

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HENRY R. TARBOX and DEPARTMENT OF THE NAVY,  
NAVAL EDUCATION & TRAINING CENTER FIRE DEPARTMENT,  
Newport, RI

*Docket No. 02-1840; Submitted on the Record;  
Issued December 2, 2002*

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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 right to compensation for the period December 10, 1994 to February 3, 1998 for knowingly failing to report earnings from employment; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment in the amount of \$97,764.04, thus precluding waiver of recovery of the overpayment.

On October 25, 1994 appellant, then a 47-year-old firefighter, filed a claim for an injury to his left elbow sustained in the performance of duty. The Office accepted his claim for contusion of the left elbow, severe strep A infection, and skin graft with resulting depression of skin. He received compensation from December 10, 1994 to June 1998, when he elected to receive benefits from the Office of Personnel Management.

On January 31, 2000 appellant plead guilty to making false statements to the Office on December 13, 1995, January 12, 1997, January 28 and February 3, 1998. Appellant served a one-year sentence in the federal penitentiary. By decision dated August 3, 2000, the Office terminated appellant's compensation benefits based on this plea.<sup>1</sup>

By decision dated February 28, 2000, the Office found that appellant had forfeited his compensation benefits for the period December 10, 1994 to February 3, 1998 in the amount of \$97,764.04 as he failed to report earnings from employment activities during this period.

The Office issued a preliminary determination on February 28, 2000 that an overpayment of compensation in the amount of \$97,764.04 had occurred as appellant had forfeited his

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<sup>1</sup> Section 8148(a) of the Federal Employees' Compensation Act, 5 U.S.C. § 8148(a), states: "Any individual convicted of a violation ... relating to fraud in the application for or receipt of any benefit' under the [Federal Employees' Compensation] Act shall forfeit entitlement to such benefits."

entitlement to compensation for the above-mentioned periods. The Office found that appellant had knowingly engaged in work activities with earnings that were not reported to the Office.

Appellant requested an oral hearing and by decision dated April 23, 2002, the hearing representative found that appellant was at fault in the creation of the overpayment for the periods in questions as he failed to report employment activities to the Office, and that therefore the overpayment was not subject to waiver.<sup>2</sup> The hearing representative further found that the overpayment should be repaid at the rate of \$1,500.00 per month.

The Board finds that the Office properly found that appellant forfeited his right to compensation for the period December 10, 1994 to February 3, 1998 because he knowingly failed to report earnings from employment activities during those periods.

Section 8106(b) of the Federal Employees' Compensation Act<sup>3</sup> 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.”

On Office Forms CA-1032 he completed and signed on December 13, 1995, January 12, 1997, January 28 and February 3, 1998, appellant indicated that, for all periods during the 15 months covered by each form, he was unemployed and he did not engage in employment, self-employment, volunteer work, or any business enterprise. These forms clearly advised appellant that 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 original.)

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<sup>2</sup> As appellant did not specifically request an oral hearing with respect to the Office's August 3, 2000 termination, or specifically address this issue at the oral hearing, the Office hearing representative restricted the decision to the issues of forfeiture and overpayment.

<sup>3</sup> 5 U.S.C. § 8106(b).

Appellant's conviction for violation of 18 U.S.C. § 1920 was for making false or fraudulent statements in order to obtain workers' compensation under the Federal Employees' Compensation Act. This is persuasive evidence that appellant knowingly omitted his earnings from employment activity for the periods covered by the CA-1032 forms he submitted to the Office covering the period December 10, 1994 to February 3, 1998. The evidence establishes that appellant owned and operated Excalibur Maintenance, Inc., at least by January 10, 1994, in that he had a business checking account and deposited checks from January 10, 1994 to December 29, 1997, as well as wrote checks and withdrew cash. By contractual agreement dated December 26, 1994, appellant agreed to act as president of Excalibur Maintenance, Inc. for a five-year period.

Other than on his CA-1032 forms, appellant has not denied that he owned and operated Excalibur Maintenance, Inc., but rather maintains that he was engaged in a hobby, not a business, and contends that he never made a profit from his activities. 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.<sup>4</sup> In addition, although appellant has asserted that he is heavily medicated during the winter months which accounts for his failure to properly complete the CA-1032 forms in question, he submitted no evidence to establish that he was mentally incapacitated or otherwise incompetent to complete the Office's forms.

The Board finds that appellant was with fault in the matter of the resulting overpayment of compensation. The Board further finds, however, that, while the Office found in its overpayment decisions that appellant had been overpaid \$97,764.04, the Office's overpayment calculation worksheets actually indicate that appellant was overpaid \$96,764.04.

Section 8129(a) of the Federal Employees' Compensation 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 Federal Employees' Compensation Act or would be against equity and good conscience."<sup>5</sup> 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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<sup>4</sup> *Armando Barbosa*, 36 ECAB 474 (1985); *David Martin*, 35 ECAB 1144 (1984).

<sup>5</sup> 5 U.S.C. § 8129.

(2) Failed to furnish information which the individual knew or should have known to be material; or

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”<sup>6</sup>

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 Federal Employees’ Compensation Act. Appellant’s conviction under this section and his false statements on his CA-1032 forms, show that he made incorrect statements as to material facts 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 December 10, 1994 to February 3, 1998.

With respect to recovery of an overpayment, the Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employees’ Compensation Act. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office’s recovery of an overpayment under the Debt Collection Act.<sup>7</sup>

The April 23, 2002 decision of the Office of Workers’ Compensation Programs is modified as to the amount of the overpayment and affirmed in all other respects.

Dated, Washington, DC  
December 2, 2002

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>6</sup> 20 C.F.R. § 10.320(b).

<sup>7</sup> See *Lewis George*, 45 ECAB 144, 154 (1993).