

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN T. HOAGLAND and GENERAL SERVICES ADMINISTRATION,
FACILITIES SUPPORT SERVICES, Washington, DC

*Docket No. 02-1186; Submitted on the Record;
Issued June 3, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his compensation for the period July 4, 1994 to August 14, 1999; (2) whether the Office properly found that an overpayment of compensation of \$82,536.59 was created; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly determined that the overpayment would be recovered by deducting \$1,000.00 every four weeks from appellant's continuing compensation.

On February 25, 1994 appellant, then a 40-year-old supply clerk, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained an emotional condition causally related to his federal employment. Appellant had stopped working on September 27, 1993. The Office accepted the claim for anxiety and appellant began receiving compensation for temporary total disability.

The Office periodically requested that appellant provide information relevant to his continued receipt of compensation benefits. The cover letters (Form CA-1032) advised appellant that "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." The letter also advises that the accompanying form (EN1032) covers the period 15 months prior to the date the form is signed by the claimant. The EN1032 form requires that the claimant report "all employment, for which you received a salary, wages, income, sales, commissions, piecework or payment of any kind." The claimant also must "report all self-employment or involvement in business enterprises."

On October 4, 1995, August 9, 1996, August 26, 1997, November 4, 1998 and August 14, 1999 appellant signed EN1032 forms. On each of these forms appellant reported no employment activity during the relevant 15-month period.

In an investigative memorandum dated August 28, 2000, with accompanying evidence, an investigator for the Department of Labor's Office of Inspector General detailed appellant's

employment activity commencing March 27, 1995. The report indicates that on March 27, 1995 appellant was hired by a newspaper distributor to deliver newspapers. The newspaper distributor stated that when appellant was hired, he asked if he could work under his wife's name and social security number. According to the distributor, appellant worked through March 1996, then returned to work again in July 1996 and worked under his own name until May 1997. Records from the Social Security Administration indicated that appellant reported earnings of \$3,070.08 for 1996 and \$2,366.22 from the newspaper job.

The evidence further established that, in September 1997, appellant began working for Montvale Corporation as a contract employee shelving and stocking supplies. The report stated that appellant worked through October 1998. Social Security records show earnings of \$5,188.63 for 1997 and \$4,701.10 for 1998. In addition, appellant was hired by a second newspaper distributor in May 1999 and worked through June 2000. The distributor indicated that appellant had asked to be paid under his wife's name and social security number.

By decision dated May 2, 2001, the Office determined that appellant forfeited his compensation for the period July 4, 1994 to August 14, 1999 on the grounds that he failed to report his employment activity on EN1032 forms.

By letter dated May 2, 2001, the Office advised appellant that it had made a preliminary determination that an overpayment of \$82,536.59 had been created during the period July 4, 1994 to August 14, 1999. The Office also made a preliminary finding that appellant was at fault in creating the overpayment.

In a decision dated January 14, 2002, an Office hearing representative finalized the preliminary determinations as to the amount of overpayment and fault. The hearing representative also found that the overpayment should be collected by deducting \$1,000.00 per month from appellant's continuing compensation.

The Board finds that the Office properly determined that appellant forfeited his compensation for the period July 4, 1994 to August 14, 1999.

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 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 ... under section 8129 of this title, unless recovery is waived under that section.”¹

The initial issue presented is whether appellant failed to report earnings as required by the EN1032 forms. With respect to the form signed October 4, 1995, the record indicates that as of March 27, 1995 appellant had worked for a newspaper distributor. Although the payments were made to appellant’s wife, the statement from the distributor clearly indicates that appellant performed the work. At an October 18, 2001 hearing before the hearing representative, appellant did not contest that he performed the delivery work. The Form EN1032 requires that a claimant report all employment or involvement in a business enterprise, even part-time or intermittent. The Board finds that appellant failed to report earnings on the October 4, 1995 Form EN1032.

The August 9, 1996 and August 26, 1997 EN1032 forms also fail to report the newspaper delivery earnings that occurred during the 15-month period covered by the form; the November 4, 1998 form omitted the earnings from Montvale Corporation. The August 14, 1999 form did not report either the earnings from Montvale Corporation or the newspaper delivery work. Accordingly, the Board finds that appellant failed to report earnings on the EN1032 forms dated August 9, 1996, August 26, 1997, November 4, 1998 and August 14, 1999.

The next issue is whether appellant “knowingly” omitted earnings and, therefore, forfeits his compensation pursuant to section 8106(b)(2). The term “knowingly” is defined in the regulations governing administration of claims filed under the Act as “[w]ith knowledge, consciously, willfully, or intentionally.”² In discussing his failure to report employment activity, appellant has alleged that he had a conversation with an Office rehabilitation specialist, Marcia Josephson. According to appellant, Ms. Josephson conferred by telephone with another Office rehabilitation specialist, Mr. Gerdts and then told appellant “I should not put my working on these forms because the Office would not understand my psychological problem and they would think that if I went back to work that I [a]m okay and I can go back to work without any problems whatsoever. So he, in essence, told me not to fill them out properly. He said, do n[o]t put it down there.” It is not entirely clear when this incident is alleged to have occurred and the record does not contain additional evidence confirming the allegation. Even if the incident were established as alleged, the relevant issue is whether appellant knowingly omitted earnings. Appellant has acknowledged that the forms were not properly completed and that he knew they were not properly completed; he argues that he relied on advice from an Office rehabilitation specialist. The receipt of advice regarding the completion of forms does not alter the unambiguous language on the Form EN1032. In *Hopkins*, for example, the claimant was advised by his postmaster that he did not need to report his employment activity.³ The Board found that this did not relieve the claimant of the responsibility to report earnings and his omission was “knowingly” made. In this case, the record shows that appellant did have earnings, that he knew the form required him to report these earnings and he failed to report the earnings. Under such circumstances the Board finds that appellant has “knowingly” omitted earnings.

¹ 5 U.S.C. § 8106(b).

² 20 C.F.R. § 10.5(n).

³ *James H. Hopkins*, 48 ECAB 281 (1997).

The period covered by the October 4, 1995 EN1032 form commences 15 months prior to the signing of the form or July 4, 1994. The final Form EN1032 that knowingly omitted earnings was August 14, 1999. Accordingly, appellant forfeited his right to compensation for this period under 5 U.S.C. § 8106(b)(2).

Appellant has argued that section 8106 is not applicable in this case because he was totally disabled. Appellant contends that compensation for total disability is paid pursuant to 5 U.S.C. § 8105; whereas section 8106 is limited to employees that are partially disabled.⁴ This argument has been raised in prior cases and the Board has made its position clear on this issue. The test is not whether the employee was receiving compensation for total disability, but whether, for the period under consideration, the employee was in fact totally disabled or merely partially disabled.⁵ A totally disabled employee normally would not have any employment earnings to report and a statutory provision regarding such earnings would be meaningless.⁶ Appellant was not, in fact, totally disabled as he did have employment earnings during this period. 5 U.S.C. § 8106 is clearly applicable in this case.

The Board further finds that the Office properly found that an overpayment of \$82,536.59 was created.

The record indicates that, for the period July 4, 1994 to August 14, 1999, appellant received \$82,536.59 in compensation. Since the Office properly found that appellant forfeited his compensation for this period, the entire amount constitutes an overpayment of compensation.

The Board further finds that appellant was at fault in creating the overpayment and, therefore, is not entitled to waiver.

Section 8129(b) of the Act⁷ 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 when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”⁸ Waiver of an overpayment is not permitted unless the claimant is “without fault” in creating the overpayment.⁹

On the issue of fault 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(1) made an incorrect statement as to a material fact,

⁴ 5 U.S.C. § 8106 (b) states that the Secretary of Labor may require a partially disabled employee to report his earnings; section 8105 provides that, if the disability is total, the basic compensation rate is 66 2/3 of the employee’s monthly pay.

⁵ *Gregg B. Manston*, 45 ECAB 344, 352 (1994); *Elbridge H. Wright*, 36 ECAB 691 (1985); *Ronald H. Ripple*, 24 ECAB 254 (1973).

⁶ *Id.*

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8129(b).

⁹ *Norman F. Bligh*, 41 ECAB 230 (1989).

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) accepted a payment which he or she knew or should have known was incorrect.”

As the above discussion establishes, appellant knowingly omitted earnings on the EN1032 forms in this case. The making of incorrect statements regarding material facts that appellant knew or should have known to be incorrect renders appellant “at fault” in the creation of the overpayment.¹⁰ The Board finds that the Office properly found appellant to be at fault in creating the overpayment. Since appellant is at fault, he is not entitled to waiver of the overpayment.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$1,000.00 per month from appellant’s continuing compensation.

Section 10.441 of the Office’s regulations provides:

“Whenever an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the] O[ffice] the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, [the] O[ffice] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship.”¹¹

In this case, appellant failed to submit any financial information. The Office’s procedure manual notes that, if a claimant is being paid compensation or is due accrued benefits from the Office and does not respond to the preliminary overpayment decision, the debt should be recovered from such benefits as quickly as possible.¹² The hearing representative noted that appellant’s wife was employed and directed that the repayment be recovered by deducting \$1,000.00 from appellant’s continuing compensation to minimize hardship. In the absence of any relevant financial information, the Board does not find an abuse of discretion in this case.¹³

¹⁰ See, e.g., *Anthony V. Knox*, 50 ECAB 402 (1999).

¹¹ 20 C.F.R. § 10.321.

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (September 1994).

¹³ See *Frederick Arters*, 53 ECAB ____ (Docket No. 01-1237, issued February 27, 2002).

The January 14, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 3, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member