

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RUSSELL L. SMOCK and DEPARTMENT OF THE ARMY,  
U.S. MILITARY ACADEMY, West Point, NY

*Docket No. 98-1852; Submitted on the Record;  
Issued January 28, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited compensation received for the period January 8, 1993 through April 8, 1994 in the amount of \$21,543.50 because he knowingly failed to report his earnings from private employment as required by § 8106(b) of the Federal Employees' Compensation Act;<sup>1</sup> and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment in the amount of \$21,543.50 and that, therefore, the overpayment was not subject to waiver.

On August 27, 1992 appellant, then a 33-year-old sewage disposal plant operator, claimed that he sustained a back injury on August 12, 1992 when he slipped on some stairs.<sup>2</sup> Appellant stopped work on August 21, 1992, received continuation of pay through October 5, 1992 and thereafter took sick and annual leave through November 2, 1992. On November 10, 1992 the Office accepted that appellant sustained a subluxation at L4-5 and thereafter accepted that he also sustained a herniated disc at L5-S1. Compensation for temporary total disability was paid retroactive to November 3, 1992.

By letter dated March 7, 1994, the Office advised appellant that he had been placed on the periodic roll as of March 6, 1994. The Office also advised appellant that "[T]o avoid an overpayment of compensation, notify this office immediately when you return to work."

On April 8, 1994 the Office received an undated Form CA-1032 information request form that appellant had completed and signed, covering the previous 15 months. On this form

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> Appellant had been a civilian employee of the employing establishment for about two weeks at the time of injury.

appellant indicated that he was neither employed by anyone except the employing establishment nor self-employed at any time during the period covered by the form.

On October 23, 1996 the Office received an investigative report with supporting exhibits from the Office of the Inspector General (OIG), which established that appellant had been employed from July 22 to October 8, 1993 as a waste treatment operator for Witt-Fiala-Flannery & Associates (WFF), and that he had been paid \$5,184.00 for this work.<sup>3</sup> Supporting the OIG's investigative memorandum was appellant's wife's testimony of his employment with WFF from approximately July 1993 while receiving FECA benefits, WFF employment records disclosing appellant's employment from July 22 through October 8, 1993, a W-2 and a W-4 form from WFF, a probationary period performance review of appellant's performance with WFF, WFF employment checklists, a WFF employment eligibility verification form and a WFF separation notice for appellant's "quality of work."

Following receipt of the investigative report the Office issued an October 8, 1997 letter decision in which it determined that appellant had forfeited his right to compensation during the period January 8, 1993 through April 8, 1994 because he knowingly failed to report his employment to the Office as required by section 8106(b) of the Act. On that same date the Office additionally issued a preliminary determination that appellant was at fault in the creation of the \$21,543.50 overpayment of compensation that resulted from the forfeiture.

Appellant did not respond to the Office's preliminary finding of fault within the 30-day period of time allotted.<sup>4</sup>

By decision dated March 5, 1998, the Office finalized the preliminary overpayment determination that appellant was at fault in the creation of the \$21,543.50 overpayment of compensation. The Office also directed appellant to repay the overpayment by sending it a check in the amount of \$21,543.50 as he was no longer in receipt of compensation benefits under the Act. As this recovery action was taken pursuant to the Office's authority under the Federal Claims Collection Act of 1966, 31 U.S.C. § 3701 *et seq.*, rather than under 5 U.S.C. § 8129(a), the Board lacks jurisdiction to review it on the instant appeal.<sup>5</sup>

The Board finds that the Office has met its burden of proof to establish that appellant "knowingly" failed to report earnings from employment and thus forfeited compensation in the amount of \$21,543.50.

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<sup>3</sup> The Office subsequently issued a September 10, 1996 decision terminating appellant's monetary benefits effective September 15, 1996 for refusal of suitable work. By letter postmarked October 12, 1996, appellant requested a hearing, but the Office denied his request as being untimely made. These matters are not now before the Board on this appeal.

<sup>4</sup> On November 12, 1997 the Office received an untimely reply in which appellant questioned the basis for the October 8, 1997 forfeiture decision and asked the Office to waive the overpayment. Appellant did not respond to the issue of whether he was at fault in the creation of the overpayment.

<sup>5</sup> *Marshall L. West*, 36 ECAB 490 (1985).

Section 8106(b) of the Act provides that the Office may require a partially disabled employee to report his or her earnings from employment or self-employment by affidavit or otherwise, in the manner and at such times as the Office specifies.<sup>6</sup> 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 § 8129 of this title, unless recovery is waived under that section.<sup>7</sup>

On the undated Form CA-1032, which appellant signed, that was received by the Office on April 8, 1994, appellant certified that he did not receive salary or wages or other payment from employment for the 15 months prior to the date of his signature. The record clearly establishes, however, that appellant in fact received wages from employment during the period covered by the questionnaire. An investigation by the United States Department of Labor, OIG, revealed that appellant was employed by WFF from July 22 to October 8, 1993 and that he received gross wages of \$5,184.00 for this work. Supporting the OIG's investigative memorandum was appellant's wife's testimony of his employment with WFF from approximately July 1993 while receiving FECA benefits, WFF employment records disclosing appellant's employment from July 22 through October 8, 1993, a W-2 and a W-4 form from WFF, a probationary period performance review of appellant's performance with WFF, WFF employment checklists, a WFF employment eligibility verification form and a WFF separation notice for appellant's "quality of work." Appellant did not deny that he had been employed by WFF and received wages during the period identified, but simply questioned the basis for the forfeiture decision. There is no medical evidence in the record to suggest that appellant was mentally incapacitated at the time he signed the forms or that he was otherwise incompetent to handle his affairs. The Board, therefore, finds, on the basis of the factual evidence developed in this case, that appellant knowingly failed to report his earnings for the period January 8, 1993 to April 8, 1994 in violation of 5 U.S.C. § 8106(b) and that appellant thereby forfeited the total amount of compensation he received for that period.<sup>8</sup>

The Board also finds that the Office properly found that appellant was with fault in the creation of an overpayment in the amount of \$21,543.50 and that, therefore, the overpayment was not subject to waiver.

Section 8129 of the Act 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 would be

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<sup>6</sup> 5 U.S.C. § 8106(b).

<sup>7</sup> *Id.*

<sup>8</sup> *See, e.g., Charles A. Griffin, 22 ECAB 94 (1970)* (if a claimant had any earnings from employment or self-employment during the period covered by the report, he would not be entitled to compensation for any portion of the period covered by the report).

against equity and good conscience.”<sup>9</sup> Thus, an overpayment cannot be waived by the Office unless appellant was without fault.<sup>10</sup>

Section 10.320 of the implementing federal regulations provides the following:

“In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition. An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact, which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which, the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only accepted a payment which, the individual knew or should have been expected to know was incorrect.”<sup>11</sup>

In its preliminary decision dated October 8, 1997, the Office found that appellant was with fault in the matter of the overpayment because he was aware, or should have been aware, when he signed the Form CA-1032 questionnaire received by the Office on April 8, 1994, that he was to report any earnings. By decision dated March 5, 1998, the Office found that appellant was with fault in the matter of the overpayment because the forfeiture and resulting overpayment were a direct consequence of appellant’s failure to report his employment with WFF on the April 8, 1994 affidavit.

The factual evidence in this case, establishes that appellant was employed during part of the 15-month period covered by the Form CA-1032 he signed on April 8, 1994 and that he earned wages that he should have reported on this form. Appellant knew or should have known that this information was material because he had been so advised by the Office letter dated March 7, 1994 placing him on the periodic roll and because the questionnaire itself clearly stated that the information provided therein would be used to determine his qualification for continued benefits or to determine whether an adjustment in benefits would be warranted and it warned appellant that a false answer to any question could be grounds for suspension of compensation benefits. Appellant thus failed to furnish information that he knew or should have known was material and for this reason he is with fault in the matter of the overpayment, recovery of which is not subject to waiver.<sup>12</sup>

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<sup>9</sup> 5 U.S.C. § 8129.

<sup>10</sup> See, e.g., *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

<sup>11</sup> 20 C.F.R. § 10.320.

<sup>12</sup> See above 20 C.F.R. § 10.320 subsections (1) and (3).

The decisions of the Office of Workers' Compensation Programs dated March 5, 1998 and October 8, 1997 are hereby affirmed.

Dated, Washington, D.C.  
January 28, 2000

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member