

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN E. MARTIN, JR. and DEPARTMENT OF THE ARMY,
FORT POLK, La.

*Docket No. 95-1994; Submitted on the Record;
Issued January 27, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited compensation for the periods October 16 through 31, 1988, November 16 through 30, 1988, May 16 through 31, 1989, October 23, 1989 through January 22, 1991, and May 6, 1991 through February 15, 1993; (2) whether the Office properly found that appellant was at fault in the creation of a \$61,531.62 overpayment in compensation; and (3) whether the Office properly pursued collection of the full amount of the overpayment of compensation.

On April 28, 1988 appellant, then a 43-year-old engineering equipment operator, sustained an employment-related acute strain of the lower back. He stopped work on May 3, 1988 and was placed on the periodic roll, effective September 24, 1989. On October 31 and November 30, 1988 and May 31, 1989 appellant completed Forms CA-8, indicating that he had not been employed or self-employed during the periods October 16 through 31, 1988, November 16 through 30, 1988 and May 16 through 31, 1989 respectively. On January 22, 1991, August 5, 1992 and February 15, 1993 he completed Forms CA-1032 in which he indicated that he had not been employed or self-employed during each of the previous 15 months. In a report submitted on September 24, 1994, the employing establishment informed the Office that appellant had been self-employed in a country and western band from October 1988 and continuing, which included the periods covered by the Forms CA-8 and CA-1032 filed by appellant in 1988, 1989, 1992 and 1993. The employing establishment also submitted surveillance records in which an employing establishment investigator observed appellant performing in the band.

On February 23, 1994 appellant, signed a plea agreement acknowledging that he had knowingly made a false statement representing that he had been unemployed for the period September 1989 to January 22, 1991, when, in fact, he had been employed as a member of a band. By decision dated March 4, 1994, the Office terminated appellant's compensation, on the grounds that he had knowingly committed a fraud. On June 14, 1994 appellant was sentenced to

a 12-month term of probation, 100 hours of community service and a \$25.00 special assessment. No additional fines or restitution were ordered by the Court. By decision dated December 16, 1994, the Office found that appellant forfeited compensation for the periods October 16 through 31, 1988, November 16 through 30, 1988, May 16 through 31, 1989, October 23, 1989 through January 22, 1991 and May 6, 1991 through February 15, 1993 on the grounds that he was knowingly engaged in work activity without notifying the Office as required by the Federal Employees' Compensation Act.¹ In a letter that same date, the Office informed him that it had made a preliminary determination that he had received a \$61,531.62 overpayment of compensation for the above periods. The Office stated that it had found appellant at fault in the creation of the overpayment, because he had failed to report earnings during the periods in question. The Office informed him of his rights regarding the overpayment of compensation, instructing him to submit the financial information requested on an accompanying overpayment questionnaire. By decision dated March 10, 1995, the Office finalized the overpayment decision, noting that appellant had not responded to the preliminary decision.

The record indicates that from October 1988 through January 1993, appellant performed in his band a number of times. The record further indicates that during this period he received compensation in the amount of \$61,531.62.

The Board finds that the Office properly determined that appellant forfeited his compensation for the periods October 16 through 31, 1988, November 16 through 30, 1988, May 16 through 31, 1989, October 23, 1989 through January 22, 1991 and May 6, 1991 through February 15, 1993 because he knowingly failed to report earnings from self-employment during this period.

Section 8106(b) of the Act 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 the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”²

¹ 5 U.S.C. §§ 8101-8193.

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

An employee can only be subjected to the forfeiture provision of section 8106 of the Act if he or she “knowingly” omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. The Office procedure manual recognizes that forfeiture is a penalty,³ and, as a penalty provision, it must be narrowly construed.⁴ The term “knowingly” is not defined within the Act or its regulations. In common usage, “knowingly” is defined as: “[w]ith knowledge; consciously; intelligently; willfully; intentionally.”⁵ In this case, appellant agreed to plea guilty to making false statements on one of the Office Forms CA-1032 at issue in this case. By pleading guilty, he admitted that he knowingly falsified the Form CA-1032 signed by him on January 22, 1991, thus not reporting his earnings during that period. The Board therefore finds that he knowingly forfeited his right to compensation for the October 23, 1989 through January 22, 1991.⁶

The Board further finds that appellant knowingly forfeited his right to compensation for the periods October 16 through 31, 1988, November 16 through 30, 1988, May 16 through 31, 1989 and May 6, 1991 through February 15, 1993.

Appellant completed Forms CA-8 on October 31 and November 30, 1988 and May 31, 1989 and Forms CA-1032 on August 5, 1992 and February 15, 1993. The record indicates that he was self-employed as a musician and received remuneration during these periods. On the Forms CA-1032, the Office instructions for filling out the forms notified appellant to report all employment. On each of the Forms CA-1032, appellant, however, indicated that he was not employed and signed certifications that all statements made in response to the questions on the forms were true and correct to the best of his knowledge. The Board therefore 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 periods covered by the Forms CA-1032. Appellant also “knowingly” omitted his earnings on the Forms CA-8.⁷ The CA-8 form requests that a claimant indicate whether he or she “worked for anyone” during the period of compensation claimed on the forms, whether in the form of salaried employment, commission employment or self-employment. On each Form CA-8 submitted by appellant, he checked a “no” or not applicable box indicating that he was not employed. The broad, inclusive language of this form

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.

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

⁴ See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

⁵ *Black's Law Dictionary* (5th ed. 1979); see *Anthony A. Nobile*, 44 ECAB 268, 271-73 (1992).

⁶ *Gregg Manston*, 48 ECAB ____ (Docket No. 95-2969, issued December 6, 1996).

⁷ See generally *Lewis George*, 45 ECAB 144 (1993); see *Anthony W. Warden*, 40 ECAB 168 (1988).

shows that appellant knew that he was required to report his earnings as a musician.⁸ Accordingly, appellant forfeited his compensation for the periods October 16 through 31, 1988, November 16 through 30, 1988, May 16 through 31, 1989 and May 6, 1991 through February 15, 1993.

Next, the Board finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation in the amount of \$61,531.62 for these periods and, therefore the overpayment for that period was not subject to waiver.

Section 8129 of the Act 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 would be against equity and good conscience.”⁹ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.¹⁰

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.¹¹

With respect to whether an individual is without fault, section 10.320(c) of the Office’s regulations provides in relevant part:

“Whether an individual is ‘without fault’ depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual’s understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which were not due, and ability to comply with any reporting

⁸ *James H. Hopkins*, 48 ECAB ____ (Docket No. 94-2351, issued January 7, 1997).

⁹ 5 U.S.C. § 8129.

¹⁰ *See Linda E. Padilla*, 45 ECAB 768 (1994).

¹¹ 20 C.F.R. § 10.320(b).

requirements (e.g., age, comprehension, memory, physical and mental condition).”¹²

Based on the forfeiture of his right to compensation for the periods October 16 through 31, 1988, November 16 through 30, 1988, May 16 through 31, 1989, October 23, 1989 through January 22, 1991 and May 6, 1991 through February 15, 1993, appellant received an overpayment in compensation for these periods. The Board finds that he was at fault in the creation of the overpayment under both the first and second standards described in section 10.320(b) above, as the record establishes that he was gainfully employed during this period and knowingly stated that he was not employed or self-employed. He thus failed to furnish material information to the Office.

The Board further finds that the Office did not err in pursuing collection of the full amount of the overpayment of compensation.

As appellant’s plea agreement does not indicate that the restitution amount would be in “full satisfaction” of the debt owed the United States, *i.e.*, that it was a “global settlement,” the Office was not precluded from continuing to pursue collection of the full amount of the debt.¹³

Finally, the Board notes that it has no jurisdiction to review the discretionary authority of the Office with regard to the method of recovery provided under the Debt Collection Act where, as in this case, appellant has no continuing compensation under the Act.¹⁴

¹² 20 C.F.R. § 10.320(c).

¹³ *Clarence D. Ross*, 42 ECAB 556 (1991).

¹⁴ *See Paul K. Raditch*, 43 ECAB 738 (1992); *Robert N. Vachon*, 36 ECAB 502 (1985).

The decisions of the Office of Workers' Compensation Programs dated March 10, 1995 and December 16, 1994 are hereby affirmed.

Dated, Washington, D.C.
January 27, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member