

period; (3) whether appellant received an overpayment of compensation in the amount of \$121,281.89 during the period of forfeiture; and (4) whether the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, was not subject to waiver.

FACTUAL HISTORY

On May 6, 1986 appellant, a 42-year-old part-time flexible clerk, filed a traumatic injury claim alleging that she injured her left upper arm when she pulled on an all purpose container on May 5, 1986. The Office accepted the claim for left rotator cuff tear. Appellant filed claims for recurrences of disability on May 28, June 4 and July 9, 1986, which the Office accepted.² Appellant stopped work on August 12, 1986 and was placed on the periodic rolls for temporary total disability. On June 29, 1996 appellant was removed from the periodic rolls based on her acceptance and return to a modified limited-duty position. Appellant filed a recurrence claim on July 15, 1996 which the Office accepted and she was placed back on the periodic rolls for temporary total disability.

On June 19, 1996 appellant completed a May 15, 1996 Form CA-1032 affidavit indicating that she was self-employed in a day care business. The Office asked appellant to complete other such forms dated July 1, 1997, July 1, 1998, August 13, 1999, June 16, 2000 and a form signed on June 11, 2001. The forms required appellant to report all employment and self-employment during the past 15 months covered by the form, including dates of employment, a description of the work done, the rate of pay and actual earnings received. The forms warned appellant as follows:

“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. ALL STATEMENTS ARE SUBJECT TO INVESTIGATION FOR VERIFICATION.” (Emphasis in the original.)

On the Form CA-1032 signed on June 11, 2001, appellant indicated that she had been self-employed since 1989 supervising a daycare in her home. Appellant provided similar responses on the other CA-1032 forms.

On October 22, 2001 the Office received a copy of appellant’s income tax return for the year 2000. Appellant reported gross receipts of \$3,500.00 from her Variety Crafts & Supply Store with the cost of goods noted as \$2,834.00 for gross income of \$666.00. She then reported \$25,593.00 in business expenses for Variety Crafts & Supply Store, which resulted in a net loss of \$27,243.00.

In an investigative report dated December 13, 2001, a postal inspector submitted evidence that in addition to appellant’s business as a day care operator appellant also operated a business called “Variety Craft and Supply Store.” The investigation revealed that appellant

² On August 12, 1986 appellant resigned from the employing establishment.

failed to report her earnings from “Variety Craft and Supply Store” since appellant first opened the store in 1996. On April 18, 1996 appellant filed a certificate of assumed name with the State of Minnesota indicating she was conducting a business under the name of “Variety Craft and Supply Store” which was located at 3434 Marion Road, SE, Rochester, MN and listed appellant as the business owner. In addition, attachments to the investigative memorandum also included a copy of a sales tax permit for Variety Craft & Supply Store, which noted the permit was issued on October 11, 1995 and was still active as of October 31, 1997; copies of newspaper advertisement dated September 25, 1996, December 8, 1999, February 1, March 14 and June 16, 2000 for Variety Craft & Supply Store; a business card for Variety Craft & Supply Store listing appellant as the owner; photocopies of checks dated December 14, 1997 and April 3, 2001 made out to Variety Crafts; a photocopy of an advertising agreement with *The Rochester Shopper* for Variety Craft & Supply Store; and a photocopy of billing records from *The Rochester Shopper* for Variety Craft & Supply Store for the period November 30, 1996 through December 27, 2000.

On December 31, 2002 appellant made a guilty plea in open court to one count of violating 18 U.S.C. § 1920; making a false statement or fraud to obtain Federal Employees’ Compensation Act benefits. The guilty plea was accepted at the time it was made.

On May 1, 2003 the Office informed appellant that her benefits were terminated effective December 31, 2002 based upon her being found guilty of fraud in order to obtain compensation benefits under the Act.

The Office calculated the amount it had paid appellant for the period March 19, 1995 through December 1, 2001 in a May 30, 2003 worksheet.³

In a decision dated May 30, 2003, the Office found that appellant had forfeited compensation for the period March 19, 1995 to June 11, 2001 because she knowingly omitted earnings from her business “Variety Crafts” on the Forms CA-1032 she completed during this period.

On May 30, 2003 the Office issued a preliminary determination that an overpayment of compensation in the amount of \$121,281.89 occurred due to the forfeiture of appellant’s right to compensation for the period March 19, 1995 through June 11, 2001 for her failure to report her involvement and income from her business, “Variety Crafts” on the multiple Forms CA-1032 she completed.

On July 22, 2003 the Office found an overpayment in the amount of \$121,281.89 occurred due to the forfeiture of appellant’s right to compensation for the period March 19, 1995 through June 11, 2001 due to her failure to report her involvement and income from her business, “Variety Crafts” on the Forms CA-1032 she completed. Next, the Office found appellant was not without fault and not entitled to waiver because she knowingly omitted earnings on the Forms CA-1032 she submitted. The Office informed appellant that she was to forward a check

³ On December 31, 2001 the Office issued a loss of wage-earning capacity decision which reduced appellant’s compensation to zero. The Office found appellant’s wages as supervisor of her home-based day care business fairly and reasonably represented her wage-earning capacity and her actual wages met or exceeded the wages of her date-of-injury job. Appellant’s counsel requested an oral hearing in a January 2, 2002 letter.

in the amount of \$121,281.89 to the Office within 30 days or contact the Office to make other arrangements for recovery.

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.⁴ In terminating appellant's compensation on December 31, 2002 in the present case, 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].”⁴

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.”⁵

The Office's procedure manual states 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 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

⁴ *Betty Regan*, 49 ECAB 496 (1998); *William A. Kandel*, 43 ECAB 1011 (1992).

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

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

Under section 8148(a), a claimant who is convicted of fraud in obtaining compensation benefits under 18 U.S.C. § 1920 forfeits her compensation. The claimant is thereafter permanently barred from receiving any compensation under the Act.⁸ Since appellant was convicted on December 31, 2002 of a violation of 18 U.S.C. § 1920, the Office properly terminated her compensation benefits under the forfeiture provision.

LEGAL PRECEDENT -- ISSUE 2

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 her earnings, forfeits her right to compensation with respect to any period for which the affidavit or report was required."⁹

The Board has held that it is not enough for the Office to establish that a claimant understated earnings. Appellant can be subjected to the forfeiture provision of section 8106(b)(2) only if the claimant "knowingly" failed to report employment or earnings.¹⁰ The term "knowingly" as defined in the Office's implementing regulation, means "with knowledge, consciously, willfully or intentionally."¹¹

The Office has the burden of proof in establishing that appellant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from self-employment. To meet this burden of proof, the Office is required to closely examine appellant's activities and statements in reporting employment earnings.¹² The Office may meet this burden in several ways. The Office may meet this burden by appellant's own subsequent admission to the Office that she failed to report employment or earnings which she knew she should report. Similarly, the Office may meet this burden by appellant's own subsequent admission to the Office that she failed to report employment or earnings which she knew she should report. Similarly, the Office

⁶ See *Paul Hanley*, 53 ECAB ____ (Docket No. 01-403, issued March 7, 2002); 20 C.F.R. § 10.17.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12f(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 which arose prior to December 18, 1997. *Jeff M. Burns*, 51 ECAB 241 (1999).

⁹ 5 U.S.C. § 8106(b).

¹⁰ *Melvin E. Gibbs*, 54 ECAB ____ (Docket No. 01-2252, issued March 6, 2003); *Barbara L. Kanter*, 46 ECAB 165 (1994).

¹¹ 20 C.F.R. § 10.5(n); see *Donald L. Overstreet*, 54 ECAB ____ (Docket No. 02-506, issued July 7, 2003).

¹² See *Michael D. Matthews*, *supra* note 8.

may meet this burden by establishing that appellant had pled guilty or was convicted of violating 18 U.S.C. § 1920 by falsely completing the affidavit section of the CA-1032 forms. Furthermore, the Office may meet this standard without an admission by appellant, if appellant failed to fully and truthfully complete the CA-1032 forms and the circumstances of the case establish that appellant failed to fully and truthfully reveal the full extent of her employment activities and earnings. The Office may also meet this burden if it establishes through the totality of the factual circumstances that appellant's certification in the CA-1032 form that she was not employed or self-employed, was false.¹³

ANALYSIS -- ISSUE 2

In the present case, regarding the issue of forfeiture, the record establishes that appellant's CA-1032 forms dated June 19, 1996, July 1, 1997, July 1, 1998, August 13, 1999, June 16, 2002 and a form signed by her on July 11, 2001, failed to report any earnings she received as the owner of the Variety Craft and Supply Store or indicate she was operating a business called Variety Craft and Supply Store.

Appellant, however, can only be subjected to the forfeiture provision of section 8106 of the Act if she "knowingly" omitted or understated earnings.¹⁴ It is not enough to merely establish that there were unreported earnings. The Office procedure manual recognizes that forfeiture is a penalty provision and, as a penalty provision, it must be narrowly construed. The term "knowingly" is defined by the regulations and means "with knowledge, consciously, willfully or intentionally."¹⁵

The record shows that appellant pleaded guilty to one count of violating 18 U.S.C. § 1920 by falsely completing the affidavit section of CA-1032 form in an attempt to obtain federal workers' compensation benefits. This is persuasive evidence that she knowingly omitted or understated earnings on the other CA-1032 forms in question.¹⁶ With respect to the remaining CA-1032 forms, the record contains an income tax return for the year 2000 in which appellant reported gross receipts of \$3,500.00 from her Variety Craft & Supply Store; a copy of a sales tax permit for Variety Craft & Supply Store, which noted the permit was issued on October 11, 1995 and was still active as of October 31, 1997; copies of newspaper advertisement dated September 25, 1996, December 8, 1999, February 1, March 14 and June 16, 2000 for Variety Craft & Supply Store; a business card for Variety Craft & Supply Store listing appellant as the owner; photocopies of checks dated December 14, 1997 and April 3, 2001 made out to Variety Crafts; photocopy of a contract for Grandma Jackie's day care, which notes appellant as the owner; a photocopy of an advertising agreement with *The Rochester Shopper* for Variety Craft & Supply Store; and a photocopy of billing records from *The Rochester Shopper* for Variety Craft & Supply Store for the period November 30, 1996 through December 27, 2000. The Board finds that appellant's activities of applying for a sales tax permit, purchasing advertisement for her

¹³ *Melvin E. Gibbs*, *supra* note 10; *Terryl A. Geer*, 51 ECAB 168 (1999).

¹⁴ *See Michael D. Mathews*, *supra* note 8; *Barbara L. Kanter*, *supra* note 10.

¹⁵ 20 C.F.R. § 10.5(n).

¹⁶ *See Michael D. Mathews*, *supra* note 8.

craft store for the period November 30, 1996 to December 27, 2000, a business card listing her as the owner of the craft store, copies of checks made out to her craft store and her 2000 income tax forms are persuasive evidence that appellant knowingly understated her earnings on her CA-1032 forms by failing to report her operation of a craft business or her earnings from the craft business. The 2000 income tax return and the checks made out to appellant show that she had earnings from her craft business. The advertisement agreement with *The Rochester Shopper*, the billing records from *The Rochester Shopper*, her sales tax permit, newspaper advertisements for the craft store and a business card listing her as the owner all show that she was active in managing the business. Thus the Office correctly determined that the totality of the factual circumstances of this case lead to the conclusion that appellant failed to fully and truthfully reveal the full extent of her employment activities and earnings. The Board has carefully considered the entire record and concludes that appellant knowingly failed to report or underreported her earnings on the aforementioned CA-1032 forms. Appellant on the CA-1032 forms noted her business as a day care operator, but never listed her craft business on the CA-1032 forms. Appellant was aware that she was required to report all self-employment activity as was evident from her reporting her operation of a day care facility. Yet, when she was asked by the Office to report earnings on her CA-1032 forms, appellant repeatedly signed forms that failed to report her operation of a craft business or her earnings from the craft business.

Based on the aforementioned evidence of record, the Board concludes that appellant's signed CA-1032 forms establish that she knowingly underreported her earnings and, therefore, is found to have forfeited her right to compensation. Given the circumstances of this case, the Board finds that appellant forfeited her right to compensation for the period March 19, 1995 to June 11, 2001.

LEGAL PRECEDENT -- ISSUE 3

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 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.”¹⁷

ANALYSIS -- ISSUE 3

If a claimant has any earnings or work activity during a period covered by a Form CA-1032 which she knowingly fails to report, she is not entitled to any compensation for any portion of the period covered by the report, even though she may not have had earnings during a portion

¹⁷ 20 C.F.R. § 10.529.

of that period.¹⁸ The Office paid appellant compensation from March 19, 1994 through June 11, 2001, in the amount of \$121,281.89. Appellant forfeited compensation for this period because she underreported her income and employment on CA-1032 forms covering the period March 19, 1995 to June 11, 2001. Based on this evidence, the Office correctly found an overpayment of compensation existed for the period March 19, 1995 to June 11, 2001. However, when it calculated the amount of the overpayment, the Office used the incorrect period March 19, 1995 through December 1, 2001. The correct period of the overpayment is March 19, 1995 to June 11, 2001. The amount of the overpayment therefore must be adjusted accordingly.

LEGAL PRECEDENT -- ISSUE 4

Section 8129(b) of the Act¹⁹ 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 regulation²⁰ 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 4

In this case, the Office found that appellant was at fault in the creation of the overpayment because she omitted earnings and work activity on CA-1032 forms for the period March 19, 1995 to June 11, 2001. The record establishes that appellant underreported earnings from self-employment during the period of the forfeiture and knowingly failed to furnish this material information to the Office regarding the crafts business. Appellant signed certification clauses on the CA-1032 forms advising her that she might be subject to civil, administrative or criminal penalties if she knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. Thus, by signing the forms, appellant is deemed to have acknowledged her duty to fill out the forms 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 she had earnings which she had not listed on the relevant forms. As she failed to provide information

¹⁸ *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

¹⁹ 5 U.S.C. § 8129(b).

²⁰ 20 C.F.R. § 10.433.

to the Office regarding her employment during the periods covered by the forms, she is at fault in creating the overpayment and is not entitled to waiver of the amount of \$121,281.89.

CONCLUSION

The Board finds that appellant forfeited her entitlement to compensation from March 19, 1995 through June 11, 2001 because she knowingly failed to report earnings from her self-employment during this period. The Board further finds that appellant received an overpayment during the period of the forfeiture. However, the Board finds that the Office incorrectly calculated the amount of the overpayment and remands the case for a redetermination of the amount of the overpayment for the period March 19, 1995 to June 11, 2001. 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.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 22 and May 30, 2003 are affirmed with regard to the issues of termination, forfeiture, fact of overpayment and waiver. The Board, however, sets aside the amount of the overpayment and remands the case to the Office to calculate the amount of the overpayment.

Issued: March 22, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member