

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORENZO P. GARCIA and U.S. POSTAL SERVICE,
POST OFFICE, Albuquerque, NM

*Docket No. 99-1665; Submitted on the Record;
Issued May 21, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective June 13, 1997, pursuant to section 8148(a) of the Federal Employees' Compensation Act.

On September 8, 1992 appellant, then a 39-year-old distribution clerk, filed a claim for aggravation of his preexisting left knee condition.¹ The employing establishment indicated that appellant's pay stopped on March 23, 1991.² The Office accepted appellant's claim for employment-related permanent aggravation of his preexisting left knee condition and paid temporary total disability compensation retroactive to March 23, 1991.

In a July 17, 1996 letter, the Office requested appellant to complete a CA-1032 form, which included questions on whether he had any employment or earnings within the prior 15 months. In an August 2, 1996 response, appellant indicated that he had no employment or self-employment during the period covered by the form and had not done any volunteer work for which any form of monetary or in kind compensation was received. In letters dated September 18, October 22 and November 22, 1996, the Office again requested that appellant complete a CA-1032 form. In an October 22, 1996 letter, the Office informed appellant that it had suspended his compensation for his failure to respond to the September 18, 1996 letter. Appellant, in a November 24, 1996 response to the November 22, 1996 letter, reported that he was earning \$6.50 an hour as the head cook and kitchen manager of a restaurant which he began on November 1, 1996.

¹ Appellant had initially injured his left knee in 1972 while serving in the army. He subsequently underwent numerous operations, including two total knee replacement operations, the second of which was performed on June 3, 1993.

² Appellant stated that the employing establishment informed him on March 23, 1991 that it had no part-time work available within his capacity. The employing establishment subsequently terminated his employment effective April 27, 1992.

In a December 19, 1996 letter, an Assistant United States Attorney served the Office with a subpoena for records pertaining to appellant, who was being investigated for a suspected felony.

In a March 10, 1997 letter, the Office informed appellant that it would begin payment of compensation for a loss of wage-earning capacity, based on the actual earnings from his position as a kitchen manager.

In an April 23, 1997 letter, the Office again asked appellant to complete a CA-1032 form. In a June 5, 1997 response, appellant indicated that he had worked as line cook at a truck stop from March to June 1996, earning \$1,396.00 for the three-month period. He reported that he had been self-employed as a cook since November 1, 1996, first at the Extra Point Lounge and, as of May 1, 1997, at the Culture Club. He also reported that he had helped his sister with a chili stand from August 1 to October 15, 1996 while he was allowed to stay at a motor home near the chili stand.

In a December 17, 1997 letter, a postal inspector informed the Office that appellant had been investigated for fraud. He stated that, from June to October 1996, postal inspectors conducted video surveillance of appellant while he operated a chili stand in Denver, Colorado. Appellant was observed setting up the stand, unloading trucks, roasting green chilies, waiting on customers, receiving payment and depositing money in the bank. The postal inspector indicated that on May 13, 1997 appellant appeared in court and was charged with workers' compensation fraud, a felony.³ He reported that appellant pled guilty to the offense on June 13, 1997.

Subsequently, the Office received a copy of May 13, 1997 criminal information, in which appellant was charged with a felony for falsely stating on the November 24, 1996 CA-1032 form that he had not worked or been involved in a business enterprise in the prior 15 months. The Office also received a plea agreement signed by appellant on June 3, 1997 in which he agreed to plead guilty to the felony charge, admitting that he had operated a chili stand from June 14 to mid-October 1996 and that he had worked part time for Watkin Co., Inc. from November 1995 to June 1996.

The plea was entered in court on June 13, 1997. Sentencing was set for September 12, 1997. The sentencing proceeding, however, was postponed several times due to appellant's medical condition, which included an infection of his leg and preparations for surgery for an amputation of his leg.

In a January 12, 1998 decision, the Office terminated appellant's compensation effective June 13, 1997 on the grounds that he had pled guilty to knowingly and willfully making a false statement in connection with the receipt of compensation. The Office found that appellant was not entitled to receive further benefits under the Act.

In a February 10, 1998 letter, appellant's attorney requested a hearing, which was held on July 23, 1998. Appellant's attorney argued that section 8148 of the Act⁴ required that a claimant

³ 18 U.S.C. § 1920.

⁴ 5 U.S.C. § 8148.

be convicted before compensation could be terminated. He stated that, although appellant had entered a guilty plea, he had not been sentenced. The attorney concluded, therefore, that as appellant's guilty plea had not been accepted and appellant had not been sentenced he had not been convicted as required by section 8148. The attorney argued that the Office did not have a proper statutory basis for terminating appellant's compensation.

In a February 10, 1999 decision, the Office hearing representative noted that, under the implementing procedures, the date of termination in fraud cases would be effective either as of the date of conviction or the date the claimant made a guilty plea in open court. She rejected the contention of appellant's attorney that the date of termination should be the date of sentencing and she, therefore, affirmed the Office's January 12, 1998 decision.

The Board finds that the Office improperly terminated appellant's compensation effective June 13, 1997.

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

Section 10.17 of the implementing regulations states:

"When a beneficiary either pleads guilty to or is found guilty on either Federal or State criminal charges of defrauding the Federal Government in connection with a claim for benefits, the beneficiary's entitlement to any further compensation benefits will terminate effective the date either the guilty plea is accepted or a verdict of guilty is returned after trial, for any injury occurring on or before the date of such guilty plea or verdict. Termination of entitlement under this section is not affected by any subsequent change in or recurrence of the beneficiary's medical condition."⁵

Section 8148 provides for termination of compensation upon conviction under section 1920. The implementing regulations provide that the termination shall be effective as of the date of a guilty verdict or date a guilty plea is entered. In either situation, the issue of guilt in the violation of section 1920 is established. No compensation, therefore, will be paid under section 8148 once it has been established that a claimant is guilty of defrauding the federal government by submitting a false or fraudulent statement in an effort to obtain compensation to which he or she is not entitled.

⁵ 20 C.F.R. § 10.17.

Appellant's attorney contended that the actual conviction had not occurred in this case because the acceptance of the plea had not taken place. The record shows that acceptance of appellant's guilty plea and his sentencing were indefinitely postponed due to his health. Under the regulations, appellant's compensation cannot be terminated until such time as the guilty plea is accepted. Therefore, the Office improperly terminated appellant's compensation effective June 13, 1997 because, while a guilty plea was made, it was not "accepted" at the time as required by section 10.17 of the regulations. In this penalty provision, the Office may not narrow the requirements through its procedure manual. The record does not contain any subsequent evidence of whether or when appellant's guilty plea was accepted. The Board must adhere to the clearly stated directive of the regulation that a termination of compensation under section 8148(a) becomes effective only when a claimant is found guilty by a jury verdict or has a guilty plea accepted.

The decision of the Office of Workers' Compensation Programs, dated February 10, 1999, is hereby affirmed.

Dated, Washington, DC
May 21, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member