

properly found that appellant abandoned his request for a prerecoupmnt hearing before an Office hearing representative.

FACTUAL HISTORY

This case has previously been before the Board. In a March 6, 2003 decision,² the Board affirmed the Office's determination that appellant forfeited compensation for the period covered by a Form CA-1032 he completed on December 29, 1995 because he failed to fully report his earnings and employment on the form. The Board found that the Office correctly determined that appellant worked as an attorney in private practice and had earnings from his self-employment activities in representing private clients and indigent criminal defendants. The Form CA-1032 specifically requested that appellant report earnings received from employment activities, even if operated at a loss or if profits were reinvested. The Board found that the Office properly determined that appellant knowingly omitted reporting his earnings as required by the form.³

The Board modified the Office's forfeiture determination to reflect that appellant forfeited compensation for the period October 27, 1994 to December 29, 1995, the 15-month period covered by a Form CA-1032 completed on December 29, 1995, rather than for the longer period found by the Office -- October 27, 1994 to March 30, 1996. The Board found that the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver. The Office found that appellant was at fault in the creation of the overpayment because he failed to provide information about his employment, which he knew or should have known was material. The Board remanded the case to the Office to recalculate the amount of the overpayment.⁴ The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

In a July 17, 2009 letter, the Office advised appellant of its preliminary determination that he received a \$32,078.57 overpayment of compensation because he forfeited benefits for the period October 27, 1994 to December 29, 1995.⁵ It recalculated the amount of the overpayment to reflect the period of forfeiture determined by the Board. The Office made a preliminary determination that appellant was at fault in the creation of the overpayment because he "misrepresented and concealed business activity and income on the [Form] CA-1032 income report, signed on December 29, 1995" and failed to report information on employment or earnings which he knew or should have known to be material. It requested that he complete an enclosed overpayment questionnaire form regarding income, expenses and assets (Form

² Docket No. 01-2252 (issued March 6, 2003).

³ In June 2003 the Office determined that it had improperly suspended appellant's compensation starting April 1, 1996 for failure to undergo an examination and it retroactively paid him compensation for the period April 1, 1996 to February 28, 1998.

⁴ The Office had previously calculated that appellant received a \$41,565.85 overpayment of compensation based on its prior determination that he forfeited his compensation for the period October 27, 1994 to March 30, 1996.

⁵ The Office advised appellant that this preliminary determination was made in accordance with the Board's March 6, 2003 decision. The record contains payment records showing that he received \$32,078.57 in compensation for the period October 27, 1994 to December 29, 1995.

OWCP-20). The Office advised appellant of actions he could take within 30 days of the date of the letter, including requesting a preresoupment hearing with an Office hearing representative.⁶

On August 14, 2009 appellant requested a preresoupment hearing with an Office hearing representative. He completed the Form OWCP-20 on August 14, 2009 indicating that he had \$6,300.00 in monthly income, \$5,400.00 in monthly expenses and \$331,200.00 in assets. In an October 1, 2009 letter, the Office advised appellant that a telephonic preresoupment hearing would be held on November 12, 2009 at 1:00 p.m. Eastern Time. Appellant was provided a toll-free number to call at the allotted time.

In a February 1, 2010 decision, the Office finalized the overpayment in the amount of \$32,078.57. It found that appellant was at fault in creating the overpayment, thereby precluding waiver of recovery. The overpayment would be repaid by deducting \$1,400.00 from his ongoing compensation payments every 28 days. The Office also found that appellant abandoned the telephonic preresoupment hearing scheduled for November 12, 2009.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁷ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁸ Section 8129(a) of the Act provides, in pertinent part, "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."⁹

Section 8106(b) of the Act¹⁰ 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 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

⁶ Appellant was receiving Office compensation for wage loss at the time the Office issued its February 1, 2010 decision.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Id.* at § 8102(a).

⁹ *Id.* at § 8129(a).

¹⁰ *Id.* at § 8106(b).

the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”

The Board has held that it is not enough merely to establish that there was unreported employment or earnings. Appellant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she knowingly failed to report employment or earnings.¹¹ The term knowingly as defined in the Office’s implementing regulations, means with knowledge, consciously, willfully or intentionally.¹²

ANALYSIS -- ISSUE 1

The Board previously determined that appellant forfeited his compensation from October 27, 1994 to December 29, 1995 because he knowingly failed to report his earnings and employment on a Form CA-1032 covering this period. Appellant was aware of his responsibility to report this information but failed to do so.¹³ The record contains payment records showing that appellant received \$32,078.57 in compensation for the period October 27, 1994 to December 29, 1995. Because the record supports that appellant forfeited compensation for the period October 27, 1994 to December 29, 1995 he is not entitled to the compensation received. The Board finds that the Office properly found that appellant received an overpayment in the amount of \$32,078.57.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁴ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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 payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁶

¹¹ *Barbara L. Kanter*, 46 ECAB 165 (1994).

¹² 20 C.F.R. § 10.5(n).

¹³ *See supra* note 10.

¹⁴ 5 U.S.C. § 8129(a).

¹⁵ *Id.* at § 8129(b).

¹⁶ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provide in relevant part:

“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....”¹⁷

Section 10.433(c) of the Office’s regulations provide:

“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 2

The Board finds that appellant was at fault in the creation of the overpayment because he failed to provide information about his employment, which he knew or should have known was material. The CA-1032 form completed by appellant on December 29, 1995 specifically advised him to report any employment activity or earnings, including self-employment, even if the business ran at a loss. Appellant was reasonably put on notice that his self-employment as a lawyer was material information to be furnished to the Office. Appellant’s failure to furnish this information created the forfeiture of compensation from October 27, 1994 to December 29, 1995 and the resulting overpayment of compensation. Appellant was at fault in the creation of the overpayment. Recovery of the overpayment is not subject to waiver.¹⁹

¹⁷ 20 C.F.R. § 10.433(a).

¹⁸ *Id.* at § 10.433(c).

¹⁹ On appeal, appellant asserted that he was not at fault in the creation of the overpayment. He made various comments about his belief that the employer retaliated against him for whistle blowing and about his belief that he was entitled to interest on a retroactive compensation payment. Such matters are not currently before the Board and appellant did not explain their relevance to the present case.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of Title 20 of the Code of Federal Regulations provide in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] 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 Office] 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 any hardship.”²⁰

ANALYSIS -- ISSUE 3

The record supports that in requiring repayment of the overpayment by deducting \$1,400.00 from appellant’s compensation payments every 28 days, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. The Office properly required repayment of the overpayment by deducting \$1,400.00 from appellant’s compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 4

The authority governing abandonment of hearings rests with the Office’s procedure manual. Chapter 2.1601.6(e) of the procedure manual, dated January 1999, provides as follows:

“e. Abandonment of Hearing Requests.

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

“Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district Office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the

²⁰ 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

“This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend.”²¹

ANALYSIS -- ISSUE 4

In the present case, the Office scheduled a telephonic prerecoumment hearing with an Office hearing representative at a specific time on November 12, 2009. The evidence establishes that the Office mailed appropriate notice to the claimant at his address of record. The record also supports that appellant did not request postponement, failed to appear for the scheduled hearing and failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office’s procedure manual, it properly found that appellant abandoned his request for a prerecoumment hearing before an Office hearing representative.²²

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$32,078.57 overpayment of compensation because he forfeited compensation from October 27, 1994 to December 29, 1995. The Board finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver. The Board further finds that the Office properly required repayment of the overpayment by deducting \$1,400.00 from appellant’s compensation payments every 28 days and that the Office also properly found that appellant abandoned his request for a prerecoumment hearing before an Office hearing representative.

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

²² See also *Claudia J. Whitten*, 52 ECAB 483, 485 (2001). After appellant abandoned the hearing, a decision was appropriately made based on the evidence of record. See *supra* note 21. On appeal, he asserted that an Office claims examiner forged his signature on the request form for a prerecoumment hearing. Appellant did not provide any evidence to support this assertion.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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