

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS E. FULTS and TENNESSEE VALLEY AUTHORITY,
RACCOON MOUNTAIN PUMP STORAGE, Chattanooga, TN

*Docket No. 97-2760; Submitted on the Record;
Issued November 29, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his right to compensation benefits for the periods of May 9, 1978 through March 2, 1982, April 1, 1982 through April 1, 1983 and August 5, 1983 through September 24, 1988 because he failed to disclose his earnings; (2) whether an overpayment of compensation occurred in the amount of \$152,887.41 occurred due to this forfeiture; (3) whether the Office properly found that appellant was at fault in the creation of the resulting overpayment and therefore the overpayment was not subject to waiver; and (4) whether the Office properly withheld funds from appellant's compensation payments to recover the amount of the overpayment.

This case is on appeal to the Board for the fifth time. The Office accepted appellant's claim for a back and neck strain and aggravation of degenerative disc disease. Appellant was paid compensation commencing March 6, 1975. On May 15, 1979 after appellant completed a federal rehabilitation program, the Office reduced appellant's compensation to a permanent partial disability award finding that he was able to perform the job of a television service and repairman. By letter dated August 14, 1979, the vocational rehabilitation specialist, R. Paul Spivey, informed appellant that since he had finished the rehabilitation program, he would no longer be required to fill out the "Wage Disclosure Forms (CA-1032)" and any "[w]ages received, employed or self-employed, unemployment benefits, or social security retirement" would not affect his compensation. From April 9, 1979 through September 12, 1988 and continuing, the Office sent appellant Forms CA-1032 to complete. The forms stated that "If you did not work for others but were self-employed (such as farming, operating a store, etc.) you must report as pay what it would have cost to have hired someone to do the same work." The form sent in 1979 also stated, "Do not report as pay any other income from a business which you fully or partially own, nor profits or income from investments or real estate. Do not report overtime pay."

On the April 9, 1979 Form CA-1032, appellant indicated that he worked for Gruetli T.V. and Appliance as a serviceman on televisions from April 1, 1979 to the present with an average weekly pay of \$92.80. On Form CA-1032 dated September 22, 1980 appellant indicated that he worked for Gruetli T.V. and Appliance at \$2.50 an hour, 32 hours a week, that he was self-employed and had worked there for the last two years as a television repairman. On Form CA-1032 dated March 9, 1981 appellant indicated that he was self-employed, that he worked as a television repairman and performed retail electronic sales and the hourly rate of pay was \$3.10. On Form CA-1032 dated March 1, 1982 appellant indicated that he was self-employed, worked full time as a television repairman and the rate of pay was \$3.35 an hour. On Form CA-1032 dated March 1, 1983 appellant indicated that he worked for Gruetli T.V. and Appliance and Western Auto which were under "the same business," that he repaired televisions and the rate of pay was \$3.35 an hour. On Form CA-1032 dated October 10, 1984 appellant indicated that he was self-employed as a Radio Shack dealer performing electronic repair from August 1, 1983 through June 30, 1984 at an hourly rate of pay of \$3.25. On Forms CA-1032 dated November 18, 1985, 1986 [no month and day date], June 30, 1987 and September 12, 1988 appellant indicated that he was not self-employed or employed in any capacity.

Appellant's income tax returns show that, in 1981, he had an adjusted gross income of \$26,347.00 and a business income (*i.e.*, net profit) of \$13,109.00 in 1982, an adjusted gross income of \$32,774.00, gross receipts of \$586,955.00 and a business income of \$18,515.00 in 1983, an adjusted gross income of \$16,655.00, gross receipts of \$586,955.00 and business income of \$2,330.00 and in 1984, an adjusted gross income of \$49,209.00, gross receipts or sales of \$322,504.00 and a business loss of \$4,105.00.

On May 3, 1990 the Office made a preliminary determination that appellant forfeited the disability compensation paid him from May 8, 1978 to November 5, 1984 and from July 5, 1986 to September 24, 1988 in the amount of \$131,710.51 because he failed to report and understated his earnings from May 8, 1978 to November 5, 1984 and from July 5, 1986 to September 24, 1988. The Office noted that on Forms CA-1032 dated May 9, 1979 and October 9, 1980 and on April 9, 1981, March 2, 1982 and April 1, 1983, appellant reported that he worked as a self-employed television serviceman with either a weekly pay rate from \$80.00 to \$92.00 but from November 5, 1984 through July 31, 1989 he reported no earnings. The Office found that an investigation by the Inspector General of the employing establishment documented that from 1979 to 1984 appellant owned and operated a septic tank cleaning service, that appellant earned \$21,000.00 in 1986 and 1987 working as an electrician for different companies and that he worked in a retail store (Radio Shack/Western Auto) from 1982 to 1984 with his gross income "never less than \$38,281.00."

On September 3, 1991 the Office made another preliminary determination that an overpayment in the amount of \$131,710.51 occurred because appellant failed to report earnings for the period May 8, 1978 to November 5, 1984 and July 5, 1986 through September 24, 1988 and that appellant was at fault in the matter of the overpayment in that he failed to report his actual earnings when requested and therefore knowingly failed to report his earnings.

Appellant requested a hearing before an Office hearing representative which was held on September 24, 1991. At the hearing, appellant's attorney stated that, in accordance with the

instructions on the Forms CA-1032, appellant thought he had to report only the hourly rate of pay it would cost him to hire someone else to do his job and he did not report all of his earnings on Forms CA-1032 because he relied on the August 14, 1979 letter from Mr. Spivey which stated that since appellant had finished the rehabilitation program, he would no longer be required to complete Forms CA-1032 and any wages received from employment or self-employment would not affect his compensation. Appellant's attorney stated that from 1978 to 1984 appellant reported his earnings on Forms CA-1032 as instructed. He stated that the Western Auto Store or Gruetli T.V. and Repairs was one business which went under different names at different times and the Office knew of appellant's activity with this business. Appellant's attorney stated that appellant did not report his earnings in 1986 and 1987 in reliance on Mr. Spivey's August 14, 1979 letter and he did not work in 1988.

At the hearing, appellant denied understating or omitting any part of his earnings on Forms CA-1032 and stated that he relied on Mr. Spivey's August 14, 1979 letter that he was not required to complete Forms CA-1032 and followed the instructions on the forms that he only had to report his hourly pay for self-employment at the rate it would cost him to hire someone else to do his job. Appellant testified that when he completed the apprenticeship, he opened up a Radio Shack and television repair store and the Office was aware of these actions. He testified that his wife was his partner in the business. Appellant also testified that Gruetli, Tennessee is the poorest county in the state and he would have had to pay someone minimum wage to do the work he did. Appellant testified that he and his brother owned a septic tank pumping service and earnings from that work were reported for the television repair shop. Appellant denied doing any work for the septic tank business. He testified that in 1984 his business for Radio Shack and television repair ended because the store was destroyed in a fire.

Appellant testified that another reason he did not report his earnings in 1986 was in order to evade his wife who was harassing him as result of their divorce proceedings. He testified that he worked for five electric companies and earned approximately \$17,000.00 in 1986 and 1987. Appellant testified that he was the "layout" man and performed wiring in stores and restaurants. Additionally, appellant described his monthly income and expenses. His brother, Jerry B. Fults, testified at the hearing, stating that he was an accountant and described the septic tank business and stated that he, not appellant, did the work in the business.

By letter dated October 22, 1991, appellant, through his attorney, submitted a financial statement, signed by appellant on October 13, 1991, listing appellant's income and expenses and supporting the figures with receipts and checks.

By letter dated October 25, 1991, the employing establishment reported the results of an investigation it conducted as to the nature of appellant's employment during the relevant time period. The employing establishment stated that appellant knowingly failed to report fully his self employment as manager of a Radio Shack and Western Auto business from 1979 through 1984, his self-employment in operating a septic tank cleaning business in the late 1970s and early 1980s and his work as an electrician in 1986 and 1987. The employing establishment stated that appellant was employed as the manager of a very successful business which included the sale of appliances, electronic equipment, groceries, gas and automobile tires as well as television repair. Further, the employing establishment stated the Grundy County clerk records

showed that appellant's business had gross receipts of over \$1.5 million from April 1, 1979 to March 31, 1984 and his income tax returns from 1982 through 1984 showed that his business had a total gross income of \$136,000.

The employing establishment stated that its investigation showed that appellant performed work for the septic cleaning service including cleaning septic tanks, using a sledge hammer to break the concrete septic tank covers and digging up field lines. The employing establishment also stated that contrary to appellant's testimony at the hearing, appellant was more than a layout man while working as an electrician as he performed many other duties such as running conduit, pulling wire, hanging light fixtures, and installing fixtures. According to the employing establishment's investigation, appellant earned \$21,443.26 in 1986 and 1987. The employing establishment made numerous other assertions about appellant's employment which it supported by documents and memoranda of interviews with appellant's family members and coworkers.

By decision dated February 7, 1992, the Office hearing representative affirmed the Office's September 3, 1991 preliminary determination. The Office hearing representative found that appellant forfeited his compensation in the amount of \$131,710.51 for the periods May 8, 1978 to November 5, 1984 and from July 5, 1986 to September 24, 1988 by failing to report or underreporting his earnings during those time periods, that appellant was at fault in the creation of the overpayment and recovery of the overpayment could not be waived. She reiterated the factual findings regarding appellant's employment and earnings which were made in the May 3, 1990 preliminary determination. The Office hearing representative considered appellant's attorney's and appellant's hearing testimony that appellant either did not report his full income or any income on the Forms CA-1032 in reliance on Mr. Spivey's August 14, 1979 letter and in accordance with the Forms CA-1032 instructions to report the rate of pay it would cost someone else to do the job. She nonetheless concluded that appellant failed to report or underreported his earnings for the relevant time periods.

Further, the Office hearing representative considered appellant's monthly expenses and income from his testimony at the hearing and a financial statement he submitted. She found that because appellant failed to submit documentation of his expenses as in the form of canceled checks, she was unable to develop an equitable repayment plan and directed the Office to collect the overpayment in its entirety. She stated, however, that if appellant submitted the appropriate financial documentation, the Office might consider formulating a repayment schedule.

On March 23, 1992 the Office received another financial statement from appellant signed by him on March 8, 1992 listing his monthly income and expenses supported by copies of canceled checks and receipts.

On April 29, 1992 appellant filed an appeal to the Board. On July 6, 1992 the Director of the Office filed a motion, requesting that the Office hearing representative's February 7, 1992 decision be set aside and the case remanded for further development. The Director noted that the Office hearing representative "set out in detail" appellant's numerous arguments as to why his compensation should not be forfeited for the time periods in questions and then without making any findings of fact or stating reasons pursuant to 20 C.F.R. § 10.130, found that appellant forfeited his compensation. The Director stated that the case should be remanded for the Office

to issue “an appropriate merit” decision that addressed the factual and legal arguments raised by appellant. In an August 6, 1992 reply, appellant’s attorney stated that he and appellant agreed with the Director’s motion. In an order granting remand dated August 24, 1992, the Board granted the Director’s motion, set aside the Office hearing representative’s decision dated February 7, 1992 and remanded the case to the Office for the hearing representative to issue a decision that addressed the factual and legal arguments raised by appellant and contained sufficient findings of fact and a statement of reasons to explain the Office hearing representative’s determination.¹

By decision dated February 11, 1993, the same Office hearing representative affirmed the Office’s September 3, 1991 preliminary determination. The decision is almost verbatim the same as the February 7, 1992 decision except that the hearing representative, in about four or five additional sentences, specified which Forms CA-1032 appellant either failed to report or underreported his earnings. The Office hearing representative found that on Forms CA-1032 dated from April 21, 1980 through November 15, 1984 appellant stated that he was self-employed as a television repairman and that the hourly rate of pay did not exceed \$3.35. Further, she found that on Forms CA-1032 dated from November 10, 1985 through September 5, 1987, appellant indicated that he was not self-employed and had no employment. The Office hearing representative considered that the Forms CA-1032 stated that false reporting or misrepresentation of a material fact could be grounds for suspension of compensation, or if fraudulent, could result in punishment by fine or imprisonment. She concluded that due to appellant’s underreporting or failing to report his earnings from May 8, 1978 to November 5, 1984 and from July 5, 1986 to September 24, 1988 appellant forfeited his compensation in the amount of \$131,710.51 for those time periods. She also found that appellant was at fault in the creation of the overpayment and recovery of the overpayment could not be waived.

Further, the Office hearing representative found that appellant submitted insufficient documentation as in the form of canceled checks to enable her to formulate a repayment schedule. She directed the Office to collect the overpayment in its entirety subject to appellant’s submitting the necessary documentation.

By letter dated March 2, 1993, the Office indicated that it would withhold \$980.00 every 28 days until the amount of appellant’s debt was recovered.

By letter dated March 10, 1993, which was received May 24, 1994, appellant’s brother, Mr. Fults, listed appellant’s income for his joint self-employment with his wife for the years from 1979 to 1984 which he found totaled \$11,494.00 and averaged \$1,916.00. Mr. Fults stated that he had prepared the joint tax returns for appellant for those years and he did not understand where the Office obtained the figure of \$38,281.00 as the figure representing appellant’s annual minimal income from his business or the total overpayment of \$131,710.51. Although appellant’s 1979 and 1980 tax returns are not in the record, Mr. Fults stated that the 1979 income tax return showed an annual business loss of \$6,529.00 and the 1980 tax return showed an annual business loss of \$11,818.00.

¹ Docket No. 92-1298 (issued August 24, 1992).

On May 7, 1993 appellant, through his attorney, appealed the decision to the Board. On August 12, 1993 the Director filed a motion, requesting that the February 11, 1993 decision be set aside and remanded for further development, as the Office hearing representative did not comply with the Board's instructions in its August 24, 1992 Order to make proper factual findings and state reasons pursuant to 20 C.F.R. § 10.130 for her finding that appellant forfeited his compensation for the relevant time periods. The Director noted that the Office hearing representative again failed to address appellant's arguments regarding whether he actually performed work for the septic cleaning service that was partially owned by a family member, whether he "knowingly" failed to report or understate his earnings having relied on Mr. Spivey's August 14, 1979 letter that he was no longer required to fill out Forms CA-1032, and whether he properly followed the instructions on the Forms CA-1032 that he filed from 1979 to 1984 when he listed an approximate minimum wage as the rate of pay for his self-employment. In a response dated August 24, 1993, appellant's attorney did not object to the Director's motion and stated that the Office had already begun reducing appellant's monthly compensation to collect the alleged overpayment. He requested that appellant be reimbursed for the monies withheld.

By order granting remand dated August 30, 1993, the Board granted the Director's motion, finding that the Office did not meet its burden of establishing a forfeiture of compensation or any resulting overpayment.² The Board therefore set aside the Office hearing representative's February 11, 1993 decision and remanded the case for further action consistent with the Director's motion. The Board stated that any overpayment collection activities initiated as a result of the February 11, 1993 decision involving compensation payments would be premature.

On January 21, 1994 the Office issued appellant a check in the amount of \$10,780.00 which covered the total amount of compensation that had been withheld from appellant's compensation payments from March 2, 1993 through January 8, 1994 to collect the amount of the overpayment.

By decision dated February 18, 1994, the same Office hearing representative as in the previous decisions affirmed the Office's September 3, 1991 preliminary determination. She reiterated that appellant forfeited his entitlement to compensation in the amount of \$131,710.51 for the periods from May 8, 1978 to November 5, 1984 and from July 5, 1986 to September 24, 1988, that appellant was at fault in the creation of the overpayment of \$131,710.51 and that recovery of the overpayment could not be waived. She considered appellant's arguments at the hearing that he was not required to report what he actually earned but only what it would cost him to hire someone else to do the work and that Mr. Spivey's August 14, 1979 letter indicated that he had completed the rehabilitation program and would no longer be required to complete the Forms CA-1032. She concluded that Form CA-1032 specifically stated that appellant must report all income including his part-time work and the record revealed that appellant earned substantially more than what he reported.

Further, the Office hearing representative found that appellant's assertion that he relied on Mr. Spivey's August 14, 1979 letter in not reporting all his income on subsequent Forms

² Docket No. 93-1551 (issued August 30, 1993).

CA-1032 he completed was not reasonable because appellant continued to submit Forms CA-1032 for at least 10 years after receiving Mr. Spivey's August 14, 1979 letter. The Office hearing representative reiterated that because appellant did not submit financial documentation of his monthly expenses as in the form of canceled checks, she was directing the Office to collect the overpayment in its entirety with the qualification that if appellant subsequently submitted the appropriate documentation, the Office might consider formulating a repayment schedule.

On May 24, 1994 appellant filed an appeal of the Office hearing representative's February 18, 1994 decision to the Board.

By decision dated May 27, 1994, the Office, through a senior claims examiner, reiterated that an overpayment of compensation in the amount of \$131,710.51 occurred because appellant failed to report or underreported his earnings on Forms CA-1032 for the periods from May 8, 1978 to November 5, 1984 and from July 5, 1986 through September 24, 1988. The Office stated that appellant was at fault in the creation of the overpayment because he failed to report or knowingly underreported his earnings from his employment. Further, the Office stated that the sum of \$1,000.00 would be withheld from appellant's continuing compensation effective May 29, 1994.

By order remanding case dated October 23, 1996, the Board set aside the Office's February 18, 1994 decision and remanded the case for further action because the record was incomplete.³ The Board found that the record did not contain any factual evidence prior to 1992 including the forms upon which the Office relied on in determining that appellant failed to report or underreport his earnings during the relevant time periods. The Board found that the absence of the documents from the record precluded the Board from reviewing the evidence on which the Office relied in reaching its decision that appellant had forfeited his right to compensation benefits. The Board therefore remanded the case to the Office for reconstruction and proper assemblage of the record, to be followed by an appropriate decision.

On July 29, 1997 the Office made a new preliminary determination that an overpayment of \$152,887.41 had occurred because appellant forfeited his entitlement to compensation for the periods of May 9, 1978 through March 2, 1982, April 1, 1982 through April 1, 1983 and August 5, 1983 through September 24, 1988. The Office found that appellant was at fault in the creation of the overpayment because he knowingly failed to disclose his earnings when required to do so on annual reports to the Office. The Office informed appellant that he should provide information regarding his income and expenses in order for the Office to decide how to recover the amount of the overpayment.

By letter dated December 4, 1996, the Office's Branch of Hearings and Review stated that it was addressing "the request for a hearing before an O[ffice] representative." The Branch stated that it recently received the case file from the district office and was in the process of reviewing it to determine whether the claim was in process for an oral hearing before an Office hearing representative. The letter explained the procedures in the event an oral hearing was scheduled.

³ Docket No. 94-1787 (issued October 23, 1996).

By letter dated January 29, 1997, appellant stated that he was not requesting an oral hearing but was asking for his case to be expedited.

On July 15, 1997 appellant appealed the Branch's "decision" dated December 4, 1996 and the appeal was assigned docket No. 97-2369.

By decision dated July 29, 1997, the Branch finalized the preliminary determination of an overpayment in the amount of \$152,887.41. The Branch noted that in its October 23, 1996 decision, the Board remanded the case for reconstruction, to be followed by an appropriate decision. The Branch stated that when appellant appealed the February 18, 1994 decision to the Board, one of the multiple case jackets had inadvertently been retained in the district Office. The Branch stated that with the Board's remand of the case to the district office, the case file was properly reassembled to include the documents prior to 1992 and the complete case file was returned to the Branch as directed by the Board. The Branch found that the preliminary determination dated September 3, 1991 should not have been affirmed by a hearing representative because it contained errors. He therefore set aside that preliminary determination and issued the one dated July 29, 1997.

In the July 29, 1997 decision, the Branch found that appellant failed to disclose earnings as required in affidavits provided to the Office from May 9, 1979 through September 24, 1988. The Branch found that because appellant failed to disclose earnings for the periods of May 9, 1978 through March 2, 1982, April 1, 1982 through April 1, 1983 and August 5, 1983 through September 24, 1988, his entitlement to compensation for those time periods was forfeited. The Branch stated that these periods represented an adjustment from the February 18, 1994 decision because the Office had erroneously included periods not covered by the CA-1032 forms and excluded periods which were covered by them. The Branch stated that the February 18, 1994 decision was incorporated into its decision "as far as the hearing representative's findings of [appellant's] earnings and business activities and that [he] knowingly failed to report earnings during the entire period of forfeiture."

The Branch stated that because it issued a new preliminary finding of overpayment, its offset to appellant's regular compensation would be stopped. Further, the Branch considered appellant's request that he should be repaid the money already withheld but stated that in view of the Office issuing a preliminary determination of an even larger debt than had initially been determined, it would be inappropriate to repay funds to him which had already been withheld.

On September 3, 1997 appellant appealed to the Board. The appeal was assigned docket No. 97-2760. By order dated May 25, 1999, the Board stated that it had not received the case record within the proper time period from the Director of the Office and therefore it was remanding the case to the Office for reconstruction and proper assemblage of the case record with an appropriate decision to follow.

By order dated June 23, 1999, the Board reinstated the appeal in Docket No. 97-2760 and dismissed the appeal in Docket No. 97-2369. The Board found that the May 25, 1999 order remanding the case for reconstruction and proper assemblage was inadvertently issued as the Director transmitted the case record to the Board on August 4, 1998 under Docket No. 97-2369. Therefore, the Board had received the case record prior to the issuance of the May 25, 1999

order and had it in its possession. The Board found that the May 25, 1999 order was issued in error and was void *ab initio* as it had not relinquished jurisdiction over the appeal docketed as No. 97-2760 at that time. The Board therefore reinstated appeal No. 97-2760.

Regarding the Branch's December 4, 1996 letter which was assigned Docket No. 97-2369, the Board found that the letter which was merely informational in nature, devoid of findings of fact and a statement of reasons for denying appellant's claim, and not accompanied by appeal rights, did not constitute a final Office decision from which appellant could properly file an appeal before the Board. As noted above, the date appellant appealed the Branch's December 24, 1996 "decision" was July 15, 1997. The Board found that as there was no final decision in Docket No. 97-2369 issued within one year of July 15, 1997, from which appellant could file an appeal, it had no jurisdiction over that appeal and Docket No. 97-2369 was dismissed.

In his brief to the Board appealing case No. 97-2760, appellant, through his attorney, contended that the February 18, 1994 decision of the Office hearing representative, which was the third decision by that hearing representative, again failed to comply with the instructions of the Board in its previous orders in that the February 1994 decision did not address the legal and factual issues raised by appellant. Appellant contended that the decision lacked sufficient findings of fact and a statement of reasons addressing the factual and legal arguments raised by appellant. Appellant therefore contended that due to the failure or refusal of the hearing representative to comply with the instructions of the Board, the case should be dismissed and compensation to appellant should be restored.

The Board finds that the case is not in posture for decision in part.

Section 8106(b) of the Federal Employees' Compensation Act⁴ 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; or
- (3) forfeits her 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 ... under section 8129 of this title, unless recovery is waived under that section."⁵

Appellant, however, can only be subjected to the forfeiture provision of section 8106(b) of the Act if he "knowingly" failed to report earnings from employment or self-employment. As

⁴ 5 U.S.C. § 8106(b) (1974).

⁵ *Garry Don Young*, 45 ECAB 621, 627 (1994).

forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings.⁶ Being a penalty provision, the forfeiture provided for in section 8106(b) of the Act must be narrowly construed.⁷ The term “knowingly” is not defined in the Act or its regulations. In common legal usage, “knowingly” is defined as: “with knowledge; consciously; intelligently; willfully; intentionally.”⁸

The Office has the burden of proof in establishing that appellant, either with knowledge, consciously, willfully or intentionally, failed to report employment or earnings.⁹ To meet this burden of proof, the Office is required to closely examine appellant’s activities and statements in reporting employment or earnings.¹⁰ The Office may meet this burden in several ways: by employee’s own admission to the Office that they failed to report employment or earnings which she knew she should report; by establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form CA-1032;¹¹ or by showing that, upon further inquiry by the Office as to employment activities, the employee continued to fail to fully and truthfully reveal the full the nature of the employment activities.¹²

After appellant appealed the decisions of the Office hearing representative dated February 7, 1992 and February 11, 1993 to the Board, each time the Board, by orders issued August 24, 1992 and August 30, 1993, remanded the case to the Branch for the Branch to make findings on appellant’s legal and factual arguments. Specifically, the arguments the Office hearing representative failed to address was whether appellant’s reliance on Mr. Spivey’s August 14, 1979 letter stating that he was no longer required to complete the CA-1032 forms and wages received from employment or self-employment would not affect his compensation, appellant’s interpretation of the instructions on the CA-1032 forms that he need only list the pay rate of what it would cost him to pay someone else to do his job and his assertion that he did not perform work for the septic cleaning service he shared with his brother justified his either not reporting or underreporting his income for the relevant time periods from 1979 through 1988. On remand in her third decision which was dated February 18, 1994, the only argument that the Office hearing representative addressed was whether appellant’s reliance on Mr. Spivey’s August 14, 1979 letter in not reporting his earnings for 1986 and 1987 was justified. She did not address any of appellant’s arguments or make any factual findings regarding his reason for listing the approximate minimum wage for the work he performed from 1979 through 1984.

⁶ *Barbara Hughes*, 48 ECAB _____ (Docket No. 94-2533, issued March 13, 1997); *Charles Walker*, 44 ECAB 641 (1993).

⁷ *Barbara Hughes*, *supra* note 6; *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

⁸ BLACK’S LAW DICTIONARY (5th Ed. 1979).

⁹ *Barbara Hughes*, *supra* note 6; *Barbara L. Kanter*, 46 ECAB 165, 169 (1994).

¹⁰ *Barbara Hughes*, *supra* note 6; *see Royal E. Smith*, 44 ECAB 417, 419 (1993).

¹¹ *Barbara Hughes*, *supra* note 6; *Barbara L. Kanter*, *supra* note 9 at 169-70 (1994).

¹² *Id.*

Regarding the time period from 1979 through 1984, appellant alleged that he was self-employed from 1979 through 1984, that his business which he shared with his wife consisted of television repair work and electronic services and was under the name of Gruetli T.V. and Appliance and Western Auto. He stated that he did not work for the septic cleaning service which he co-owned with his brother. According to the employing establishment's investigation, however, appellant performed work for the septic cleaning service. The evidence of record consisting of appellant's tax returns dated 1982 through 1984 and findings in the employing establishment's investigation shows a significant discrepancy between the hourly pay rate appellant listed and his gross earnings from his business. Section 20 C.F.R. § 10.130 states that the Office's decision "shall contain findings of fact and a statement of reasons." In the February 18, 1994 decision, the Office failed to make the appropriate findings of fact and provide a statement of reasons as instructed by the Board in both its orders. In its July 29, 1997 decision, the Branch made new findings regarding the amount of the overpayment but it did not make any findings regarding appellant's arguments as to why his compensation should not be forfeited. Rather, the Branch incorporated the Office hearing representative's February 18, 1994 decision into its decision. Thus, the Branch, like the Office hearing representative, failed to make appropriate legal and factual findings in its July 29, 1997 decision.

Section 20 C.F.R. § 10.130 states that the Office's decision "shall contain findings of facts and a statement of reasons." The absence of the appropriate findings of facts and statement of reasons on the relevant issues precludes the Board's review of the Branch's decision.¹³ In the instant case, the Branch's failure to address appellant's factual and legal arguments for the time period from 1979 to 1984 precludes the Board's review of the decision. The case must therefore be remanded for the Branch to issue a *de novo* decision containing findings of fact and a statement of reasons as to why appellant's compensation is forfeited for the time period from 1979 to 1984 in the context of appellant's legal and factual arguments.

Regarding appellant's employment status in 1986 and 1987, the Office hearing representative found in her February 18, 1994 decision that appellant worked for five different electric companies in 1986 and 1987 and earned \$21,000.00 during that time period. On his Forms CA-1032 dated November 18, 1985, 1986, June 30, 1987 and September 12, 1988 (which encompass the 15 months prior to the date of the form), appellant indicated he did not work at all. The Office hearing representative found that appellant's reliance on Mr. Spivey's August 14, 1979 letter was not reasonable because the fact that appellant completed Forms CA-1032 from 1979 through 1988 would reflect his awareness that he needed to complete the forms to obtain benefits. This finding is correct. Further, appellant's assertion at the hearing that on the December 12, 1986 Form CA-1032 he did not indicate that he was working for five electric companies and report his earnings from them in order to evade his wife is not a valid reason for not reporting his employment and earnings in 1986 and 1987. The Branch's finding therefore that appellant forfeited his compensation in 1986 and 1987 because he knowingly failed to report his earnings from his employment with the five electric companies will be affirmed.

¹³ See *Beverly Dukes*, 46 ECAB 1014, 1017 (1995); *James B. Bowers*, 44 ECAB 121, 123 (1992).

The Board finds that the Office properly determined that appellant was at fault in the creation of the overpayment of compensation for the years 1986 and 1987 and that, therefore, the overpayment for that time period was not subject to waiver.

Section 8129(b) of the Act¹⁴ 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.¹⁵ Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.¹⁶

The implementing regulation¹⁷ 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.

The Office correctly determined that appellant was at fault in the creation of the overpayment for the years 1986 and 1987, as he failed to furnish information which he knew or should have known to be material. In the Forms CA-1032 appellant indicated that he did not have any income even though he worked for five electric companies during that time period and earned more than \$21,000.00. As stated above, his reason for not reporting the income, that Mr. Spivey's August 14, 1979 letter stated he was not required to complete CA-1032s and income from employment or self-employment would not affect his compensation is not valid given appellant subsequently completed Form CA-1032s for at least 10 years after receiving the letter.

On remand if the Branch determines that an overpayment occurred during the relevant time period from 1979 through 1985, the Branch must make more factual findings on the amount of the overpayment. In the decisions dated February 7, 1992, February 11, 1993 and February 18, 1994, the Branch found that the amount of the overpayment was \$131,710.51. Appellant agreed at the hearing that the amount of compensation he had received from May 8, 1978 to November 5, 1984 and from July 5, 1986 to September 24, 1988 was \$131,710.51. In the July 29, 1997 decision, the Branch found that the amount of the overpayment was \$152,887.41, stating that in the February 18, 1994 decision, the Office erroneously included periods not covered by the CA-1032 forms and excluded periods which were covered by them.

The Branch indicates on a disability benefit payment worksheet and a handwritten sheet how it calculated the figure of \$152,997.41. The handwritten worksheet refers to a computer

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ *Nina D. Newborn*, 47 ECAB 132, 1399 (1995); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹⁶ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹⁷ 20 C.F.R. § 10.320(b).

printout “295” from the Employees Standard Administration for the time periods from April 1, 1982 through April 1, 1983 and from August 5, 1983 through September 24, 1988. The computer printout 295, however, is dated from January 28, 1982 through November 19, 1988 and therefore does not document the Office’s calculation of the overpayment preceding 1982. Further, it is not clear why the Branch’s determination that the overpayment of \$131,710.51 was erroneous and the overpayment of \$152,997.41 is correct and why it was appropriate to include 1985 in the period of the overpayment. On remand the Branch should make factual findings on the difference in the amount of the overpayment, provide reasons as to why it found the actual amount of the overpayment as \$152,997.41 and cite to documentation in the record which supports that finding. On remand the Office should also determine the amount of the overpayment in 1986 and 1987.

If on remand the Branch determines that an overpayment has been made from 1978 through 1985 and appellant is at fault in the creation of the overpayment, the Branch must address the factors in section 10.321(a) to determine the amount of monthly payments to recover the overpayment appellant is required to make.

Section 10.321(a) of the regulations relating to recovery of overpayment states:

“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 the future 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.”¹⁸

In the present case, appellant twice submitted documentation in the form of canceled checks and receipts on October 22, 1991 and March 23, 1992 of his monthly expenses. It is unclear why in her decisions dated February 7, 1992 and February 11, 1993, the Office hearing representative stated that appellant did not submit the appropriate documentation as in the form of canceled checks. Since the Branch incorporated the Office’s February 11, 1993 decision into its decision, the Branch also erred in failing to consider the relevant evidence in the record, *i.e.*, the receipts and canceled checks, and make the appropriate determination of the amount of the recovery pursuant to section 10.321(a). On remand the Branch must make the necessary findings in this regard for the relevant time periods, if appropriate.

The decision of the Office dated July 29, 1997 is affirmed in part, vacated in part and remanded for further action consistent with this opinion.

Dated, Washington, D.C.
November 29, 1999

¹⁸ 20 C.F.R. § 10.321(a); see *Kattie L. Summers*, 48 ECAB _____ (Docket No. 93-2381, issued July 21, 1995).

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member