U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOBBY HUGHLEY and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 00-17; Oral Argument Held February 6, 2001;
Issued September 10, 2001

Appearances: *Bobby Hughley, pro se*; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 22, 1999; (2) whether the Office properly found that appellant forfeited his right to compensation for the period July 23, 1994 to March 12, 1997 for knowingly failing to report earnings; (3) whether appellant was with fault in the matter of an overpayment of compensation in the amount of $68,354.76; and (4) whether the Office, by its June 9, 1999 decision, properly refused to reopen appellant's case for further merit review.

On May 30, 1979 appellant, then a 23-year-old motor vehicle operator, filed a claim for an injury to his neck sustained on May 30, 1979 in a motor vehicle accident. He returned to work on November 12, 1979, but thereafter sustained several recurrences of disability and last worked at the employing establishment on August 17, 1984. The Office paid compensation for disability for these absences from work, with the exception of March 17 to April 14, 1981, a period during which appellant was found to have refused suitable work.

By decision dated March 26, 1990, the Office reduced appellant's compensation based on his capacity to earn wages in the position of social service case aide. By letter dated December 10, 1990, appellant requested reconsideration and the Office, by decision dated May 14, 1991, found that the additional evidence was not sufficient to warrant modification of its prior decision.

Appellant appealed to the Board, and the Director of the Office filed a motion to remand, on the grounds that appellant did not receive a required prereduction notice prior to the Office's March 26, 1990 decision. The Director stated that the Office, on remand, would reinstate appellant's compensation retroactive to April 8, 1990, and, after such further development as it deemed necessary, would issue a *de novo* decision on appellant's loss of wage-earning capacity. By order dated August 28, 1992, the Board granted the Director's motion to remand; the Board

set aside the Office's May 14, 1991 decision and remanded the case "to the Office for further development in conformance with the Director's motion to be followed by a *de novo* decision."[1]

By letter dated September 3, 1992, the Office notified appellant that he was entitled to a resumption of his compensation benefits. The Office requested that appellant complete and return its Form CA-8, and report all employment from the date on which compensation was terminated to the present. Appellant submitted an Office Form CA-8 dated September 21, 1992, on which he reported that he was self-employed in the vegetable and produce business, with no profit, during the period claimed. By letter dated December 20, 1993, the Office advised appellant that he was required to report earnings from any remunerative employment and that, if he omitted or understated his earnings, compensation would be declared forfeited for the period involved. The Office stated that it sent appellant a Form CA-1032 on January 1, 1993, that no reply had been received, that his benefits had been suspended as of December 12, 1993 and that his benefits would be restored retroactively when he completed and returned the Form CA-1032.

The case record contains a Form CA-1032 signed by appellant and dated October 19, 1993, which an Office memorandum indicated appellant brought into its contact area on October 19, 1993.[2] On this form appellant answered "yes" to the question whether he was self-employed during the 15 months covered by the form; he listed his dates of self-employment as "November 15, 1991, May 15 and December 30, 1992, described the work performed as long distance hauling, reported actual earnings of $18,199.00 and stated that name of the firm or business was "G[eorgi]a Pride Meat and Veg[etable]."

In a letter to the Office dated June 12, 1995, the employing establishment stated that appellant "has been gainfully self-employed since 1986, doing long distance hauling and still receiving full compensation benefits every 28 days."

By letter dated October 4, 1995, the Office advised appellant that it did not have a fully completed Form CA-1032 since October 19, 1993. The Office requested that appellant complete and return this form to the Office within 30 days. Appellant submitted an Office Form CA-1032 dated October 23, 1995, on which he answered "no" to the question whether he was self-employed or involved in any business enterprise in the past 15 months. Appellant answered "yes" to the form's question whether he was unemployed for all periods during the past 15 months.

By letter dated December 24, 1996, the Office requested that appellant submit a Form CA-1032 within the next 15 days. Appellant submitted a Form CA-1032 dated January 6, 1996, but received by the Office on January 9, 1997. On this form, he answered "no" to the question whether he was self-employed or involved in any business enterprise in the past 15 months. Appellant answered "yes" to the form's question whether he was unemployed for all periods during the past 15 months.

[1] Docket No. 92-54.

[2] This memorandum also indicates that appellant visited the Office on October 18, 1993 with a question on how to complete the Form CA-1032, and that he mentioned self-employment earnings.

By letter dated February 21, 1997, the Office noted that appellant's Form CA-1032 due in January 1997 was signed with a date of January 6, 1996. The Office stated, "While we assume you intended to indicate 1997, our records must reflect an accurate history." The Office requested that appellant return another Form CA-1032. Appellant submitted a Form CA-1032 dated March 12, 1997, on which he answered "no" to the question whether he was self-employed or involved in any business enterprise in the past 15 months. He answered "yes" to the form's question whether he was unemployed for all periods during the past 15 months.

On October 17, 1997 a criminal complaint was filed against appellant, charging him with violation of 18 U.S.C. § 1920.[3] A jury trial began on March 17, 1999, and on March 22, 1999 appellant was found guilty of violating this section.

In a letter dated March 29, 1999, a postal inspector stated:

> "During the period of August 1995 through December 1997, an investigation of [appellant] has shown him to be involved in the transportation of produce from Macon, Georgia to New Haven, Connecticut. In 1995 [appellant] purchased a 1988 Mack truck, and attached to it, a 24 f[ee]t refrigerated van body. [Appellant] would personally drive his truck down south to Georgia and purchase the produce.
>
> "[Appellant] began selling the produce in New Haven, Connecticut, under the business name of Georgia Pride Meats and Vegetables. The investigation later revealed that, since 1994, [appellant] had been issued vending permits, department of health licenses and a Connecticut sales tax ID number."

By decision dated March 30, 1999, the Office found that, under 5 U.S.C. § 8148, appellant was not entitled to receive compensation under the Federal Employees' Compensation Act after March 22, 1999, on which date the Office terminated his compensation. By decision dated April 2, 1999, the Office found that appellant had forfeited his entitlement to compensation for the period July 23, 1994 to March 12, 1997 for failure to report self-employment on Forms CA-1032 dated October 23, 1995, January 6, 1996 and March 12, 1997.

On April 2, 1999 the Office issued a preliminary determination that appellant had received an overpayment of compensation in the amount of $68,354.76 that arose from his forfeiture of compensation from July 23, 1994 to March 12, 1997 ($67,895.33) and from the Office's payment of compensation from March 22, 1999, when his entitlement ended, through March 27, 1999 ($459.43). The Office preliminarily found that appellant was at fault in the matter of these overpayments for the reasons that appellant knowingly omitted earnings from

[3] This section, titled "False statement or fraud to obtain federal employee's compensation," provides: "Whoever knowingly and willfully falsifies, conceals, or covers up a material fact or makes a false, fictitious, or fraudulent statement or representation or makes or uses a false statement or report knowing the same to contain any false, fictitious, or fraudulent statement or entry in connection with the application for or receipt of compensation or other benefit or payment under Subchapter I or II of Chapter 81 of Title 5, shall be guilty of perjury and on conviction thereof shall be punished by a fine under this title, or by imprisonment for not more than 5 years or both; but if the amount of the benefits falsely obtained does not exceed $1,000.00, such person shall be punished by a fine under this title or by imprisonment for not more than 1 year, or both."

self-employment and that he received compensation after his conviction for fraud. Appellant requested a decision based on the written evidence. By final decision dated May 27, 1999, the Office found that appellant was at fault in the matter of the overpayment of compensation in the amount of $68,354.76.

By letter dated May 24, 1999, appellant requested reconsideration, contending that his errors on the Forms CA-1032 in question were due to dyslexia, that he relied on the Office's competency to advise him of errors on these forms, that he had no intent to defraud and that he would not have been in a position to be charged if appropriate procedures had been followed by the Office. Appellant submitted a copy of portions of the transcript of his March 1999 trial containing testimony of the Office claims examiner and the postal inspector involved in his case. Appellant submitted a September 1, 1988 report from Dr. Chang S. Suh stating that he suffered from a learning deficit and an October 28, 1989 psychological evaluation indicating appellant had high school reading skills.

By decision dated June 9, 1999, the Office found that the additional evidence was immaterial and not sufficient to warrant review of its prior decision.

The Board finds that the Office properly terminated appellant's compensation effective March 22, 1999.

Section 8148(a) of the Federal Employees' Compensation Act[4] 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 receipt of any benefit under this subchapter or subchapter III of this chapter, shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under this subchapter or subchapter III of this chapter 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."

To terminate an employee's compensation under section 8148(a) of the Act, the evidence must establish that the individual was convicted and that the conviction is related to the claim for, or receipt of, benefits. The termination is effective on the date of the verdict or on the date the guilty plea is accepted by the court. Because of the criminal basis for the termination, no pretermination notice is required before a final decision is issued.[5]

In this case, the record establishes that a jury found appellant guilty on March 22, 1999 of committing fraud in connection with his claim for benefits under the Act in violation of 18 U.S.C. § 1920. Therefore, by specific terms of the statute, appellant forfeited his entitlement to all compensation benefits arising from his employment injuries effective the date of his conviction. Congress has enacted this provision as an absolute forfeiture of compensation,

[4] 5 U.S.C. § 8148(a).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12 (March 1997).

without any provision for any waiver of the effects of this section of the Act.[6] The Office, therefore, properly terminated appellant's compensation effective March 22, 1999 pursuant to section 8148(a).

The Board finds that the Office properly found that appellant forfeited his right to compensation for the period July 23, 1994 to March 12, 1997 for knowingly failing to report earnings.

Section 8106(b) of the Act[7] provides 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 --
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> > "(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 section 8129 of this title, unless recovery is waived under that section."

On Office Forms CA-1032 he completed and signed on October 23, 1995, January 6, 1997,[8] and March 12, 1997 indicated that he was not self-employed or involved in any business enterprise, and was unemployed for all periods during the past 15 months. These forms clearly advised appellant what must be reported with regard to self-employment: "**ANY work or ownership interest in any business enterprise,** even if the business lost money or if profits or income were reinvested or paid to others. If you performed any duties in any business enterprise for which you were not paid, you must show as rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties you did, even if your work was for yourself or a family member or relative." (Emphasis in the originals.)

Appellant's conviction of a violation of 18 U.S.C. § 1920 was for making a false or fraudulent statement in order to obtain workers' compensation under the Act. This is persuasive evidence that appellant knowingly omitted his earnings for the periods covered by the Forms CA-1032 he submitted to the Office covering the period July 23, 1994 to March 12, 1997. A postal inspector's March 29, 1999 letter reflects that an investigation showed that appellant was involved with the transportation of produce from Georgia to Connecticut from August 1995

[6] *Jorge E. Sotomayor*, 52 ECAB ___ (Docket No. 99-452, issued October 6, 2000).

[7] 5 U.S.C. § 8106(b).

[8] Appellant dated this form January 6, 1996, but it is clear he signed this on January 6, 1997, as it was received by the Office on January 9, 1997 in response to a December 24, 1996 Office letter and it was accompanied by another Office form dated January 6, 1997 received by the Office on January 9, 1997.

through December 1997. Other than on his Forms CA-1032, appellant has not denied that he was self-employed from July 1994 to March 1997.

The Board has found unavailing an argument that a claimant had no earnings to report to the Office because expenses exceeded revenues in the business enterprise.[9] Although appellant has submitted evidence that he suffers from a learning deficit and that he underwent detoxification from alcohol in June 1996, the evidence does not establish that he was mentally incapacitated or otherwise incompetent to complete the Office's forms. Appellant completed Office Forms CA-1032 showing his earnings from self-employment both before and after the forms on which he falsely reported no self-employment.

The Board finds that appellant was with fault in the matter of an overpayment of compensation in the amount of $68,354.76.

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. The only exception to this requirement is a situation which meets the tests set forth as follows 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."[10] No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.320 of Title 20 of the Code of Federal Regulations states 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
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> "(2) Failed to furnish information which the individual knew or should have known to be material; or
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> "(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[11]

A conviction under 18 U.S.C. § 1920, under the terms of that section, can be obtained only if the defendant "knowingly and willfully" falsifies or conceals a material fact or makes a false or fraudulent statement in order to obtain workers' compensation under the Act. Appellant's conviction under this section and his false statements on his Forms CA-1032, show

[9] *Armando Barbosa*, 36 ECAB 474 (1985); *David Martin*, 35 ECAB 1144 (1984).

[10] 5 U.S.C. § 8129.

[11] 20 C.F.R. § 10.320(b).

that he made an incorrect statement as to a material fact and that he failed to furnish information he knew was material. This establishes he was with fault with regard to the portion of the overpayment resulting from his forfeiture of compensation from July 23, 1994 to March 12, 1997.

With regard to the portion of the overpayment resulting from continuing payment of compensation after appellant's conviction under 18 U.S.C. § 1920, the Office apparently applied the third standard in determining that appellant was at fault in creating the overpayment. Appellant knew or should have known that he was not entitled to receive compensation after he was found guilty of fraud in connection with his compensation claim under 18 U.S.C. § 1920. Appellant continued to accept compensation benefits after the March 22, 1999 conviction until March 27, 1999. Therefore, appellant was at fault in creation of the resulting $459.43 overpayment such that it is not subject to waiver.

The Board finds that the Office, by its June 9, 1999 decision, properly refused to reopen appellant's case for further merit review.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> "(1) end, decrease or increase the compensation awarded; or
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> "(2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[12]

The evidence appellant submitted with his May 24, 1999 request for reconsideration, consisting of reports from psychiatrists and psychologists, was already in the case record at the time of the Office's April 2, 1999 decision. In the absence of medical evidence supporting it, appellant's legal argument that his errors on the Office's Forms CA-1032 were due to dyslexia has no reasonable color of validity and is not sufficient to require that the Office reopen the case for further review of the merits of appellant's claim.[13]

[12] *Eugene F. Butler*, 36 ECAB 393 (1984).

[13] *See Nora Favors*, 43 ECAB 403 (1992).

The decisions of the Office of Workers' Compensation Programs dated June 9, May 27, April 2 and March 30, 1999 are affirmed.

Dated, Washington, DC
September 10, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member