

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRADY L. FOWLER and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

*Docket No. 00-850; Submitted on the Record;
Issued January 11, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant forfeited his entitlement to compensation from February 22, 1996 to May 22, 1997 for knowingly failing to report earnings; (2) whether appellant forfeited his entitlement to compensation after January 20, 1999 due to his conviction of a violation of 18 U.S.C. § 1920; (3) whether appellant received an overpayment of compensation in the amount of \$28,179.94 and, if so, whether he was at fault in the creation of this overpayment; and (4) whether appellant abandoned his request for a hearing scheduled for November 16, 1999.

This case is on appeal before the Board for the second time. Previously, the Board found that the Office of Workers' Compensation Programs met its burden of establishing that appellant's employment-related disability ceased without residuals by April 24, 1989, but remanded the case to the Office for decisions on appellant's claims for recurrences of disability after that date.¹

On remand the Office accepted appellant's claims for recurrences of disability and resumed payment of compensation for temporary total disability. By decision dated January 3, 1997, the Office reduced appellant's compensation to that of partial disability on the basis of his capacity to earn wages as a clerk.

On May 22, 1997 appellant completed an Office Form CA-1032, on which he reported that he had not worked for any employer and was not self-employed for the past 15 months.

On January 20, 1999 in a stipulation of facts relative to sentencing, appellant pleaded guilty to a violation of 18 U.S.C. § 1920, admitting that he knowingly and willfully made material false statements on his Office Form CA-1032 he completed on May 22, 1997 in that he reported no income for the prior 15 months when he fact had been self-employed and received

¹ Docket No. 92-82 (issued December 30, 1992).

over \$4,000.00 in income during that period. In a judgment entered on April 8, 1999 appellant was fined \$1,000.00, order to make restitution of \$4,000.00 and placed on probation for three years.

By decision dated April 28, 1999 and remailed to appellant's current address on June 8, 1999, the Office terminated appellant's compensation effective January 20, 1999 on the basis that he was not entitled to receive further compensation benefits under the Federal Employees' Compensation Act because of a guilty plea to defrauding the compensation program. The Office also found that appellant forfeited his entitlement to compensation during the period from February 22, 1996 to May 22, 1997 for knowingly failing to report income during this period.

On June 8, 1999 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$28,179.94 that arose from his forfeiture of compensation from February 22, 1996 to May 22, 1997 and from his receipt of compensation after his guilty plea on January 20 until February 27, 1999. The Office found that appellant was at fault in the matter of the overpayment on the basis that the evidence demonstrated that he was aware of the reporting requirements.

Appellant requested a hearing on the issues of fault and possible waiver and a hearing was scheduled for November 16, 1999. By decision dated December 2, 1999, an Office hearing representative found that appellant had abandoned his request for a hearing for the reason that he failed to appear and did not contact the Office before or after the scheduled hearing to explain his failure to appear.

By decision dated December 2, 1999, an Office hearing representative found that appellant received an overpayment in the amount of \$28,179.94 and that appellant was at fault in creating this overpayment due to his incorrect statement about his income that he knew to be incorrect.

The Board finds that appellant forfeited his entitlement to compensation for the period February 22, 1996 to May 22, 1997 for knowingly omitting his earnings on a report covering this period.

Section 8106(b) of the Act² 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 § 8129 of this title, unless recovery is waived under that section.”

² 5 U.S.C. § 8106(b).

The record reflects that appellant entered a plea of guilty and was adjudged guilty of violating 18 U.S.C. § 1920³ with regard to the Office Form CA-1032 he completed on May 22, 1997. In the stipulation of facts which appellant signed on January 20, 1999, appellant admitted that he knowingly and willfully made material false statements on his Office Form CA-1032 he completed on May 22, 1997 in that he reported no income for the prior 15 months when he fact had been self-employed and received over \$4,000.00 in income during that period. This is persuasive evidence that appellant knowingly omitted earnings on the Office Form CA-1032,⁴ which covered the 15 months prior to May 22, 1997, the date appellant signed this form.

The Board finds that the Office properly determined that appellant forfeited compensation under section 5 U.S.C. § 8148.

Section 8148(a) of the Act 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 a receipt of any benefit under [the Act], shall forfeit (as of the date of such conviction) any entitlement to any benefit 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.”

In this case, appellant pleaded guilty to one count of filing a Form CA-1032, which contained a false statement that he had no earnings, a violation of 5 U.S.C. § 1920. Therefore, by the specific terms of the statute, appellant forfeited, as of the date of his conviction, all further compensation benefits arising from the December 8, 1996 employment injury. 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 Office, therefore, properly terminated appellant’s compensation under section 8148.

The Board finds, however, that the Office improperly set the effective date of termination as January 20, 1999. Section 8148 specifically states that the forfeiture shall be effective as of the date of the conviction. The Office’s regulation, found at 20 C.F.R. § 10.17, states that when a beneficiary under the Act pleads guilty to defrauding the government in connection with a claim for benefits, “the beneficiary’s entitlement will terminate effective the date ... the guilty plea is accepted....” In this case, the Office used January 20, 1999 as the effective date of the forfeiture. However, the record shows that, while appellant entered his plea of guilty on January 20, 1999, the plea was not accepted by the judge until April 8, 1999 and guilt was

³ 5 U.S.C. § 1920 states: “Whoever knowingly and willfully falsifies, conceals, or covers up a material fact, or makes a false, fictitious, or fraudulent statement or representation, or makes or uses a false statement or report knowing the same to contain any false, fictitious, or fraudulent statement or entry in connection with the application for or receipt of compensation or other benefit or payment under Subchapter I or III of Chapter 81 of Title 5, shall be guilty of perjury and on conviction thereof shall be punished by a fine under this title, or by imprisonment for not more than five years, or both; but if the amount of the benefits falsely obtained does not exceed \$1,000.00, such person shall be punished by a fine under this title, or by imprisonment for not more than one year, or both.”

⁴ *James D. O’Neal*, 48 ECAB 255 (1996); *Iris E. Ramsey*, 43 ECAB 1075 (1992).

adjudicated at that time. The date of the conviction is not the date appellant entered his guilty plea but the date that the plea was accepted and guilt adjudicated.⁵ The effective date of forfeiture of compensation, therefore, was April 8, 1999.

The Board finds that appellant received an overpayment in the amount of \$26,621.33 that arose from his forfeiture of compensation from February 22, 1996 to May 22, 1997.

Due to forfeiture for omitting earnings, appellant is not entitled to the compensation he received from February 22, 1996 to May 22, 1997. The amount of compensation he received during this period, \$26,621.33 constitutes an overpayment of compensation. The fact that the U.S. District Court ordered restitution in the amount of \$4,000.00 does not preclude the Office from pursuing collection of the full amount of the overpayment, as the Court's order does not state that the restitution would be in "full satisfaction" of the debt owed the United States.⁶

The Board finds that appellant was at fault in the creation of the overpayment in the amount of \$26,621.33.

Section 8129(a) of the 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 Act or would be against equity and good conscience."⁷ 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

"(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."⁸

⁵ *Michael D. Matthews*, 51 ECAB ____ (Docket No. 98-2204, issued December 23, 1999).

⁶ See *Clarence D. Ross*, 42 ECAB 556 (1991); Federal (FECA) Procedure Manual, Part 6 -- *Debt Management, Debt Liquidation*, Chapter 6.300.19 (September 1994).

⁷ 5 U.S.C. § 8129.

⁸ 20 C.F.R. § 10.320(b).

As he admitted in his plea of guilty to criminal charges, appellant made an incorrect statement as to a material fact that he knew was incorrect. He, therefore, is at fault in the creation of the overpayment of compensation arising from his knowing omission of earnings.

The Board finds that appellant did not receive an overpayment of compensation in the amount of \$1,558.61 during the period January 20 to February 27, 1999.

As found above, the Office improperly set the effective date of termination of compensation due to appellant's conviction as January 20, 1999. As compensation should not have been terminated until April 8, 1999, appellant did not receive an overpayment of compensation from January 20 to February 27, 1999, during which period he was paid \$1,558.61.

The Board finds that appellant abandoned his request for a hearing scheduled for November 16, 1999.

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

“A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant.”

* * *

“A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.”⁹

These regulations, however, were again revised as of April 1, 1999. Effective January 4, 1999, the regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.¹⁰ Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

⁹ 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

¹⁰ 20 C.F.R. § 10.622(b) (1999).

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.6.e of the procedure manual, dated January 1999, provides as follows:

“e. Abandonment of Hearing Requests.

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

“Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [District Office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

“This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend.”¹¹

In this case, the Office scheduled an oral hearing at a specific time and place on November 16, 1999. The record shows that the Office mailed appropriate notice to the claimant at his last known address. The record also demonstrates that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Thus, the record evidence meets the conditions for abandonment specified in the Office's procedure manual. Therefore, the Office properly found that appellant abandoned his request for an oral hearing.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

The December 2, 1999 decision of the Office of Workers' Compensation Programs finding that appellant abandoned his request for a hearing is affirmed. The Office's June 8, 1999 decision, is affirmed as modified change the date of termination from January 20 to April 8, 1999. The December 2, 1999 decision of the Office hearing representative is affirmed with regard to the overpayment of compensation from February 22, 1996 to May 22, 1997; including the finding of fault and reversed as to the overpayment of compensation of \$1,558.61 from January 20 to February 27, 1999.

Dated, Washington, DC
January 11, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member