

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET J. SCHAEFER and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Palo Alto, CA

*Docket No. 03-1020; Submitted on the Record;
Issued November 7, 2003*

DECISION and ORDER

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

The issues are: (1) whether appellant forfeited her right to compensation for the period March 16, 1992 through November 10, 1993; (2) whether an overpayment of \$44,159.42 occurred as a result; and (3) whether appellant was at fault in the creation of the overpayment.

On July 28, 1990 appellant, a 42-year-old team leader/social worker supervisor, filed a traumatic injury claim alleging that she sustained numerous bruises and injuries to her head, neck and back when the motor vehicle in which she was riding was rear-ended by a truck on July 26, 1990. The Office of Workers' Compensation Programs accepted the claim for head contusion, bilateral transmandibular joint syndrome with reparative orthodontic surgery, consequential post-traumatic stress syndrome and spinal subluxations. She received appropriate compensation. Appellant returned to work part time in mid September 1990 and to full-time work on January 15, 1991. On February 11, 1992 appellant filed a recurrence of disability claim, which was accepted by the Office. The Office began paying appellant compensation for total disability effective February 12, 1992.

The record contains evidence from the Social Security Administration, which reported self-employment earnings for 1990 to 1992, in the amounts of \$4,830.00 for 1990, \$1,150.00 for 1991 and \$977.00 for 1992.

Appellant submitted income tax returns for the period 1989 to 1992 and 1999. Her 1992 income tax return showed an income of \$3,940.00 and expenses of \$1,384.00 leaving a net profit of \$927.00. In her 1991 income tax return for profit or loss from business she reported earnings of \$4,960.00, expenses of \$3,715.00 for a net profit of \$1,245.00. On appellant's 1990 business income tax return she noted income of \$9,900.00, expenses of \$4,670.00 and a net profit of \$5,230.00.

Appellant completed a Form EN1032 affidavits dated June 16, 1993, November 10, 1993, May 25, 1994, August 31, 1995, September 3, 1996, September 24, 1997, June 13 and September 2, 1998, September 6, 1999 and August 2, 2000. The affidavits required appellant to report earnings from employment or self-employment during the 15-month period prior to the

completion and signing of each affidavit. The affidavits advised signers that false, evasive or omitted answers might subject them to forfeiture of compensation benefits, civil liability, or criminal prosecution. The affidavits contained the following instructions:

“Report ALL employment for which you received a salary, wages, income, sales commissions, piece work, or payment of any kind....”

* * *

“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 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, childcare, 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 as your ‘rate of pay’ what you were paid. Include the value of such things as housing, meals, clothing and reimbursed expenses, if they were received as part of your employment.”

* * *

“Report ANY work or ownership in any business enterprise, even if the business lost money or if profits or income were reinvested or paid to others. If you performed any duties in any business enterprise, for which you were not paid, you must show as rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties you did, even if your work was for yourself or a family member....”

On April 19, 1996 appellant entered a guilty plea in federal court to one count of violating 18 U.S.C. § 371, by entering a conspiracy to make and cause to be made documents to the employing establishment which contained false statements in violation of 18 U.S.C. §§ 1001 and 1002. The plea agreement specified that from on or about 1987 or 1988 appellant had knowingly and willfully agreed to a scheme proposed by Dennis R. Abbey, to provide counseling services for veterans to whom Mr. Abbey was either a fiduciary in fact or appointed as fiduciary. Appellant was required to pay a percentage of the amount she received for the “counseling services” provided. In 1989 appellant agreed to a modification of her agreement with Mr. Abbey whereby she would state she provided counseling services when she had not and he would issue checks to appellant and she would write a check to Mr. Abbey for his portion of the money. Appellant was charged with defrauding the employing establishment of \$14,167.76 under 18 U.S.C. § 371 for the period 1990 through February 1993.

In a December 3, 1998 letter, the Office of the Inspector General noted that appellant had been sentenced on April 11, 1997 to “three months of imprisonment followed by three months of home detention and three years probation” with no fine or restitution ordered.

On June 20, 2001 the Office issued a preliminary finding that an overpayment in the amount of \$44,159.42 occurred due to appellant's failure to report self-earnings on Forms CA-1032 dated June 16 and November 10, 1993, which covered the period March 16, 1992 through November 10, 1993. Due to this failure to report earnings, appellant was found to be at fault in the creation of the overpayment and, therefore, she was not entitled to consideration of waiver. The Office also issued a decision on June 20, 2001 finding that appellant forfeited her compensation for knowingly failing to report her self-earnings.

Appellant requested a preresoupment hearing to consider the issues of fault and wavier of the overpayment on July 11, 2001.

A hearing was held on December 19, 2001, at which appellant and Jean Berrie, a handwriting expert, testified. Ms. Berrie testified that the signatures on the June 16 and November 10, 1993 CA-1032 forms were not signed by the same person who had signed the May 24, 1994 CA-1032 form and provided her rationale for this conclusion.

By decision dated March 15, 2002, an Office hearing representative finalized the preliminary overpayment determination of the Office dated June 20, 2001 and affirmed the forfeiture determination. The Office hearing representative found that the evidence of record supported that appellant violated section 8106(b) of the Federal Employees' Compensation Act by knowingly failing to report earnings as required. The hearing representative found that appellant forfeited her entitlement to compensation for the 15 months prior to the June 16 and November 10, 1993 Forms CA-1032 as the evidence supported that she had knowingly omitted earnings during the period covered and, thus, forfeited all entitlement to compensation during the period March 16, 1992 through November 10, 1993 in the amount of \$44,159.42. He also considered testimony from Ms. Berrie, a handwriting expert, regarding the signature on the June 16 and November 10, 1993 CA-1032 forms and found it unpersuasive in view of the surrounding circumstances. The hearing representative found that waiver of the overpayment was not available as appellant was at fault in the creation of the overpayment. As no reasonable repayment plan could be established, the Office hearing representative found that the overpayment of \$44,159.42 was due and payable in full.

The Board finds that appellant forfeited her right to compensation for the period March 16, 1992 through November 10, 1993, because she knowingly failed to report earnings from employment.

Section 8106(b) of the Act¹ provides in pertinent part:

“The Secretary of Labor may require a 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--

- (1) fails to make an affidavit or report when required; or
- (2) knowingly omits or understates any part of his earnings;

¹ 5 U.S.C. § 8106(b).

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

Appellant, however, can only be subjected to the forfeiture provision of section 8106(b) of the Act if she “knowingly” failed to report earnings from employment or self-employment.³ As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings.⁴ Being a penalty provision, the forfeiture provided for in section 8106(b) of the Act must be narrowly construed.⁵ The inquiry is whether appellant knowingly omitted or understated her earnings from employment for the periods covered by the CA-1032 forms. The regulations define “knowingly” as “with knowledge, consciously, willfully or intentionally.”⁶ The language on the Form CA-1032 is clear and unambiguous in requiring a claimant to report earnings from self-employment or a business enterprise in which he worked.

The Office has the burden of proof in establishing that appellant, either with knowledge, consciously, willfully or intentionally, failed to report employment or earnings.⁷ To meet this burden of proof, the Office is required to closely examine appellant’s activities and statements in reporting employment or earnings.⁸ The Office may meet this burden in several ways: by employee’s own admission to the Office that they failed to report employment or earnings, which he knew he should report; by establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form CA-1032;⁹ or by showing that, upon further inquiry by the Office as to employment activities, the employee continued to fail to fully and truthfully reveal the full nature of the employment activities.¹⁰

The record reflects that appellant was convicted of one count of conspiracy under 5 U.S.C. § 371 making false statements in violation of 18 U.S.C. §§ 1001 and 1002, whereby she agreed to a scheme of making false statements to obtain money from the employing establishment for counseling sessions which did not occur. The conviction for defrauding the employing establishment covered the period 1990 through February 1993. The Board finds that appellant’s plea agreement and conviction, her income tax returns and social security information constitute persuasive evidence that she knowingly omitted earnings from self-employment when she completed the affidavit on CA-1032 forms dated June 16 and

² *Garry Don Young*, 45 ECAB 621, 627 (1994).

³ *Robert R. Holmes*, 49 ECAB 161 (1997).

⁴ *Barbara Hughes*, 48 ECAB 398 (1997); *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

⁵ *Anthony A. Nobile*, *supra* note 4.

⁶ 20 C.F.R. § 10.5(n); *see Linda L. Coggins*, 51 ECAB 300 (2000); *Christine C. Burgess*, 43 ECAB 449 (1992).

⁷ *Barbara Hughes*, *supra* note 4; *Barbara L. Kanter*, 46 ECAB 165, 169 (1994).

⁸ *Barbara Hughes*, *supra* note 4; *see Royal E. Smith*, 44 ECAB 417, 419 (1993).

⁹ *Barbara Hughes*, *supra* note 4; *Barbara L. Kanter*, *supra* note 7 at 169-70.

¹⁰ *Id.*

November 10, 1993, which required her to report any enterprise “in which she worked and from which she received revenue.” As the Form CA-1032 covers a period of 15 months, the June 16 and November 10, 1993 CA-1032 forms constitute persuasive evidence that appellant knowingly omitted her earnings from her self-employment earnings as a counselor. The Board finds that the testimony by Ms. Berrie, the handwriting expert, is unpersuasive. As noted by the hearing representative, the CA-1032 forms were correctly addressed to appellant and there was no evidence why another individual would complete the forms. Moreover, the record contains no evidence that the handwriting expert affirmatively testified that the CA-1032 forms were signed by appellant. She merely noted that the signatures on the June 16 and November 10, 1993 Forms CA-1032 and the May 25, 1994 were not signed by the same person. As appellant was repeatedly informed of her responsibility to fully report, her earnings on the CA-1032 forms in question, her knowing omission of these earnings on the forms she signed is sufficient to establish that she violated section 8106(b)(2). Also persuasive is appellant’s plea agreement and conditions for knowingly conspiring in the scheme with Mr. Abbey. The Board finds that appellant forfeited her right to compensation for the period March 16, 1992 through November 10, 1993, because she failed to report employment pursuant to section 8106(b)(2)¹¹ resulting in an overpayment.¹²

The record reflects that, during the period of forfeiture from March 16, 1992 through November 10, 1993, appellant was paid compensation for wage loss in the amount of \$44,159.42. The period of forfeiture is determined by the date appellant completed the CA-1032 form. Each CA-1032 form requires that information be provided concerning activities during the previous 15 months. If a CA-1032 form is improperly completed resulting in a finding of forfeiture, the Board has found that the period of forfeiture is the entire 15-month period covered by the form in question.¹³ The CA-1032 forms dated June 16 and November 10, 1993 cover the period March 16, 1992 through November 10, 1993. Since appellant has forfeited her right to compensation during this period, this sum constitutes an overpayment of compensation.

The Board further finds that appellant was at fault in the creation of the resulting overpayment.

Section 8129 of the Act¹⁴ 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 be against equity

¹¹ See *Burnett Terry*, 46 ECAB 457 (1995) (finding that income directly traceable to the product of an employee’s work is considered earnings or wages).

¹² See *Iris E. Ramsey*, 43 ECAB 1075, 1091 (1992) (finding that appellant’s plea of guilty to filing false documents in violation of federal law constituted persuasive evidence that she “knowingly” omitted her earnings when she completed Office affidavits, notwithstanding her attempts to explain away the plea).

¹³ *William G. Norton, Jr.*, 45 ECAB 630 (1994).

¹⁴ 5 U.S.C. § 8129(b).

and good conscience.¹⁵ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.¹⁶

The implementing regulation¹⁷ provides that a claimant is with fault in the creation of an overpayment when she: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.

In the preliminary overpayment determination dated June 20, 2001, the Office found that appellant was at fault in the matter of the overpayment because she was repeatedly informed of the necessity and importance of reporting earnings information to the Office and she knowingly withheld this information. The record reflects no evidence of any educational, mental or emotional handicap, which would have prevented appellant from comprehending the written materials, from understanding regulations, from seeking good advice, or from otherwise not complying with the clear and basic instructions provided to her regarding the conditions of her entitlement.

Appellant knew or should have known that the income from and “employment activities” she engaged in with Mr. Abbey in their illegal business enterprise was material information relevant to the receipt of compensation. The forms clearly stated that the information provided would be used to determine whether she qualified for continued benefits or whether an adjustment in benefits would be warranted. The forms also warned appellant that a false or evasive answer to any question, or the omission of an answer, could be grounds for the suspension of benefits. The Board finds that appellant knowingly answered falsely when she certified that she was unemployed during the covered periods. The Office hearing representative found that appellant knowingly withheld this information and so declared in federal court by pleading guilty. The Board finds that because appellant failed to furnish information that she knew or should have known to be material pursuant to section 10.433(a)(2), she is with fault in the matter of the overpayment resulting from his forfeiture. Accordingly, no waiver of collection of the overpayment is possible under section 8129(b) of the Act.

In summary, pursuant to section 8106(b) appellant has forfeited her right to compensation for the period March 16, 1992 through November 10, 1993 and this forfeiture has resulted in an overpayment of compensation in the amount of \$44,159.42.

Lastly, the Board finds that the Office could properly pursue full collection of the overpayment amount.

¹⁵ *James H. Hopkins*, 48 ECAB 281 (1997); *Michael H. Wacks*, 45 ECAB 791 (1994).

¹⁶ See *William E. McCarty*, 54 ECAB ____ (Docket No. 03-308, issued April 14, 2003); *Beverly E. Labbe*, 50 ECAB 440 (1999); *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is with fault in helping to create the overpayment).

¹⁷ 20 C.F.R. § 10.433(a).

The Board notes that the September 11, 2000 financial disclosure form prepared by appellant, failed to show any income greater than her expenses. For this reason, the Office hearing representative indicated that he could not determine a reasonable repayment plan. The Office hearing representative found that since it was impossible to establish an accurate repayment plan, the full amount of the overpayment of \$44,159.42 was due and payable.

Section 10.441(a) of Office regulations provides:

“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 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.”¹⁸

In this case, appellant is receiving continuing compensation benefits for disability, but failed to provide full disclosure regarding income, expenses and assets. In such cases the Office should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.¹⁹ The Office properly required repayment of the \$44,159.42 overpayment.

The decision of the Office of Workers’ Compensation Programs dated March 15, 2002 is hereby affirmed.

Dated, Washington, DC
November 7, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁸ 20 C.F.R. § 10.441(a).

¹⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.4.d(1)(b) (September 1994).