

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FLOYD E. SWOAP and PEACE CORPS,
Washington, DC

*Docket No. 01-482; Submitted on the Record;
Issued January 15, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his compensation from March 3, 1997 through June 2, 1998 which resulted in an overpayment of \$21,481.82; and (2) whether appellant was at fault in the creation of the overpayment, thus precluding waiver of recovery of the overpayment.

In 1994 appellant, then a 49-year-old Peace Corps volunteer, sustained a facial laceration, soft tissue contusion of the low back and aggravation of a preexisting condition of alcohol abuse in the performance of duty.¹ By letter dated November 16, 1995, the Office advised appellant that he would receive wage-loss benefits for temporary total disability effective November 12, 1994.

In a June 2, 1998 Office Form CA-1032 requesting employment and earnings information, completed and signed by appellant on June 13, 1998, he indicated that he had not been employed or involved in any business during the previous 15 months. The form contained a warning that a false or evasive answer to any question or the omission of an answer could be grounds for the forfeiture of compensation and civil and criminal liability. Appellant was asked whether, in the 15-month period prior to June 2, 1998, he had any employment for which he received a salary or payment of any kind, the dates of the employment, a description of the employment and the rate of pay. The form advised that severe penalties might be applied for failure to report all work activities thoroughly and completely. Appellant wrote "no" in answer to the question of whether he had worked for any employer during the past 15 months and wrote "yes" in answer to the question of whether he was unemployed during that period.

¹ While serving in Mongolia in 1994, appellant increased his consumption of alcohol due to the cultural pressure to consume alcohol and this aggravated a past history of alcohol abuse. He indicated that it was customary in Mongolia to accept alcohol that was offered in social and business situations. Appellant's facial laceration was sustained on October 27, 1994 when he was assaulted in Hawaii while on medical leave and his back injury occurred July 14, 1994 while he walked to training class.

In a letter dated January 4, 2000, the Refugio Independent School District advised the Office that appellant had been employed as a full-time special education teacher from August 12, 1997 to May 30, 1998 with an annual salary of \$22,050.00.

By decision dated April 27, 2000, the Office determined that appellant had forfeited his right to compensation for March 3, 1997 through June 2, 1998 because he knowingly failed to report his earnings as a teacher during that period.

By letter dated April 27, 2000, the Office advised appellant of its preliminary finding that he had received an overpayment of \$21,481.82 because he had forfeited his right to compensation for March 3, 1997 through June 2, 1998 and that he was at fault in the creation of the overpayment because he had knowingly failed to report earnings for that period. Appellant was advised to submit evidence or argument if he disagreed with the fact or amount of the overpayment or the preliminary finding that he was at fault in the creation of the overpayment.

On June 5, 2000 the Office issued a final decision that appellant had received an overpayment of \$21,481.82 and that appellant was at fault in the creation of the overpayment because he had knowingly failed to report earnings for that period.

By letter dated August 29, 2000, appellant requested a review of the written record.

In a statement dated May 22, 2000, received by the Office subsequent to the June 5, 2000 decision, appellant stated that the Office should waive recovery of the overpayment because the physician treating him for alcohol abuse had encouraged him to retrain in another profession and, as part of his teacher training, he was required to teach for one year on a provisional contract. He stated that he did not recall completing the CA-1032 form dated June 13, 1998 in which he indicated that he had not been employed for the previous 15-month period. Appellant stated that his alcohol abuse overwhelmed his mental capacity and he suffered memory lapses and was considered mentally ill at times.

By decision dated November 6, 2000, the Office hearing representative affirmed the Office's April 27, 2000 decision on the grounds that appellant had knowingly failed to report earnings for the period March 3, 1997 through June 2, 1998.

The Board finds that the Office properly determined that appellant forfeited his right to compensation benefits for March 3, 1997 through June 2, 1998 under section 8106(b)(2) of the Federal Employees' Compensation Act.

Section 8106(b) of the Act² states 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.”

Section 8129(a) of the Act³ provides that when 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 test 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.”⁴ If an employee is not “without fault” the overpayment is not subject to waiver.⁵

In this case, on June 13, 1998 appellant submitted a completed Office Form CA-1032. The CA-1032 form submitted by appellant specifically requested information from appellant regarding any earnings from employment or self-employment and noted that a false or evasive answer could result in the forfeiture of compensation and other penalties. On the CA-1032 form appellant indicated that he had no employment or earnings during the period March 3, 1997 through June 2, 1998.

The Board finds that appellant forfeited his right to compensation benefits for March 3, 1997 through June 2, 1998 under section 8106(b)(2) because he knowingly omitted his earnings from his employment as a teacher.

² 5 U.S.C. § 8106(b).

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129(b).

⁵ See *Monroe E. Hartzog*, 40 ECAB 322, 331 (1988).

The information supplied by the Refugio Independent School District revealed that appellant was employed and earning an annual salary of \$22,050.00 during the period August 12, 1997 through May 30, 1998. The case record establishes that appellant received compensation benefits totaling \$21,481.82 for the period March 3, 1997 through June 2, 1998. Since appellant was clearly instructed on the CA-1032 form that he must report any employment or earnings during the period in question, March 3, 1997 through June 2, 1998, and he knowingly stated that he had no employment or earnings for this period, the Office properly determined that appellant had forfeited his right to compensation.⁶

The Board further finds that appellant was not without fault in the creation of the overpayment for the period March 3, 1997 through June 2, 1998 and therefore the overpayment is not subject to waiver.

As noted above, 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 but that where an employee is not “without fault,” the overpayment is not subject to waiver.

In determining whether an individual is “without fault” what constitutes “fault” must first be determined. The Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition. An individual is with fault in the creation of an overpayment if he:

- “(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 known to be incorrect.”⁷

In the present case, it is apparent that appellant is at fault in the creation of the overpayments of compensation under all three of the standards as set forth above. Appellant is at fault under the first standard because he stated that he was not employed between 1997 and 1998 when, in fact, the record establishes that he was working as a teacher. Under the second standard, appellant knowingly failed to furnish material information to the Office, that he had earnings from his teaching employment. Appellant was aware or should have been aware of the materiality of the information that he had earnings from his teaching job. He was at fault under the third standard because he accepted compensation from the Office during the time he was employed as a teacher and he thus accepted a payment which he knew or should have known was incorrect. Although appellant alleged that he had memory lapses due to his alcohol abuse and did not recall completing the Form CA-1032 for the period March 3, 1997 through June 2,

⁶ See *William E. Steadman*, 38 ECAB 688, 694 (1987).

⁷ 20 C.F.R. § 10.433(a) (1999).

1998, he provided no medical evidence in support of his assertion that he was not mentally competent when he submitted the form on June 13, 1998. The Office properly determined that appellant was not without fault in the creation of the overpayment of compensation under section 8129 and therefore the overpayment was not eligible for waiver.

The decisions of the Office of Workers' Compensation Programs dated November 6, June 5 and April 27, 2000 are affirmed.

Dated, Washington, DC
January 15, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member