

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TERRY G. MONCRIEF and DEPARTMENT OF THE ARMY,  
ANNISTON ARMY DEPOT, AL

*Docket No. 01-1987; Submitted on the Record;  
Issued September 11, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether appellant forfeited his entitlement to compensation from March 1, 1997 to May 29, 1998; (2) whether appellant was at fault in the creation of the resultant overpayment and, therefore, not entitled to waiver of recovery of the overpayment; and (3) whether appellant established work-related disability after March 15, 1999.<sup>1</sup>

Appellant's claim for a back injury on February 13, 1985, due to lifting heavy machinery, was accepted for a lumbosacral strain, subsequent herniated discs and depression. He returned to work in mid-1985, but stopped soon after. The Office of Workers' Compensation Programs authorized corrective surgery in 1989 and 1994 and paid compensation through January 20, 1998 when appellant returned to light-duty work, which his treating physician, Dr. James G. White, a Board-certified neurological surgeon, had found to be found appropriate.

Appellant stopped work on February 9, 1998 and filed for disability compensation, which was denied on April 17, 1998. He subsequently resigned from the employing establishment on May 11, 1998.

While on compensation, appellant completed at least seven CA-1032 forms requiring him to report employment and earnings. The February 22, 1997 form reported no income or employment for the previous 15 months. The May 29, 1998 form, which reported income of \$500.00 for the tax year 1997, stated that appellant worked "painting houses" from May 12 through August 25, 1997 for Frankie Moncrief's Professional Painting.<sup>2</sup>

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<sup>1</sup> Appellant received a schedule award for his back injury, which ran from April 6, 1998 through March 14, 1999.

<sup>2</sup> "Frankie" is the name of appellant's former wife. The record contains a copy of a business card for Moncrief's Professional Painting, listing the name of Terry Moncrief, his business and residential telephone numbers and his home address.

The employing establishment's compensation investigator office stated in a May 12, 1998 report that appellant had been interviewed regarding his house painting during 1997 to 1998 and requested further information from the Office. On May 24, 1999 the employing establishment's investigator submitted a final report finding that appellant had worked as a painting contractor in 1997 and 1998 and had been paid earnings which he had not reported.

On September 14, 2000 the Office denied appellant's claim for disability compensation after March 15, 1999. On September 20, 2000 the Office found that appellant had forfeited his claim for compensation from March 1, 1997 through May 29, 1998 and created an overpayment of \$21,638.59.<sup>3</sup> The Office found appellant to be with fault in creating the overpayment because he knowingly understated his earnings during the 15 months prior to May 29, 1998 when he signed the earnings form.

Appellant requested a hearing, which was held on February 22, 2001. The hearing representative found that appellant had forfeited compensation because he underreported his earnings from the painting business and that the medical evidence was insufficient to establish that his continuing disability after March 14, 1999 was work related.

The Board finds that appellant forfeited his disability compensation for the 15 months prior to May 29, 1998.

Section 8106(b) of the Federal Employees Compensation Act<sup>4</sup> 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."

To find a forfeiture of compensation, the Office must establish that a claimant knowingly failed to report employment or earnings during the relevant period.<sup>5</sup> Because forfeiture is a penalty, merely showing that there were unreported earnings from employment is insufficient.<sup>6</sup>

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<sup>3</sup> The Office calculated the overpayment, based on a weekly salary of \$424.25 for 326 days and \$430.50 for 54 days, as a total of \$23,078.93 minus health and life insurance deductions.

<sup>4</sup> 5 U.S.C. § 8101 *et seq*; 5 U.S.C. § 8106(b) (1974).

<sup>5</sup> *Edwin C. Whitlock*, 50 ECAB 384, 390 (1999).

<sup>6</sup> *Martin James Sullivan*, 50 ECAB 158, 160 (1998).

The Office procedure manual recognizes that forfeiture as a penalty provision must be narrowly construed.<sup>7</sup>

The inquiry is whether appellant knowingly failed to report his employment activities and earnings.<sup>8</sup> The term knowingly is not defined within the Act or its implementing regulations. In common usage, the Board had recognized that the definition of “knowingly” includes such concepts as “with knowledge,” “consciously,” “intelligently,” “willfully,” or “intentionally.”<sup>9</sup>

The CA-1032 form instructs compensation recipients to report all earnings from self-employment or involvement in business enterprises, including the provision of services such as painting in exchange for money and activities such as managing or overseeing a business. A claimant who signs the form certifies that his responses are true, complete and correct and that he understands the penalty for fraudulently concealing or failing to report income or other information that could have an effect on benefits.

In this case, appellant’s testimony, the employing establishment’s statements in response to the hearing transcript and the investigative reports of appellant’s painting work during 1997 to 1998 establish that appellant knowingly underreported his earnings during the 15-month period covered by the CA-1032 form he signed on May 29, 1998.

On that form appellant stated that he was self-employed with a firm called Frankie Moncrief’s Professional Painting<sup>10</sup> and that he earned \$500.00 from May 12 through August 8, 1997. In the record are copies of two canceled checks dated September 11, 1997 for \$950.00 issued by Gaylon Pierce Homes to appellant who endorsed them. The owner of this business told the employing establishment’s investigator on May 11, 1998 that appellant had been paid to finish painting a house started by someone else and that appellant had worked for a Jim Dawson during June, July and August 1997. Based on these facts appellant underreported his income.

On May 7, 1998 appellant was interviewed by the employing establishment’s investigator. He admitted that he had a business called Moncrief’s Professional Painting, but denied being involved in the business prior to returning to light-duty work in January 1998. Appellant also denied being involved in any painting activity prior to April 7, 1998. He stated that he supervised employees and occasionally did some touch-up work but not any of the heavier jobs.

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<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10.c.(c) (July 1997).

<sup>8</sup> *John M. Walsh*, 48 ECAB 474, 479 (1997).

<sup>9</sup> *Barbara Hughes*, 48 ECAB 398, 400 (1997).

<sup>10</sup> The record shows that a county contractor’s license was issued to appellant on May 20, 1997, expiring on September 30, 1997 and another was issued on October 10, 1997, expiring on September 30, 1998.

On May 11, 1998 the date of his resignation from the employing establishment, appellant called the investigator and related that “after thinking about it” and talking with his wife, he remembered that he had painted some houses as far back as 1997.

On the May 29, 1998 form appellant denied that he had worked for any employer during the previous 15 months. However, on April 30, 1999 the owner of a health store stated that he had hired appellant to paint the inside of his home during June to July 1997. He could not remember how much he paid appellant but remembered that appellant did the work alone for the most part. A dairy supply business owner stated on May 17, 1999 that he hired appellant in October or November 1997 to paint the inside of his new home.

For five months in 1998, the record establishes that Colyer-Lloyd, Inc. paid to appellant as vendor three checks dated April 27, May 15 and 22, 1998 for a total of \$5,800.00 for painting and refinishing work at two homes.

Appellant also received two checks dated April 6 and 8, 1998 for \$1,900.00 from James L. Slichenmyer, who explained to the investigator that appellant painted two homes for him and asked him to put his wife’s name as payee on the checks. Mr. Slichenmyer did so on the first check, but could not remember her name on April 8, 1998 when he wrote the second check, so he left the payee space blank. When the check came back, appellant’s name had been written in as payee.

On the CA-1032 form signed on May 29, 1998, appellant reported none of this income or employment, even though he had informed his rehabilitation counselor on January 5, 1998 that he had been working to develop a business as a sub-contractor/painter and had two painting contracts so far. The Board finds that the record amply establishes that appellant was well aware of his obligation to report employment and income and knowingly failed to report all earnings from self-employment received in 1997 and 1998 as required.<sup>11</sup>

The Board also finds that appellant was at fault in creating the overpayment and is therefore, not entitled to waiver of recovery of the overpayment.

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.<sup>12</sup> The only exception to this requirement must meet the tests set forth 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

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<sup>11</sup> See *Ruth Moreno Rios*, 48 ECAB 587, 590 (1997) (finding that appellant knowingly failed to report the wages she earned under a second social security number while receiving disability compensation).

<sup>12</sup> 5 U.S.C. § 8129(a).

adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”<sup>13</sup>

No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.<sup>14</sup>

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.433 of Title 20 of the Code of Federal Regulations provides in relevant part:

“(a) [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. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of the benefits. A recipient who had 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 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. (This provision applies only to the overpaid individual).

(b) 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.”<sup>15</sup>

In this case, appellant failed to furnish information which he knew or should have known was material to his receipt of compensation benefits. He completed the required earnings and employment forms in 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995 and 1997 prior to May 29, 1998, each time certifying that he was aware of his obligation to report income or other information that could affect his benefits. Appellant was also well aware that he could not receive wage-loss compensation while earning income -- he was informed of the terms and conditions under which he would receive compensation in October 1985 and thereafter.

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<sup>13</sup> 5 U.S.C. § 8129(b).

<sup>14</sup> *Anthony V. Knox*, 50 ECAB 402, 409 (1999).

<sup>15</sup> 20 C.F.R. § 10.433 (1999).

Based on appellant's failure to report the correct amount of his income in 1997 and 1998, which he knew would affect the amount of benefits he was entitled to receive, the Board finds that appellant was at fault in creating the overpayment of \$21,638.59, which is not therefore, subject to waiver of recovery.<sup>16</sup>

The Board finds that appellant failed to establish that disability for work after March 15, 1999 was causally related to the accepted injuries.

In this case, the Office accepted that appellant was injured at work in 1985 and subsequently that appellant suffered from depression resulting from the chronic pain produced by the work injury. On February 9, 1998 appellant saw Dr. White, his long-time treating physician, because of pain in his low back and down his left leg. Dr. White stated that appellant's physical examination was "unchanged" and sent him for a magnetic resonance imaging (MRI) scan. Dr. White interpreted the MRI scan as showing degenerative disc disease "basically unchanged from previous studies" with no evidence of herniation. A lumbar myelogram and computerized tomography scan showed a small herniation at L5 and some disc bulging at L4. On April 6, 1998 Dr. White provided an impairment rating and released appellant to return to work "with the previous job restrictions."

Following appellant's voluntary resignation on May 11, 1998, appellant sought no medical treatment until April 12, 1999 when Dr. White noted that appellant was "somewhat angry" because his compensation had ended and appeared depressed. Dr. White saw appellant on September 1, 1999, performed another MRI scan on April 19, 2000 and a myelogram on February 5, 2001 and stated on February 7, 2001 that appellant was 100 percent permanently and totally disabled due to his chronic pain.

On May 10, 2001 Dr. White completed a questionnaire provided by appellant's attorney. Dr. White agreed that appellant's previous injuries had resulted in a weakened disc and joint, that his current medical condition -- herniated discs at L4 and L5 -- was related to the earlier medical problems caused by his work-related injuries and that his current pain and discomfort would prevent appellant from doing any physical work.

The Board finds that Dr. White's reports are insufficiently rationalized to meet his burden of proof. After appellant stopped work in February 1998, Dr. White reported mild disc bulging at L3-4 and a small herniated disc at L5 but noted that appellant had declined further surgery. Appellant sought no medical treatment after Dr. White released him to return to his light-duty job in April 1998 until a year later.

While Dr. White found appellant to be totally disabled, he provided no rationale for his conclusion that appellant's current herniated discs resulted from the 1985 lumbar strains or the resultant herniated discs which were corrected by surgery in 1989 and 1994. In his more recent

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<sup>16</sup> On July 11, 2001 the Office deducted \$6,297.45 from the overpayment, leaving a principal debt of \$15,341.14, because the monthly payment ordered by the hearing representative was less than the amount of interest accruing each month. Inasmuch as appellant is no longer receiving compensation, the Board has no jurisdiction to review the method of recovery of the overpayment; *see Beverly E. Labbe*, 50 ECAB 440, 443 (1999) (finding that the Board has no jurisdiction to consider the recovery of an overpayment against the assets or salary of an employee).

reports, Dr. White did not discuss how the lumbar strains and herniated discs resulting from the 1985 work incident caused the conditions found in the diagnostic tests done in 1999 and thereafter. Nor did Dr. White consider or explain appellant's back symptoms in light of his significant work as a house painter following his resignation from the employing establishment in May 1998. For this reason Dr. White's reports are not based on an accurate history. Dr. White failed to provide a well-reasoned opinion on the causal relationship between appellant's current back condition and the injuries he sustained at work in 1985 to establish disability on or after March 15, 1999. Inasmuch as appellant failed to meet his burden of proof to establish a causal relationship between his back condition or disability for waiver commencing March 15, 1999 the Board finds that he is not entitled to compensation.<sup>17</sup>

The June 1, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
September 11, 2002

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>17</sup> See *Michael E. Smith*, 50 ECAB 313, 316 (1999) (finding that appellant failed to submit a rationalized medical opinion on causal relationship).