

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES W. CARTER and DEPARTMENT OF DEFENSE,
DEFENSE COMMISSARY AGENCY, Maxwell AFB, AL

*Docket No. 01-2088; Submitted on the Record;
Issued October 1, 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 received a \$47,633.58 overpayment of compensation for the period December 6, 1996 through March 3, 1999; (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$250.00 from appellant's compensation payments every four weeks.

On a January 12, 1988 appellant, then a 46-year-old meat cutter, sustained a work-related injury when a garbage can fell on his head. His claim was accepted for right clavicle separation, sprain and contusion of the right hip, HNP C5-6 and HNP L5-S1 and appellant was paid appropriate compensation for total temporary disability. He has not returned to work.

On March 6, October 17, 1998 and March 3, 1999, appellant completed and signed CA/EN-1032 forms indicating that he had no earnings and was not self-employed for the 15 months preceding each form. The CA/EN-1032 form required that various types of income and activities be reported -- including salary, wages, income sales, commissions, piece work etc and it notifies appellant of the consequences of falsifying them.

Appellant, who completed three years of college, had been investigated for outside income related to modeling he had done. In that investigation appellant successfully defended himself by establishing that he did not receive any income.

On December 30, 1999 appellant, plead guilty to an indictment brought against him for "unlawfully, willfully and designedly" defrauding the federal government by failing to report to secondary sources of income through self-employment. In June 1997, appellant began selling watermelons from a roadside stand during the watermelon season. According to appellant, he kept no records but estimated he earned approximately \$300.00 per month.

On April 15, 2000 the Office received an investigative report from the Office of the Inspector General that contained evidence establishing appellant was engaged in self-employment, including selling watermelons at the roadside stand and to a local grocery store. The evidence included a videotape showing appellant performing “vigorous physical activity” as well as several witness statements, including customers at his roadside stand and police officers who saw him daily at the stand. One witness testified that appellant indicated to her that he picked the watermelons himself and loaded them several deep in his pick up. Occasionally appellant loaded the watermelons into his customer’s vehicles. The watermelons were estimated to weigh as much as 41 lbs.

In a May 12, 2000 letter, the Office preliminarily found that appellant forfeited his right to compensation for the period of March 6, 1996 through March 3, 1999 and thereby created an overpayment of \$47,633.58, based on his conviction of fraud. The Office also found that appellant was at fault in creating the overpayment and, therefore, waiver of the overpayment was not available to him.

In a June 12, 2000 letter, appellant requested a prerecoupment hearing.

At the hearing appellant testified he pled guilty to the fraud charges in the state proceedings. Appellant also testified that he did not report his income for self-employment because it did “not feel like work.” Appellant said he just sat in a chair and people came, gave him money and took the watermelons.

In a June 18, 2001 decision, the hearing representative found that appellant forfeited his right to the compensation and thereby created an overpayment in the amount of \$47,633.58. The hearing representative also found appellant at fault for creating the overpayment. After considering the financial information appellant provided in his Overpayment Recovery Form, the hearing representative compromised the principal of the resulting debt to \$36,138.33.

The Board finds the appellant forfeited his right to compensation by knowingly omitting and understating his earnings for the period December 6, 1996 through March 3, 1999 and he thereby created an overpayment in the amount of \$47,633.58.

Section 8106(b) of Federal Employees’ Compensation Act provides, as follows:

“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. The employee shall include in the affidavit or report the value of housing, board, lodging and other advantages which are part of his earnings in employment or self-employment and which can be estimated in money. 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.”¹

The Board has held that it is not enough merely to establish that there were unreported employment or earnings. Appellant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he “knowingly” failed to report employment or earnings.² The term “knowingly” is not defined within the Act and the Board has recognized that the definition of “knowingly” includes such concepts as “with knowledge,” “consciously,” “intelligently,” “willfully,” or intentionally.”³ The Office, in its implementing federal regulations, has defined “knowingly” to mean “with knowledge, consciously, willfully or intentionally.”⁴ The Board has found that the office can meet this burden of proof in several ways, including by appellant’s own admission to the Office that he failed to report employment or earnings from self-employment which he knew or should have known to report, or by establishing that appellant has pled to violating applicable federal statutes by falsely completing the affidavits in the Form EN-1032.⁵

On March 6, October 17, 1998 and March 3, 1999, appellant signed Office EN-1032 forms that covered the 15-month periods preceding the dates he signed the forms. The forms advised appellant that he must report all employment, including the value of housing, meals, equipment and reimbursed expenses in a business; that he must report self-employment (such as sales, service, operating a store, or business) and report any such enterprise, in which he worked “even if operated at a loss.” For self-employment, the form required appellant to provide information regarding the dates of employment, type of work performed, number of hours worked per week, rate of pay and name of firm or business. The Form EN-1032 advised appellant that anyone “who fraudulently conceals or fails to report income or other information which would have an effect on benefits, or who makes a false statement or misrepresentation of a material fact” in claiming Office benefits might be subject to criminal prosecution. In the Forms EN-1032 signed on the above dates, appellant responded “no” to the questions concerning employment, self-employment and earnings and responded “yes” to a question regarding whether he was unemployed for the prior 15 months. Thereafter, appellant plead guilty to a charge of falsifying these forms and was found guilty. The record supports appellant knowingly concealed his earnings from self-employment from the Office.

The Board further finds that whether the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

¹ 5 U.S.C. § 8106.

² See *Martin James Sullivan*, 50 ECAB 158 (1998); *Barbara L. Kanter*, 46 ECAB 165 (1994).

³ See *Charles Walker*, 44 ECAB 641 (1993).

⁴ See 20 C.F.R. § 10. 5(n).

⁵ *Martin James Sullivan*, *supra* note 2 at 160.

Section 8129(a) of the Act⁶ 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.⁷ 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 this subchapter or would be against equity and good conscience.”⁸ No waiver of payment 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 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who--

- (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....”⁹

In this case, the Office applied the first standard in determining that appellant was at fault in creating the overpayment.

Section 10.433(c) of the Office’s regulations provides:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹⁰

In the present case, the Office properly found that appellant made an incorrect statement as to a material fact, which he knew or should have known to be incorrect. In this regard, appellant pled guilty to the fact that he did not report earnings from self-employment as required.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 5 U.S.C. § 8129(a).

⁸ 5 U.S.C. § 8129(b).

⁹ 20 C.F.R. § 10.433(a).

¹⁰ 20 C.F.R. § 10.433(c).

The Board further finds that the Office properly required repayment of the compromised resulting debt by deducting \$250.00 from appellant's compensation payments every four weeks.

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

“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 the 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.”¹¹

The record supports that, in requiring repayment of the overpayment by deducting from appellant's compensation payments every four weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting from appellant's compensation payments every four weeks.

The June 18, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 1, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹¹ 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).