2004 to April 16, 2005. Thus, the Office properly determined the amount and period of the overpayment.

[12] *Supra* note 3.

[13] *Supra* note 8.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act[14] provides as follows:

> "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."[15]

No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.[16]

Section 10.433(a) of the Office's implementing regulations provides:

> On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent 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 (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.[17]

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

> "(b) Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."[18]

ANALYSIS -- ISSUE 3

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation in question, he knew or should have known the payments were incorrect.[19] The record establishes such knowledge.

---

[14] 5 U.S.C. § 8129(b).

[15] *Id.*

[16] *Gregg B. Manston,* 45 ECAB 344 (1994).

[17] *Kenneth E. Rush,* 51 ECAB 116 (1999).

[18] 5 U.S.C. § 10.433(b).

[19] *See Claude T. Green,* 42 ECAB 274, 278 (1990).

As noted, under section 8148(a), a claimant who is convicted of fraud in obtaining compensation benefits under 18 U.S.C. § 1920 will permanently forfeit his entitlement to further compensation benefits effective the date of the conviction. The date of conviction in this case was August 24, 2004 and therefore no further benefits were due effective this date.[20] Appellant knew or should have known that he was no longer entitled to receive compensation after being convicted of two counts of fraud in obtaining compensation benefits under 18 U.S.C. § 1920.[21] Appellant accepted compensation benefits after the August 24, 2004 judgment through April 16, 2005, totaling $11,593.89, which he knew to be incorrect. Therefore, appellant was at fault in creation of the overpayment such that it was not subject to waiver.[22]

LEGAL PRECEDENT -- ISSUE 4

The Office's procedures provide for finding an overpayment when there is a forfeiture of compensation:

> "Forfeiture. Section 8106(b) of the Act provides that compensation may be forfeited for failure to report earnings….
>
> "(2) Advising the Claimant. When the evidence shows that the claimant had earnings and knowingly did not show them on Form CA1032, the claims examiner should prepare a formal decision declaring the compensation forfeit and an overpayment."[23]

Regarding overpayments that result from a new decision on entitlement, the Office's procedures further provide:

> "Regardless of whether the claimant is 'with fault' or 'without fault,' a new determination on entitlement which results in an overpayment (*e.g.*, an amended schedule award, the correction of an incorrect pay rate, the forfeiture of compensation) entitles the claimant to request reconsideration and a hearing and/or review by the Employees' Compensation Appeals Board (ECAB) on the entitlement issue. Therefore, a separate formal decision on the claimant's *entitlement* to benefits, with full appeal rights, should be issued along with the preliminary overpayment finding. Form CA-2201 and Form CA-2202 are preliminary finding notices, and are not proper for use in place of the entitlement

[20] *Supra* note 8.

[21] *See Bob R. Gilley*, 51 ECAB 377 (2000).

[22] In its decision dated September 28, 2006, the Office requested that appellant repay the overpayment either by a lump-sum payment or by contacting the Office to arrange for a repayment schedule. The Board notes that since the Office did not issue a final decision with regard to recovery of the overpayment, the Board does not have jurisdiction over the matter. *See* 20 C.F.R. § 501.2(c).

[23] Federal (FECA) Procedural Manual, Part 2 -- Claims, *Periodic Review of Disability Claims*, Chapter 2.0812.11.3(c) (June 2003). *See* 5 U.S.C. § 8106(b) (forfeited compensation shall be recovered under the provision of the Act pertaining to overpayments).

decision on the issue that resulted in the overpayment."[24] (Emphasis in the original.)

ANALYSIS -- ISSUE 4

The Office's September 28, 2006 decision found a $71,448.55 overpayment of compensation from January 11, 1998 to April 11, 1999 and from November 19, 1999 to February 19, 2001 based on the fact that appellant failed to report income from self-employment such that he forfeited compensation during these periods. However, prior to its final overpayment decision in the matter, the Office failed to issue a forfeiture decision for this period prior to the overpayment decision of September 28, 2006.

The Board finds that the Office's September 28, 2006 final overpayment decision is contrary to the Office procedures, noted above, which contemplate that the Office issue a formal decision declaring the compensation forfeit prior to a final overpayment determination. Therefore, the Board finds that as the Office failed to comply with its procedures, it has not met its burden of proof in determining that there was an overpayment of compensation in the amount of $71,448.55 due to a forfeiture as it has not yet issued a separate formal decision finding a forfeiture of compensation during the periods in question.[25]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective August 24, 2004. The Board further finds that the Office properly found that appellant received an $11,593.89 overpayment of compensation from August 24, 2004 to April 16, 2005 and that he was at fault in creating this overpayment. The Board finds that the Office did not establish that appellant received a $71,448.55 overpayment, due to a forfeiture of compensation, for the periods January 11, 1998 to April 11, 1999 and November 19, 1999 to February 19, 2001.

[24] Federal (FECA) Procedural Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.4(a) (May 2004).

[25] The Board finds that it is unnecessary to address the fifth issue, with regard to fault, in view of the Board's disposition of the fourth issue.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 28, 2006 which found an overpayment of compensation of $11,593.89 from August 24, 2004 to April 16, 2005 is affirmed; the September 28, 2006 decision which found an overpayment of compensation of $71,448.55 for the period January 11, 1998 to April 11, 1999 and from November 19, 1999 to February 19, 2001 is reversed; and the March 22, 2006 Office decision which terminated appellant's compensation benefits effective August 24, 2004 is affirmed.

Issued: October 10, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board