

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD L. OVERSTREET and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Hampton, GA

*Docket No. 02-506; Oral Argument Held April 8, 2003;
Issued July 7, 2003*

Appearances: *Maximillian S. Kim, Esq.*, for appellant; *James C. Gordon, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited compensation for the period August 7, 1987 to November 18, 1989 and December 22, 1989 to October 23, 1996; (2) whether the Office properly determined that an overpayment of \$427,540.26 was created; and (3) whether the Office properly denied waiver on the grounds that appellant was at fault in creating the overpayment.

Appellant filed a claim on September 27, 1994 alleging that he had sustained injuries causally related his federal employment as an air traffic controller. The Office accepted the claim for depressive reaction and hypertension; appellant did not return to work and he received compensation benefits.

The Office periodically sent appellant a request for information pertinent to his continued receipt of compensation benefits. The request for information (Form EN1032) requires a claimant to provide information with respect to employment activity and covers a period of 15 months. In the case of self-employment, the EN1032 states: "Earnings from self-employment (such as farming, sales, service, operating a store, business, etc.) must be reported. Report any such enterprise in which you worked and from which you received revenue, even if it is operated at a loss or if profits were reinvested. You must show as "rate of pay" what it would have cost you to have hired someone to perform the work you did." As of 1994, the EN1032 stated: "Report all self-employment or involvement in business enterprises. These include but are not limited to: farming; sales work; operating a business, including a store or a restaurant; and providing services in exchange for money, goods or other services. The kinds of services which you must report include such activities as carpentry, mechanical work, painting, contracting, child care, odd jobs, etc. Report activities such as keeping books and records or managing and/or overseeing a business of any kind, including a family business. Even if your activities were part time or intermittent, you must report them.... Report any work or ownership interest

in any business enterprise, even if the business lost money or if profits or income were reinvested or paid to others.”

The record indicates that appellant signed and certified as truthful his statements made on EN1032's dated November 7, 1988, November 18, 1989, March 22 and December 10, 1991, October 15, 1992, October 6, 1993, October 3, 1994, October 9, 1995 and October 23, 1996. On each of the EN1032's appellant indicated that he did not have earnings to report. The Board notes, however, that on the October 23, 1996 EN1032 appellant wrote “see attached letter.” In the referenced letter dated October 23, 1996, appellant acknowledged that he and his wife had operated a photography enterprise and received revenue. He argued that the enterprise was not a business, but rather a hobby and that the revenue received was for actual expenses, not profit.

In an investigative report dated November 23, 1998, an investigator from the Department of Labor's Office of Inspector General (OIG) detailed appellant's employment activity in the photography enterprise. The report included witness statements and other documents.

By decision dated July 30, 1999, the Office determined that appellant forfeited his compensation for the period August 7, 1987 to November 18, 1989 and December 22, 1989 to October 23, 1996. The Office found that, for the EN1032's from November 7, 1988 through October 23, 1996, appellant had omitted earnings that must be reported. According to the Office the compensation paid during the periods in question totaled \$427,540.26.

By letter dated July 30, 1999, the Office notified appellant that it had made a preliminary determination that an overpayment of \$427,540.26 was created on the grounds that he had forfeited compensation for the periods August 7, 1987 to November 18, 1989 and December 22, 1989 to October 23, 1996. The Office also made a preliminary determination that appellant was at fault in creating the overpayment.

In a separate decision dated July 30, 1999, the Office reduced appellant's compensation on the grounds that his wage-earning capacity was represented by the selected position of studio cameraman.

By decision dated October 21, 2001, an Office hearing representative affirmed the forfeiture decision and finalized the determination that an overpayment of \$427,540.26 was created and that appellant was at fault in creating the overpayment. The hearing representative also remanded the case for recalculation of the loss of wage-earning capacity determination.¹

The Board finds that appellant forfeited his compensation from August 7, 1987 to November 18, 1989 and December 22, 1989 to October 9, 1995; his compensation is not forfeited for the period October 10, 1995 to October 23, 1996.

¹ Since the Office must further develop the record with respect to appellant's wage-earning capacity, the Board will not address this issue as the case is in an interlocutory posture with respect thereto, *See* 20 C.F.R. § 501.2(c).

Section 8106(b) of the Federal Employees' Compensation Act provides 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 times the Secretary specifies.... An employee who fails to make an affidavit or report when required; or 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 ... under section 8129 of this title, unless recovery is waived under that section.”²

The investigative memorandum from the OIG investigator indicates that appellant was engaged in employment activity as a photographer. The record contains a brochure for “Donnie’s Studio 10,” indicating that appellant offered his services as a photographer with specific prices listed. A witness reported that it was generally known in the community that appellant operated a photography studio. He does not dispute that he took photographs and received payment; he characterizes his activity as a “hobby” that involved family and friends and asserts that the payments received covered expenses without realizing a profit. The assertion is clearly inconsistent with brochure offering services as “Donnie’s Studio 10.” Moreover, even if it were accepted that the photography enterprise attempted only to cover expenses, it is the kind of activity that must be reported on the EN1032. The form itself clearly requires a claimant to report any work that he performs and receives payment for, regardless of whether the activity earns a profit. It is important for the Office to be aware of any employment activity, as it may, for example, be relevant to a wage-earning capacity determination. The Board finds that appellant should have reported his employment activity as a photographer on the EN1032 forms in this case.

The initial EN1032 at issue was signed by appellant on November 7, 1988; it, therefore, covers a 15-month period commencing August 7, 1987. The record contains a witness statement that appellant took prewedding photographs for her in August 1988 and the record contains an invoice for Donnie’s Studio 10, dated August 11, 1988. Appellant, therefore, omitted earnings on the November 7, 1988 form. With respect to the EN1032 signed on November 18, 1989, the witness reported that appellant took photographs of her wedding on November 11, 1988 and was paid for his services. This is within the 15-month period covered by the form and should have been reported.

With respect to the March 22, 1991 EN1032, a witness reported that in April 1990, appellant worked as a photographer at his daughter’s wedding and was paid for his services. The record also contains a statement from the chief executive office of a local business indicating that appellant was hired in September 1991 to perform photographic work for the company. This employment activity is within the period covered by the December 10, 1991 and October 15, 1992 EN1032’s. With respect to the forms signed on October 6, 1993, October 3, 1994 and October 9, 1995, the record contains transaction logs for a film processing firm, Merit Prints, which shows continued activity by Donnie’s Studio 10, during the years 1993, 1994 and 1995.

² 5 U.S.C. § 8106(b).

Accordingly, the record shows that appellant continued to have unreported employment activity during these periods.

The Board notes that, with respect to the EN1032 signed on October 23, 1996, appellant reported “no” for self-employment but also attached a letter of the same date that discussed his employment activity. The Office does not explain why the October 23, 1996 EN1032 constitutes an omission of earnings. The attached letter, incorporated into the Form EN1032, provides relevant information indicating that appellant did have employment activity during the preceding 15 months. The Board finds that the record does not establish that appellant omitted or understated earnings on October 23, 1996. He, therefore, does not forfeit his compensation through that date.

Having established that there were earnings omitted on the EN1032’s submitted from November 7, 1988 through October 9, 1995, the next question is whether the omission was “knowingly” made. The term “knowingly” is defined in the regulations governing administration of claims filed under the Act as “[w]ith knowledge, consciously, willfully or intentionally.”³ In this case, appellant has argued that his self-employment was not a profit making enterprise and he did not report it. Whether appellant made a profit on his activities is not the relevant issue.⁴ The forms clearly advised him that he must report his employment activity, regardless of whether there was a profit. Appellant had not offered an explanation as to why, in view of the clear language on the EN1032, he did not report his work as a photographer. The totality of the circumstances indicates that he “knowingly” omitted earnings under section 8106(b)(2) of the Act by failing to report his employment activities and earnings on the Office forms covering the periods August 7, 1987 to November 18, 1989 and December 22, 1989 to October 9, 1995.⁵

The Board further finds that an overpayment of compensation was created; the amount of the overpayment is not in posture.

Since appellant has forfeited his right to compensation for the periods August 7, 1987 to November 18, 1989 and December 22, 1989 to October 9, 1995, it is evident that the compensation paid for these periods constitutes an overpayment of compensation. The Office’s original determination as to the amount of the overpayment was based on receipt of compensation through October 23, 1996, therefore, the case will be remanded for recalculation of the amount of overpayment.

The Board further finds that appellant was at fault in creating the overpayment.

³ 20 C.F.R. § 10.5(n).

⁴ See *Terryl A. Geer*, 51 ECAB 168, 172 (1999).

⁵ See *id.* (the Office may establish “knowingly” if it establishes through the totality of the factual circumstances of record that appellant’s certification in a Form EN1032, that he was not employed or self-employed was false).

Section 8129(b) of the Act⁶ provides: “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 the Act or would be against equity and good conscience.”⁷ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁸

Section 8129(b) of the Act⁹ provides: “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 the Act or would be against equity and good conscience.”¹⁰ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹¹

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect.”

The Board has found that appellant knowingly failed to report employment activity on the EN1032 forms. It is well established that information regarding self-employment is considered material and must be disclosed.¹² The form itself advises a claimant that anyone who fraudulently conceals or fails to report income or other information that would have an effect on benefits or who makes a false statement or misrepresentation of a material fact in claiming benefits, may be subject to criminal prosecution. By reporting “no” as to self-employment, appellant made an incorrect statement as to a material fact which he knew or should have known to be incorrect. In addition, he failed to provide information that he knew or should have known to be material. Appellant is, therefore, at fault pursuant to both section 10.433(1) and section 10.433(2) in this case. Since appellant is at fault, he is not entitled to waiver of the overpayment.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 5 U.S.C. § 8129(b).

⁸ *Gregg B. Manston*, 45 ECAB 344 (1994).

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *Gregg B. Manston*, *supra* note 8.

¹² *See, e.g., Larry W. Seybert*, 49 ECAB 197, 202 (1997).

The decision of the Office of Workers' Compensation Programs dated October 24, 2001 is modified to reflect that the forfeiture period is August 7, 1987 to November 18, 1989 and December 22, 1989 to October 9, 1995. The decision is affirmed with respect to fact of overpayment and denial of waiver; the case is remanded for recalculation of the amount of the overpayment.

Dated, Washington, DC
July 7, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member