

\$20,303.86 due to the forfeiture; and (3) whether she was at fault in the creation of the overpayment and thus not entitled to waiver.

FACTUAL HISTORY

On August 9, 2004 appellant, then a 46-year-old general clerk, filed a claim for a traumatic injury occurring that date in the performance of duty. The Office accepted the claim, assigned claim number 10-0386073, for a permanent aggravation of a herniated disc at L4-5, low back strain and a consequential tear of the right meniscus and a tear of the right wrist.² Appellant received compensation for intermittent periods of disability from December 11, 1990 through March 14, 1999. She received compensation from the Office under the name of Julia Andrews, social security number (SSN) 348-62-XXXX.

Appellant submitted claims for compensation on account of disability (Form CA-8) covering the period December 11, 1990 through May 13, 1991.³ Appellant did not report any salaried or self-employment on the CA-8 forms.

On August 13, 1991 appellant signed an affidavit of earnings and employment (Form CA-1032) covering the prior 15-month period which advised that she must report all employment or self-employment from which she received wages or other income and must report what she was paid for any employment. The form advised appellant that false or evasive answers or omissions may be grounds for forfeiting her compensation and could subject her to criminal prosecution. In response to a question on the form regarding whether she was employed, appellant responded “no” and stated that she was “not actively employed” during the 15-month period in question.

Appellant submitted numerous CA-8 forms requesting compensation for the periods October 31 through December 12, 1992 and January 9 through February 6, 1993. She listed “not applicable” in response to the question on the forms regarding whether she was employed, except for the period November 14 to 27, 1992, where she indicated that she worked part time at the employing establishment.

Appellant also completed a Form CA-1032 dated August 21, 1993 covering the prior 15-month period. She listed her employment from April 1979 onwards at the employing establishment. Appellant noted on the form that she was currently disabled for work and receiving compensation payments.

The record establishes that the Office paid appellant compensation for either total or partial disability during the periods December 11, 1990 through August 13, 1991, October 31 to December 12, 1992 and January 9 through February 6, 1993.

² Appellant has various other accepted claims, including 10-0465289, which the Office accepted for low back strain and a right meniscus tear and doubled into the current claim number. She also has another claim, assigned claim number 10-0352075, which is currently before the Board under Docket No. 04-444. The issues in Docket No. 04-444 are forfeiture of compensation, fact of overpayment and fault.

³ The Office placed appellant on the periodic roll beginning June 1991.

In a letter dated September 25, 2000, an inspector for the employing establishment informed the Office that appellant “admitted she failed to report she was gainfully employed as required” when submitting Forms CA-1032, CA-7 and CA-8 to the Office and did not inform the Office that she used more than one name and SSN. In an investigative memorandum of the same date, the inspector related that appellant worked for other federal agencies under the name Julia Peters or Julia Tippen with a SSN of 438-64-XXXX. He indicated that appellant worked for the Department of Veterans Affairs (VA) from September 20, 1992 through January 22, 1993. The inspector further related that on an application for federal employment (SF-171) dated May 28, 1992, appellant listed self-employment as a “child care service worker earning \$240.00 per week during the period October 1988 through October 1991.” He also noted that appellant signed a Consent for Disclosure of Wage Information form on August 13, 1991 without revealing that she worked under another name or SSN.

In a memorandum of interview dated August 25, 2000, an inspector related that appellant stated that she applied for a new SSN in 1976 because she did not want to apply for a job in Illinois with a SSN from the South and wanted to hide from an ex-husband. The investigator stated:

“[Appellant] acknowledged that when she worked for the Veterans Administration during October through December 1987 and from September 1992 through January 1993 she was also employed by the [employing establishment]. [Appellant] reviewed 13 Forms CA-7 and CA-8 and initialed and dated each form acknowledging that she had completed and signed these forms. When asked if she knew she was supposed to report her VA employment and income on the CA-7s and CA-8s, [she] initially stated ‘I understand.’ [Appellant] repeated ‘I understand’ several times after I repeatedly asked her if she realized she was supposed to report her VA employment and income on the forms.

“She said she worked at the VA while she claimed [Office] benefits because she needed money and thought [the Office] was slow in getting her any money. [Appellant] later stated that she thought she only had to report [employing establishment] earnings on the CA-7s and CA-8s. [Appellant] did acknowledge she received income from VA and did not report the income when she completed the CA-7s and CA-8s during December 1987 and September 1992 through January 1993.”

The inspector included a signed Form SF-171 dated May 26, 1992 in which appellant indicated that she was self-employed in child care services from October 1988 through October 1991 earning \$240.00 a week caring for three to four children.

The record indicates that appellant resigned from federal employment on January 22, 1993. Accompanying her application is a Certified Summary of Federal Service form showing that she worked for the employing establishment from April 9, 1979 to the present and for the VA from October 5, 1987 to September 2, 1988 and September 29, 1992 to January 22, 1993.

By decision dated March 12, 2003, the Office found that appellant forfeited her entitlement to compensation from December 11, 1990 through August 13, 1991, October 31 through December 12, 1992 and January 9 through February 6, 1993. The Office found that appellant knowingly failed to report earnings from employment on Forms CA-7, CA-8 and CA-1032 for the periods in question.⁴

On March 12, 2003 the Office notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$20,303.86 because she forfeited entitlement to compensation for the periods December 11, 1990 through August 13, 1991, October 31 through December 12, 1992 and January 9 through February 6, 1993. The Office found that appellant was at fault in creating the overpayment because she knowingly omitted earnings on Forms CA-7, CA-8 and CA-1032 for the periods in question.

On April 7 and March 10, 2003 appellant requested a preresoupment hearing and an oral hearing on the forfeiture decision.

Appellant submitted a statement to the hearing representative dated January 21, 2004. She related that she completed a notice of recurrence of disability, Form CA-2a, which stated that she should complete Part C of the form only if not employed with the federal government. Appellant maintained that due to the wording of the Form CA-2a, she believed that she should not list federal jobs when claiming compensation on Office forms. Appellant acknowledged working at the VA from October 1992 through February 1993 but stated that she did not violate her physical limitations. Appellant also stated that she did not perform any child care from October 1988 through October 1991. She explained that she listed child care employment on her application to work at the VA in order to increase her chances of being hired permanently. She also noted that she wanted her daughter to be able to claim deductions for child care expenses for income tax purposes.

Appellant submitted an affidavit dated January 20, 2004 in which she related that she did not provide child care as stated on the SF-171. She also submitted affidavits from friends who stated that she did not provide child care. In a statement dated November 18, 2003, her daughter, Fanita E. Tippen, related that appellant did not charge her for providing occasional child care to her children.

At the hearing, held on January 22, 2004, appellant stated that she was not in the child care business from October 1988 through October 1993 and only indicated that she was so employed on her SF-171 because she did want to disclose her health problems. She also related that while working at the VA from October 31 through December 12, 1992 she took a lot of paid leave. Appellant explained that she believed from the language on the Form CA-2a that she was not supposed to report federal employment when claiming compensation. She further noted that she disclosed all of her employment and social security numbers in 1999 in connection with her application for disability retirement.

⁴ The Board had held that the language of Form CA-7 is not specific enough to reasonably put an injured employee on notice that he or she had to report all earnings. See *Linda L. Coggins*, 51 ECAB 300 (2000). In this case, however, the Office also based its forfeiture determination on appellant's signing of Forms CA-1032 and CA-8 covering the periods in question.

By decision dated July 1, 2004, the hearing representative affirmed the Office's March 12, 2003 forfeiture decision and finalized the finding that appellant received an overpayment of compensation in the amount of \$20,303.86 because she forfeited her compensation from December 11, 1990 through August 13, 1991, October 31 through December 12, 1992 and January 9 through February 6, 1993. The hearing representative further finalized the finding that appellant was at fault in the creation of the overpayment and thus not entitled to waiver. He noted that she was no longer receiving compensation and that the overpayment was "due and payable."

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the Federal Employees' Compensation Act provides that 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."⁵

Section 10.529 of the Office's implementing regulation provides as follows:

"(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution."⁶

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. Appellant can be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) only if she "knowingly" failed to report employment or earnings.⁷ The term "knowingly" as defined in the Office's implementing regulation, means "with knowledge, consciously, willfully or intentionally."⁸ The Board has held that the Office can meet this burden of proof in several ways, including appellant's own admission to the Office that she failed to report employment or earnings which she knew she should report, or establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form CA-1032.⁹

ANALYSIS -- ISSUE 1

The Office found that appellant forfeited her entitlement to compensation from December 11, 1990 through August 13, 1991, October 31 through December 12, 1992 and

⁵ 5 U.S.C. § 8106(b)(1) and (2).

⁶ 20 C.F.R. § 10.529.

⁷ *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁸ 20 C.F.R. § 10.5(n).

⁹ *Barbara L. Kanter*, *supra* note 7.

January 9 through February 6, 1993. Regarding the period December 11, 1990 through August 13, 1991, appellant signed numerous CA-8 forms requesting compensation from December 11, 1990 through May 31, 1991. She did not disclose any employment other than her work with the employing establishment. Additionally, on August 13, 1991 appellant signed a Form CA-1032 covering the period May 13, 1990 through August 13, 1991. She stated on the form that she was not employed during that period. The record establishes, however, that appellant signed an application for federal employment on May 26, 1992 and listed self-employment in child care services from October 1988 through October 1991 earning \$240.00 a week. Appellant contended that she did not actually provide child care but only listed it on the application form so she did not have to disclose her employment injuries to the VA. In support of her contention, she submitted affidavits from friends who stated that she did not provide child care and a statement from her daughter who asserted that appellant did not charge her for child care. Appellant's contention that she did not provide child care as listed on the SF-171, however, is not credible given that the SF-171 provides that a false statement on the form may result in a "fine or imprisonment." By signing the SF-171 form, appellant certified that her statements were "true, correct, complete and made in good faith." The Board therefore finds that appellant had undisclosed earnings from child care during December 11, 1990 through May 31, 1991, the period covered by the August 13, 1991 Form CA-1032.

Regarding the time periods October 31 through December 12, 1992 and January 9 through February 6, 2003, appellant submitted numerous CA-8 forms requesting compensation for these periods without disclosing any employment other than her worked for the employing establishment. On August 21, 1993 she signed a Form CA-1032 covering the period May 21, 1992 through August 21, 1993. She noted only that she worked for the employing establishment and indicated that she was currently receiving workers' compensation. By appellant's own admission, however, she worked from September 20, 1992 through January 22, 1993 at the VA. The record also contains a form detailing appellant's federal service which establishes that she worked from September 20 through January 22, 1993 at the VA. Thus, the Board finds that the evidence clearly establishes that appellant had undisclosed earnings during the time covered by the August 21, 1993 Form CA-1032.

The Office has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.¹⁰ In this case, appellant signed CA-1032 forms on August 13, 1991 and August 21, 1993 which advised her that she must report both employment and all earnings from employment and self-employment. The CA-1032 forms clearly state that "a false or evasive answer to any questions or omission of any answer, may be grounds for forfeiture of your compensation benefits and subject you to criminal prosecution." Additionally, appellant signed numerous CA-8 forms which clearly state that she should report any earnings from employment. The forms advise that any person who knowingly makes "any false statement, misrepresentation, concealment of fact or any other act of fraud" in order to obtain compensation under the Act is subject to various civil, administrative and criminal penalties. Specifically, Form CA-8 requires that the injured employee provide certain information if he or she "worked anywhere" during the period of

¹⁰ *Terryl A. Geer*, 51 ECAB 168 (1999).

compensation claimed.¹¹ Moreover, appellant initially told inspectors with the employing establishment that she knew that she should have reported her employment with the VA. The fact that she performed her work for the VA and as a child care provider under a different name and SSN than the name and SSN that she used to obtain compensation benefits from the Office provides further evidence that she intended to conceal her earnings. The factual circumstances of record, including appellant's acknowledgement that she failed to submit the necessary information, her signing of strongly worded certification clauses on the CA-1032 and CA-8 forms, and her use of a name and SSN which differed from the name she used in order to obtain compensation from the Office, provide persuasive evidence that she "knowingly" understated her earnings and employment information.¹² The Office, therefore, properly found that appellant forfeited her compensation for the periods December 11, 1990 through August 13, 1991, October 31 through December 12, 1992 and January 9 through February 6, 1993.

On appeal appellant contends that she interpreted language on the Form CA-2a to mean that she did not have to report federal employment. The Form CA-2a is a notice of recurrence of disability rather than a claim for compensation or a statement of earnings and employment. The clear language of the Form CA-1032 and Form CA-8 requires disclosure of all employment and earnings.

On appeal appellant also maintains that she has signed an affidavit "under penalty of perjury" stating that she did not perform child care work. As discussed above, however, her assertion is not credible given her signature on the SF-171 providing that she had completed the form truthfully and in good faith and given the penalty stated on the form of a fine or imprisonment for falsely completing the employment application.

Appellant also argues that she should not forfeit compensation for the entire period because she was in the hospital for part of the time. The Board has held, however, that when a CA-1032 is improperly completed resulting in a forfeiture of compensation, the period of the forfeiture is the entire 15-month period covered by the form in question even if he or she had no earnings during a portion of the period.¹³

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of the Office's implementing regulation provides as follows:

"(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement,

¹¹ Item No. 9 on Form CA-8 requests information about salaried employment and commission and self-employment, including name and address of business or employer, dates and hours worked, pay rate, total amount earned or income derived and type of work activity performed. With respect to commission and self-employment, Form CA-8 instructs the employee to "show all activities, whether or not income resulted from [such] efforts."

¹² See generally *Robert C. Gilliam*, 50 ECAB 334 (1998).

¹³ *Martin James Sullivan*, 50 ECAB 158 (1998).

omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

“(b) Where the right to compensation is forfeited, [the Office] shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”¹⁴

ANALYSIS -- ISSUE 2

If a claimant has any earnings during a period covered by a Form CA-1032 which he or she knowingly fails to report, he or she is not entitled to any compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.¹⁵ The Office paid appellant compensation from December 11, 1990 through August 13, 1991 in the amount of \$17,451.53, from October 31 through December 12, 1992 in the amount of \$1,946.83 and January 9 through February 6, 1993 in the amount of \$905.50, for a total of \$20,303.86. As appellant forfeited compensation for this period because she omitted earnings and employment on CA-1032 forms, covering these periods, there exists an overpayment of compensation in the amount of \$20,303.86.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act¹⁶ provides that “[a]djustment 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.” Section 10.433 of the Office’s implementing regulation¹⁷ provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(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 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 to be incorrect.”

ANALYSIS -- ISSUE 3

In this case, the Office found that appellant was at fault in the creation of the overpayment because she omitted earnings on CA-1032 and CA-8 forms for the periods

¹⁴ 20 C.F.R. § 10.529.

¹⁵ *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

¹⁶ 5 U.S.C. § 8129(b).

¹⁷ 20 C.F.R. § 10.433.

December 11, 1990 through August 13, 1991, October 31 through December 12, 1992 and January 9 through February 6, 1993. The record establishes that appellant had unreported earnings from employment during the period of forfeiture and knowingly failed to furnish this material information to the Office. Appellant signed certification clauses on the CA-1032 forms dated August 13, 1991 and August 21, 1993. The certification clauses advised her that she might be subject to civil, administrative or criminal penalties if she knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. Thus, by signing the form, appellant is deemed to have acknowledged her duty to fill out the form properly, including the duty to report any employment or self-employment activities and income. She further signed CA-8 forms covering the periods of the forfeiture which indicated she worked only for the employing establishment. The CA-8 forms provided that she was subject to felony criminal prosecution for knowingly making a false statement or misrepresentation. Appellant initially told inspectors that she was aware that she should have reported her earnings and employment on the Office forms. She further worked under a name and SSN which differed from the name and SSN she used to obtain workers' compensation benefits from the Office.¹⁸ The evidence of record, therefore, shows that appellant was aware or should have been aware of the materiality of the information that she had earnings which she had not listed on the relevant forms. As she failed to provide information to the Office regarding her employment during the periods covered by the forms, she is at fault in creating the overpayment and is not entitled to waiver of record in the amount of \$20,303.86.

Regarding repayment of the overpayment of compensation, the Board's jurisdiction is limited to review those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employees' Compensation Act. In this case, appellant is no longer receiving wage-loss compensation and, therefore, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.¹⁹

CONCLUSION

The Board finds that appellant forfeited her entitlement to compensation for the periods December 11, 1990 through August 13, 1991, October 31 through December 12, 1992 and January 9 through February 6, 1993 because she knowingly failed to report earnings from employment. The Board further finds that appellant received an overpayment of compensation in the amount of \$20,303.86 during the period of the forfeiture. The Board finds that the Office properly found that appellant was at fault in the creation of the overpayment and thus not entitled to waiver.

¹⁸ See *Lewis George*, 45 ECAB 144 (1993).

¹⁹ See *Robert S. Luciano*, 47 ECAB 793 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 1, 2004 is affirmed.

Issued: February 1, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member