

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN L. HOSS, JR. and DEPARTMENT OF THE ARMY,
COMMANDER, Fort Polk, LA

*Docket No. 01-404; Submitted on the Record;
Issued December 16, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective August 24, 1999 under 5 U.S.C. § 8148; (2) whether the Office properly determined that appellant forfeited his right to compensation for the periods November 1, 1993 to February 1, 1995; (3) whether appellant received an overpayment of compensation in the amount of \$42,695.93; and (4) whether appellant is at fault in the creation of the overpayment, thus precluding waiver of recovery of the overpayment.

On September 19, 1988 appellant, then a 38-year-old electrical foreman, sustained an employment-related lumbosacral sprain and herniated nucleus pulposus at L5-S1. The Office authorized several low back surgeries, which were performed between 1988 and 1990. Appellant received continuation of pay from September 22 to December 1, 1988 and compensation for total wage loss from December 2, 1988 to October 9, 1999.

Appellant completed Form EN-1032 affidavits dated February 6, 1991, January 21, 1992, February 1, 1993, January 24, 1994, February 1, 1995, January 29, 1996 and May 11, 1998. The affidavits required appellant to report earnings from employment or self-employment during the 15-month period prior to the completion and signing of each affidavit. The affidavits advised signers that false, evasive or omitted answers might subject them to forfeiture of compensation benefits, civil liability, or criminal prosecution. The last three affidavits contained the following instructions:

“Report ALL employment for which you received a salary, wages, income, sales commissions, piece work, or payment of any kind....

“Report ALL self-employment or involvement in business enterprises. These include but are not limited to: farming; sales work; operating a business, including a store or restaurant; and providing services in exchange for money, goods, or other services. The kinds of services which you must report include such activities as carpentry, mechanical work, painting, contracting, childcare,

odd jobs, etc. Report activities such as keeping books and records, or managing and/or overseeing a business of any kind, including a family business. Even if your activities were part time or intermittent, you must report them.

“Report as your ‘rate of pay’ what you were paid. Include the value of such things as housing, meals, clothing and reimbursed expenses, if they were received as part of your employment.

“Report ANY work or ownership 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 of duties you did, even if your work was for yourself or a family member....”

On August 24, 1999 appellant entered a plea of guilty in open court to count 1 of a 14-count indictment. Count one of the indictment had alleged that appellant violated 18 U.S.C. § 1920 because he knowingly and willingly made false statements on a Form EN-1032 affidavit he completed on February 1, 1995. It was alleged that appellant stated on the affidavit that he was not self-employed, receiving income, or otherwise involved in any business enterprise despite the fact that he knew he performed work and received income in connection with family businesses named “B and R Custom Homes” and “B and R Electric” and was engaged in cattle ranching and commercial beef production. As a part of the plea agreement, the government agreed not to prosecute appellant on counts 2 through 14 of the indictment.¹

By decision dated November 23, 1999, the Office terminated appellant’s compensation effective August 23, 1999 under 5 U.S.C. § 8148. The Office based its termination on the fact that appellant pled guilty on August 23, 1999 to violating 18 U.S.C. § 1920 by knowingly and willfully making false statements on an affidavit he signed on February 1, 1995. The Office further determined that appellant forfeited his entitlement to compensation for the periods November 3, 1993 to February 1, 1995 and February 11, 1997 to May 11, 1998. The Office based its forfeiture decision on its determination that appellant knowingly made false statements on an affidavit signed on February 1, 1995 (covering the period November 1, 1993 to February 1, 1995) and on an affidavit signed on May 11, 1998 (covering the period February 11, 1997 to May 11, 1998). On November 23, 1999 the Office also issued a preliminary determination that appellant received a \$89,158.00 overpayment of compensation based on the compensation he received during the periods of forfeiture.² The Office made a preliminary determination that appellant was at fault in the creation of the overpayment.

By decision dated and finalized August 7, 2000, an Office hearing representative affirmed the Office’s November 23, 1999 decision, with regard to the termination of appellant’s

¹ These counts related to appellant’s wrongful receipt of workers’ compensation and to false statements he made on affidavits for various periods.

² The overpayment consisted of \$42,695.93 for the period November 1, 1993 to February 1, 1995 and \$46,462.07 for the period February 11, 1997 to May 11, 1998.

compensation effective August 23, 1999 under 5 U.S.C. § 8148. He also affirmed the Office's November 23, 1999 decision, with regard to forfeiture as modified to reflect that appellant forfeited his entitlement to compensation for the period November 3, 1993 to February 1, 1995 but did not forfeit his entitlement to compensation for the period February 11, 1997 to May 11, 1998. The Office hearing representative determined that appellant received a \$42,695.93 overpayment of compensation for the period November 3, 1993 to February 1, 1995, but did not receive an overpayment for the period February 11, 1997 to May 11, 1998. He further determined that appellant was at fault in the creation of the \$42,695.93 overpayment, thus precluding waiver of recovery of the overpayment.

The Board finds that the Office properly terminated appellant's compensation effective August 24, 1999 under 5 U.S.C. § 8148.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.³ In terminating appellant's compensation in the present case, the Office relied on 5 U.S.C. § 8148(a) which provides that a person convicted of a statute relating to fraud in the application for or receipt of benefits under the Federal Employees' Compensation Act shall forfeit future entitlement to benefits.

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 benefit under this subchapter or subchapter III of this chapter [compensation for local police officers], 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 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 [forfeiture] or 8129 [recovery of overpayments]."⁴

Section 10.17 of the Office's implementing federal regulation provides:

"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

³ *William A. Kandel*, 43 ECAB 1011, 1020 (1992).

⁴ 5 U.S.C. § 8148(a). Public Law No. 103-333, which amended the Act by adding 5 U.S.C. § 8148, was enacted on September 30, 1994. Subsection (b) of 5 U.S.C. § 8148, not relevant in this case bars receipt of compensation by any person imprisoned for a felony conviction during the period of such imprisonment. 5 U.S.C. § 8148(b).

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

The Office's procedure manual states that in support of termination or suspension of compensation the record must contain copies of the indictment or information, the plea agreement, if any, the document containing the guilty verdict and/or the court's docket sheet. Further, this evidence must establish: (1) the individual was convicted; and (2) the conviction is related to the claim for, or receipt of, compensation benefits under the Act.⁶ The termination is effective on the date of the verdict or on the date the guilty plea is accepted and guilt adjudicated.⁷ Because of the criminal basis for the termination, no pretermination notice is required before a final decision is issued.⁸

On August 24, 1999 appellant entered a plea of guilty to violating 18 U.S.C. § 1920 when he knowingly and willfully made false, fictitious and fraudulent statements on an affidavit he signed on February 1, 1995 regarding his employment, self-employment and income during the period November 1, 1993 to February 1, 1995. Under section 8148(a) of the Act, a claimant who is convicted of fraud in obtaining compensation benefits under 18 U.S.C. § 1920 will have his compensation forfeited. The claimant is thereafter permanently barred from receiving any compensation under the Act.⁹ Since appellant was convicted of an offense under section 1920, the Office properly terminated his compensation benefits effective August 24, 1999, the date the guilty plea was accepted and guilt adjudicated.¹⁰

The Board further finds that the Office properly determined that appellant forfeited his right to compensation for the period November 1, 1993 to February 1, 1995.

⁵ 20 C.F.R. § 10.17.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(d) (March 1997).

⁷ See *Paul Hanley*, 53 ECAB ___ (Docket No. 01-403, issued March 7, 2002); 20 C.F.R. § 10.17.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(f)(2) (March 1997).

⁹ Congress has enacted 5 U.S.C. § 8148(a) as an absolute forfeiture of compensation, without any provision for waiver of the effects of this section of the Act. *Michael D. Matthews*, 51 ECAB 247 (1999). This forfeiture is a permanent forfeiture which bars appellant from any further entitlement to compensation for any employment-related injuries or conditions. *Jeff M. Burns*, 51 ECAB 241 (1999).

¹⁰ The record contains the appropriate court documents specified by Office procedure. Appellant alleged that he entered a plea of guilty to count one of the indictment because he had been advised he would not have to pay a fine or restitution. He claimed that he was led to believe that the only way the Office could enforce restitution would be to garnish his compensation benefits. However, the record contains court documents and a statement from the prosecuting U.S. Attorney which explicitly show that appellant was aware the Office would impose restitution.

Section 8106(b) of the Act¹¹ 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 --

- (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.”¹²

In the present case, the record establishes that appellant omitted self-employment and earnings on a Form EN-1032 dated February 1, 1995, which covered the period November 1, 1993 to February 1, 1995. In this form, the Office notified appellant of his responsibility to complete the forms and provide relevant information concerning his employment status and earnings during the period covered by the form. By pleading guilty to violating 18 U.S.C. § 1920, appellant admitted that he omitted self-employment and earnings on the February 1, 1995 affidavit with respect to the period November 1, 1993 to February 1, 1995.¹³ Moreover, the record contains numerous documents, including various bills of sale and statements from customers and suppliers, which show that appellant engaged in self-employment and had earnings during this period. For example, the record contains numerous documents concerning the commercial purchase and sale of homes in connection with the family business “B and R Custom Homes” as well as documents concerning the commercial sale of cattle.

Appellant, however, can only be subjected to the forfeiture provision of section 8106 of the Act if he “knowingly” omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. The Office procedure manual recognizes that forfeiture is penalty¹⁴ and, as a penalty provision, it must be narrowly construed.¹⁵ The term “knowingly” is

¹¹ 5 U.S.C. § 8106(b).

¹² While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and, therefore, a statutory provision about such earnings would be meaningless. *Id.* at 260.

¹³ These earnings were related to the family businesses named “B and R Custom Homes” and “B and R Electric” and a business which involved the purchasing, raising and selling of cattle.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

¹⁵ See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

not defined within the Act or its regulations. In common usage “knowingly” is defined as: “[w]ith knowledge; consciously; intelligently; willfully [and] intentionally.”¹⁶

When appellant pled guilty to violating 18 U.S.C. § 1920, he admitted that he knowingly and willingly omitted self-employment and earnings on the February 1, 1995 affidavit with respect to the period November 1, 1993 to February 1, 1995. Moreover, the Form EN-1032 signed by appellant on February 1, 1995 used such terms as “operating a business,” “work or ownership in any business enterprise” and “managing and/or overseeing a business of any kind, including a family business” to explain the obligation for reporting all forms of employment, self-employment and earnings.¹⁷ The explicit language of the Form EN-1032 clearly advised appellant that the nature of the work in his housing and cattle businesses would require him to report such employment activities on the form. The documents contained in the case record and the activities detailed therein, such as commercial purchases and sales, show that appellant knew he had self-employment and earnings, which he was required to report on the Form EN-1032. Appellant’s signing of strongly-worded certification clause on the Form EN-1032 further shows that he was aware of materiality of his failure to report his self-employment and earnings.

Under these circumstances, the Board concludes that appellant “knowingly” omitted his earnings under section 8106(b)(2) of the Act by failing to report his self-employment activities and earnings on the Form EN-1032 covering the period November 1, 1993 to February 1, 1995.¹⁸ Accordingly, the Board finds that the Office properly determined that appellant forfeited his right to compensation for the period November 1, 1993 to February 1, 1995.

The Board further finds that appellant is not subject to forfeiture of compensation for the period February 11, 1997 and May 11, 1998. Appellant completed a Form EN-1032 on May 11, 1998 claiming that he did not have employment, self-employment or earnings for the period February 11, 1997 and May 11, 1998. The record does not contain any evidence or testimony showing that appellant had employment, self-employment or earnings for this period as defined by the language of the Form EN-1032. The record reflects that in June 1997 he sold a home and an adjacent 44-acre farm. However, the documents of record and appellant’s testimony show that the property was personal in nature and constituted a private investment rather than a business enterprise.¹⁹

The Board further finds that appellant received an overpayment of compensation in the amount of \$42,695.93.

¹⁶ BLACK’S LAW DICTIONARY (5th ed. 1979); see *Anthony A. Nobile*, 44 ECAB 268, 271-73 (1992).

¹⁷ Appellant was also advised to report his work even if he was not paid or the enterprise did not make a profit.

¹⁸ See generally *Lewis George*, 45 ECAB 144 (1993).

¹⁹ The Board has held that there is a distinction between income received from investment and earnings received by performing work. The former is not considered to be evidence of a claimant’s ability to work and earn wages but a return on investment while the latter is considered to be wages if the source of income can be established to be the product of the claimant’s work; see *Gregg B. Manston*, 45 ECAB, 344, 353 (1994).

For the reasons described above, appellant forfeited his compensation for the period November 1, 1993 to February 1, 1995. Therefore, he was not entitled to receive \$42,695.93 in compensation for the period November 1, 1993 to February 1, 1995 and he received a \$42,695.93 overpayment for this period. Appellant did not receive an overpayment for the period February 11, 1997 to May 11, 1998 as it has been determined, as explained above, that his compensation was not forfeited for this period.²⁰

The Board further finds that appellant is at fault in the creation of the overpayment, thus precluding waiver of recovery of the overpayment.

Section 8129(a) of the Act²¹ 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.²² 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 this subchapter or would be against equity and good conscience.”²³ No waiver of payment 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 10.433(a) of Title 20 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 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....”²⁴

In this case, the Office applied the first and second standards in determining that appellant was at fault in creating the overpayment.

²⁰ Appellant received \$46,462.07 in compensation for this period.

²¹ 5 U.S.C. §§ 8101-8193.

²² 5 U.S.C. § 8129(a).

²³ 5 U.S.C. § 8129(b).

²⁴ 20 C.F.R. § 10.433(a).

Section 10.433(c) of the Office's regulations provides:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”²⁵

Appellant is at fault in the creation of the overpayment because he made an incorrect statement as to a material fact, which he knew to be material and failed to provide information which he knew to be material in that he stated on the February 1, 1995 affidavit that he did not have self-employment earnings for the period November 1, 1993 to February 1, 1995 and he failed to report such activity and earnings. When appellant pled guilty to violating 18 U.S.C. § 1920, he admitted that he knowingly and willingly made false statements and omitted self-employment and earnings on the February 1, 1995 affidavit with respect to this period. Moreover, the language of the Form EN-1032 signed by appellant on February 1, 1995 and the documents contained in the case record describing his commercial activities show that he knew he had self-employment and earnings which he was required to report on the Form EN-1032.

For these reasons, appellant is at fault in the creation of the \$42,695.93 overpayment, thus precluding waiver of recovery of the overpayment.

The August 7, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 16, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

²⁵ 20 C.F.R. § 10.433(c).