

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTIN JAMES SULLIVAN and U.S. POSTAL SERVICE,
POST OFFICE, Boston, Mass.

*Docket No. 97-455; Submitted on the Record;
Issued November 16, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his right to compensation benefits for the period October 13, 1991 to January 14, 1993 because he knowingly failed to report his employment activities; (2) whether an overpayment of compensation occurred in the amount of \$28,593.16 due to this forfeiture; (3) whether the Office properly found that appellant was not "without fault" in the creation of the resulting overpayment and that, therefore, the overpayment was not subject to waiver; and (4) whether the amount of restitution ordered by the U.S. District Court shall be credited against the amount of overpayment.

In the present case, the Office accepted that appellant, a letter carrier, sustained synovitis of both knees and right shoulder bursitis as a result of a fall on March 8, 1990. The Office authorized payment of appropriate compensation benefits, with temporary total disability benefits commencing April 24, 1990. Appellant completed Forms EN-1032 on March 19, 1991, April 8, 1992 and January 14, 1993 indicating that he had no earnings for the previous 15 months. The Office terminated payment of compensation benefits on January 14, 1993. By decision dated December 1, 1993, the Office found that appellant had failed to report earnings and had forfeited compensation for the period April 24, 1990 through January 14, 1993 resulting in an overpayment of compensation in the amount of \$63,582.21. In a decision dated February 14, 1995, an Office hearing representative found that the evidence of record only established that appellant received earnings as of June 24, 1992. The hearing representative concluded that as the record only substantiated earnings beginning in June 1992, and as the first and second EN-1032 forms appellant signed were dated March 19, 1991 and April 8, 1992, prior to June 24, 1992, only the Form EN-1032 completed on January 14, 1993 failed to report earnings as required. As appellant forfeited compensation received for the 15 months prior to January 14, 1993, the hearing representative concluded that the period of the forfeiture was October 13, 1991 to January 14, 1993. The hearing representative remanded the case for issuance of a new preliminary decision on the amount of overpayment for the above-stated period. On March 10, 1995 the Office issued a preliminary decision that an overpayment had

occurred in the amount of \$28,593.16 and that appellant was at fault in the creation of the overpayment. Appellant requested a precoupment hearing. By decision dated July 30, 1996 and finalized on August 2, 1996, the Office hearing representative found that appellant had earnings from self-employment during the 15-month period prior to January 13, 1993 when he completed a Form EN-1032 and that appellant knowingly and willfully withheld his earnings information from the Office. The hearing representative found that appellant therefore forfeited compensation paid from October 13, 1991 to January 13, 1993, resulting in an overpayment in the amount of \$28,593.16. The hearing representative also found that appellant was at fault in the creation of the overpayment and therefore the overpayment was not subject to waiver.

The Board finds that appellant forfeited his right to compensation benefits for the period because he knowingly failed to report his employment activities during the period October 13, 1991 to January 14, 1993.

Section 8106(b) of the Federal Employees' Compensation Act provides as follows:

“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. The employee shall include in the affidavit or report the value of housing, board, lodging, and other advantages which are part of his earnings in employment or self-employment and which can be estimated in money. 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.”¹

The Board has held that it is not enough merely to establish that there were unreported employment or earnings. Appellant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he “knowingly” failed to report employment or earnings.² The term “knowingly” is not defined within the Act or its implementing regulations. In common usage, the Board has recognized that the definition of “knowingly” includes such concepts as “with knowledge,” “consciously,” “intelligently,” “willfully,” or “intentionally.”³ The Board has found that the Office can meet this burden of proof in several ways, including by appellant’s own admission to the Office that he failed to report employment or earnings which he knew he should report, or by

¹ 5 U.S.C. § 8106(b).

² *Barbara L. Kanter*, 46 ECAB 165 (1994).

³ *Charles Walker*, 44 ECAB 641 (1993).

establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form EN-1032.⁴

The evidence of record establishes that appellant “knowingly” omitted his earnings from the Office in the present case. The record reflects that appellant was charged in U.S. District Court with a misdemeanor offense of “theft of government property” pursuant to 18 U.S.C. § 641. Appellant entered a plea of guilty and was adjudged guilty of violating 18 U.S.C. § 641 when he falsely completed the affidavit in Form EN-1032 and wrongfully accepted government monies during the period April 1992 to February 1993. The court found that appellant had accepted \$19,773.16 during the period between completion of Forms EN-1032 on April 8, 1992 and January 14, 1993. The court ordered restitution in the amount of \$19,773.16 to the Office by judgment entered on October 24, 1995. The Board also notes that at the hearing held on May 16, 1994 before the Office hearing representative, appellant, as well as his representative, admitted that appellant had earnings during the 15-month period prior to January 14, 1993 which appellant failed to report on his EN-1032 form dated January 14, 1993. The Board finds that appellant’s guilty plea in the U.S. District Court matter, against his own interest, and his admission at the hearing held before the Office hearing representative that he had failed to report earnings on the Form EN-1032 in question, which he in fact should have reported, constitutes persuasive evidence that appellant knowingly omitted his earnings when he completed the affidavit on Form EN-1032 on January 14, 1993 and that the provisions of 5 U.S.C. § 8106(b)(2) therefore apply to the period covered by the affidavit. The Board therefore finds that appellant has forfeited his compensation benefits received during the period October 13, 1991 to January 14, 1993.

The Board also finds that there was an overpayment of compensation in the amount of \$28,593.16 because appellant forfeited his compensation for the period from October 13, 1991 through January 14, 1993.

The record reflects that, during the period of forfeiture from October 13, 1991 through January 14, 1993, appellant was paid compensation for wage loss in the amount of \$28,593.16. The period of forfeiture is determined by the date appellant completed the EN-1032 form. Each EN-1032 form requires that information be provided concerning activities during the previous 15 months. If an EN-1032 form is improperly completed resulting in a finding of forfeiture, the Board has found that the period of forfeiture is the entire 15-month period covered by the form in question.⁵ Since appellant has forfeited his right to compensation during this period, this sum constitutes an overpayment of compensation. While the U.S. District Court determined the amount of restitution to be the amount of compensation received during the periods between the submission of the April 8, 1992 and January 13, 1993 EN-1032 forms, the Office properly determined that, pursuant to the Act, the appropriate period of forfeiture was October 13, 1991 to January 14, 1993.

⁴ See *Barbara L. Kanter*, *supra* note 2.

⁵ *William G. Norton, Jr.*, 45 ECAB 630 (1994).

The Board also finds that appellant is not without fault in the creation of the overpayment and that the overpayment cannot be waived.

Section 8129(b) of the Act⁶ provides as follows:

“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.”

Section 10.320(b) of the Office’s implementing regulations⁷ provides as follows:

“In determining whether an individual is with fault the Office will consider all pertinent circumstances, including age, intelligence, education, and physical and mental condition. 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.”

The Board finds that appellant was not without fault in the creation of the overpayment due to his failure to furnish information to the Office, which he knew was material, when he knowingly failed to report his earnings from self-employment in the affidavits he completed on Form EN-1032 dated January 14, 1993. Pursuant to the provisions of section 8106(b), appellant has forfeited his right to compensation, during the period in question. This forfeiture has resulted in an overpayment of compensation in the amount of \$28,593.16 and appellant is not without fault in the creation of this overpayment. Accordingly, no waiver of collection of the overpayment is possible under section 8129(b) of the Act.

On appeal, appellant alleged that restitution to be paid to the U.S. District Court in the amount of \$19,773.16 should be in lieu of further forfeiture overpayment recovery. The Office’s procedure manual discusses the interplay between court ordered restitution in fraud cases and the Office’s administrative debt collection process, as follows:

“19. *Court Ordered Restitution in Fraud cases.* When a debtor has been convicted in court of filing a false claim which resulted in an overpayment/debt due the

⁶ 5 U.S.C. § 8129(b).

⁷ 20 C.F.R. § 10.320(b).

government, the court often orders the defendant to make restitution to the United States as a condition of probation. The amount of restitution may or may not be the full amount of the debt owed to [the Office].

“a. *If the court order states that the restitution amount will be in full satisfaction of the debt* owed the United States (a ‘Global Settlement’), the Court Order takes precedence over the Office’s administrative debt collection process. In such cases, if the restitution amount is less than the outstanding debt principal balance, the principal balance must be reduced to the restitution amount set by the court. Also, interest may not be applied to such debts unless stipulated in the Court Order. However, should the probation period end and the debtor has failed to make full restitution of the amount ordered by the court, [the Office] may pursue collection of the full original debt amount.

“b. *If the Court Order does not represent a ‘Global Settlement,’* the [Office] should continue to pursue collection of the full amount of the debt, taking credit for any restitution amounts received. Unless assessment of interest is stipulated in the Court Order, interest may not be applied to the restitution amount and any restitution payments received should be applied directly to the debt principal.”⁸

In the present case, the court order in question did not indicate that the recovery of \$19,773.16 from appellant in restitution was meant to be in full satisfaction of the debt owed to the United States, *i.e.*, that it was meant to constitute a global settlement.⁹ For this reason, the Office was not precluded from continuing to pursue full collection of appellant’s debt in the amount of \$28,593.16, taking credit for any restitution amounts received. As the hearing representative’s decision dated July 30, 1996 did not address the interplay between the restitution ordered by the U.S. District Court and the Office’s overpayment determination, the Board is unable to discern from the record whether such credit has been allowed by the Office. Accordingly, the decision dated July 30, 1996 will be modified to reflect that the Office may recover from appellant in full the overpayment of \$28,593.16, with credit to be given to the restitution paid as ordered by the U.S. District Court.

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300 (September 1994).

⁹ See *Clarence D. Ross*, 42 ECAB 556 (1991).

The decision of the Office of Workers' Compensation Programs dated July 30, 1996 and finalized on August 2, 1996, is affirmed, but is modified to reflect that restitution paid shall be credited against the full recovery of the overpayment.

Dated, Washington, D.C.
November 16, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member