

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRYL A. GEER and DEPARTMENT OF THE NAVY,
PORTSMOUTH NAVAL SHIPYARD, Portsmouth, NH

*Docket No. 97-2231; Submitted on the Record;
Issued November 18, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his right to compensation benefits for the period October 26, 1985 through January 14, 1989 because he knowingly failed to report his employment activities; (2) whether the forfeiture resulted in an overpayment in the amount of \$71,824.61; (3) whether the Office properly determined that appellant was at fault in the creation of the overpayment; and (4) whether the Office properly required repayment of the overpayment by deducting \$240.00 every four weeks from appellant's continuing compensation payments.

On March 19, 1980 appellant, then a 41-year-old general foreman, sustained an injury to his back while in the performance of duty. The Office accepted his claim for cervical radiculitis and chronic right C6-7 radiculopathy with discogenic disease by aggravation. Appellant stopped work on March 26, 1980 and did not return.

On January 26, 1987, January 25, 1988 and January 14, 1989 appellant completed Office CA-1032 forms, certifying that he was neither employed nor self-employed during the preceding 15-month periods. With respect to self-employment, such as farming, sales, service, operating a store, business, *etc.*, the form required appellant to report "any such enterprise in which you worked and from which you received revenue, even if operated at a loss or if profits were reinvested." The form warned appellant that anyone "who fraudulently conceals or fails to report income or other information which would have an effect on benefits, or who makes a false statement or misrepresentation of a material fact" in claiming Office benefits might be subject to criminal prosecution.

By letter dated October 22, 1992, an official with the employing establishment indicated that appellant was "a convicted cocaine distributor and purchaser."

The record contains a transcript of appellant's November 1989 trial before the U.S. District Court for the New Hampshire district. At the trial, a witness testified that he had

purchased cocaine “at least a couple of dozen times” from appellant in exchange for monetary sums ranging from \$300.00 to \$1,000.00. The witness further testified that he observed appellant having in his possession up to two kilos of cocaine. The witness also testified that appellant told him that he was interested in dealing hashish if the quantity was sufficiently large. A jury found appellant guilty of conspiracy to distribute and possess cocaine and hashish from January 1986 through November 1988 and of traveling in interstate commerce to distribute cocaine around March 1986.¹ Appellant was subsequently sentenced to 10 years in prison.

By decision dated April 5, 1995, the Office determined that appellant forfeited his right to compensation for the period October 26, 1985 through January 14, 1989 because he knowingly failed to report his employment activities during this period. The Office found that appellant knowingly failed to report his earnings from the illegal distribution of cocaine and hashish on CA-1032 forms covering the period October 26, 1985 through January 14, 1989 and, therefore, forfeited the \$71,824.61 of compensation he received during this period.

In a letter dated April 5, 1995, the Office advised appellant that it had made a preliminary determination that he had received an overpayment of compensation in the amount of \$71,824.61 which occurred when he forfeited his right to compensation for the period October 26, 1985 through January 14, 1989. The Office further informed appellant that it had made a preliminary determination that he was at fault in the creation of the overpayment because he failed to report his earnings during this period. The Office notified appellant that he had a right to submit evidence or argument if he disagreed with the preliminary determination, and requested that he complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents.

On April 25, 1995 appellant requested a hearing before an Office hearing representative.

In a Form OWCP-20 returned to the Office on May 5, 1995, appellant listed his monthly income as his workers’ compensation check from the Office and his expenses as \$2,251.13. Appellant further submitted an affidavit of his assets and liabilities dated June 21, 1996 which indicated that his total monthly expenses were \$1,863.00 and his weekly income was \$584.25.²

At the hearing, held on June 28, 1996, appellant related that he did not receive any money from drug sales, but that “once in a while they [would] give me a line of cocaine and I [would] do a line of cocaine. There was no charge. What it cost them, I do [not] know.” Appellant stated that the other people in the conspiracy did receive money from the transactions.

By decision dated May 9, 1997, the hearing representative affirmed the Office’s April 5, 1995 decision regarding forfeiture and finalized the Office’s preliminary determination that appellant was at fault in creating a \$71,824.61 overpayment and that, therefore, the overpayment was not subject to waiver. The hearing representative indicated that he had reviewed the

¹ In her summation to the jury, the prosecuting attorney related that to convict appellant of conspiracy to distribute and possess cocaine and hashish, the jury must find he was doing it “for profit.”

² The total of appellant’s monthly expenses appears to be \$2,068.00.

financial information submitted by appellant and determined that the overpayment would be recovered by deducting \$240.00 from appellant's continuing compensation every four weeks.

The Board finds that the Office properly determined that appellant forfeited his right to compensation benefits for the period October 26, 1985 through January 14, 1989 because he knowingly failed to report his employment activities.

Section 8106(b) of the Federal Employees' Compensation Act³ 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 right to compensation during the period for which the affidavit or report was required.⁴

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if 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 has recognized that the definition of "knowingly" includes such concepts as "with knowledge," "consciously," "intelligently," "willfully," or "intentionally."⁵

The Office thus has the burden of proof in establishing that appellant did, either with knowledge, consciously, willfully or intentionally, fail to report employment or earnings.⁶ To meet this burden of proof, the Office is required to closely examine appellant's activities and statements in reporting employment or earnings.⁷ The Office may meet this burden in several ways. The Office may meet this burden by appellant's own subsequent admission to the Office that he failed to report employment or earnings which he knew he should report. Similarly, the Office may meet this burden by establishing that appellant has pled guilty to violating 18 U.S.C. § 1920 by falsely completing the affidavit section of the Form CA-1032.⁸ Furthermore, the Office may meet this standard without an admission by appellant, if appellant failed to fully and truthfully complete the Form CA-1032 and the circumstances of the case establish that appellant failed to fully and truthfully reveal the full extent of his employment activities and earnings. The Office may also meet this burden if it establishes through the totality of the factual circumstances of record that appellant's certification in a Form CA-1032, that he was not employed or self-employed, was false.

³ 5 U.S.C. § 8106(b).

⁴ *Charles Walker*, 44 ECAB 641 (1993).

⁵ *Christine P. Burgess*, 43 ECAB 449 (1992).

⁶ *Anthony A. Nobile*, 44 ECAB 268 (1992).

⁷ *Royal E. Smith*, 44 ECAB 417 (1993).

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

In the instant case, the record establishes that appellant knowingly omitted employment and earnings on Office CA-1032 forms covering the period of October 26, 1985 through January 14, 1989 despite the fact that during this time he was engaged in employment, albeit illegal in nature, and had earnings. The Form CA-1032 required appellant to report all forms of employment, self-employment and earnings, yet he responded “no” or “not applicable” to the questions concerning employment, self-employment and earnings and responded “yes” to a question regarding whether he was unemployed for the 15-month period preceding each form. The explicit language of the form advised appellant that all employment must be reported. Appellant was convicted by a jury of conspiracy to distribute and possess cocaine and hashish during January 1986 through November 1988 and of transporting cocaine and hashish over state lines. Thus, appellant engaged in employment activities during the period in question.

Appellant argued that he did not knowingly fail to report earnings because he did not earn any money working as a member of the drug conspiracy. However, the Form CA-1032 clearly stated that employment activities had to be reported even if there were no actual earnings. Further, the testimony during the court proceedings reveal that appellant did receive earnings in the form of money from the sale of cocaine. Appellant also testified before the Office hearing representative that he received free cocaine in exchange for his services.⁹ As the Board noted in *Norman R. Moon*,¹⁰ appellant is not protected by the reporting requirements of section 8106 because his employment resulted from the illegal exchange of controlled substances instead of earnings from private industry or self-employment. Whether appellant made a profit on his activities is not the relevant issue, as explained on the forms for reporting employment. The Board concludes therefore, that the totality of the factual circumstances shows that appellant “knowingly” omitted his earnings under section 8106(b)(2) of the Act by failing to report his employment activities and earnings on the Office forms covering the period October 26, 1985 through January 14, 1989.

The Board further finds that the forfeiture resulted in an overpayment in the amount of \$71,824.61.

The case record reveals that appellant received compensation in the amount of \$71,824.61 during the period October 26, 1985 through January 14, 1989. The Board finds that, based on appellant’s forfeiture of compensation for this period, he has an overpayment in the amount of \$71,824.61.

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

⁹ See *Linda K. Richardson*, 47 ECAB 171 (1995) (defining wages as every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses, the reasonable value of board, rent, housing, lodging, payment in kind, tips and any similar advantage received); *Gary L. Allen*, 47 ECAB 240 (1996) (defining earnings from self-employment as a reasonable estimate of the rate of pay it would cost the employee to have someone else perform the work or duties the employee is performing and finding that a lack of profits from self-employment through a corporation, partnership, or sole proprietorship does not remove the employee’s obligation to report the employment or rate of pay).

¹⁰ 42 ECAB 947 (1991).

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹¹ The only exception to this requirement is a situation which meets the test set forth in section 8129(b):

“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 [the Act] or would be against equity and good conscience.”¹²

Accordingly, no waiver of an overpayment is possible if the claimant is not “without fault” in creating the overpayment. In determining whether an individual is at fault in the creation of an overpayment, Office regulations provide in pertinent 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 known was incorrect.”¹³

In this case, the Office applied the first and second standards in determining that appellant was at fault in creating the overpayment. Appellant is at fault under the first standard because he stated that he was not employed between 1986 and 1989 when the record reveals that he was engaged in self-employment as a member of an illegal conspiracy to possess and distribute cocaine and hashish. Under the second standard, appellant knowingly failed to furnish material information to the Office, that he had earnings from his activities as a dealer in controlled substances. Appellant completed Office CA-1032 forms which advised him that he might be subject to criminal prosecution for misrepresenting or omitting employment or earnings and, therefore, the evidence of record shows that he was aware or should have been aware of the materiality of the information. Since appellant is at fault in creating the overpayment, it is not subject to waiver.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$240.00 every four weeks from appellant’s continuing compensation payments.

¹¹ 5 U.S.C. § 8129(a).

¹² 5 U.S.C. § 8129(b).

¹³ 20 C.F.R. § 10.320(b).

Section 10.321(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of further payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual.”¹⁴

The record supports that, in requiring repayment of the overpayment by deducting \$240.00 every four weeks from appellant’s continuing compensation payments, the Office took into consideration the financial information submitted by appellant, as well as the factors set forth in section 10.321, and found that this method of recovery would minimize any resulting hardship on appellant. The Office hearing representative indicated that she had considered the amount of appellant’s assets and the extent his monthly income exceeded his monthly expenses.¹⁵ Therefore, the Office properly required repayment of the overpayment by deducting \$240.00 from appellant’s continuing compensation payments every four weeks.

The decision of the Office of Workers’ Compensation Programs dated May 9, 1997 is hereby affirmed.

Dated, Washington, D.C.
November 18, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

¹⁴ 20 C.F.R. § 10.321(a).

¹⁵ The hearing representative found that appellant’s monthly income was \$2,414.00 and his expenses were \$2,168.00 and that he could therefore repay \$240.00 from his monthly compensation checks. It appears from the affidavit completed by appellant on June 6, 1996 that his monthly income was \$2,337.00 and his expenses were \$2,068.00 which would allow appellant to repay \$240.00 per month which minimizes any resulting hardship.