

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT V. SUTTLE, III and DEPARTMENT OF THE NAVY,
U.S. NAVAL OBSERVATORY, Washington, D.C.

*Docket No. 98-1537; Submitted on the Record;
Issued June 22, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 15, 1994 on the grounds that he pled guilty on December 15, 1994 to one count of violating 18 U.S.C. §§ 1341 and 1342; (2) whether the Office properly determined that appellant forfeited compensation paid from March 17, 1979 through October 19, 1981, December 31, 1981 through January 31, 1983, July 10, 1983 through October 30, 1989 and December 16, 1990 through August 1, 1993; (3) whether an overpayment in the amount of \$257,947.07 resulted from the above periods; and (4) whether the Office properly determined that appellant was at fault in the creation of the \$257,947.07 overpayment of compensation and therefore not subject to a waiver.

On August 28, 1973 appellant, then a 30-year-old electronics technician, sustained a back injury while lifting a power supply in the performance of duty. The Office accepted appellant's claim for sciatic scoliosis. Appellant stopped work following the injury and the Office paid appropriate compensation. Following a recurrence on February 10, 1978, appellant was placed on the periodic compensation rolls.

Appellant was requested by the Office to complete the Form CA-1032 as required under section 8106(b) of the Federal Employees' Compensation Act. Appellant first completed Form CA-1032 on March 17, 1980 failing to indicate work and earnings for the previous 15 months. Thereafter, appellant completed the Forms CA-1032 on March 1, October 19, 1981, January 31, 1983, October 10, 1984, November 20, 1985, November 19, 1986, November 22, 1987, November 15, 1988, October 30, 1989, March 16, August 17, 1992 and August 1, 1993. In signing each of the forms appellant certified that he was neither employed nor self-employed during the covered periods.

An investigation conducted by the U.S. Department of Labor, Office of the Inspector General, revealed that appellant misrepresented his employment and income for the period January 17, 1989 through August 1, 1993. The findings of the investigation established that

appellant had engaged in real estate sales beginning in 1975. The investigation has been incorporated into the case record.

On December 15, 1994 appellant entered a guilty plea in federal court on one count of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342. The plea agreement specified that appellant had knowingly and willfully made false statements on the CA-1032 forms he signed from August 1980 to about August 1993 because, during the time he stated that he was unemployed, he was earning commissions as a result of real estate transactions and had devised a scheme to falsely show that the commissions were earned by his wife.

On March 28, 1995 appellant was sentenced to 14 months imprisonment, restitution in the amount of \$257,000.00, a \$50.00 special assessment and \$50,000.00 in civil penalties.

In a decision dated February 4, 1997, the Office issued a preliminary determination that appellant was at fault in the creation of an overpayment. The Office calculated the amount of overpayment to be \$257,947.07 which covered the periods forfeited under section 8106(b) to be March 17, 1979 through October 19, 1981 (\$40,502.88), December 31, 1981 through January 31, 1983 (\$19,875.10), July 10, 1983 through October 30, 1989 (\$130,755.02) and December 16, 1990 through August 1, 1993 (\$66,814.07).

In a letter decision of February 7, 1997, the Office informed appellant that because he pled guilty to defrauding the Act on December 15, 1994, his right to benefits were terminated pursuant to 5 U.S.C. § 8148(a) effective December 15, 1994.

In a decision dated March 4, 1998, an Office hearing representative, affirmed the Office's decisions of February 4 and 7, 1997. The hearing representative found that appellant forfeited compensation paid to him for the periods March 17, 1979 through October 19, 1981, December 31, 1981 through January 31, 1983, July 10, 1983 through October 30, 1989 and December 16, 1990 through August 1, 1993 as he knowingly and willfully withheld earning information. The hearing representative found that the forfeited compensation resulted in an overpayment in the amount of \$257,947.07 and that appellant was at fault in the creation of the overpayment. The hearing representative found that because of appellant's conviction, he was further barred from receiving any benefits under the Act.¹

The Board finds that the Office properly terminated appellant's compensation effective December 15, 1994 on the grounds that he pled guilty on December 15, 1994 to one count of violating 18 U.S.C. §§ 1341 and 1342.

¹ The hearing representative concluded that the overpayment would be collected by applying the \$1,500.00 monthly restitution payments appellant had been ordered to make in his criminal case to the balance due and directed him to make an additional lump-sum payment of \$5,000.00 since he was no longer receiving period compensation payments following the termination of his benefits. Since this action was taken pursuant to the Office's authority under the Federal Claims Collection Act of 1966, 31 U.S.C. § 3701 *et. seq.* (as amended), the Board lacks jurisdiction to review this aspect of the decision on appeal. *Marshal L. West*, 36 ECAB 490 (1985).

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.² In this case, the Office relied on section 8148 of the Act³ which provides that felons convicted of fraud in the application for benefits shall forfeit future entitlements to benefits.

Subsection (a)⁴ states that an individual convicted of a federal or state statute relating to fraud in the application for [or] receipt of any benefits 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 the conviction. Such forfeiture shall be in addition to any action taken under sections 8106 or 8129 for recovery of an overpayment.⁵

The Office's procedure manual states that in support of termination under section 8148, the record must contain copies of the indictment or information, the plea agreement, if any, the guilty verdict and the court's docket sheet. Further, this evidence must establish: (1) the individual was convicted; and (2) the conviction is related to the claim for, or receipt of, benefits.⁶ The termination is effective on the date of the verdict or on the date the guilty plea is accepted by the court.⁷ Because of the criminal basis for the termination, no pretermination notice is required before a final decision is issued.⁸

On December 15, 1994 appellant pled guilty in federal court to one count of violating 18 U.S.C. §§ 1341 and 1342, a criminal offense of mail fraud. Appellant falsely reported his income in an effort to obtain benefits under fraudulent pretenses.⁹ By letter decision dated February 7, 1997, the Office advised appellant that his entitlement to compensation benefits were being terminated pursuant to 5 U.S.C. § 8148. Following a hearing, the Office affirmed the termination.

² William A. Kandel, 43 ECAB 1011, 1020 (1992).

³ 5 U.S.C. § 8148.

⁴ Subsection (b), not relevant in this case, provides for the suspension of benefits payable to beneficiaries imprisoned as a result of a felony conviction not related to claims under the Act. 5 U.S.C. § 8148(b).

⁵ Sections 8106 and 8129 pertain in part to the recovery by the Office of an overpayment of compensation benefits. 5 U.S.C. § 8106(b), 8129.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.11 (August 1995).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.11(d)(1).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.11(e)(2).

⁹ The record reveals that appellant indicated on several Forms EN-1032 for the period October 1981 through March 1992 that he was not employed or self-employed despite the fact that he was earning commission as a result of real estate transactions, which he falsely showed as having been earned by his wife. Appellant had been receiving Office compensation benefits for total disability due to his employment injury. Appellant's December 15, 1994 plea related to false statements made on Forms EN-1032 covering the period from October 1981 through March 1992.

The Board finds that appellant's conviction proves his willful intent to conceal his self-employment and whatever earnings resulted so that he could continue to receive disability compensation checks to which he was not entitled. While section 8106(b) is a penalty provision and will thus be narrowly construed,¹⁰ appellant's conviction for falsely completing the CA-1032 forms brings him within the purview of section 8148 and thus precludes his future entitlement to benefits.¹¹

Inasmuch as appellant was convicted on December 15, 1994 which is after section 8148 was enacted and the Office properly followed its procedures, the Board finds that the Office properly terminated appellant's compensation effective December 15, 1994.¹²

The Board finds that appellant forfeited his right to compensation for the periods March 17, 1979 through October 19, 1981, December 31, 1982¹³ through January 31, 1983, July 10, 1983 through October 30, 1989 and December 16, 1990 through August 1, 1993 because he knowingly failed to report earnings from employment and/or self-employment.

Section 8106(b) of the Act¹⁴ provides that a partially disabled employee must report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times specified by the Secretary of Labor. The penalty for failing to make an affidavit or report when required or knowingly omitting or understating any part of an employee's earnings is forfeiture of his or her right to compensation during the period for which the affidavit or report was required.¹⁵

In this case, the record reflects that appellant was convicted of one count of mail fraud in violation of 18 U.S.C. § 1341 and 1342 whereby he devised a scheme of making false statements regarding his compensation claim. The Board finds that appellant's conviction constitutes persuasive evidence that appellant knowingly omitted his earnings from his work as a realtor when he completed the affidavits on Forms CA-1032 during the aforementioned periods, all of which explicitly required him to report any enterprise "in which you worked and from which you

¹⁰ *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

¹¹ *Harvey P. Milstein*, Docket No. 95-1907 (issued February 11, 1999).

¹² In a submission to the hearing representative, appellant's attorney argued that section 8148, as it applies in its application to convictions arising out of criminal activity that took place prior to its enactment on September 30, 1994, was unconstitutional. The Board notes, however, that appellant was convicted on December 15, 1994, which is after the time section 8148 became law. Moreover, the Board has recognized that it is beyond the power of administrative agencies to rule on the constitutional legality of congressional enactments. *Linda K. Richardson*, 47 ECAB 171 (1995). The Director has properly noted that appellant's attorney's argument was rejected in *Slugocki v. U.S.*, by and through its Department of Labor, 988 F. Supp. 1443 (S.D.Fla. 1997).

¹³ Although the hearing representative denoted the period as being December 31, 1981 through January 31, 1983, the record reflects that the Form CA-1032 signed by appellant on January 31, 1983 encompassed the preceding 12 months or the period from December 31, 1982 through January 31, 1983. There is no signed CA-1032 form covering the period December 31, 1981 through December 31, 1982 in the record.

¹⁴ 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(b).

¹⁵ *Charles Walker*, 44 ECAB 641, 644 (1993).

received revenue.” As the Office found and the record reflects, appellant obtained his license to sell real estate in 1980 and appellant himself asserted that he had engaged in income generating activities as early as December 1979. As appellant was repeatedly informed of his responsibility to fully report his earnings on the CA-1032 forms in question, his knowing omission of these earnings on the forms he signed is sufficient to establish that appellant violated section 8106(b)(2).¹⁶ Therefore, the Board finds that appellant forfeited his right to compensation for the periods March 17, 1979 through October 19, 1981, December 31, 1982 through January 31, 1983 July 10, 1983 through October 30, 1989, and December 16, 1990 through August 1, 1993 because he failed to report employment pursuant to section 8106(b)(2),¹⁷ resulting in an overpayment.¹⁸

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

Section 8129 of the Act¹⁹ 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 be against equity and good conscience.²⁰ Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.²¹

The implementing regulation²² provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (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.

In its preliminary determination dated February 4, 1997, the Office found and an Office hearing representative affirmed that appellant was at fault in the matter of the overpayment because he was repeatedly informed of the necessity and importance of reporting earnings

¹⁶ Appellant’s argument that he was not required to report his earnings since he was receiving compensation for temporary total disability has been rejected by the Board on numerous occasions. *E.g. Elbridge H. Wright*, 36 ECAB 691 (1985); *James M. Davis*, 37 ECAB 344 (1986); *Sherwood T. Rodrigues*, 37 ECAB 617 (1986).

¹⁷ See *Burnett Terry*, 46 ECAB 457 (1995) (finding that income directly traceable to the product of an employee’s work is considered earnings or wages).

¹⁸ See *Iris E. Ramsey*, 43 ECAB 1075, 1091 (1992) (finding that appellant’s plea of guilty to filing false documents in violation of federal law constituted persuasive evidence that she “knowingly” omitted her earnings when she completed Office affidavits, notwithstanding her attempts to explain away the plea).

¹⁹ 5 U.S.C. § 8129(b).

²⁰ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

²¹ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994); see *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is with fault in helping to create the overpayment).

²² 20 C.F.R. § 10.320(b).

information to the Office and he knowingly withheld this information. The record reflects no evidence of any educational, mental or emotional handicap which would have prevented appellant from comprehending the written materials, from understanding regulations, from seeking good advice, or from otherwise not complying with the clear and basic instructions provided to him regarding the conditions of his entitlement.

Appellant knew or should have known that the income from the real estate sales was material information because the forms themselves clearly stated that the information provided would be used to determine whether he qualified for continued benefits or whether an adjustment in benefits would be warranted; the forms also warned appellant that a false or evasive answer to any question, or the omission of an answer, could be grounds for the suspension of benefits. Thus, appellant knowingly answered falsely when he certified that he was unemployed during the covered periods. The Office hearing representative found that appellant knowingly withheld this information and so declared in federal court by pleading guilty. The Board finds that because appellant failed to furnish information that he knew or should have known to be material pursuant to section 10.320(b)(2), he is with fault in the matter of the overpayment resulting from his forfeiture.

In summary, pursuant to section 8106(b) appellant has forfeited his right to compensation for the periods March 17, 1979 through October 19, 1981, December 31, 1982 through January 31, 1983, July 10, 1983 through October 30, 1989 and December 16, 1990 through August 1, 1993 and this forfeiture has resulted in an overpayment of compensation. Accordingly, no waiver of collection of the overpayment is possible under section 8129(b) of the Act. The Board notes that as the forfeiture period does not include the period covered from December 31, 1981 through January 31, 1982 as the Office found, the portion of the hearing representative's decision that adjudicates the overpayment aspect of appellant's case is vacated and that issue is remanded for a recalculation of the overpayment amount for the covered forfeiture periods.

The decisions of the Office of Workers' Compensation Programs dated March 4, 1998, February 7 and 4, 1997 are affirmed in part and remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
June 22, 1999

George E. Rivers
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member