

**United States Department of Labor
Employees' Compensation Appeals Board**

DON A. DUE, Appellant

and

**DEPARTMENT OF THE NAVY, LONG
BEACH NAVAL SHIPYARD, Long Beach, CA,
Employer**

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**Docket No. 04-718
Issued: August 27, 2004**

Appearances:
Tina Overton, for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On January 24, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated April 25, 2003, forfeiting his compensation for the period June 20, 1997 to September 16, 2000, and an October 15, 2003 decision denying reconsideration without merit review of the claim.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the forfeiture issue and the denial of reconsideration.

ISSUES

The issues are: (1) whether the Office properly forfeited appellant's compensation for the period June 20, 1997 to September 16, 2000; and (2) whether the Office properly denied appellant's request for reconsideration without merit review of the claim.

¹ The record contains an April 25, 2003 preliminary determination of an overpayment of compensation; there is no final decision of record with respect to an overpayment and the issue is not before the Board on this appeal.

FACTUAL HISTORY

The Office accepted that appellant sustained aggravation of preexisting loose body of the right knee, right knee arthritis and right meniscus tear in the performance of duty on January 24, 1983. Appellant stopped working and received compensation for temporary total disability. By decision dated January 14, 1988, the Office reduced appellant's compensation to reflect his wage-earning capacity in the selected position of production line welder.

Appellant continued to receive compensation based on a loss of wage-earning capacity. Periodically the Office requested that appellant complete a Form EN1032² that requested information with respect to any employment activity, volunteer work, dependents, and receipt of other federal benefits. The Form EN1032 requires that an employee "report ALL self-employment or involvement in business enterprise," and also requires reporting of "ANY work or ownership interest in any business enterprise," even if the business lost money or profits were reinvested. The form requests information regarding any activity within the prior 15 months.

On September 20, 1998, September 18, 1999, July 22 and September 16, 2000, appellant completed the EN1032 and responded "no" with respect to self-employment or involvement with a business enterprise within the prior 15 months. He reported no earnings or employment activity. In November 2000, the Office of the Inspector General (OIG) conducted an investigation and determined that appellant owned and operated a fencing business since 1992. The evidence gathered by the investigators included invoices, receipts and testimony from appellant. According to the investigative report provided by the OIG, invoices from 1996 to 2000 indicated that the business had earned approximately \$471,000.00 during this period. In a report of interview on November 2, 2000, appellant acknowledged that he had been in the fencing business for the prior seven years, with his last fencing job approximately one month prior to the interview. Appellant stated that he had difficulty reading, that his former spouse completed the CA-1032 forms, except for his signature, and that he did not know he should have reported his fencing business on the forms.

On June 27, 2001 appellant was charged in United States District Court for the Western District of Missouri with violating 18 U.S.C. § 1920. The information alleged that, on September 20, 1998, September 18, 1999 and July 22, 2000, appellant knowingly made false statements on CA-1032 forms in order to obtain compensation benefits. In a signed plea agreement dated June 27, 2001, appellant agreed to plead guilty to the information charging a violation of 18 U.S.C. § 1920. The plea agreement stated, "by entering into this [p]lea [a]greement, the defendant admits that he knowingly committed this offense, and is in fact guilty of this offense."

By decision dated November 27, 2001, the Office terminated appellant's compensation for wage-loss and medical benefits pursuant to 5 U.S.C. § 8148. The Office determined that appellant was not entitled to further compensation as he had pleaded guilty to a violation of 18 U.S.C. § 1920.

² The cover letter to the form is labeled as CA-1032; the actual questions are contained in a Form EN1032.

In a decision dated April 25, 2003, the Office determined that, pursuant to 5 U.S.C. § 8106(b), appellant forfeited his compensation for the period June 20, 1997 to September 16, 2000. The Office found that appellant had knowingly failed to report earnings on CA-1032 forms completed from September 20, 1988 to September 16, 2000.

In a letter dated October 1, 2003, appellant requested reconsideration of the claim. Appellant stated that a girlfriend had completed the paperwork and he signed the forms in good faith. He also stated that he did not intend to make any fraudulent statements on the forms.

By decision dated October 15, 2003, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the April 25, 2003 decision.

LEGAL PRECEDENT -- ISSUE 1

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—

- (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 ... under section 8129 of this title, unless recovery is waived under that section.”³

ANALYSIS -- ISSUE 1

In the present case, the record indicates that, on September 20, 1998, September 18, 1999, July 22, 2000, and September 16, 2000, appellant signed EN1032 forms that provided information regarding his employment activity. On each of the forms appellant indicated that he did not have any earnings during the 15-month period covered by the form. The record, however, establishes that appellant did have earnings during the period covered by each of the forms. The investigation conducted by the OIG revealed that appellant owned and operated a fencing business during this period. In an interview dated November 2, 2000, appellant acknowledged that he had been involved in a fencing business for the prior seven years, with the last job performed approximately one month earlier. Invoices and testimony obtained during the investigation establish that appellant continued to work and have earnings from 1997 to 2000. Moreover, the plea agreement signed by appellant acknowledges that he made false statements on the September 20, 1998, September 18, 1999 and July 22, 2000 forms. With respect to the September 16, 2000 EN1032, the record establishes that appellant continued to operate the fencing business and had earnings in the period covered by the September 16, 2000 form. For

³ 5 U.S.C. § 8106(b).

example, the record contains an invoice dated September 9, 2000 for work performed by appellant.

The Board therefore finds that the record supports a finding that appellant failed to report earnings on the forms from September 20, 1998 to September 16, 2000. The next issue presented is whether the failure to report was “knowingly” under 5 U.S.C. § 8106(b). The term “knowingly” is defined in the regulations governing administration of claims filed under the Act as “[w]ith knowledge, consciously, willfully or intentionally.”⁴

Appellant stated in his November 2, 2000 investigative interview that his former wife completed the forms, that appellant then signed the forms, and that he did not know he should have reported the fencing business on the EN1032 forms. In this case, however, the plea agreement provided probative evidence on the issue contrary to appellant’s assertion. With respect to the September 20, 1998, September 18, 1999 and July 22, 2000 forms, the plea agreement clearly stated that appellant “admits that he knowingly committed this offense” of making false statements to obtain compensation payments. The plea agreement is persuasive evidence that appellant knowingly admitted earnings,⁵ and is consistent with the evidence supporting appellant’s longstanding involvement in the business and significant earnings derived from the fencing business. With respect to the September 16, 2000 EN1032, the record contains no evidence that appellant’s failure to report earnings should be treated differently from the prior forms. Appellant had worked in the fencing business for approximately seven years, continued to have earnings through September 2000, and acknowledged in the plea agreement that he had knowingly omitted earnings on the forms completed from September 20, 1998 to July 22, 2000.

For the above reasons, the Board finds that on September 20, 1998, September 18, 1999, July 22 and September 16, 2000, appellant knowingly omitted earnings on the EN1032 forms. Pursuant to 5 U.S.C. § 8106(b) he forfeited his right to compensation for the period covered by the forms. Since each form covers a 15-month period, appellant forfeits his compensation from 15 months prior to September 20, 1998, which is June 20, 1997 through September 16, 2000.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁶ the Office’s regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent new evidence not previously considered by the Office.⁷ Section 10.608(b) states that any application for review that does not meet at least one of the

⁴ 20 C.F.R. § 10.5(n).

⁵ See *Michael D. Matthews*, 51 ECAB 247 (1999).

⁶ 5 U.S.C. § 8128(a) (providing that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

⁷ 20 C.F.R. § 10.606(b)(2).

requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁸

ANALYSIS -- ISSUE 2

In this case, appellant submitted a request for reconsideration on October 1, 2003, stating that he had a learning disability and that he did not actually complete the forms other than to provide his signature. Appellant stated that he never intentionally made false statements regarding his claim. The Board finds that appellant did not advance a new and relevant legal argument in his request for reconsideration. He had previously noted his difficulty in reading and argued that he was not aware of his obligation to report his self-employment activity. Appellant did not submit any new and relevant evidence with respect to the forfeiture issue under 5 U.S.C. § 8106(b). He did not meet any of the requirements set forth at 20 C.F.R. § 10.606(b)(2), and therefore the Board finds that the Office properly denied the reconsideration request without reviewing the merits of the claim.

CONCLUSION

The Board finds that appellant has forfeited his right to compensation for the period June 20, 1997 to September 16, 2000 under 5 U.S.C. § 8106(b). The Board further finds that the Office properly denied appellant's October 1, 2003 reconsideration request.

⁸ 20 C.F.R. § 10.608(b); *see also* Norman W. Hanson, 45 ECAB 430 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 15 and April 25, 2003 are affirmed.

Issued: August 27, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member