U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANE A. PASTVA and U.S. POSTAL SERVICE,
POST OFFICE, Warren, OH

Docket No. 02-1141; Submitted on the Record;
Issued December 11, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant forfeited her right to compensation beginning on May 4, 2001 because she was found guilty of violating 18 U.S.C. § 1001.

On December 6, 1987 appellant, then a 25-year-old letter carrier, filed the first of several timely claims for injuries she sustained in the performance of duty.[1] Her claims were accepted for a right ankle and right knee injury occurring on December 3, 1987;[2] a right foot injury resulting from employment factors in 1992; a right knee injury on May 25, 1994,[3] and a consequential emotional condition in 1997. Appellant received appropriate compensation for wage loss and medical treatment after each respective injury.

In September 1994 appellant underwent right knee surgery and eventually was able to return to work part time with permanent activity restrictions. From September 1994 to January 1997 her work hours varied from zero to six hours per day and she received partial disability compensation benefits.[4] Appellant claimed a recurrence of total disability commencing January 13, 1997 due to her accepted right knee condition.[5] The Office accepted this recurrence and paid compensation for total wage loss. Every two weeks thereafter appellant filed a Form

[1] Appellant filed a traumatic injury claim for an injury to her right ankle dated December 6, 1987. This claim was assigned No. A9-316960. In 1992 appellant filed an occupational disease claim for injury to her right foot. This claim was assigned No. A9-363193. She thereafter filed an occupational disease claim for an emotional reaction. This claim was assigned No. A9-390515. The preceding claims were doubled into master file No. A9-390515.

[2] Coming down stairs.

[3] A sanitary dispenser fell off the wall and hit her right knee.

[4] Appellant was performing maintenance work.

[5] Appellant slipped on ice after getting out of her car.

CA-8 claim for continuing compensation on account of disability. On each form appellant indicated that she remained totally disabled and had not earned any income through salaried employment, commissions or self-employment during the prior two-week period. Each CA-8 claim was approved by the Office and compensation was paid.

In 1997 the employing establishment inspection service conducted an investigation of appellant regarding possible fraud in connection with her most recent workers' compensation claim. The investigation was initiated after receipt of information from management that appellant was conducting a business out of her home relating to the manufacture and sale of yard decorations. On February 11, 1997 a postal inspector drove by appellant's home and noticed several yard ornaments in the yard and a sign with an arrow and the words "yard decos" on a utility pole near a local intersection. As a result of these observations, a formal investigation was begun.

On May 15, 1997 an employing establishment research analyst (investigator) attempted to contact appellant at her residence and was informed by a neighbor that appellant produced yard signs, but that she was on vacation at that time. He returned on May 22, 1997 and spoke with appellant, indicating that he was interested in purchasing eight Chef Wahoo yard decorations,[6] for which appellant quoted him a price of eight dollars a piece. The investigator made a $40.00 deposit on the order, on May 30, 1997 he returned to appellant's residence and paid the balance due, received a receipt and picked up the signs. On three subsequent occasions, June 13, July 2 and 18, 1997, the investigator returned to appellant's residence with a postal inspector and purchased three garden gnomes and two additional yard ornaments for a total of $59.00. A Chief Wahoo clock was also purchased for $35.00. All of the meetings were tape recorded. At the May 30, 1997 meeting appellant provided the investigator with a photo album which she stated depicted all of the items that she makes. The photo album included more than 100 items and appellant was recorded stating that she made all of the items for the prices listed. In the front of the album appellant included a business card that stated as follows:

"All Occasion Yard Signs

411 Asbury Lane

Niles, Ohio 44446

Jane 652-3799, Lori 544-4258."

At the June 13, 1997 meeting appellant was recorded quoting the investigator a price for the garden gnomes, as well as a discounted price if he were to buy three gnomes. She gave the investigator and the inspector four business cards as well as a copy of "The Winfield Catalogue," explaining that she could make any item depicted in the catalogue. At this meeting appellant also disclosed that she had made over 3,000 Chief Wahoo yard decorations in her first year of business and many fourth of July ornaments in 1996. She stated that income earned from the signs paid for her son's tuition at a Catholic High School and helped to pay for his tuition at Marietta College. Appellant was also recorded explaining that she purposely keeps her prices

[6] Referring to the Cleveland Indians -- professional baseball team.

low in order to sell everything. She expressed interest when the investigator mentioned a friend who was interested in selling her products at a store in a mall.

When the investigator and the inspector returned to appellant's residence on July 2, 1997 to pick up a previous order, appellant was tape-recorded taking a verbal order for a Chief Wahoo clock. Once again she provided business cards and expressed her interest in the business venture involving a retail store in a mall. On July 18, 1997 appellant was recorded stating that she had been unable to complete the clock because she had been unable to obtain the clock mechanism from her supplier.

Posing as the businessman interested in buying appellant's yard decorations for a retail store, another postal inspector met appellant at her residence on August 4, 1997 and recorded their conversation. At that time, appellant told the inspector that she made various items including ceramic garden gnomes, wooden silhouettes, personalized football players, holiday decorations and deer cutouts. She indicated that she expected to make 50 large yard ornaments and 50 to 100 small yard ornaments during the next two weeks in preparation for Halloween sales. Appellant also explained that her husband and mother cut the ornaments out of wood and she paints them. She stated that she had painted up to 12 to 14 hours per day. In her estimation, appellant sold between $4,500.00 and $5,000.00 worth of yard decorations in the six-week period leading up to Halloween in 1994. She reported to the inspector that she had advertised by various means, including placing a sign on a utility pole, a flyer in the grocery store and advertisement on cable television.[7] Appellant was recorded stating that she researched the possibility of a copyright infringement regarding the Chief Wahoo ornaments and learned that there were no copyright problems. In explaining her production problems, she indicated that she recently began using presanded wood in order to cut down on production time. Finally appellant stated that she was planning to build an addition to her house in order to accommodate the woodcutting.

Based upon all of the information gathered, the postal inspectors acquired a federal search warrant for appellant's residence and on August 14, 1997 the postal inspection service executed the federal search warrant at appellant's residence. Various items were seized including multiple lists of customers and a notebook labeled "Orders and Sales," all of which listed items sold, prices paid and amounts due. At the time of the search, appellant was interviewed by an inspector and provided a signed sworn statement. She asserted that she made yard decorations as a hobby for personal use and for therapeutic purposes. Appellant maintained that her mother, who was 69 years old, did 90 percent of the work. She denied that she ran a business selling the items and emphasized that she had only cleared a nominal amount of money in order to cover materials.

The postal inspectors interviewed individuals whose names appeared in the items seized from appellant's residence. Appellant's neighbor, Lori Ewanish, acknowledged that she painted wooden yard signs with appellant and that appellant paid her in cash. At the hearing on this matter, Ms. Ewanish acknowledged that she was paid by appellant but denied that it was an

[7] The inspectors subsequently obtained a copy of the flyer as well as advertisement orders on TCI Cable for the periods of March 11 to April 11, 1996 and April 28 to May 26, 1997. They also received a copy of an advertisement placed in a car club newsletter on two occasions.

employment relationship. Also interviewed were four other individuals who were listed as customers that had purchased various items from appellant during the period of 1994 to 1996. The postal inspectors verified these purchases with invoices and cancelled checks provided by the individuals. One individual interviewed indicated that she acted as an intermediary in the sale of 20 to 25 Chief Wahoo decorations in the Fall of 1995. Two other individuals indicated that they became aware of appellant's yard decorations from an advertisement on cable television.

After concluding its investigation of appellant, the employing establishment issued an investigative memorandum dated February 20, 1998 documenting its findings. The report was received and reviewed by appellant's immediate supervisor, who issued appellant a notice of removal on March 27, 1998, effective April 30, 1998. Appellant was charged with falsifying CA-8 forms, claims for continuing compensation on account of disability. The officer in charge concurred in the supervisor's decision to terminate appellant's employment.

The employing establishment terminated appellant's employment effective April 30, 1998 for falsifying CA-8 forms when she stated that she had no income from self-employment. Appellant filed a grievance which subsequently went to an arbitration panel hearing in February 1999.

At the arbitration hearing on this matter, appellant acknowledged that she and her husband made yard decorations; she explained that she ordered patterns from a magazine, her mother and husband cut the items out of wood and she painted them. She claimed that painting had been of therapeutic value after her multiple surgeries, that she only made the items as a hobby for herself and friends and denied that she was in the business of selling yard decorations. Appellant asserted that the costs of making the decorations far exceeded any money made, noting that the pattern for the Chief Wahoo ornament alone cost $1,100.00. She testified that any excess money went to her mother for bingo or to her neighbor, Lori Ewanish, who was struggling financially. Appellant claimed that the business cards were meant as a joke by Ms. Ewanish, who used to paint decorations with her. She also denied ever paying Ms. Ewanish as an employee, but admitted that she had placed ads in the newsletter put out by her antique car club, the Allied Forces. Appellant maintained that the cable television ads were placed to promote a garage sale and did not generate much interest.

On cross examination appellant acknowledged that she had painted up to 12 hours per day, that in the last 5 years she had made approximately 1,000 yard decorations and 50 ceramic items, that she personally had painted only 300 yard decorations during that time and that many of the wooden items were burned because she did not have space to store them. She admitted that the photo album was an accurate depiction of the items that she made, that she told postal inspectors that she had been able to pay for her son's tuition with the proceeds from her business, that she was exaggerating when she told inspectors that she had filled an order for 300 Chief Wahoo ornaments and that in all she had made over 3,000 of those decorations. Appellant claimed that she had filled out the CA-8 forms honestly and to the best of her ability, that no one ever gave her specific instructions as to how to fill them out, and that no one ever told her she was filling them out incorrectly.

The arbitration panel noted that the employing establishment contended that during the period May 10 to August 15, 1997 appellant made dishonest statements on five CA-8 forms, which required an employee to report all work activities, regardless of how income was obtained, indicating that she was totally disabled and had not earned any income during the prior two-week period. Since the evidence gathered revealed that appellant continually engaged in self-employment activities, the employing establishment maintained that appellant filled out the CA-8 forms with an intent to defraud her employer; actions which warranted her discharge. The arbitration panel concluded that when all of the factors were considered together, orders were taken, sales aides were provided, deliveries were made and money was exchanged, they provided a strong indication that appellant was running a business making and selling yard decorations from her home in an attempt to make a profit for a period of several years. The panel concluded that therefore appellant's completion of the CA-8 forms was an attempt to defraud the employing establishment, such that termination for just cause was warranted.

On May 12, 1999 the arbitration panel upheld appellant's removal from the employing establishment.

A grand jury then issued an indictment charging appellant with 12 counts of violating 18 U.S.C. § 1341 and 18 U.S.C. § 1920 when she mailed multiple CA-8 forms claiming compensation for wage loss and did not report that she had received income from work activities. The grand jury also charged appellant in Count 13 of violating 18 U.S.C. § 1001 when, on or about August 14, 1997 she "did knowingly and willfully make a false, fraudulent and fictitious material statement and representation; that is, defendant stated that she never ran any advertising, other than one magazine advertisement, in order to sell yard signs and ornaments and craft products, when, in fact, as she well knew she had paid for advertising and ran such advertising on cable television."

Following a trial, a United States District Court found appellant not guilty in connection with Count 1 through 8 (mail fraud – 18 U.S.C. § 1341) and Count 9 through 12 (falsifying and concealing information -- 18 U.S.C. § 1920), but found her guilty in connection with Count 13 (making false statements -- 18 U.S.C. § 1001).

By decision dated May 9, 2001, the Office determined that appellant was not entitled to any further compensation benefits pursuant to the provisions of section 8148 of the Federal Employees' Compensation Act. The Office terminated appellant's benefits effective May 4, 2001 and noted that the decision applied to all of appellant's claims for compensation filed prior to that date.

Appellant disagreed with the May 9, 2001 decision and requested an oral hearing before an Office hearing representative. A hearing was held on November 27, 2001 at which appellant testified. At the hearing appellant argued that the false statement she made and for which she was convicted under 18 U.S.C. § 1001 did not relate to her receipt of benefits under the Act. She noted that she was not found guilty of violating 18 U.S.C. § 1920, the specific statute relating to committing fraud in connection with any application for or receipt of compensation benefits, as described in section 8148 of the Act. Appellant claimed that she had simply forgotten about the ad she had taken out on the local cable television channel. Appellant claimed that violation of 18

U.S.C. § 1001, for which she was convicted, was a misdemeanor and not a felony, and she claimed that the local cable television ad was personal and not business advertising.

By decision dated February 26, 2002, the Office hearing representative affirmed the Office determination terminating appellant's compensation benefits effective May 4, 2001, finding that a federal district court had found her guilty of fraud involving a false statement made in connection with her receipt of the Act's benefits. The hearing representative cited to 20 C.F.R. § 10.17[8] and concluded that appellant's entitlement to benefits must be terminated effective May 4, 2001 pursuant to 5 U.S.C. § 8148.

The Board finds that the Office properly determined that appellant forfeited her right to compensation beginning May 4, 2001 because she knowingly failed to report earnings from self-employment.

Section 8106(b) of the Act[9] 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."

Title 18 section 1001(a) of the United States Code provides as follows:

> "Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative or judicial branch of the Government of the United States, knowingly and willfully: (1) falsifies, conceals or covers up by any trick, scheme or device a material fact; (2) makes any materially false, fictitious or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious

[8] 20 C.F.R § 10.17 states: "When a beneficiary either pleads guilty 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."

[9] 5 U.S.C. § 8106(b).

> or fraudulent statement or entry; shall be fined under this title or imprisoned not more than five years or both."

In this case, the employing establishment conducted an investigation concerning appellant's manufacture and sale of yard decorations and terminated her employment effective April 30, 1998 for falsifying CA-8 forms in which she had reported that she had no income from self-employment for the periods covered by the forms.

The Board notes that section 8148(a) of the Act provides that any individual convicted of a violation of 18 U.S.C. § 1920 or any other federal or state criminal statute relating to fraud in the application for or receipt of any benefit under the Act shall forfeit, as of the date of such conviction, any entitlement to any benefit the individual would otherwise be entitled to under the Act for any injury occurring on or before the date of such conviction.[10] Such forfeiture shall be in addition to any action taken under section 8106 or 8129 for recovery of an overpayment.

Office procedures provide that, before any action is taken to terminate or suspend compensation under section 8148, the file must contain a copy of the indictment or information; a copy of the plea agreement, if any; a copy of the document containing the guilty verdict; and/or a copy of the court's docket sheet.

In this case, the record is complete with such documents and demonstrates that the federal district court's finding following a trial that appellant was guilty of violating 18 U.S.C. § 1001, for making a false or fraudulent statement to postal investigators concerning whether she engaged in advertising for her yard ornaments, was a proper basis for the Office's termination of compensation benefits under section 8148 of the Act.

When postal inspectors interviewed appellant concerning her workers' compensation claim she denied advertising for purchasers for her yard decorations. She later admitted to placing the advertisement in *The Force* magazine after inspectors showed her a copy of her advertisement in the magazine. Appellant also persisted in denying all other advertising, although she had also purchased two cable television advertisements, which ran March through April 1996 and again from April through May 1997, in which she again solicited for customers for her yard decorations. The count for which the federal district court found appellant guilty was under 18 U.S.C. § 1001, which stated:

> "[Appellant] did knowingly and willfully make a false, fraudulent and fictitious material statement and representation; that is, [appellant] stated that she never ran any advertising, other than one magazine advertisement, in order to sell yard signs and ornaments and craft products, when in fact, as she well knew, she had paid for advertising and ran such advertising on cable television; [a]ll in violation of Title 18 United States Code, section 1001."

[10] 5 U.S.C. § 8148(a). *See Robert C. Gilliam*, 50 ECAB 339 (1999). Section 8148 prohibits individuals who have been convicted of fraud related to their claims from receiving further benefits paid by the Employees' Compensation Fund.

Office governing regulations prescribe in part that:

> "When a beneficiary either pleads guilty to or is found guilty of either federal or state criminal charges of defrauding the federal government in connection with a claim for benefits … [t]he 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."[11]

Pursuant to the regulations, the Office properly terminated appellant's compensation benefits effective May 4, 2001, the date on which the judge's verdict was issued.

In this case, appellant was convicted of violating 18 U.S.C. § 1001 when she stated during the investigation on August 14, 1997 that she had not done any advertising for the sale of her yard ornaments, other than the one advertisement in the magazine shown to her by the postal inspector. Based upon appellant's written statement, it is clear that she was aware that the investigation being conducted that day involved her receipt of compensation for wage loss under the Act. By making a fraudulent statement as to whether she had been advertising the yard ornaments for sale, she committed fraud in the application for or receipt of compensation benefits.

The Board therefore finds that appellant's conviction of violating 18 U.S.C. § 1001 constitutes conviction of a federal criminal statute relating to fraud in the application for or receipt of compensation benefits and that appellant shall therefore forfeit as of May 4, 2001 any entitlement to any benefit she would otherwise be entitled to under the Act for any injury occurring on or before May 4, 2001.[12]

On appeal appellant, through her representative, argues that violation of 18 U.S.C. § 1001 does not constitute a felony and that therefore the Office could not terminate appellant's benefit under section 8148 of the Act. The Board has established, however, that whether appellant's conviction is classified as a misdemeanor or a felony does not change the fact that she remains in violation of section 8148 of the Act.[13] Although Title 5 U.S.C. § 8148 is entitled "Forfeiture of benefits by convicted felons," the statutory text of section 8148(a) does not contain the word "felony" and refers instead to persons "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 the Act. (Emphasis added.)

Therefore, the Board finds that since the express language of section 8148(a) applies to persons convicted of either a felony or a misdemeanor violation of the criminal statutes referenced in that subsection, appellant's attorney's argument is without merit.

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[11] *See* 20 C.F.R. § 10.17; *see also* Federal (FECA) Procedure Manual, Part -- 2, Claims; *Disallowances*, Chapter 2.1400.12 (March 1997).

[12] Additionally, appellant made false statements on CA-8 forms dated July 3 and August 15, 1997 indicating no income or self-employment, which calls for forfeiture for the periods affected under 5 U.S.C. § 8106(b)(2).

[13] *See Iris E. Ramsey*, 43 ECAB 1075 (1992).

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 26, 2002 is hereby affirmed.

Dated, Washington, DC
December 11, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member