

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERT A. GARCIA and DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE, TX

*Docket No. 00-2510; Submitted on the Record;
Issued December 4, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his compensation for the period December 2, 1992 through August 28, 1998; (2) whether the Office properly found an overpayment of \$80,548.81 was created; and (3) whether the Office properly found appellant to be at fault in creating the overpayment.

On April 19, 1986 appellant, then a 32-year-old laborer, sustained injuries to his stomach, shoulder and chest while lifting murals in the course of his federal employment duties. The Office accepted appellant's claim for bilateral shoulder strain, upper chest strain and ventral hernia.¹

On June 16, 1992 appellant advised the Office that his address had changed from Marion, Texas, to P.O. Box 208, Bertram, Texas 78605.

On March 2, 1994 the Office sent a Form CA-1032 to appellant, at P.O. Box 514, Marion, Texas 78124. In letters dated March 3 and March 8, 1994, the Office forwarded to appellant's attorney a copy of Office Form CA-936, requesting consent for disclosure of wage information from the Social Security Administration.

The Office CA-1032 form of March 2, 1994 was returned as "undeliverable." On November 17, 1994 the Office sent a CA-1032 form to appellant's attorney with a request for

¹ The record reflects that appellant filed a claim for a recurrence of disability on October 15, 1987, after returning to work in the private sector, which the Office accepted. On February 24, 1989 the Office determined that appellant's employment as a part-time security guard fairly and reasonably represented his wage-earning capacity. He returned to part-time work of 20 hours a week and was compensated for disability on the periodic rolls.

completion of the form and appellant's current mailing address.² No response was received from appellant's attorney.

By letter dated February 27, 1995, appellant advised that he had called the Office several times, without a response, to advise that his new address was 6736 Hickory Springs, San Antonio, Texas 78249.

On March 3, 1995 the Office sent a CA-1032 form to appellant. On April 7, 1995 he completed and signed the CA-1032 form covering the prior 15-month period (January 7, 1994 to April 7, 1995), which advised that he must report all employment from which he received wages or other income. In response to whether he had worked for any employer during the prior 15 months, appellant listed the Super 8 Motel in San Antonio, Texas, and indicated that he earned \$204.00 weekly or \$6.00 an hour as of June 22, 1994. He responded that he was not self-employed and provided a new address at 6738 Spring Manor, San Antonio, Texas 78249.

On March 12, 1996 appellant completed a CA-1032 form covering the prior 15-month period (December 12, 1994 to March 12, 1996). Appellant listed the Super 8 Motel as his employer from June 22, 1994 to June 27, 1995, earning \$204.00 a week. He responded that he was not self-employed and listed his Spring Manor address.

On May 2, 1996 the Office sent a CA-1032 form to appellant's former residence at 6736 Hickory Springs, San Antonio, Texas and, it was returned as undeliverable. On July 31, 1997 the Office sent another CA-1032 form to appellant's Hickory Springs address.³

On March 2, 1998 the Office sent a CA-1032 form to appellant at his Spring Manor address. On March 7, 1998 appellant notified the Office of a change in his address to 1727 West Avenue, E., Muleshoe, Texas 79347.

On June 11, 1998 appellant submitted page two of a signed CA-1032 form covering the prior 15-month period (March 11, 1997 to June 11 1998). He listed earnings from the Las Vegas Church of Christ in Las Vegas, New Mexico. He stated his rate of pay was \$1,800.00 with actual earnings of \$1,500.00 dollars. By letter dated August 17, 1998, the Office requested whether the earnings noted from the Las Vegas Church of Christ were annual, weekly or monthly basis. The Office also noted that appellant had not submitted the first page of the CA-1032 form.

On August 6, 1998 the Social Security Administration reported that, from January 1989 through December 1997, appellant received earnings from: San Antonio Lodging Builders, Inc., in the amount of \$5,346.50 in 1994 and \$6,258.00 in 1995; Fiesta Texas Theme Park in 1994 in the amount of \$97.46; Mann Petroleum Inc., in 1995 in the amount of \$1,816.75; Church of Christ in Muleshoe, Texas, in 1997 in the amount of \$7,499.96; and self-employment received in the amount of \$7,817.00 for 1996 and \$9,032.00 in 1997.

² The record reflects that appellant's correct address was in the file.

³ The record reflects that the Office acknowledged his new address of 6738 Spring Manor, San Antonio, Texas 78249 on August 1, 1997.

On August 28, 1998 appellant completed the first page of the CA-1032 form and noted that from March 1996 to October 1997, he worked for the Las Vegas Church of Christ at a gross salary of \$1,800.00 a month. He advised that he presently worked as a minister at the Muleshoe Church of Christ from October 1997, earning a gross salary of \$2,100.00 a month. Appellant stated that he worked about 40 to 55 hours a week; his job duties consisted of a radio program, sermon preparation, visiting the sick, performing weddings, funerals and finishing up graduate school. He indicated that a church paid \$60.00 a month, paid directly to the Gas Company, on his behalf.

By letter dated September 9, 1998, appellant stated that, from 1996 to 1997, he worked at the Las Vegas Church of Christ and made \$21,600.00 gross or approximately \$18,000.00 net. He stated that this was considered self-employment, which ended in October 1997. Appellant stated that he worked for Mann Petroleum, earning \$275.00 weekly, for about seven weeks in the fall of 1995. He worked at Fiesta Texas for about two weeks during the summer 1994 as a host and his earnings were less than \$400.00. Appellant currently worked at the Muleshoe Church of Christ since October 1997, earning \$2,500.00 a month gross or \$2,100.00 net, with travel expense assistance in the amount of \$60.00 a month.

By decision dated October 15, 1998, the Office determined that appellant's actual earnings as a minister fairly and reasonably represented his wage-earning capacity and reduced his compensation to zero.⁴

By decision dated October 15, 1998, the Office found that appellant forfeited his right to compensation for the period of December 2, 1992 to August 28, 1998, based on his failure to complete Office CA-1032 form report and for understating the amount of his earnings.

In a preliminary overpayment determination dated October 15, 1998, the Office found that an \$80,548.81 overpayment was created due to appellant's forfeiture of compensation from December 2, 1992 to August 28, 1998. The Office also made a preliminary determination that appellant was at fault in creating the overpayment.

By letters dated November 4 and November 12, 1998, appellant requested a hearing regarding the preliminary overpayment determination and forfeiture issues, which was held on August 24, 1999.

By decision dated February 1 and finalized February 9, 2000, an Office hearing representative affirmed the October 15, 1998 forfeiture decision.

The Board finds that appellant forfeited his compensation for the periods January 7, 1994 to March 12, 1996 and from March 11, 1997 to August 28, 1998 based on three CA-1032 forms he completed. The Office has not met its burden of proof to find forfeiture for the period December 2, 1992 to January 6, 1994 or from March 13, 1996 to March 10, 1997.

⁴ By letter dated August 31, 1998, the Office proposed the modification of appellant's compensation.

Section 8106(b) of the Federal Employee's Compensation Act provides in pertinent part:

“The Secretary of Labor may require a disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at 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; 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 ... under section 8129 of this title, unless recovery is waived under that section.”⁵

In order to establish that appellant should forfeit the compensation he received for the periods he completed CA-1032 forms, the evidence must establish that he knowingly omitted or understated his employment and earnings.⁶ As forfeiture is a penalty, it is not enough merely to establish that there were underreported earnings from employment. The inquiry is whether appellant knowingly omitted or understated his earnings from employment for the periods covered by the CA-1032 forms. The term knowingly is not defined within the Act or its implementing federal regulations. In common usage, the Board has adopted the definition of “knowingly” as “with knowledge; consciously; intelligently; willfully; intentionally.”⁷ The language on the Form CA-1032 is clear and unambiguous in requiring a claimant to report earnings from self-employment or a business enterprise in which he worked.

With respect to the periods January 7, 1994 to April 7, 1995; December 12, 1994 to March 12, 1996; and May 28, 1997 to August 28, 1998, appellant completed three CA-1032 forms encompassing these periods. The Board finds that these periods of forfeiture have been established under section 8106(b)(2) based on appellant's knowing omission and understatement of his earnings on the forms he completed.⁸ The forms advise that appellant must report all employment for which he received a salary, wages, income, sales, commissions, piecework or any payment of any kind, including service in the military, that he must report self-employment (such as sales, service, operating a store, or business) and report any such enterprise in which he worked.

With respect to the period January 7, 1994 to April 7, 1995, appellant signed a CA-1032 form dated April 7, 1995 indicating that he worked as a front desk clerk at the Super 8 Motel on June 22, 1994 making \$6.00 an hour and a net of \$204.00 a week. He did not indicate that he had any other employment or earnings. In response to the question regarding whether he was self-employed, appellant responded “no.” However, records from the Social Security Administration show that in addition to \$5,346.50 from San Antonio Lodging Builders, Inc. (Super 8 of San Antonio) in 1994 and \$6,258.00 in 1995, appellant earned \$97.46 from Fiesta

⁵ 5 U.S.C. § 8106(b).

⁶ *Robert R. Holmes*, 49 ECAB 161 (1997).

⁷ *Christine C. Burgess*, 43 ECAB 449 (1992).

⁸ The Board notes the overlapping nature of the periods for several of the CA-1032 forms.

Texas Theme Park in 1994. Appellant has acknowledged working at the theme park for several weeks during the summer of 1994 and earnings of approximately \$400.00.⁹ As appellant did not report the full extent of his earnings when he completed the April 7, 1995 CA-1032, the Board finds that appellant knowingly understated his earnings.¹⁰

With respect to the period from December 12, 1994 to March 12, 1996, appellant signed a CA-1032 form dated March 12, 1996 indicating that he worked as a front desk clerk at the Super 8 Motel from June 22, 1994 to June 27, 1995. Appellant stated that he had not been self-employed nor did he report any other employment or earnings. However, records from the Social Security Administration show that, in 1996, appellant had self-employment earnings of \$7,817.00 and earnings of \$1,816.75 from Mann Petroleum during 1995. In as much as appellant did not report his earnings with Mann Petroleum when completing the March 12, 1996 CA-1032, the Board finds that appellant knowingly understated his earnings.

With respect to the period March 11, 1997 to August 28, 1998, appellant submitted page two of a 1032 form on June 11, 1998 and completed page one of the form on August 28, 1998. This form showed that appellant received \$1,800.00 of gross monthly earnings from the Las Vegas, New Mexico, Church of Christ and noted that he worked for the Muleshoe Church of Christ since October 1997.¹¹ Information from the Social Security Administration shows that the Church of Christ in Muleshoe, Texas, paid appellant \$7,499.96 in 1997 and that he had self-employment earnings in 1997 of \$9,032.00. In a letter dated September 9, 1998, appellant responded that, from 1996 and 1997, he was at the Las Vegas Church of Christ and made approximately \$21,600.00 gross or \$18,000.00 net. He advised that this was considered self-employment. The Social Security Administration's records for 1997 show self-employment earnings of \$9,032.00 in 1997. Appellant also stated that he was at the Muleshoe Church of Christ since October 1997 and he was paid \$2,500.00 a month gross and approximately \$2,100.00 net. The Board finds that appellant underreported his earnings from the various churches and also failed to report his earnings in the manner and at the time specified by the Office.

The record establishes that, for the three reporting periods above, appellant either failed to fully report or underreported his earnings from employment. The CA-1032 forms explicitly advised appellant that all his earnings must be reported. Appellant's knowledge of the reporting requirement is documented by reporting some of his earnings. His signature on the CA-1032 forms certified "all the statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief." The failure to fully report and underreport

⁹ The Board notes that appellant's earnings were not so *de minimus* that they did not have to be reported to the Office as required under the Act. See *Antonio J. Giunta*, 53 ECAB ___ (Docket No. 2000-479, issued February 19, 2002); *Barbara L. Kanter*, 46 ECAB 165 (1994).

¹⁰ *Roger Seay*, 39 ECAB 441, 445 (1988)

¹¹ On page 1 of the August 28, 1998 Form EN-1032, appellant reported that from March 1996 to October 1997, he had actual earnings of \$1,500.00 a month and gross earnings of \$2,100.00 a month at the Las Vegas, New Mexico Church of Christ.

earnings is found to be a knowing omission by appellant.¹² Accordingly, he forfeited his right to compensation for these periods.

The Board further finds that appellant was at fault in the creation of an overpayment of compensation for the periods covered by the CA-1032 forms he completed.

Section 8129(b) of the Act provides:

“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.”¹³

Accordingly, no waiver of an overpayment is possible if the claimant is with fault in the creation of the overpayment of compensation. [In determining whether an individual is with fault, section 10.320(b) of the Office’s federal regulations provide in relevant part:]

In determining whether an individual is at fault, section 10.433(a) of the Code of Federal Regulations provides in relevant part:

“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 furnish 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 been expected to know was incorrect.”¹⁴

In this case, the Office applied the second standard in determining appellant was at fault in the creation of the overpayment. The evidence of record establishes that appellant failed to furnish information of the CA-1032 forms he completed which omitted or understated his earnings for the relevant periods covered by the forms. The forms instructed appellant that the information was material and should be fully reported to the Office. In failing to completely report his earnings during the periods covered by the three CA-1032 forms in question, appellant failed to furnish information he knew or should have known to be material to the Office. Therefore, he is not without fault for the overpayment resulting from this omission.

¹² *Christine C. Burgess*, 43 ECAB 449 (1992).

¹³ 5 U.S.C. § 8129(b).

¹⁴ 20 C.F.R. § 10.433(a) (1999).

The Board finds that with respect to the periods December 2, 1992 to January 6, 1994 and March 13, 1996 to March 10, 1997, the Office did not meet its burden of proof in establishing a forfeiture of compensation.

The Office based its forfeiture finding for the period December 2, 1992 to November 17, 1994 on the fact that copies of the Form CA-1032 were sent to appellant and his attorney and no reply was received. The Office found that the copies addressed to appellant's attorney were properly addressed and that notice to his representative was sufficient notice to appellant of the section 8106 reporting requirement.¹⁵ For the period of 1994, the Office noted that the Social Security Administration's records revealed earnings of \$5,346.50 for the year with San Antonio Lodging Builders. As noted above, however, the record reflects that only the November 17, 1994 1032 report form was submitted to appellant's attorney. The Office's March 3 and March 8, 1994 letters merely forwarded a CA-936 form, pertaining to the disclosure of wage information from the Social Security Administration.

Further, the Office improperly invoked the forfeiture penalty provision for appellant's failure to make an affidavit when required. The Office's federal regulations then in effect provided that the penalty for failing to respond to a request for an affidavit or report is the suspension of compensation, not forfeiture. Section 10.125 (a) stated:

“While in receipt of compensation for partial or total disability and unless found by the Office to be unnecessary or inappropriate, an employee shall periodically be required to submit an affidavit or other report of earnings from employment or self-employment on either a part-time or full-time basis. If an employee when required, fails within 30 days of the date of the request to submit such an affidavit or report, the employee's right to compensation for wage loss under section 8105 or 8106 is suspended until such time as the requested affidavit or report is received by the Office....”¹⁶

Although the claims examiner appropriately found that, under the Office's implementing federal regulations, notice to appellant's attorney of the reporting requirements under section 8106 may be imputed to appellant, the proper penalty for the failure to respond to the Office's November 17, 1994 letter was the suspension of compensation benefits.¹⁷ For this reason, the period of forfeiture of compensation in this case properly commenced as of January 17, 1994, the beginning of the 15-month period covered by the April 7, 1995 CA-1032 form. The Office improperly invoked forfeiture for the 15-month period prior to the March and November 1994

¹⁵ Section 10.144 of the Office's federal regulations then provided: “Notice to any claimant of any administrative action, determination, decision, or request to any part for the production of evidence shall be sent to the representative and the notice or request shall have the same force and effect as if it has been sent to the claimant.” 20 C.F.R. § 10.144.

¹⁶ 20 C.F.R. § 10.125(a) (1998); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(b) September (1995), which provides for the suspension of compensation under the Office's federal regulations if timely reports of earnings are not made.

¹⁷ *See Kathy J. Snyder*, Docket No. 00-0490 (issued January 24, 2002); *Virginia M. Wilkins*, Docket No. 97-221, (issued October 16, 1998).

letters to appellant's attorney. For this reason, the forfeiture declared from December 2, 1992 to January 7, 1994 will be set aside.

With respect to the period March 13, 1996 to March 10, 1997, the record establishes that a May 2, 1996 CA-1032 form was returned to the Office as undeliverable and on July 31, 1997 another CA-1032 form was sent by the Office to an incorrect address. The next Form CA-1032 completed by appellant was not until June 11, 1998. The record does not reflect that copies of these CA-1032 forms were submitted to any authorized representative. For the reasons noted above, the evidence of record does not support the Office's forfeiture finding as there is no CA-1032 form covering the period following March 12, 1996 until March 11, 1997, the period commencing 15 months prior to June 11, 1998.

Because the Office has not met its burden of proof to establish forfeiture for the periods December 2, 1992 to January 7, 1994 and from March 13, 1996 to March 10, 1997, the case is not in posture for a decision with respect to whether appellant received an overpayment of compensation and, if so, whether he is at fault in the creation of such overpayment. For this reason, the Office must recalculate the amount of the overpayment for the forfeiture periods found by the Board.

The February 1, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed, in part, reversed in part and remanded to the Office for recalculation of the amount of compensation forfeited in conformance with this decision of the Board.

Dated, Washington, DC
December 4, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member