

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL D. MATTHEWS and U.S. POSTAL SERVICE,
POST OFFICE, Lawrence, MA

*Docket Nos. 98-2204; & 99-2508; Submitted on the Record;
Issued December 23, 1999*

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 terminated appellant's compensation under 5 U.S.C. § 8148; and (2) whether the Office properly determined that appellant forfeited compensation for the period October 4, 1992 through January 5, 1995.

On April 7, 1977 appellant, then a 28-year-old letter carrier, was driving a postal vehicle, which was involved in a collision. Appellant was partially ejected from the vehicle and it rolled over. Appellant sustained a fractured pelvis and severe internal injuries. Appellant underwent surgery on the day of the employment injury consisting of exploratory laparotomy, extensive small bowel and colon resection with anastomosis, repair of a laceration of the vena cava, resection and replacement of the right common iliac artery, plication of the vena cava and repair of a laceration of the left thigh. On May 2, 1977 appellant underwent additional surgery for repair of duodenal perforation and securing of bleeding of the gastroduodenal artery, jejunostomy, gastostomy, splenectomy with drainage and drainage of a pelvic abscess. Appellant underwent additional operations in the next several months and was released from the hospital on December 25, 1977.

The Office accepted appellant's claim for pelvic fracture and extensive internal injuries. Appellant received continuation of pay for the period April 10 through May 24, 1977. The Office began payment of temporary total disability compensation effective May 25, 1977. On September 9, 1978 appellant returned to light-duty work at the employing establishment. He stopped working again on May 8, 1980. The Office reinstated payment of temporary total disability compensation.

In a September 1, 1981 report, Dr. Michael J. Murphy, a Board-certified orthopedic surgeon, indicated that appellant sustained disruption of his entire small bowel mesentery, right iliac artery, inferior vena cava and super-mesenteric artery. Dr. Murphy addressed the multiple operations appellant underwent as a result of the employment injury. He noted that due to

massive weight loss and nerve compression of the perineal nerve, appellant developed a bilateral foot drop. Dr. Murphy stated that appellant had short bowel syndrome, indicating that he had lost over 75 percent of his small bowel and his entire right and traverse colon had been removed. He reported that appellant would suffer from incapacitating diarrhea for the rest of his life.

The Office required appellant to complete periodic CA-1032 form questionnaires on whether he had any earning from employment or self-employment for the prior 15 months, as well as status of dependents. In forms dated April 6, 1991, January 17, 1992, January 4, 1994 and January 5, 1995, appellant indicated that he had not received any earnings from employment or self-employment. In a February 15, 1996 CA-1032 form, appellant indicated that he had been intermittently self-employed in mowing lawns for the period January 1 through December 31, 1995. He estimated that he received \$40.00 a month and approximately \$425.00 to \$500.00 in the year.

In an April 1, 1997 memorandum, a postal inspector indicated that appellant had been performing lawn mowing and maintenance for some of his neighbors. Several people interviewed by the postal inspectors indicated that they paid appellant \$16.00 to \$20.00 per mowing. The postal inspectors indicated that appellant admitted performing the mowing and further admitted his answers on the CA-1032 forms, in which he did not report self-employment, were incorrect. The postal inspectors related that appellant informed them that he first started mowing lawns on his lawn tractors as a favor to two neighbors who were sick and began accepting payment for the work. He noted that in 1993 he took on additional lawn work because of increasing expenses, including braces for his son, college tuition for his daughter and increased insurance cost for his home. The postal inspectors submitted copies of checks made out to appellant for lawn mowing work, dated from August 18, 1993 to January 19, 1995.

Appellant was indicted on two counts of making false statements on the CA-1032 forms in violation of 18 U.S.C. § 1920 and four counts of accepting compensation payments based on those false statements. On July 1, 1997 appellant pleaded guilty to one count of making a false statement on a CA-1032 form in violation of 18 U.S.C. § 1920. On July 27, 1997 the judge accepted appellant's plea and adjudicated guilt. On December 12, 1997 the judge entered a sentence of one year of probation and restitution of \$1,599.83 in compensation, which was the difference between what appellant received in compensation for the period November 1993 to December 1994 and what he would have received if he had reported his compensation.¹

In an October 23, 1997 decision, the Office terminated appellant's compensation effective July 1, 1997, on the grounds that he was no longer entitled to compensation because he was convicted of an offense relating to fraud in the application for or the receipt of compensation benefits under the Federal Employees' Compensation Act.

In a November 12, 1997 letter, appellant requested review of the written record by an Office hearing representative. He recounted the history of his employment injury, noting that he had lost 85 percent of his small intestine, half of his pancreas and half of his colon. Appellant

¹ The Board notes that there is no indication that the court ordered restitution in this case constituted a Global Settlement over the Office's debt collection; *see Clarence D. Ross*, 42 ECAB 556 (1991).

noted that he underwent 16 operations after the employment injury. He indicated that he had constant problems with diarrhea due to the extensive loss of his digestive system and had to take medications and vitamins and follow a special diet because of his condition. Appellant stated that he attempted to return to work but lost 30 pounds in the period in which he attempted to work. He then retired. Shortly thereafter, his wife left him and his three-year-old daughter. Appellant remarried in 1982. He indicated that in 1993 household expenses rose because his son needed braces, his daughter was starting college and his homeowners' insurance and property tax increased. Appellant began cutting lawns at that time to bring in additional money without forcing his wife to work longer hours. He stated that he did not think he was doing anything wrong in performing the work. Appellant commented that he thought the amounts he was earning were too small to be significant and he was not earning a living by mowing the lawns. He noted that he made \$2,800.00 in almost three years while mowing lawns. Appellant described his reaction to the investigation, indictment and guilty plea. He admitted that he deserved punishment but requested that his compensation benefits be reinstated because of the effect of the loss of the benefits on his family and because he would no longer be able to pay for the medication necessary to treat his condition.

In an April 1, 1998 decision, an Office hearing representative found that appellant pleaded guilty to making a false statement on a CA-1032 form, which was ample evidence that he knowingly failed to report earnings. The hearing representative further found that appellant was aware of the requirement to report any earnings from work activities but failed to report those earnings. He concluded that appellant, therefore, knowingly failed to report his earnings. The hearing representative, therefore, affirmed the Office's October 23, 1997 decision.

In an August 3, 1998 decision, the Office found that appellant had forfeited compensation for the period October 4, 1992 through January 5, 1995 because he had failed to report earnings for the period in question. In an August 3, 1998 letter, the Office informed appellant that it had made a preliminary determination that a \$50,370.18 overpayment had occurred in his case because compensation was forfeited for the periods covered by the CA-1032 forms dated January 4, 1994 and January 5, 1995.² The Office further found that appellant was at fault in the creation of the overpayment because he knowingly failed to report his earnings for the periods in question. In a separate August 3, 1998 letter, the Office found that appellant had received a \$2,995.55 overpayment in compensation because his compensation was terminated effective July 1, 1997 but he continued to receive benefits through August 16, 1997. The Office further found that appellant was not without fault in the creation of the overpayment. In both letters

² The Office calculated the amount of the overpayment on the basis of the compensation appellant received for the period October 4, 1992 through January 5, 1995.

appellant was advised of his right to submit additional evidence and to request a hearing before an Office hearing representative.³

The Board finds that the Office properly determined that appellant forfeited compensation under section 5 U.S.C. § 8148.

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 or a receipt of any benefit under [the Act], shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under [the Act] for any 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.”⁴

In this case, appellant pleaded guilty to one count of filing a CA-1032 form which contained a false statement that he had no earnings. The indictment indicated that this charge, to which appellant pleaded guilty, was based on a violation of 18 U.S.C. § 1920. Therefore, by the specific terms of the statute, appellant forfeited all compensation benefits arising from the April 7, 1997 employment injury. Congress has enacted this provision as an absolute forfeiture of compensation, without any provision for any waiver of the effects of this section of the Act. The Office, therefore, properly terminated appellant’s compensation under section 8148.

The Board finds, however, that the Office improperly set the effective date of termination as July 1, 1997. Section 8148 specifically states that the forfeiture shall be effective as of the date of the conviction. In this case, the Office used July 1, 1997 as the effective date of the forfeiture. However, the record shows that, while appellant entered his plea of guilty on July 1, 1997, the plea was not accepted by the judge until July 27, 1997 and guilt was adjudicated at that time. The date of the conviction is not the date appellant entered his guilty plea but the date that the plea was accepted and guilt adjudicated. The effective date of forfeiture of compensation, therefore, was July 27, 1997.

The Board further finds that the Office properly found that appellant forfeited compensation for the period October 4, 1992 through January 5, 1995.

³ In a June 12, 1998 letter, appellant requested an appeal from the April 1, 1998 decision of the Office hearing representative. This appeal was docketed on July 6, 1998 as Docket No. 98-2204. In a January 20, 1999 letter, appellant also requested that the Board review the Office’s August 3, 1998 decision. This letter was treated as a request for an appeal from that decision and was docketed as Docket No. 99-2508 on February 1, 1999. Due to the common factual background, these appeals will be combined into one decision. As the Office has not issued final decisions pursuant to the preliminary findings made in the August 3, 1998 letters, the Board has no jurisdiction to consider on this appeal whether appellant received overpayments of \$50,370.18 for the period October 4, 1992 through January 5, 1995 and \$2,995.55 for the period July 1 through August 16, 1997 and any issues related to these overpayments. 20 C.F.R. § 501.2(c).

⁴ 5 U.S.C. § 8148(a).

Section 8106(b) of the Act⁵ 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 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.”⁶

In this case, appellant, in CA-1032 forms dated January 4, 1994 and January 5, 1995, indicated that he had not received any earnings during the periods covered by these forms, including earnings from self-employment. However, evidence developed by the postal inspectors, indicated that appellant had received payment for mowing lawns and had received checks in payment of his services from August 18, 1993 to January 19, 1995. Appellant admitted that he had received such payments. Therefore, appellant received earnings within the period October 4, 1992 through January 5, 1995, the period covered by the CA-1032 forms in question.

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 merely to establish that there were unreported earnings from employment. The inquiry is whether appellant knowingly failed to report his 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,” “intelligently,” “willfully,” or “intentionally.”⁷ The record shows that appellant pleaded guilty to one count of making a false statement on a CA-1032 form. The guilty plea is persuasive evidence that appellant knowingly omitted reporting his earnings on the CA-1032 forms dated January 4, 1994 and January 5, 1995.⁸ The guilty plea was made under oath and against his own interests. The

⁵ 5 U.S.C. § 8106(b) (1974).

⁶ While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for 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.

⁷ *Charles Walker*, 44 ECAB 641 (1993); *Christine P. Burgess*, 43 ECAB 449 (1992).

⁸ *Iris E. Ramsey*, 43 ECAB 1075 (1992).

evidence of record, therefore, establishes that appellant knowingly omitted his earnings on the CA-1032 forms in question and is subject to forfeiture of compensation under section 8106(b) for the periods covered by those forms. The Office, therefore, properly found that appellant forfeited compensation for the period October 4, 1992 through January 5, 1995. Section 8148 provides that the Office has the authority to seek any forfeiture of compensation under section 8106 in addition to any forfeiture declared pursuant to section 8148.

The decisions of the Office of Workers' Compensation Programs, dated August 3 and April 1, 1998, are hereby affirmed.

Dated, Washington, D.C.
December 23, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member