

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD F. HEBERT and U.S. POSTAL SERVICE,
POST OFFICE, North Reading, MA

*Docket No. 01-1447; Submitted on the Record;
Issued July 22, 2002*

DECISION and ORDER

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

The issues are: (1) whether appellant forfeited his right to monetary compensation from August 17, 1988 through December 14, 1990, thereby creating an overpayment of compensation in the amount of \$46,946.47; and if so, (2) whether he was at fault in the creation of such an overpayment and, therefore, not subject to a waiver; (3) whether the Office of Workers' Compensation Programs properly required appellant to repay the overpayment of compensation in a lump sum of \$46,946.47.

On July 11, 1978 appellant, then a 35-year-old letter carrier, filed a claim alleging that he sustained an injury to his lower back while in the performance of his federal duties. He stopped work the same day. The Office accepted appellant's claim for low back strain, spinal fusion and post-traumatic and postoperative arachnoiditis. He received 45 days of continuing pay and compensation for total disability through December 7, 1996. Appellant has been receiving compensation for disability on the periodic rolls since December 8, 1996.¹

This case has been before the Board previously. By decision dated August 4, 1995, the Board remanded the case to the Office.² The Board found that the investigative memorandum upon which the Office based its forfeiture and overpayment decisions upon was not accompanied by copies of all the relevant evidence.³ It further found that the evidence related to appellant's criminal prosecution for "mail fraud and false statements" was insufficient to establish that appellant was engaged in employment activities during the entire period of the forfeiture.

¹ By decision dated November 25, 1996, the Office adjusted appellant's compensation benefits effective December 8, 1996 based upon a determination that the selected position of appointment clerk represented appellant's wage-earning capacity.

² Docket No. 95-1356.

³ The forfeiture and overpayment decisions were based upon the time period October 8, 1987 through December 14, 1990.

Accordingly, the Board found that the evidence did not provide adequate factual support for the Office's forfeiture and overpayment decisions and remanded for further development and the issuance of *de novo* decisions.

By decision dated January 9, 1996, the Office made a preliminary determination that appellant was at fault with regard to an overpayment which occurred during the period October 8, 1987 through December 14, 1990. The amount of the overpayment was \$63,138.87.⁴ By decision dated February 24, 1997, the Office denied appellant's request for reconsideration as it found the evidence submitted to be of an immaterial nature. By decision dated August 26, 1997, the Office again denied appellant's request for reconsideration on the basis that the evidence submitted was of a cumulative nature. By decision dated October 5, 1999, the Office finalized its determination that appellant was at fault with regard to an overpayment in the amount of \$63,138.87 which occurred during the period October 8, 1987 through December 14, 1990. The Office determined that \$220.94 would be deducted from appellant's compensation payments every 28 days effective October 10, 1999.

By decision dated April 24, 2000, the Board again remanded the case to the Office. Based upon the Director of the Office's motion to set aside the October 5, 1999 decision and remand the case for specific development, the Board directed the Office to reopen the issue of appellant's forfeiture, conduct a merit review pursuant to 5 U.S.C. § 8128(a) and attempt to secure copies of the evidence supporting the March 25, 1991 investigative memorandum and then issue a *de novo* preliminary and final overpayment decision based on any overpayment of compensation resulting from the forfeiture.

By decision dated August 15, 2000, the Office determined that appellant forfeited compensation paid from August 17, 1988 through December 14, 1990 by failing to report his employment activities pursuant to 5 U.S.C. § 8106(b). Also by decision dated August 15, 2000, the Office made a preliminary determination that an overpayment in the amount of \$46,946.47 occurred as a result of the forfeiture and that appellant was at fault in the creation of the overpayment because he knowingly failed to report employment earnings on Forms CA-1032 covering the period August 17, 1988 through December 14, 1990.

By decision dated April 16, 2001, an Office hearing representative finalized the preliminary determination of the Office dated August 15, 2000 and affirmed the forfeiture determination. The Office hearing representative found that the Forms CA-1032 completed by appellant on February 8 and November 17, 1989 and December 14, 1990 and the June 13, 1991 judgment be rendered in the U.S. District Court of Massachusetts clearly reflected and supported that appellant violated section 8106(b) of the Federal Employees' Compensation Act by knowingly failing to report earnings as required. The hearing representative found that appellant forfeited his entitlement to compensation for the 15 months prior to the February 8 and November 17, 1989 and December 14, 1990 Form CA-1032s as his pleading supported that he had earnings during the periods covered by the Form CA-1032s and, thus, had forfeited all entitlement to compensation benefits received during the period August 17, 1988 through December 14, 1990 in the amount of \$46,946.47. The hearing representative further found that

⁴ See *supra* note 1.

waiver of the overpayment was not available as appellant was at fault in the creation of the overpayment. As there was a lack of sufficient evidence to establish an accurate collection repayment plan, the Office hearing representative found that the overpayment of \$46,946.47 was due and payable in full.

The Board finds that appellant forfeited his right to monetary compensation from August 17, 1988 through December 14, 1990 which resulted in an overpayment of \$46,946.47.

To determine whether an overpayment of compensation occurred in this case, as found by the Office in its April 16, 2001 decision, the Board must review whether appellant forfeited his right to monetary compensation from August 17, 1988 through December 14, 1990 pursuant to 5 U.S.C. § 8106(b).⁵

In the present case, the Office relied on section 8106 in finding that appellant forfeited his right to compensation for the period from August 17, 1988 through December 14, 1990 on the basis that he knowingly failed to report his employment on Office CA-1032 forms dated February 8, November 17, 1989 and December 14, 1990 and on a June 13, 1991 judgment in a criminal prosecution covering the period March 21, 1989 through April 7, 1990.

The factual evidence of record reflects that appellant was requested by the Office to complete the Form CA-1032 as required under section 8106(b) of the Federal Employees' Compensation Act. Appellant completed Forms CA-1032 on February 8 and November 17, 1989 and December 14, 1990 failing to indicate work and earnings for the previous 15 months. In signing each of the forms, appellant certified that he was neither employed nor self-employed during the covered periods. All of the CA-1032 forms explicitly required appellant to report any enterprise "in which you worked and from which you received revenue."

An investigation conducted by the U.S. Department of Labor, Office of the Inspector General and the employing establishment revealed that appellant was employed at a business in Worcester known as Dick's Tackle Shop from in or about March 1989 through in or about April 1990. The investigation and supporting documents have been incorporated into the case record.

On March 15, 1991 appellant entered a guilty plea in federal court to 16 counts of mail fraud and 2 counts of making false statements in violation of 18 U.S.C. §§ 1341 and 1001. The plea agreement specified that appellant had knowingly and willfully from in or about March 1989 through in or about April 1990 had devised a scheme to obtain money by the means of false and fraudulent pretenses and representations from the Office of the United States Department of Labor, knowing that such pretenses and representations were false when made. As part of the scheme, appellant made false statements on the November 17, 1989 CA-1032 form he signed and returned to the Department of Labor certifying his continuing status as being totally disabled when he stated that he was unemployed, when in fact he was employed at a business in Worcester known as Dick's Tackle Shop. It was also part of the scheme that on or

⁵ See *Samuel J. Rosso*, 28 ECAB 43, 46 (1976).

about January 9, 1990, in an interview with a Department of Labor employee, appellant falsely stated that he was not employed and that he was unemployed.

On June 13, 1991 appellant was placed on probation for a term of twelve months, five months which was to be served under home detention with electronic surveillance, ordered to pay a special assessment of \$900.00 for violating 18 U.S.C. §§ 1341 and 1001 and ordered to pay restitution in the amount of \$1,500.00.

The Board finds that appellant forfeited his right to compensation for the periods August 17, 1988 through December 14, 1990 because he knowingly failed to report earnings from employment.

Section 8106(b) of the Federal Employees' Compensation Act⁶ 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; or

forfeits her 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 ... under section 8129 of this title, unless recovery is waived under that section.”⁷

Appellant, however, can only be subjected to the forfeiture provision of section 8106(b) of the Act if he “knowingly” failed to report earnings from employment or self-employment. As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings.⁸ Being a penalty provision, the forfeiture provided for in section 8106(b) of the Act must be narrowly construed.⁷ The term “knowingly” is not defined in the Act or its regulations. In common legal usage, “knowingly” is defined as: “with knowledge; consciously; intelligently; willfully; intentionally.”⁹

The Office has the burden of proof in establishing that appellant, either with knowledge, consciously, willfully or intentionally, failed to report employment or earnings.¹⁰ To meet this burden of proof, the Office is required to closely examine appellant’s activities and statements in

⁶ 5 U.S.C. § 8106(b).

⁷ *Garry Don Young*, 45 ECAB 621, 627 (1994).

⁸ *Barbara Hughes*, 48 ECAB 398 (1997); *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

⁹ BLACK’S LAW DICTIONARY (5th ed. 1979); see *Charles Walker*, 44 ECAB 641 (1993).

¹⁰ *Barbara Hughes*, *supra* note 8; *Barbara L. Kanter*, 46 ECAB 165, 169 (1994).

reporting employment or earnings.¹¹ The Office may meet this burden in several ways: by employee's own admission to the Office that they failed to report employment or earnings which he knew he should report; by establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form CA-1032;¹² or by showing that, upon further inquiry by the Office as to employment activities, the employee continued to fail to fully and truthfully reveal the full nature of the employment activities.¹³

The record reflects that appellant was convicted of 16 counts of mail fraud and 2 counts of making false statements in violation of 18 U.S.C. §§ 1341 and 1001 whereby he devised a scheme of making false statements regarding his compensation claim. The conviction covered the period March 21, 1989 through April 7, 1990. The Board finds that appellant's conviction constitutes persuasive evidence that appellant knowingly omitted his earnings from his work at Dick's Tackle Shop when he completed the affidavit on Forms CA-1032 dated November 17, 1989 and December 14, 1990, all of which explicitly required him to report any enterprise "in which he worked and from which he received revenue." The Board further finds that the evidence of record supports that appellant was engaged in employment activities on or about August 17, 1988, the period covered in the Form CA-1032 dated November 17, 1989. The investigative evidence of record contains a detailed listing of dates of delivery from February 25, 1988 through August 15, 1989 with appellant's signature indicating he took possession of deliverables for Dick's Tackle Shop. This detailed listing of delivering and acceptance of deliverables, as indicated by appellant's signature, is persuasive evidence that appellant was engaged in income generating activities for Dick's Tackle Shop. As the Form CA-1032's cover a period of 15 months, the February 8 and November 17, 1989 Forms CA-1032 constitutes persuasive evidence that appellant knowingly omitted his earnings from his employment at Dick's Tack Shop since August 17, 1988 as he signed for deliverables on August 16 and 31, September 27, October 6, 7 and 25, November 1 and 2 and December 19, 1988 and into the months of 1989. As appellant was repeatedly informed of his responsibility to fully report his earnings on the CA-1032 forms in question, his knowing omission of these earnings on the forms he signed is sufficient to establish that he violated section 8106(b)(2). Therefore, the Board finds that appellant forfeited his right to compensation for the periods August 17, 1988 through December 14, 1990 because he failed to report employment pursuant to section 8106(b)(2),¹⁴ resulting in an overpayment.¹⁵

The record reflects that, during the period of forfeiture from August 17, 1988 through December 14, 1990, appellant was paid compensation for wage loss in the amount of

¹¹ *Barbara Hughes*, supra note 8; see *Royal E. Smith*, 44 ECAB 417, 419 (1993).

¹² *Barbara Hughes*, supra note 8; *Barbara L. Kanter*, supra note 10 at 169-70 (1994).

¹³ *Id.*

¹⁴ See *Burnett Terry*, 46 ECAB 457 (1995) (finding that income directly traceable to the product of an employee's work is considered earnings or wages).

¹⁵ See *Iris E. Ramsey*, 43 ECAB 1075, 1091 (1992) (finding that appellant's plea of guilty to filing false documents in violation of federal law constituted persuasive evidence that she "knowingly" omitted her earnings when she completed Office affidavits, notwithstanding her attempts to explain away the plea).

\$46,946.47. The period of forfeiture is determined by the date appellant completed the CA-1032 form. Each CA-1032 form requires that information be provided concerning activities during the previous 15 months. If a CA-1032 form is improperly completed resulting in a finding of forfeiture, the Board has found that the period of forfeiture is the entire 15-month period covered by the form in question.¹⁶ The CA-1032 forms dated November 17, 1989 and December 14, 1990 cover the period August 17, 1988 through December 14, 1990. Since appellant has forfeited his right to compensation during this period, this sum constitutes an overpayment of compensation. While the U.S. District Court determined the amount of restitution to be the amount of compensation received during the periods March 21, 1989 through April 7, 1990, the Office properly determined that, pursuant to the Act, the appropriate period of forfeiture was August 17, 1988 to December 14, 1990 as evidenced by the CA-1032 forms dated November 17, 1989 and December 14, 1990.

The Board further finds that appellant was at fault in the creation of the resulting overpayment.

Section 8129 of the Act¹⁷ provides that an overpayment of compensation shall be recovered by the Office unless 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 be against equity and good conscience.¹⁸ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.¹⁹

The implementing regulation²⁰ provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (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.

In its preliminary determination dated August 15, 2000, the Office found and an Office hearing representative affirmed that appellant was at fault in the matter of the overpayment because he was repeatedly informed of the necessity and importance of reporting earnings information to the Office and he knowingly withheld this information. The record reflects no evidence of any educational, mental or emotional handicap which would have prevented appellant from comprehending the written materials, from understanding regulations, from seeking good advice, or from otherwise not complying with the clear and basic instructions provided to him regarding the conditions of his entitlement.

¹⁶ *William G. Norton, Jr.*, 45 ECAB 630 (1994).

¹⁷ 5 U.S.C. § 8129(b).

¹⁸ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹⁹ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994); see *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is with fault in helping to create the overpayment).

²⁰ 20 C.F.R. § 10.433(a).

Appellant knew or should have known that the income from and employment activities he engaged in at Dick's Tackle Shop was material information because the forms themselves clearly stated that the information provided would be used to determine whether he qualified for continued benefits or whether an adjustment in benefits would be warranted; the forms also warned appellant that a false or evasive answer to any question, or the omission of an answer, could be grounds for the suspension of benefits. Thus, appellant knowingly answered falsely when he certified that he was unemployed during the covered periods. The Office hearing representative found that appellant knowingly withheld this information and so declared in federal court by pleading guilty. The Board finds that because appellant failed to furnish information that he knew or should have known to be material pursuant to section 10.320(b)(2), he is with fault in the matter of the overpayment resulting from his forfeiture.

In summary, pursuant to section 8106(b) appellant has forfeited his right to compensation for the period August 17, 1988 through December 14, 1990 and this forfeiture has resulted in an overpayment of compensation in the amount of \$46,946.47. Accordingly, no waiver of collection of the overpayment is possible under section 8129(b) of the Act.

Lastly, the Board finds that the Office could properly pursue full collection of the overpayment amount.

The Board further notes that the Office hearing representative found that the September 11, 2000 financial disclosure form prepared by appellant was incomplete as there was no indication of appellant's spouse's income or itemization of the household heat, electricity and/or gas, telephone, water/sewer, food, house supplies, laundry and cleaning, clothing, life insurance, medical insurance, uninsured medicals, incidentals and toiletries, motor vehicle expenses, motor vehicle loan payment, child care, etc. The hearing representative further noted that the Office had sent a copy of the financial disclosure Form OWCP-20 with its preliminary determination of August 15, 2000 and the last detailed financial disclosure form completed by appellant was prepared on January 31, 1996. The Office hearing representative found that since it was impossible to establish an accurate repayment plan, the full amount of the overpayment of \$46,946.47 was due and payable.

Section 10.441(a) of Office regulations provides:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”²¹

In this case, appellant is receiving continuing compensation benefits for disability but failed to provide full disclosure regarding income, expenses and assets. In such cases, the Office should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.²² The Office properly required repayment of the \$46,946.47 overpayment.

The decision of the Office of Workers’ Compensation Programs dated August 15, 2000 and finalized on April 16, 2001 is affirmed.

Dated, Washington, DC
July 22, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

²¹ 20 C.F.R. § 10.441(a) (1999).

²² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.4.d(1)(b) (September 1994).