

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES W. BILLINGS and DEPARTMENT OF THE ARMY,  
Fort Stewart, GA

*Docket No. 02-20; Submitted on the Record;  
Issued August 19, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on the grounds that he forfeited his entitlement to compensation effective February 2, 2000 pursuant to 5 U.S.C. § 8148(a); (2) whether the Office properly found an overpayment of \$93,132.55 for the periods March 6, 1994 through June 3, 1996 and March 3, 1997 through February 1, 1999; and (3) whether the Office properly determined that appellant was at fault in creating the overpayment.

On February 29, 1980 appellant, then a 32-year-old mechanic, filed a claim for a traumatic injury occurring on that date in the performance of duty. The Office accepted appellant's claim for lumbar strain and chronic lumbosacral strain. Appellant sustained intermittent periods of total disability from February 29 to December 13, 1980. He stopped work on July 20, 1981 and did not return.

The Office required appellant to complete periodic EN-1032 form questionnaires regarding whether he had any earnings from employment or self-employment for the prior 15 months. The Office advised appellant on the EN-1032 form that he was obliged to report "immediately" any employment to the Office and that fraudulently concealing or failing to report income could subject him to criminal prosecution. In forms dated June 6, 1995, June 3, 1996, June 3, 1998 and February 1, 1999, appellant stated that he had not been employed or self-employed for the previous 15 months.

On September 20, 1999 appellant was indicted on four counts of making false statements in order to obtain workers' compensation benefits in violation of 18 U.S.C. § 1920 and five counts of mail fraud in connection with his claim for benefits under the Federal Employees' Compensation Act in violation of 18 U.S.C. § 1341.

On February 2, 2000 appellant changed his plea from not guilty to guilty on one count of making a false statement on an EN-1032 form on or about June 5, 1995 in violation of 18 U.S.C.

§ 1920. In pleading guilty, appellant admitted that he knowingly submitted a false Office form stating that he had not been employed or self-employed in order to obtain compensation benefits. Appellant further admitted that he worked as an engine mechanic for Jane's Crafts/Lawn & Garden Equipment and as a towtruck/wrecker driver for Billings Service Station with earnings from his employment and self-employment.

On April 4, 2000 a judge, with the U.S. District Court for the Southern District of Georgia, accepted appellant's guilty plea and sentenced him to four months incarceration and partial restitution of \$30,399.00.

By decision dated February 15, 2000, the Office found that appellant had forfeited his entitlement to compensation in the amount of \$93,132.55 from March 6, 1994 through June 3, 1996 and from March 3, 1997 through February 1, 1999 because he failed to report his earnings as required pursuant to 5 U.S.C. § 8106.

In another decision dated February 15, 2000, the Office terminated appellant's compensation benefits effective February 2, 2000 under 5 U.S.C. § 8148(a) on the grounds that he had committed fraud related to his receipt of compensation payments.

By letter dated February 15, 2000, the Office made a preliminary determination that an overpayment of compensation was created for the periods March 6, 1994 through June 3, 1996 and March 3, 1997 through February 1, 1999 in the amount of \$93,132.55 as appellant forfeited compensation for these periods. The Office further made a preliminary determination that appellant was at fault in the creation of the overpayment.

On March 13, 2000 appellant requested a hearing before an Office hearing representative on the issue of the overpayment.

By decision dated June 13, 2001, the hearing representative found that an overpayment in the amount of \$93,132.55 existed and that appellant was at fault in its creation. He further affirmed the Office's termination of appellant's compensation. The hearing representative, however, remanded the case for further development of the issue of repayment of the overpayment.

The Board finds that the Office properly terminated appellant's compensation benefits on the grounds that he forfeited his entitlement to compensation pursuant to 5 U.S.C. § 8148(a).

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] receipt of any benefits under [the Act], shall forfeit (as of the date of such conviction) any entitlement to any benefits 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.”<sup>1</sup>

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.<sup>2</sup> Because of the criminal basis for the termination, no pretermination notice is required before a final decision is issued.<sup>3</sup>

In this case, the record establishes that appellant pled guilty to one count of making false statements or committing fraud to obtain federal employee’s compensation 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, without any provision for any waiver of the effects of this section of the Act.

The Board finds, however, that the Office improperly set the effective date of termination as February 2, 2000. Section 8148 specifically states that the forfeiture shall be effective as of the date of the conviction. In this case, the Office used February 2, 2000, the date that appellant entered his plea of guilty, as the effective date of termination. However, the record shows that the plea was not accepted by the judge until April 4, 2000. The date of conviction is not the date appellant entered his guilty plea but the date that the plea was accepted and guilt adjudicated. The effective date of forfeiture of compensation, therefore, is April 4, 2000.

The Board further finds that appellant received an overpayment of compensation in the amount of \$93,132.55.

In order to determine whether an overpayment of compensation occurred in this case, the Board must initially determine whether appellant forfeited his right to monetary compensation from March 6, 1994 through June 3, 1996 and March 3, 1997 through February 1, 1999 pursuant to 5 U.S.C. § 8106(b).

Section 8106(b) of the Act provides that an employee who “fails to make an affidavit or report when required or 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.”<sup>4</sup>

The Board has held that it is not enough merely to establish that there were unreported earnings or employment. Appellant can be subjected to the forfeiture provision of 5 U.S.C.

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<sup>1</sup> Sections 8106 and 8129 pertain in part to the recovery by the Office of an overpayment of compensation benefits. 5 U.S.C. §§ 8106(b), 8129.

<sup>2</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(e)(1) (March 1997).

<sup>3</sup> *Id.*; Chapter 2.1400.12(f)(2).

<sup>4</sup> 5 U.S.C. § 8106(b).

§ 8106(b) only if he “knowingly” failed to report employment or earnings.<sup>5</sup> The term “knowingly” is not defined in 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.”<sup>6</sup> The Board has held that the Office can meet this burden of proof in several ways, including appellant’s own admission to the Office that he failed to report employment or earnings which he knew he should report or establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form EN-1032.<sup>7</sup>

The evidence of record establishes that appellant “knowingly” concealed his earnings from employment from the Office on EN-1032 forms covering the periods March 6, 1994 through June 3, 1996 and March 3, 1997 through February 1, 1999. The EN-1032 form required appellant to report all forms of employment, self-employment and earnings, yet he responded “no” 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. On April 4, 2000 appellant was convicted of one count of making a false statement in order to obtain federal employee’s compensation in violation of 18 U.S.C. § 1920. In entering his guilty plea, appellant admitted making false statements on an EN-1032 form on or about June 1995 and omitting his earnings from employment or self-employment in order to obtain compensation benefits. The Board finds that appellant’s guilty plea constitutes persuasive evidence that he knowingly omitted earnings for the previous 15 months or March 6, 1994 through June 6, 1995, when he completed the EN-1032 form on June 6, 1995. Furthermore, at the hearing, appellant, through his attorney, admitted that he worked driving a wrecker “off and on over the years” in return for a 50 percent commission.<sup>8</sup> He further admitted, during the course of the hearing, that he worked in a craft shop set up by himself and his wife and listed the profits and losses from the business for 1994 through 1998.<sup>9</sup>

The Board finds that appellant’s guilty plea in the U.S. District Court, against his own interest and his admission to the Office and at the hearing that he was employed during the 15-month periods covered by the EN-1032 forms signed June 6, 1995, June 3, 1996, June 3, 1998 and February 1, 1999 constitutes persuasive evidence that he knowingly omitted his earnings when he complete the affidavits.<sup>10</sup> Consequently, the provisions of section 8106(b)(2) apply to

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<sup>5</sup> See *Barbara L. Kanter*, 46 ECAB 165 (1994).

<sup>6</sup> *Charles Walker*, 44 ECAB 641 (1993).

<sup>7</sup> See *Barbara Kanter*, *supra* note 5.

<sup>8</sup> In a statement to the Office dated June 16, 1999, appellant listed dates throughout the previous two years in which he had worked driving a wrecker for half of the wrecker fee.

<sup>9</sup> The Board has found unavailing an argument that a claimant had no earnings to report to the Office because expenses exceeded revenues in the a business enterprise. *Armando Barbose*, 36 ECAB 474 (1985).

<sup>10</sup> As appellant admitted at the hearing that he knew in 1995 report earnings, he knew that he should have reported his continued earnings from 1996 through 1998.

the periods covered by the affidavits. The period of forfeiture is determined by the date appellant completed the Office form, which requires that information be provided concerning activities during the previous 15 months. If the form is improperly completed resulting in a finding of forfeiture, the Board has found that the period of forfeiture is the entire 15-month period covered by the form in question.<sup>11</sup> The Board, therefore, finds that appellant forfeited his compensation benefits during the periods March 6, 1994 through June 3, 1996 and March 3, 1997 through February 1, 1999.

The Board finds that there was an overpayment of compensation in the amount of \$93,132.55 because appellant forfeited his compensation from March 6, 1994 through June 3, 1996 and March 3, 1997 through February 1, 1999.

In this case, appellant received compensation in the amount of \$93,132.55 during the periods March 6, 1994 through June 3, 1996 and March 3, 1997 through February 1, 1999. The Board finds that, based on appellant's forfeiture of compensation for this period, he has an overpayment in the amount of \$93,132.55.

The Board further finds that appellant was not without fault in the creation of the \$93,132.55 overpayment.

Section 8129(b) of the Act<sup>12</sup> provides that “[a]djustment 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 this subchapter or would be against equity and good conscience.” Section 10.433 of the Office’s implementing regulations<sup>13</sup> provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(2) Failed to provide information which he or she knew or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

The Board finds that appellant failed to furnish information to the Office, which he knew was material, when he knowingly failed to report his earnings from employment and self-employment on the affidavits he completed June 6, 1995, June 3, 1996, June 3, 1998 and February 1, 1999. Pursuant to section 8106(b), appellant has forfeited his right to compensation

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<sup>11</sup> *William G. Norton, Jr.*, 45 ECAB 630 (1994).

<sup>12</sup> 5 U.S.C. § 8129(b).

<sup>13</sup> 20 C.F.R. § 10.433.

during those periods. As appellant is not without fault in the creation of this overpayment, no waiver of collection of the overpayment is possible under section 8129(b) of the Act.

The decision of the Office of Workers' Compensation Programs dated June 13, 2001 is affirmed as modified.

Dated, Washington, DC  
August 19, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member