

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM M. VAUGHAN and DEPARTMENT OF THE AIR FORCE,  
PEASE AIR FORCE BASE, N.H.

*Docket No. 96-501; Submitted on the Record;  
Issued April 23, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited compensation for the period of May 16, 1987 to September 6, 1989; and (2) whether the Office properly found that appellant was at fault in the creation of a \$19,899.80 overpayment in compensation.

On June 8, 1984 appellant, then a 31-year-old painter, injured his lower back and left leg when he fell. The Office initially accepted his claim for lumbosacral sprain and later accepted a herniated disc at the L5-S1 level. On July 15, 1986 appellant was granted a schedule award for a three percent permanent impairment of his left leg covering the period of October 10 to December 9, 1985. On October 27, 1987 the Office amended appellant's schedule award to a 17 percent permanent impairment of the left leg and awarded him compensation for the additional 14 percent impairment covering the period of June 1, 1987 to August 9, 1988. Thereafter, appellant continued to receive appropriate compensation for temporary total disability.

On June 20 and August 5, 1988, and August 9, 1989, the Office sent appellant CA-1032 forms to be completed to report any employment or earnings and the status of dependents. The Office advised that earnings from self-employment from farming, sales, service, operating a store or similar employment for the prior 15 months must be reported. The Office stated that appellant should report any such enterprise in which he worked from which he received revenue even if it operated at a loss or if profits were reinvested and must show as a rate of pay what it would have cost him to have hired someone to perform the work he did. On CA-1032 forms completed July 15 and September 4, 1988, and September 6, 1989, appellant indicated that he had not been engaged in any type of self-employment by responding in the negative to this section of the form.

In a memorandum dated July 24, 1992, James E. Buchanan, a special agent of the Department of Labor, Office of the Inspector General, indicated that appellant had been investigated for work activity as a general carpenter and painter while claiming total disability

benefits. The investigation disclosed that appellant had received earnings for work as a general carpenter at Trader Alan's 5<sup>th</sup> Wheel, Inc., Trader Alan's 24-Hour Truck Stop hereinafter (Trader Alan's), under his own name on October 2 and 9, 1987 and had received payment checks under the name of William Morgan from October 16, 1987 to December 16, 1988 from Trader Alan's. Appellant's employment at Trader Alan's was confirmed by Kathy D'Orlando, a coworker at that establishment and former girlfriend, Michael A. Cronin, the Chief of Police in Amesbury, Massachusetts where Trader Alan's is located and James A. Teeter, Assistant General Manager at Trader Alan's. John J. Murphy, who employed appellant at Trader Alan's, indicated that appellant was hired on an hourly basis to work as a carpenter for the purpose of renovating the truck stop. Specifically, appellant was to convert the furnace room and bar room areas into a new dining room and to replace the diner. Agent Buchanan secured payroll checks from Trader Alan's to appellant also known as William Morgan for the period of October 2, 1987 to December 16, 1988.

Appellant was indicted in federal court on three counts of filing false statements on the CA-1032 forms dated July 15 and September 4, 1988, and September 6, 1989 in violation of 18 U.S.C. § 1001, one count of mail fraud in relation to his receipt of compensation checks for temporary total disability in violation of 18 U.S.C. § 1341 and one count of wire fraud in relation to his receipt of compensation *via* wire transfer in violation of 18 U.S.C. § 1343. Appellant plead guilty to the five counts delineated in the aforementioned indictment. The Honorable Shane Devine, Senior United States District Judge for the District of New Hampshire, found that the amount of restitution due to the Department of Labor was \$10,451.34, waived the fine due to appellant's inability to pay and sentenced appellant to 8 to 14 months of imprisonment. Appellant was ordered to pay a special assessment in the amount of \$250.00.

In a decision dated February 25, 1993, the Office terminated appellant's compensation effective March 7, 1993 on the grounds that he was capable of performing his date-of-injury employment and did not have any residuals from his employment injury. In a decision dated September 10, 1993, an Office hearing representative affirmed the Office's February 25, 1993 decision.

In a decision dated April 12, 1994, the Office declared a forfeiture of appellant's compensation for the period May 16, 1987 through September 6, 1989 on the grounds that appellant had knowingly concealed earnings. In the memorandum accompanying the decision, the Office noted that the CA-1032 form appellant signed July 15, 1988 covered the period May 16 through July 15, 1987, the CA-1032 form he signed September 4, 1988 covered the period June 3 through September 4, 1988 and the CA-1032 form he signed September 6, 1989 covered the period June 5, 1988 through September 6, 1989. As appellant was engaged in self-employment activities from October 1987 through December 16, 1988, these activities occurred within the time periods covered by the three forms and, therefore, appellant forfeited compensation received for the entire period May 16, 1987 to September 6, 1989. Consequently, the Office found that appellant had received an overpayment in the amount of \$19,899.80. The Office then made a preliminary finding that appellant was at fault in the creation of the overpayment because he made incorrect statements as to a material fact, failed to furnish information as to a material fact and received compensation that he knew was incorrect. The Office informed appellant that he had the right to submit any arguments or evidence if he disagreed that the overpayment occurred, disagreed with the amount of the overpayment,

believed that the overpayment occurred through no fault of his own or believed that recovery of the overpayment should be waived. The Office informed appellant that he had a right to a prerecoupment hearing before an Office hearing representative.

In a decision dated May 13, 1994, the Office finalized its determination that appellant was at fault in the creation of the overpayment of compensation.

A prerecoupment hearing was held and in a decision dated August 23, 1995, an Office hearing representative found that appellant was charged, plead guilty and was convicted on charges of fraud for his failure to report his earnings on CA-1032 forms for work performed at Trader Alan's from October 2, 1987 to December 16, 1988. He found that this was convincing evidence that appellant knowingly omitted his earnings when he completed the affidavits. The Office hearing representative further found that appellant was required to report his earnings despite being in receipt of a schedule award for part of this time period. The Office hearing representative found that appellant was not without fault in the creation of the overpayment because appellant failed to furnish information on the CA-1032 forms which he knew or should have known to be material. He ordered a recovery of the overpayment, \$19,899.80, at a rate of \$100.00 a month.

The Board finds that the Office properly determined that appellant forfeited compensation covering the period of May 16, 1987 to September 6, 1989 based on his failure to report earnings.<sup>1</sup>

Section 8106(b) of the Federal Employees' Compensation Act<sup>2</sup> 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 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 of 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.”<sup>3</sup>

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<sup>1</sup> The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on November 29, 1995, the only decisions before the Board is the Office's August 23, 1995 decision. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2). Although appellant has asserted on appeal that the Office improperly calculated his rate of pay when it determined his loss of wage-earning capacity, this issue is not before the Board as no formal loss of wage-earning capacity decision has been rendered within one year of the date of appellant's appeal.

<sup>2</sup> 5 U.S.C. § 8106(b)

<sup>3</sup> While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for

The Office, however, to establish that appellant should forfeit the compensation he received during the period, must establish that he knowingly failed to report employment or earnings. As forfeiture is a penalty, it is not enough that there were unreported employment activities and earnings. The term knowingly is not defined within the Act or its implementing regulations. In common usage, the Board had recognized that the definition of “knowingly” includes such concepts as “with knowledge, consciously, willfully or intentionally.”<sup>4</sup>

In this case, appellant was informed by the CA-1032 forms that he was to report any work performed in self-employment enterprises such as farming, store operation, service, etc. On appeal, appellant contends that he was not under any obligation to report said income because he was deemed totally disabled at the time of the employment and therefore was not subject to the forfeiture provision of section 8106(b) of the Act.

The Board has determined that the test is whether, for the time period under consideration, the employee was, in fact, totally disabled or merely partially disabled, and not whether he received compensation for that period for total or partial loss of wage-earning capacity. The Board has stated that it is not relevant that the Office did not make a formal decision changing the employee’s compensation status from one of total disability to one of partial disability, as the false reports regarding employment status kept important information from the Office which would have shown that he was only partially disabled.<sup>5</sup> Thus, appellant’s contention in the regard is without merit.

The record reflects that appellant was convicted of three counts of making false statements regarding his compensation in violation of 18 U.S.C. § 1001. The Board finds that appellant’s conviction constitutes persuasive evidence that he knowingly omitted his earnings from his self-employment activities with Trader Alan’s when he completed affidavits on CA-1032 forms dated July 15 and September 4, 1988, and September 6, 1989, all of which explicitly required him to report any enterprise “in which you worked and from which you received revenue.” The Office has shown by the clear weight of evidence that appellant knowingly omitted reporting his earnings.<sup>6</sup>

The Board further rejects appellant’s contention respecting the appropriateness of subjecting his schedule award compensation to forfeiture and notes that the Office properly included the period of appellant’s schedule award, June 1, 1987 through August 9, 1988, in the

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determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and therefore a statutory provision about such earnings would be meaningless. 24 ECAB at 260.

<sup>4</sup> *Charles Walker*, 44 ECAB 641 (1993); *Christine P. Burgess*, 43 ECAB 449 (1992).

<sup>5</sup> *Anthony Derenzo*, 40 ECAB 504 (1989); *Elbridge H. Wright*, 36 ECAB 691 (1985).

<sup>6</sup> See *James D. O’Neal*, 48 ECAB \_\_\_\_ (Docket No. 94-2581, issued December 24, 1996); *Philip G. Arcadipane*, 48 ECAB \_\_\_\_ (Docket No. 95-1024, issued June 6, 1997).

period of compensation subject to forfeiture. Section 8106(b)(2) of the Act<sup>7</sup> states that a partially disabled employee who knowingly fails to report his earnings and/or employment to the Office forfeits his right to compensation. Section 8101(12) of the Act defines “compensation” as “the money allowance payable to an employee or his dependents and any other benefits paid for from the Employees’ Compensation Fund.”<sup>8</sup> Thus, section 8106(b)(2) of the Act contemplates a schedule award as compensation, for purposes of forfeiture as monetary compensation payable to an employee under section 8107 are payments made from the Employees’ Compensation Fund.

Under these circumstances, the Board concludes that appellant knowingly omitted his earnings under 5 U.S.C. § 8106(b)(2) by failing to report his employment activities and earnings on the applicable Forms CA-1032. Accordingly, the Board finds that appellant has forfeited his right to compensation benefits based on his receipt of temporary total disability for the period May 16, 1987 through September 6, 1989.

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

Section 8129 of the Act<sup>9</sup> provides that an overpayment of compensation must be recovered unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter [Act] or would be against equity and good conscience.”<sup>10</sup> Accordingly no waiver of an overpayment is possible if claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault section 10.320(b) of the Office’s regulations provides 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 the individual knew or should have known to be incorrect; or
- (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.”<sup>11</sup>

In this case, the Office of Workers’ Compensation Programs applied the first standard in determining that appellant was at fault in creating the overpayment. The evidence of record demonstrates that appellant indicated on the CA-1032 forms that he was not engaged in

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<sup>7</sup> 5 U.S.C. § 8102(b)(2).

<sup>8</sup> 5 U.S.C. § 8101(12).

<sup>9</sup> 5 U.S.C. §§ 8101-8193.

<sup>10</sup> 5 U.S.C. § 8129

<sup>11</sup> 20 C. F. R. § 10.320(b)

self-employment. However, the evidence of record, including appellant's conviction for submitting false statements on his CA-1032 forms and his receipt of checks for employment activities as a carpenter establish that appellant's negative responses to questions regarding self-employment were incorrect. Appellant did not report his service oriented employment, a material fact specifically noted on the CA-1032 forms. Appellant failed to report a material fact and presented information on employment which he knew or should have known to be incorrect. Therefore, appellant was at fault in the creation of the overpayment and is not entitled to waiver of the overpayment.<sup>12</sup>

The decision of the Office of Workers' Compensation Programs dated August 23, 1995 is hereby affirmed.

Dated, Washington, D.C.  
April 23, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>12</sup> On appeal, appellant has raised an issue concerning the amount of recovery determined by the Office hearing representative to be appropriate. As noted *infra*, the Office terminated appellant compensation benefits effective March 7, 1993. Consequently, recovery of the forfeiture will be made under the Debt Collection Act. Since the Board's jurisdiction to review the collection of overpayment is limited to cases of adjustment wherein the Office decreases later payment to which an individual is entitled, *see* 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989), the Board lacks jurisdiction over the recovery issue in this case because recovery cannot be made by adjusting later payment, but must be recovered by other means. Nonetheless, the Board notes that appellant's argument concerning District Court Judge Devine's waiver of restitution is without merit inasmuch as he did not order that the restitution amount would be in "full satisfaction" of the debt owed the United States; *see Clarence D. Ross*, 42 ECAB 556 (1991).