

**United States Department of Labor
Employees' Compensation Appeals Board**

J.D., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
BUREAU OF CUSTOMS & BORDER)
PROTECTION, Houston, TX, Employer)
_____)

**Docket No. 13-86
Issued: June 3, 2013**

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument April 2, 2013

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 16, 2012 appellant filed a timely appeal from April 23 and June 6, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant forfeited his right to compensation for the period September 10, 2003 to December 19, 2009; (2) whether OWCP properly terminated compensation effective February 7, 2012; (3) whether it properly found an overpayment of \$293,335.04 was created; and (4) whether OWCP properly determined that appellant was at fault in creating the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 5, 2002 appellant, then a 39-year-old K-9 officer, filed a traumatic injury claim (Form CA-1) alleging that on October 26, 2002 he sustained a back injury when he slipped and fell on stairs while in the performance of duty. On December 11, 2002 OWCP accepted the claim for a lumbar strain. Appellant stopped work on October 26, 2002. He received compensation for temporary total disability. The record indicates that appellant underwent L5-S1 surgery on June 3, 2003 and March 17, 2004.

As an employee receiving compensation for wage loss on the periodic rolls, OWCP periodically sent appellant an EN-1032 form requesting information with respect to any employment activity, dependents and receipt of any other federal benefits.² The form requests information for the preceding 15 months. It states that all self-employment or involvement in business enterprises must be reported. Appellant signed EN-1032 forms on December 10, 2004, January 6 and December 12, 2006, December 12, 2007, January 14 and December 19, 2009. On each form he indicated that he was not employed or engaged in employment activity.

By letter dated November 10, 2011, an employing establishment manager advised OWCP that on May 27, 2010 appellant had been charged with making a false statement and four counts of mail fraud. In an investigative report dated December 12, 2011, the Department of Labor's Office of the Inspector General (OIG) noted that appellant had submitted EN-1032 forms dated December 10, 2004, January 6 and December 12, 2006, December 12, 2007, January 24 and December 19, 2009, reporting no employment activity. The report stated that as of August 2003 appellant was the certified sole owner of a business known as RC Bods Custom Airbrushing. On February 2, 2007 appellant's spouse was named the governing authority of a limited liability corporation known as Herzog Racing. On March 13, 2007 appellant filed an amendment to make himself the governing authority. The report states that the website for RC Bods Custom Airbrushing set forth that in early 2003 appellant began to design, layout and customize radio controlled (RC) model boats and soon after began to make his creations available to other enthusiasts. In addition, the report noted that the website for Herzog Racing listed new products for 2009.

With respect to court documents concerning the criminal case, the record contains a judgment stating that on April 25, 2011 appellant pleaded guilty to one count of false statement or fraud to obtain FECA benefits under 18 U.S.C. § 1920, and to four counts of mail fraud under 18 U.S.C. § 1341 on January 2 and December 12, 2006, December 12, 2007 and January 14, 2009. The judgment was signed on September 28, 2011, and noted that a special assessment of \$100.00 was ordered for each count, and "restitution ordered" in the amount of \$6,924.60 to the Department of Labor. A pleading prepared by the United States stated that, if the case were tried, it would prove beyond a reasonable doubt that during the period covered by six EN-1032 forms (December 10, 2004, January 6 and December 12, 2006, December 12, 2007, January 14 and December 19, 2009) appellant was the owner of two businesses. Appellant was the owner of RC Bods Custom Airbrushing since August 2003 and the owner of Herzog Racing since 2007. He maintained three bank accounts as owner of Herzog Racing. Appellant also filed business tax forms for 2007 and 2008 for Herzog Racing.

² The cover letter is identified as a CA-1032 form, but the form requesting information is identified as EN-1032.

By decision dated April 23, 2012, OWCP determined that appellant had forfeited his compensation from September 10, 2003 to December 19, 2009 as he knowingly omitted his employment activities on EN-1032 forms.

In a separate decision dated April 23, 2012, OWCP terminated compensation effective February 7, 2012 on the grounds that appellant pleaded guilty to violations of 18 U.S.C. § 1920 and 18 U.S.C. § 1341. OWCP found that under 5 U.S.C. § 8148 appellant was not entitled to continuing compensation.

In a letter dated April 23, 2012, OWCP advised appellant of a preliminary determination that an overpayment of \$293,335.04 was created. As to fact of overpayment, it found the overpayment occurred from September 10, 2003 to December 19, 2009 as all wage loss received represented an overpayment because appellant forfeited his right to compensation based on the incorrect EN-1032s.³ OWCP also made a preliminary determination that appellant was at fault in creating the overpayment. By decision dated June 6, 2012, it finalized the overpayment determinations.

LEGAL PRECEDENT -- ISSUE 1

Under FECA a claimant may forfeit his or her right to compensation under certain circumstances. 5 U.S.C. § 8106(b) provides in pertinent part:

“(b) 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.”⁴

ANALYSIS -- ISSUE 1

OWCP found that appellant knowingly omitted earnings on six EN-1032 forms dated December 10, 2004, January 6 and December 12, 2006, December 12, 2007, January 14 and December 19, 2009. The form requires a claimant to provide information regarding any self-employment or involvement in business activity, whether part time or intermittent and even if the business lost money.

³ The cover letter described the overpayment period as commencing on August 10, 2003, but the accompanying memorandum indicates that the overpayment period began on September 10, 2003.

⁴ 5 U.S.C. § 8106(b).

The evidence of record establishes that appellant was engaged in business activity from 2003 to 2009. Appellant was the owner of one business, RC Bods Custom Airbrushing, from August 2003 and the website for the business noted that he was engaged in business activity as of 2003. According to the investigative reports, he continued to be involved in RC model boat business activity and became owner of a second business, Herzog Racing, which offered products and services related to RC model boats from 2007 through 2009.

The EN-1032 forms required appellant to disclose such business activity, even if it was a part-time or intermittent activity and without regard to whether the business earned a profit. The characterization of the enterprise as a hobby does not relieve him of the obligation to report the employment activity as earnings on the EN-1032.⁵ The period of the form covers the 15 months prior to completion and signing of the form. The evidence of record establishes that appellant failed to properly report employment activity on the EN-1032 forms dated December 10, 2004, January 6 and December 12, 2006, December 12, 2007, January 14 and December 19, 2009.

The next issue is whether the omission was “knowingly” under 5 U.S.C. § 8106(b). The guilty plea in the criminal case involved four of the EN-1032 forms: January 6 and December 12, 2006, December 12, 2007 and January 14, 2009. As the Board has noted, a guilty plea to making false statements on an EN-1032 is persuasive evidence of a knowing omission under 5 U.S.C. § 8106(b).⁶ As to the December 10, 2004 and December 19, 2009 EN-1032s, the Board looks to the circumstances of the case to determine “knowingly” and EN-1032 forms not covered by a guilty plea may also result in forfeiture.⁷ In this case there is uncontroverted evidence that appellant was engaged in employment activities with respect to RC model boats during the 15-month periods covered by the December 4, 2004 and December 19, 2009 forms. Given the clear language requiring the disclosure of self-employment activity, the uncontroverted evidence of continued employment activity, the guilty pleas noted above, the Board finds that the forfeiture properly includes the December 4, 2004 and December 19, 2009 EN-1032 forms. The period of the forfeiture therefore begins 15 months prior to September 10, 2003 or December 10, 2004 and concludes on December 19, 2009.

LEGAL PRECEDENT -- ISSUE 2

Public Law No. 103-333, enacted on September 30, 1994, amended FECA by adding section 8148, which provides for forfeiture of compensation benefits by an individual convicted of fraud with respect to receipt of compensation and prohibits the payment of compensation benefits to an individual while incarcerated pursuant to a felony conviction. 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 a receipt of any benefit under this subchapter or subchapter III of the this chapter, shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under this subchapter of subchapter III for any

⁵ See 20 C.F.R. § 10.5(g).

⁶ *Harold F. Franklin*, 57 ECAB 387 (2006); *James D. O'Neal*, 48 ECAB 255 (1996).

⁷ See *M.C.*, Docket No. 10-881 (issued February 7, 2011).

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 or 8129.”⁸

ANALYSIS -- ISSUE 2

The language of 5 U.S.C. § 8148(a) noted above is clear. Congress provided that an employee who is convicted of a violation of 18 U.S.C. § 1920 or other statute relating to fraud with respect to compensation benefits, is not entitled to compensation as of the date of conviction. The record establishes that appellant pled guilty to violations of 18 U.S.C. § 1920 and 18 U.S.C. § 1341 with respect to receipt of compensation benefits. A copy of the court judgment recording the guilty pleas signed on September 28, 2011 is included in the record.⁹ Pursuant to section 8148(a), OWCP properly terminated compensation as of February 7, 2012.

LEGAL PRECEDENT -- ISSUE 3

20 C.F.R. § 10.529 states:

“(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, concealment 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, [OWCP] 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.”

ANALYSIS -- ISSUE 3

The Board reviewed the forfeiture issue under the first issue and affirmed OWCP’s finding that appellant forfeited his right to compensation for the period September 10, 2003 to December 19, 2009. Since appellant forfeited his right to compensation, pursuant to 20 C.F.R. § 10.529 OWCP may declare an overpayment and recover the overpayment in accord with 5 U.S.C. § 8129.

OWCP determined that the gross compensation paid from September 10, 2003 to December 19, 2009 was \$293,335.04. The record contains documentation of OWCP’s calculations and there is no contrary evidence. The Board finds that OWCP properly found that the compensation paid of \$293,335.04 represented an overpayment.¹⁰ It is also noted that the judgment in the criminal case did order restitution to the Department of Labor. OWCP

⁸ 5 U.S.C. § 8148(a). 20 C.F.R. § 10.17 provides that when a claimant pleads guilty to federal or state criminal charges of fraud in connection with receipt of Federal Government benefits, the claimant’s entitlement to further compensation benefits will terminate effective the date the guilty plea is accepted.

⁹ OWCP procedures indicate that the record should contain a copy of the document containing a guilty verdict or plea. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1440.12(d) (March 1997).

¹⁰ See *Alan L. Trindle, Sr.*, 53 ECAB 487 (2002) (gross compensation represented amount of overpayment from forfeiture of compensation).

procedures indicate that appellant should receive credit for any restitution amount received under court order.¹¹ On return of the case record, OWCP should ensure that appellant received credit for any restitution paid.

LEGAL PRECEDENT -- ISSUE 4

Section 8129(b) of FECA 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 FECA or would be against equity and good conscience.”¹² A claimant who is at fault in creating the overpayment is not entitled to waiver.¹³ 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 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.”

ANALYSIS -- ISSUE 4

As the analysis of the forfeiture issue indicated, OWCP properly found that appellant had knowingly omitted earnings on the EN-1032 forms December 10, 2004, January 6 and December 12, 2006, December 12, 2007, January 14 and December 19, 2009. The fault standard noted above indicates that the failure to provide information which appellant “knew or should have known” to be material supports a finding that appellant was at fault in creating the overpayment. The evidence of record established that appellant knowingly failed to provide material information as to employment activity. Pursuant to 20 C.F.R. § 10.433(2), appellant is at fault in creating the overpayment and is not entitled to waiver.

On appeal, appellant asserts that the restitution ordered in the criminal case represents all that he owes to the United States for his actions. OWCP procedures recognize that a court order stating the restitution amount will be in full satisfaction of the debt owed to the United States (a Global Settlement) will take precedence over its debt collection process,¹⁴ but it is well established that to constitute a global settlement a court order must clearly state that the restitution is meant to represent the full satisfaction of any debt owed to the United States.¹⁵ The court order in this case provides no indication that it was meant to represent a global settlement. The judgment merely ordered \$6,924.60 in restitution based on “findings for the total amount of losses” for the offenses committed and without further detail. The court order does not contain the explicit, essential language stating that the restitution ordered represented a “global settlement” with respect to the debt owed to the United States. As noted above, appellant should

¹¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.18 (June 2009). See also *Martin James Sullivan*, 50 ECAB 158 (1998).

¹² 5 U.S.C. § 8129(b).

¹³ See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.18 (June 2009).

¹⁵ See *Robert Ringo*, 53 ECAB 258 (2001); *Joseph Popp*, 48 ECAB 624 (1997).

receive credit for any restitution paid, but the Board finds that the court order does not represent a global settlement.

CONCLUSION

The Board finds that appellant forfeited his right to compensation for the period September 10, 2003 to December 19, 2009, and OWCP properly terminated compensation effective February 7, 2012. The Board further finds that an overpayment was created from September 10, 2003 to December 19, 2009. The amount of the overpayment was \$293,335.04 minus any restitution paid pursuant to the court judgment. The Board also finds that OWCP properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 6, 2012 is modified to reflect the amount of the overpayment, should reflect a credit for restitution paid and be affirmed as modified. The April 23, 2012 decision is affirmed.

Issued: June 3, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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