

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARRELL K. SCHLUETER and DEPARTMENT OF THE AIR FORCE,
GENERAL BILLY MITCHELL FIELD, Milwaukee, WI

*Docket No. 03-241; Submitted on the Record;
Issued April 16, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he forfeited his entitlement pursuant to section 8148(a) of the Federal Employees' Compensation Act;¹ (2) whether the Office properly found an overpayment of \$94,823.09² from January 8, 1997 to January 4, 2001; and (3) whether the Office properly determined that appellant was at fault in creating the overpayment, thus precluding waiver of recovery of the overpayment.

Appellant, then a firefighter, filed a claim on October 25, 1985 after he injured his right knee playing volleyball at work. The Office accepted the claim for a partial tear of the anterior cruciate ligament and chondromalacia. A recurrence of disability on June 11, 1986 was also accepted as work related. On August 1, 1991 appellant filed another recurrence of disability claim after he slipped on the pavement and twisted his right knee. The Office accepted this claim as well. The Office denied a third recurrence of disability claim on December 6, 1996 but continued to pay compensation.

On November 27, 1990 and June 7, 1989 the Office issued schedule awards for a total 19 percent permanent impairment of appellant's right leg, running from April 25, 1989 to December 7, 1990. An additional schedule award for 11 percent permanent impairment of the right leg was issued on December 3, 1996, running from September 12, 1996 to April 16, 1997.

While on disability compensation, appellant signed EN-1032 forms on April 8, 1998, attesting to the fact that he had no earnings or self-employment during the prior 15 months. He

¹ 5 U.S.C. § 8101 *et seq*; 5 U.S.C. § 8148(a).

² The amount was based on the varying amounts of monthly compensation being paid to appellant in these time frames January 8 to June 1997 at a rate of \$1,512.15 every four weeks; June 1997 to March 1998 at \$1,779.00; March 1998 to March 1999 at \$1,806.00; March 1999 to March 2000 at \$1,835.00; and March 2000 to January 4, 2001 at \$1,885.00, for a total of \$94,823.09.

reiterated this statement in a form signed on June 1, 1999 covering the prior 15 months. On a form he signed on January 4, 2001, covering the prior 20 months, he stated that he was self-employed in a family business, Schlueter's Trucking, managing and overseeing lawn and snow services with his wife. Appellant added that he worked one to two hours a day on average driving a truck and operating a lawn mower, that he was not paid, that the rate was \$10.15 an hour and that the money had been reinvested and paid to family members. Appellant also signed eight other forms claiming disability compensation from September 12, 1996 through July 19, 1997 and reporting no earnings.

On April 6, 2001 appellant responded to an Office inquiry, stating that he worked 40 hours a month and that he received no income from Schlueter's Trucking. An itemized statement of earnings from the Social Security Administration (SSA) showed wages of \$6,646.00 for 1997, \$5,330.00 for 1998 and \$6,867.00 for 1999 for appellant.

In a May 14, 2001 memorandum, the regional inspector general concluded that appellant had made false statements to obtain disability benefits because he had been employed and actively working as a landscaper and snow removal operator. The investigator provided the Office with a document showing that appellant had earned \$153,414.35 from August 1997 through September 2001. The Office determined that appellant had no loss of wage-earning capacity during that time.

On March 7, 2002 appellant signed a plea agreement listing nine counts of his scheme to defraud the Office in obtaining wage-loss benefits. Appellant pled guilty to one count of wire fraud pursuant to sections 1343 and 1920 of the United States Code,³ in that he knowingly and willfully caused \$1,806.00 in benefits to be transferred from the U.S. Treasury to his personal bank account on March 28, 1998 in furtherance of a scheme to defraud the government.

The agreement stated that the "essence" of appellant's scheme was to obtain compensation based upon false statements and representations of material fact to the Office regarding his employment status, business ownership, wage rate and earnings. Appellant knowingly and willfully made false statements and representations to determine his continuing eligibility for benefits. He also concealed and failed to disclose the occurrence of events affecting his right to receive benefits, specifically his self-employment and receipt of income, with the intent to secure such benefits.

On March 8, 2002 the Office terminated appellant's compensation and medical benefits pursuant to section 1920,⁴ which prohibits the Office from paying benefits to any individual convicted of felony fraud related to the application for or receipt of benefits. The Office found that appellant had forfeited his entitlement to compensation from January 8, 1997 through January 4, 2001, because he knowingly omitted or understated his earnings during that period.

On April 9, 2002 the Office found that an overpayment in the amount of \$94,823.09 had occurred and that appellant was at fault in creating the overpayment. The Office noted that

³ 18 U.S.C. § 1343; 18 U.S.C. § 1920.

⁴ 18 U.S.C. § 1920.

appellant's judgment stipulated that he would pay \$113,167.76 in restitution to the Office by July 7, 2006. On May 10, 2002 appellant was sentenced to six months in prison and three years' supervised probation. He was ordered to pay the restitution at no less than \$100.00 a month.

Appellant requested a review of the written record. On August 1, 2002 the hearing representative affirmed the termination of appellant's compensation, finding that he had forfeited his entitlement by pleading guilty to a felony pursuant to section 8148.

The Board finds that the Office properly terminated appellant's compensation benefits on the grounds that he forfeited his entitlement.

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁵ In terminating appellant's compensation, the Office relied on section 8148(a), which provides that a person convicted of a statute relating to fraud in the application for, or receipt of benefits under the Act shall forfeit future entitlement to benefits.

Section 8148(a) states:

"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 benefits under [the Act], shall forfeit (as of the date of such conviction) any entitlement to any benefits such individual would otherwise be entitled to under [the Act] 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."⁶

Congress has enacted this provision as an absolute forfeiture of compensation, without any provision for waiver of the effects.⁷ The implementing regulation states that when a beneficiary either pleads guilty to or is found guilty of either federal or state criminal charges of defrauding the federal government in connection with a claim for benefits, the beneficiary's entitlement to any further compensation for any injury prior to the date of the guilty plea or verdict is ended and is not affected by any subsequent change in or recurrence of the beneficiary's condition.⁸

The Office's procedure manual states that, in support of this penalty termination, the record must contain copies of the indictment or information, the plea agreement, if any and the document containing the guilty verdict or the court's docket sheet.⁹ This evidence must establish that the individual was convicted and that the conviction is related to the claim for, or receipt of,

⁵ *Betty Regan*, 49 ECAB 496, 501 (1998).

⁶ 5 U.S.C. § 8148(a).

⁷ *Michael D. Matthews*, 51 ECAB 247, 251 (1999).

⁸ 20 C.F.R. § 10.17.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12.d. (March 1997).

benefits.¹⁰ The termination is effective on the date of the verdict or on the date the court accepts the guilty plea.¹¹ Because of the criminal basis for the termination, no predetermination notice is required before a final decision is issued.¹²

In this case, the record establishes that appellant pled guilty to one count of wire fraud in connection with obtaining federal compensation in violation of section 1920 of the Act. The court accepted the guilty plea on March 8, 2001. Therefore, by specific terms of the statute, appellant forfeited his entitlement to all compensation benefits arising from his employment injuries effective the date of his conviction.¹³

The Board further finds that appellant forfeited his right to compensation from January 8, 1997 through January 4, 2001, because he knowingly failed to report his employment activities.

Section 8106(b) of the Act¹⁴ 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.”

While section 8106(b)(2) refers only to partially disabled employees, the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled and not whether he received compensation during that period for loss of wage-earning capacity.¹⁵

¹⁰ *Id.*

¹¹ *Id.* at Chapter 2.1400.12.e.(1).

¹² *Id.* at Chapter 2.1400.12.f.(2).

¹³ See *Jorge E. Sotomayor*, 52 ECAB ___ (Docket No. 99-452, issued October 6, 2000) (finding that appellant was convicted by a jury of committing fraud in connection with his claim for benefits and, therefore, forfeited his entitlement to all compensation arising from his employment injuries).

¹⁴ 5 U.S.C. § 8106(b) (1974).

¹⁵ *Joseph M. Popp*, 48 ECAB 624, 627 n. 12 (1997); citing *Ronald H. Ripple*, 24 ECAB 254, 260 (1973); (explaining that a totally disabled employee normally would not have any employment earnings and, therefore, a statutory provision about such earnings would be meaningless).

To declare a forfeiture of compensation, the Office must establish that a claimant knowingly failed to report employment or earnings during the relevant period.¹⁶ Because forfeiture is a penalty, merely showing that there were unreported earnings from employment is insufficient.¹⁷ The Office procedure manual recognizes that forfeiture as a penalty provision must be narrowly construed.¹⁸

The inquiry is whether appellant knowingly failed to report his employment activities and earnings.¹⁹ The term knowingly is defined in the implementing regulations at 20 C.F.R. § 10.5(n). Knowingly is defined as “with knowledge, consciously, willfully or intentionally.”²⁰

The EN-1032 form instructs compensation recipients to report all self-employment or involvement in business enterprises, including the provision of services in exchange for money and activities such as managing or overseeing a business. The form advises that a beneficiary must report all employment, including the value of housing, meals, equipment and reimbursed expenses in a business. He must report self-employment (such as sales, service, operating a store, or business) and 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 EN-1032 form 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. 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 failed to report any earnings from his self-employment on the April 8, 1998 and June 1, 1999 forms. In addition, he reported no earnings on the eight CA-8 claim forms he signed in 1997. Yet the statement of earnings from SSA shows significant wages during 1997 through 1999, attributed to appellant’s social security number.

Further, a document furnished by the inspector general’s investigator showed monthly income from two jobs averaging \$2,500.00 a month from August 1997 through August 2001, in addition to his disability compensation. Thus, appellant’s contention on the January 4, 2001 EN-1032 form that he had no earnings from the family business for the previous 20 months is negated by the record.

¹⁶ *Edwin C. Whitlock*, 50 ECAB 384, 390 (1999).

¹⁷ *Martin James Sullivan*, 50 ECAB 158, 160 (1998).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10. c.(c) (July 1997).

¹⁹ *John M. Walsh*, 48 ECAB 474, 479 (1997).

²⁰ *Barbara Hughes*, 48 ECAB 398, 400 (1997).

The record, plus appellant's guilty plea to defrauding the federal government, establishes that he knowingly failed to report his earnings and self-employment pursuant to section 8106(b)(2). Therefore, he has forfeited his right to compensation for the period covered by the three EN-1032 forms he fraudulently completed.²¹

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.²² 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 adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."²³

No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.²⁴

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

²¹ See *Warren P. Tilghman*, 53 ECAB ____ (Docket No. 00-1269, issued May 16, 2002) (finding that even though appellant received no profit from his business and lost money, his failure to report his earnings subjected him to forfeiture of the compensation received during the applicable period).

²² 5 U.S.C. § 8129(a).

²³ 5 U.S.C. § 8129(b).

²⁴ *Anthony V. Knox*, 50 ECAB 402, 409 (1999).

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 OWCP 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.”²⁵

In this case, appellant failed to furnish information, which he knew or should have known was material to his receipt of compensation benefits. Appellant completed the required earnings and employment forms in 1998, 1999 and 2001, 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 as he had been informed of the terms and conditions, under which he would receive compensation for each of his accepted claims.

Based on appellant’s failure to report the correct amount of his earnings from self-employment from January 8, 1997 to January 4, 2001, 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 \$94,823.09, which is not, therefore, subject to waiver of recovery.²⁶

²⁵ 20 C.F.R. § 10.433 (1999).

²⁶ 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).

The August 1, April 9 and March 8, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 16, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member