

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN R. INGATE and U.S. POSTAL SERVICE,
AIRPORT MAIL FACILITY, Baltimore, MD

*Docket No. 03-1764; Submitted on the Record;
Issued March 11, 2004*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant forfeited compensation for the period June 13, 2000 to April 5, 2001 on the basis that he failed to report earnings from self-employment; (2) whether she received a \$22,030.60 overpayment of compensation; and (3) whether appellant was at fault in the creation of the overpayment.

On April 23, 2000 appellant, a 45-year-old mail handler, filed a traumatic injury claim alleging that he injured his left upper arm due to a defective dock plate on April 12, 2000. The Office of Workers' Compensation Programs accepted the claim for a left shoulder contusion and strain and authorized left shoulder surgeries. Appellant was released to light-duty work for four hours per day on March 8, 2001 and full duty, with restrictions on April 10, 2001.

On CA-7 forms dated June 10, July 17 and 23, 2000 appellant indicated that he did not engage in salaried employment, commissioned, volunteer or self-employment for the period June 6 through July 28, 2000 for which he requested compensation. The question on the form asked, "[h]ave you worked outside your federal job during the period(s) claimed in [s]ection 2? (*Include salaried, self-employed, commissioned, volunteer, etc.*)" (Italics in original).

On CA-7 forms dated March 19 and April 8, 2001, appellant indicated that he was a stockholder in Champion Realty, Inc. and Facilitator, Inc. and that he had received no income from his self-employment for the period February 5 through April 6, 2001.

The Office asked appellant to complete a CA-1032 form to report income for the prior 15 months and the status of dependents. In an April 2, 2001 response, he indicated that he was involved in a business enterprise that was ongoing but which provided no income to him as a stockholder. Appellant indicated that his business involvement was merely passive or as a facilitator.

The Office received an investigative report dated August 10, 2001 from the U.S. Postal Inspection Service, Washington Metro Division. In the August 10, 2001 investigative report, a

postal inspector stated that appellant was the operator of an internet business known as the *For Sale by Owner Network (FSBON)*. The postal inspector noted that appellant had not reported the business activity on his CA-7 forms dated June 7, July 17 and 28, 2000, but did report the activity on his March 19 and April 8, 2001 CA-7 forms and an April 2, 2001 CA-1032 form. The postal inspectors issued a subpoena which produced documents showing that appellant had two accounts with Cardservice to process the website credit card transactions. The first account, closed by appellant on January 25, 2001, had transactions processed which totaled \$10,548.09. A second account had transactions processed which totaling \$42,628.51. Records submitted by the postal inspectors included copies of the FSBON.com website; information on domain names for FSBON; articles of incorporation for Facilitator, Inc.; an application for a post office box with the signatures of appellant and his wife dated October 22, 1999; Cardservice international information on FSBON listing appellant as the owner of the business; contact information for appellant's website FSBON; and transactions noted by Cardservice International for FSBON during the period June 1 through December 31, 2000. The records show the administrative technical contact as Website Masters and billing contact as Invoice Processing System for the FSBON.com website. Appellant was listed as the administrative contact for Facilitator, Inc. for the domain name of FSBON.net while the technical contact was listed as NameSecure.

In an investigative interview, appellant stated that his wife and son ran the company during the time he was on compensation "because he was 'high' on the prescription drugs [that] he used following his operations." With regards to Facilitator, Inc., appellant informed the postal inspectors that "it would be wrong to say that he worked" in response to the question "[h]ave you worked outside your federal job?" He reiterated that he was merely a stockholder and did not perform any work for the company. The reason his answer was different on the first 3 CA-7 forms and the CA-1032 form was due to "different wording of the questions on the Form EN-1032." Appellant stated that he called an Office claims examiner to ask how to answer the Form CA-1032 as the wording was different from the CA-7 forms that he had completed. Regarding his activity with Champion Realty, Inc., appellant stated that his real estate license was with this company and that the business he was involved in was Facilitator, Inc.

On February 21, 2002 the Office issued a notice of preliminary forfeiture of benefits. By decision dated March 21, 2002, the Office determined that appellant had forfeited compensation from June 13, 2000 through April 5, 2001, based on his failure to provide information regarding the understating of earnings from owning and operating an internet business. On April 19, 2002 the Office made a preliminary overpayment determination of \$22,030.60 due to the forfeiture of compensation and finding appellant at fault in creating the overpayment.¹

By letter dated May 2, 2002, appellant requested a hearing and submitted copies of his corporate tax returns for 1999 and 2000, an April 30, 2002 affidavit from Richard E. Barbe, Jr., and a Maryland State Department of Labor, Licensing and Regulation letter dated August 7, 2000 indicating that no wages had been paid to employees or officers and that any remuneration for services must be reported as wages and was taxable.

¹ The Office noted that the compensation paid to appellant was \$22,665.44, but appellant had previously repaid \$634.84 on an overpayment which had occurred due to his receipt of compensation for total disability when he had been working part time.

The April 30, 2002 affidavit of Mr. Barbe indicated that he was the tax accountant for both appellant and his business, Facilitator, Inc. He noted that the payments made to appellant by FSBON were loan repayments and that, while the business showed a profit in 2000 with no wages paid, and the earnings were “taxed like investment income.”

At the hearing, held on February 26, 2003, appellant’s attorney stated that appellant tried to ensure that the initial CA-7 forms were correct at the time he submitted them but they “did [not] show anywhere that there was any employment.” He related that, “as soon as it was brought to my attention that he was not putting anything into the CA-7 [form] with respect to a business or some other possible employment situation, I instructed him and he filled those CA-7 [forms] in correctly” to show that appellant was “a passive stockholder” with no income. Appellant testified that, during the period he was on compensation, his activities with his business did not change “with the exception to the fact that Steven, my son, picked up more of the burden because I was pretty heavily medicated.” Appellant’s attorney related that appellant’s internet business did not have any employees, had not turned a profit and owed appellant’s family between \$28,000.00 and \$30,000.00 in ongoing loans to keep the business afloat. With regard to his involvement in the website, appellant noted that he would daily “pull down the [e]mail and then I know if a listing has been placed or not” and that he did the best that he could with the bookkeeping activity for the business. Appellant testified that his company, Facilitator, Inc., “owns a for sale by owner network” which allowed “people to go ahead and place their properties that they want to sell” on his company’s internet site. Regarding expenses, appellant noted that he made the payments and that funds going to the company were directly deposited into the company’s checking account. Regarding the ongoing development work done on the site, appellant stated Chesapeake Internet did the updates.

In a March 17, 2003 overpayment recovery questionnaire, appellant noted that he performed minimal bookkeeping for Facilitator, Inc., but the “principal programming duties, data entry and collecting and disbursement of any fees generated by the business were done by my son or through a Web page manager service.”

By decision dated May 15, 2003, an Office hearing representative affirmed the March 21, 2002 forfeiture decision and the April 19, 2002 preliminary overpayment decision. The Office hearing representative found that “pulled information from the computer on a daily basis and wrote checks and did basic bookkeeping,” and had earnings from his self-employment activities.

The Board finds that appellant forfeited his right to compensation for the period June 13, 2000 to April 6, 2001.

Section 8106(b) of the Federal Employees' Compensation Act² states 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.”

To find a forfeiture of compensation, the Office must establish that a claimant knowingly failed to report earnings from self-employment during the relevant period.³ Because forfeiture is a penalty, merely showing that there were unreported earnings from employment is insufficient.⁴ The Office procedure manual recognizes that forfeiture as a penalty provision that must be narrowly construed.⁵

The CA-7 forms dated June 10, July 17 and 23, 2000 and March 9 and April 8, 2001 and the CA-1032 form that appellant signed on April 2, 2001 encompass the period June 13, 2000 to April 5, 2001. He represented on the CA-7 forms, dated June 10, July 17 and 23, 2000, that he had no earnings from employment, self-employment or involvement in any business enterprise during this time. On the March 9 and April 8, 2001 CA-7 forms, appellant noted that he was merely a stockholder in Champion Reality, Inc. and Facilitator, Inc. and that he received no income from these corporate concerns. On the April 2, 2001 CA-1032 form, he noted that his business involvement was passive and that he received no earnings as a stockholder. The record, however, shows otherwise. The investigative report documents appellant's considerable involvement and earnings from employment activities with an internet business. The credit card transactions for his website show transactions in the amount of \$10,548.09 for the account closed on January 25, 2001 and \$42,628.51 in another account as of April 5, 2001.

² 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(b).

³ *Edwin C. Whitlock*, 50 ECAB 384 (1999).

⁴ *Martin James Sullivan*, 50 ECAB 158 (1998).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

The CA-1032 form instructs compensation recipients to report all earnings from self-employment or involvement in business enterprises, including the provision of services such as painting in exchange for money and activities such as managing or overseeing a business. The record clearly establishes that appellant was engaged in extensive self-employment activities during the period in question which he knowingly failed to report to the Office. The investigation report documents that appellant worked as the operator of an internet business “known as the *For Sale by Owner Network*.” Appellant has not disputed that he was engaged in self-employment activities. Rather, he asserts that his activities did not result in reportable earnings as the business had not turned a profit. In defining earnings under the applicable federal regulations, the Office has noted:

“Earnings from employment or self-employment means:

“(1) Gross earnings or wages before any deduction and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or

“(2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. *Neither lack of profits*, nor the characterization of the duties as a hobby, removes an unremunerated individual’s responsibility to report the estimated cost to have someone else perform his or her duties.”⁶ (Emphasis added.)

Appellant characterized his activity as being a passive stockholder as Champion Realty, Inc. and Facilitator, Inc. and that no income was received. The evidence establishes that he was daily involved in the management of the company and not merely a passive stockholder. Appellant checked daily for emails, he kept the bookkeeping records for the business, he made payments for the business and he was listed as the owner of the business and administrative contact for the business. He also closed an account with Cardservice on January 25, 2001 which had processed transactions totaling \$10,548.09 and opened a second account with Cardservice which had transactions posted in the amount of \$42,628.51 as of April 5, 2001.

The Board has distinguished between income received from investment and earnings received by performing work. The former is not considered to be evidence of a claimant’s ability to work and earn wages but a return on investment while the latter is considered to be wages if the source of income can be established to be the product of the claimant’s work.⁷ In the case of *Gregg B. Manston*,⁸ the Board found that, while passive land investment can be considered an investment, activity such as property management can be considered employment from which a claimant derives earnings as the product of his work. Management activities maybe considered self-employment activities if someone else could be hired to perform such activities, if the employee was not performing them.⁹ The distinction to be made is between

⁶ 20 C.F.R. § 10.5(g); see *Melvin E. Gibbs*, 54 ECAB ____ (Docket No. 01-2252, issued March 6, 2003).

⁷ *Anthony V. Knox*, 50 ECAB 402 (1999); *Burnett Terry*, 46 ECAB 457 (1995).

⁸ 45 ECAB 344 (1994).

⁹ *Id.*

passive business investment profit and active work resulting in earnings. Before the Office can declare a forfeiture of compensation, it must establish that appellant received earnings from self-employment, not from passive investment in business ventures. The evidence of record in this case establishes that appellant was more than a passive investor in internet website businesses, but was an active manager of his business enterprises. In general, earnings from self-employment means a reasonable estimate of the rate of pay it would cost the employee to have someone else perform the work or duties the employee is performing.¹⁰ Section 8106(b) requires that a self-employed individual, even if he has no monetary earnings, report an estimate of the advantages that he has occurred by the performance of his self-employment activities. This requirement recognizes that an individual who works for himself may occur advantages which may not be typical earnings in a standard employment setting.¹¹ Whether the employee makes a profit on his activities is not the relevant issue.¹² Under the circumstances, the Board finds that appellant knowingly omitted or understated his earnings for the period June 13, 2000 to April 5, 2001, in violation of 5 U.S.C. § 8106(b) and, thereby, forfeited the total amount of compensation he received for that period.

The Board also finds that an overpayment of \$22,030.60 in compensation occurred as a result of the forfeiture.

The record indicates that the Office paid appellant compensation from June 13, 2000 to April 5, 2001 in the amount of \$22,030.60. Based on appellant's forfeiture of his right to compensation during this period, he received an overpayment of compensation for this period in the amount of \$22,030.60.

The Board also finds that appellant was at fault in the creation of the overpayment.

Section 8129 of the Act¹³ provides that an overpayment of compensation shall be recovered by the Office 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 be against equity and good conscience.¹⁴ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.¹⁵

The implementing regulation¹⁶ provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual

¹⁰ See *Anthony V. Knox*, *supra* note 7.

¹¹ *Id.*

¹² *Terryl A. Geer*, 51 ECAB 168 (1999).

¹³ 5 U.S.C. § 8129(b).

¹⁴ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹⁵ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994); see *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is with fault in helping to create the overpayment).

¹⁶ 20 C.F.R. § 10.433(a).

knew or should have known to be incorrect; (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.

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 that 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).¹⁷

The Office found that appellant was at fault in creating the overpayment under the second criteria above.

Appellant is at fault because he failed to provide information that he knew or should have known to be material. On each of the CA-1032 forms, the Office advised as follows:

“The information requested in this letter is required in connection with your benefits under the Act, 5 U.S.C. § 8101 *et seq.* This information will be used to decide whether you are entitled to continue receiving these benefits or whether your benefits should be adjusted.”

Appellant, therefore, knew or should have known that his self-employment or involvement in an internet web enterprise was material information as to his entitlement to benefits. Contrary to appellant’s contention, he was not a passive investor. The record establishes that appellant had daily involvement in maintaining the books and checking emails. Appellant’s failure to provide this material information on his CA-1032 forms, establishes fault in the creation of the overpayment that occurred through May 7, 1999, the date of his last Form CA-1032.

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 Under the circumstances of this case, the Office properly found that appellant was at fault in the creation of the overpayment.

¹⁷ 20 C.F.R. § 10.433(a).

¹⁸ 20 C.F.R. § 10.433(b).

The decision of the Office of Workers' Compensation Programs dated May 15, 2003 is hereby affirmed.

Dated, Washington, DC
March 11, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member