

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RANDY G. POOLE and U.S. POSTAL SERVICE,  
POST OFFICE, Santa Ana, CA

*Docket No. 02-1249; Submitted on the Record;  
Issued November 5, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his compensation under 5 U.S.C. § 8148(a) effective January 23, 1998, because he was convicted of a felony for violation of 18 U.S.C. § 1001 for underreporting his earnings; (2) whether appellant received an overpayment of compensation in the amount of \$34,265.99 because he forfeited his compensation under 5 U.S.C. § 8106(b) for the period January 6, 1996 to April 4, 1997; (3) whether appellant was at fault in the creation of this overpayment; and (4) whether the overpayment should be recovered.

The Office accepted that on March 16, 1988 appellant, then a 26-year-old letter carrier, sustained post-traumatic stress disorder, acute anxiety and aggravation of preexisting irritable bowel syndrome when he received a threatening letter. Appellant stopped working on March 17, 1988, returned to a new location on April 25, 1988, but thereafter lost intermittent time from work until September 2, 1992, when he stopped work completely.

By letter dated January 6, 1993, the Office advised appellant that he was being placed on the periodic roll effective December 13, 1992 and it advised him to "notify this office immediately when you return to work." Thereafter appellant periodically received Forms CA-1032 on which he was required to report his employment status.

On April 6, 1997 appellant completed and signed a Form CA-1032 covering the preceding 15 months. On this form appellant reported that he earned \$200.00 monthly between May 1 and September 1, 1996, mowing lawns for neighbors as a form of therapy.

On August 15, 1997 the employing establishment provided the Office with an investigative report, which showed that appellant had not fully disclosed the extent of his involvement with or his earnings from a family business, A & R Lawn Care Company.

On October 7, 1997 the employing establishment also provided the Office with a copy of a two-count indictment that charged appellant with felony violations of 18 U.S.C. § 1001 in

connection with the Form CA-1032 he had signed on April 6, 1997, as well as his June 24, 1997 response to an Office request for an explanatory statement regarding that same Form CA-1032.

On January 30, 1998 the employing establishment submitted a January 23, 1998 copy of the jury verdict from appellant's criminal prosecution in the U.S. District Court for the Northern District of Mississippi, which found him guilty on both counts of the indictment.

Following receipt of this evidence, the Office issued a February 13, 1998 decision, finding that appellant had been convicted on two counts of having violated 18 U.S.C. § 1001 in connection with his compensation claim. The Office determined that appellant's entitlement to any further compensation benefits for his accepted physical and emotional conditions had been terminated by operation of law, effective January 23, 1998, the date the jury returned its guilty verdicts pursuant to 5 U.S.C. § 8148(a).

On October 2, 1998 the Office received a copy of an April 2, 1998 judgment order, in which U.S. District Court Judge noted that a jury had returned guilty verdicts on two counts charging appellant with having violated 18 U.S.C. § 1001 on April 6 and June 24, 1997. In this order the judge sentenced appellant to three years probation, but did not direct him to make restitution to the Office.

By decision dated November 3, 1998, the Office determined that appellant had forfeited his right to compensation under 5 U.S.C. § 8106(b) for the period January 1, 1996 through March 31, 1997, because he failed to fully report his earnings from employment and/or self-employment to the Office. The Office also made a preliminary determination that appellant was at fault in the creation of the \$34,167.09 overpayment that resulted from the forfeiture under 5 U.S.C. § 8106(b).

On November 27, 1998 appellant submitted a Form OWCP-20 Overpayment Recovery Questionnaire that described his current financial situation and requested that the Office waive recovery of the overpayment.

On January 27, 1999 the Office issued a decision, which finalized the overpayment determination, finding that appellant was at fault in the creation of the overpayment such that waiver of recovery of the overpayment could not be considered. The Office directed appellant to repay his overpayment by making monthly installment payments of \$100.00.

By letter dated March 13, 2000, appellant appealed this decision to the Board. The appeal was docketed as No. 00-1495, but on June 29, 2000 the Office made a motion to remand the case for recalculation of the amount of the overpayment as the period of the overpayment had not been correctly determined. On August 28, 2000 the Board granted the Director's motion and remanded the case to the Office for further action.

Thereafter, on February 20, 2001 the Office found the period of overpayment to be from January 6, 1996 to April 6, 1997 and recalculated the overpayment amount to be \$34,265.99. The Office issued both a preliminary and a final decision that date with the corrected period of forfeiture and amount of overpayment. The Office found that the forfeiture had occurred because on April 6, 1997 appellant completed a Form CA-1032 falsely and was convicted in U.S. District Court on two counts of making false statements in order to obtain workers'

compensation payments. The Office found that appellant, contrary to his claim on the form that he earned \$200.00 per month mowing lawns, worked commercial lawn businesses and earned in excess of \$24,000.00 during the preceding year. The Office found appellant knowingly underreported his earnings during the period January 6, 1996 to April 6, 1997 and, therefore, forfeited his right to receive compensation for that period. The Office found that the amount of compensation paid for that period was now forfeit and, therefore, an overpayment which appellant was required to repay.

Appellant disagreed with the amount of the overpayment, the denial of waiver and the amount of recovery required. He submitted financial information to support his claim of being broke and again requested waiver of recovery of the overpayment. Appellant indicated that in 1999 the total amount of the overpayment due had been reduced to \$12,000.00.

By decision dated January 30, 2002, the Office affirmed that appellant had received an overpayment in the amount of \$34,265.99, due to the forfeiture of compensation received for the period January 6, 1996 to April 6, 1997. The Office found he was at fault in the creation of the overpayment and waiver of recovery of the overpayment was not possible. It indicated that the total amount of the overpayment was to be collected in full.

The Board finds that the Office properly determined that appellant forfeited his compensation under 5 U.S.C. § 8148(a) effective January 23, 1998, because he was convicted that date of a felony for violation of 18 U.S.C. § 1001 for underreporting his earnings.

Title 5 U.S.C. § 8148 states that “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 receipt of any benefit ... shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to ... 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.”

As appellant was convicted on January 23, 1998 of two felony counts of criminal violation of 18 U.S.C. § 1001, he is, therefore, not entitled to any compensation benefits from that date onward.

The Board also finds that appellant forfeited his compensation entitlement for the period January 6, 1996 to April 6, 1997, under 5 U.S.C. § 8106(b) due to his underreporting of his earnings on Form CA-1032.

Section 8106(b) of the Federal Employees’ Compensation Act provides in pertinent part:

“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.”<sup>1</sup>

On the Form CA-1032 appellant signed on April 6, 1997, he certified that he received \$200.00 per month in wages, seasonally, from mowing lawns during the 15 months prior to the date of his signature. The record establishes, however, that appellant had significant income for that period and an investigation by the United States Postal Inspection Service revealed that he had earnings in excess of \$24,000.00 during that period.

The Board finds, that appellant knowingly underreported his earnings for the period January 6, 1996 to April 6, 1997, in violation of 5 U.S.C. § 8106(b) and thereby forfeited the total amount of compensation he received for that period.<sup>2</sup> The Office determined that appellant was paid \$34,265.99 during the period in question and, therefore, the amount of overpayment due to forfeiture was \$34,265.99. Moreover, the Board notes that appellant does not get credit for payment of assessment fees or court fines with respect to the amount of the overpayment, as they do not constitute repayments to the Office. The Office also found that appellant was subject to permanent forfeiture of compensation entitlement effective January 23, 1998 and ongoing, due to his felony conviction on two counts of violating 18 U.S.C. § 1001. The amount of the overpayment due to forfeiture under section 8106(b) for the period January 6, 1996 to April 6, 1997 is correct.

The Board finds that appellant was with fault in the matter of the resulting overpayment of compensation.

Section 8129 of the Act 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 would be against equity and good conscience.”<sup>3</sup> Thus, an overpayment cannot be waived by the Office unless appellant was without fault.<sup>4</sup> Appellant was not without fault in this case as the forfeiture was the result of his omissions.

Section 10.433 of the Office’s implementing federal regulations provides the following:<sup>5</sup>

“[The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.... A

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<sup>1</sup> 5 U.S.C. § 8106(b).

<sup>2</sup> *See, e.g., Charles A. Griffin*, 22 ECAB 94 (1970) (if a claimant had any earnings from employment or self-employment during the period covered by the report, he would not be entitled to compensation for any portion of the period covered by the report).

<sup>3</sup> 5 U.S.C. § 8129.

<sup>4</sup> *See, e.g., Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

<sup>5</sup> 20 C.F.R. § 10.433.

recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (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 provide 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.”

In its preliminary determinations dated November 3, 1998 and February 20, 2001, the Office found that appellant was with fault in the matter of the overpayment because he knowingly underreported his income from his lawn mowing business on the Form CA-1032 questionnaire he signed on April 6, 1997.

By decision dated February 20, 2001, the Office found that appellant was with fault in the creation of the overpayment for the period January 6, 1996 to April 6, 1997, under the second criterion because the forfeiture and resulting overpayment were a direct consequence of appellant’s failure to provide information to the Office he knew or should have known to be material, *i.e.* his earnings from his employment activities.

The factual evidence in this case establishes that appellant earned in excess of \$24,000.00 during the 15-month period covered by the Form CA-1032 he signed on April 6, 1997. As he had frequently been advised of his reporting obligations by acceptance letter dated January 6, 1993 and by subsequent Office Forms CA-1032, appellant knew or should have known that this information was material because the questionnaire itself clearly stated that the information provided therein would be used to determine his qualification for continued benefits or to determine whether an adjustment in benefits was warranted. The Office forms warned appellant that a false answer to any question could be grounds for suspension of compensation benefits. Appellant thus failed to furnish information that he knew or should have known was material and for this reason he is with fault in the matter of the overpayment, recovery of which is not subject to waiver.<sup>6</sup>

Regarding recovery of the overpayment, the Board finds that it does not have jurisdiction to review the amount or means of recovery of the overpayment under the Debt Collection Act, as appellant has no entitlement to further compensation payments under the Debt Collection Act.<sup>7</sup>

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<sup>6</sup> See text accompanying notes 3 and 4.

<sup>7</sup> See *John M. Walsh*, 48 ECAB 474 (1997) (The Board’s jurisdiction to review the collection of an overpayment is limited to cases adjustment where the Office decreases later compensation payments to which an individual is entitled; recovery under the Debt Collection Act is not reviewable by the Board; see also *Levon H. Knight*, 40 ECAB 658 (1989); 5 U.S.C. § 8129).

Accordingly, the January 30, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
November 5, 2002

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member