

creation of the overpayment and did not intend to defraud anyone. He noted reporting all earnings on his federal income tax returns and contended this was sufficient notice to the Office.

FACTUAL HISTORY

On May 7, 1990 appellant, then a 39-year-old machinist, sustained left ulnar neuropathy when he received an electric shock while operating equipment. Following a brief absence, appellant returned to work in a clerical position at a pay rate lower than that of his date-of-injury position. He received wage-loss compensation payments on the periodic roll beginning December 15, 1991.

By decision dated March 3, 1992, the Office determined that the position of time-leave clerk appellant performed since December 15, 1991 properly represented his wage-earning capacity. The Office advised appellant that he was required to report on his employment, including self-employment, whenever the Office so requested.

The Office required appellant to complete periodic Form EN1032 questionnaires regarding whether he had any earnings from employment or self-employment for the period of 15 months. The EN1032 forms advised appellant that he must report all employment, for which he received a "salary, wages, income, sales commissions, piecework or any payment" of any kind, that he must report self-employment and that he must report any such enterprise in which he worked. The forms requested that he report employment and earnings for the 15 months prior to the completion of any given form. The Office advised appellant that he was obligated to immediately report any employment to the Office and that fraudulently concealing or failing to report income could subject him to criminal prosecution.

Appellant completed and signed EN1032 forms on August 23, 1994, August 25, 1996, July 28, 1997, September 3, 1998, August 10, 1999, August 23, 2000 and December 10, 2001.¹ There is no Form EN1032 of record signed in 1995. On the forms from August 23, 1994 to July 28, 1997 and on August 10, 1999 and December 10, 2001, appellant reported his employment as a time and leave clerk at the employing establishment during the previous 15 months. On the forms dated September 3, 1998 and August 23, 2000, he indicated that he had no employment, self-employment or remunerated volunteer work during the previous 15 months.

Records from the Social Security Administration (SSA) reveal that appellant received earnings from employment other than his work at the employing establishment from 1994 through 2000. The SSA itemized statement of earnings demonstrate that appellant had earnings from Union College as follows: \$67.50 in 1994; \$527.50 in 1995; \$322.00 in 1996; \$530.70 in 1997. Appellant also had earnings from the Department of Defense as follows: \$20,039.68 in

¹ The cover letters that originally accompanied the forms are not of record. Therefore, the date of the forms themselves cannot be ascertained.

1995; \$28,738.97 in 1996; \$30,787.58 in 1997; \$30,372.28 in 1998. Appellant also earned \$82.98 in 1998 working for the Mazzone Management Group.²

By decision dated April 2, 2001, the Office found that appellant forfeited entitlement to compensation for the period May 25, 1994 to August 23, 2000, on the grounds that he omitted reporting his earnings and employment from EN1032 forms covering this period.

By notice dated May 3, 2001, the Office advised appellant of its preliminary determination that an overpayment of compensation was created in the amount of \$15,658.35 because he forfeited compensation for the period May 25, 1994 to August 23, 2000. The Office made a preliminary determination that he was at fault in the creation of the overpayment and that, consequently, it was not subject to waiver.

On May 4, 2001 the Office sent appellant an overpayment recovery questionnaire (Form OWCP-20). Appellant completed and signed the Form OWCP-20 on May 18, 2001 and noted his income, assets and debts. He contended that he did not understand the Office's reporting requirements and that he had been trying to "get off comp[ensation]" for four years. On May 31, 2001 appellant requested a prerecoupment hearing, held February 28, 2002. At the hearing, he contended that he reported all employment on his income tax returns and that this was sufficient notice to the Office.

By decision dated November 8, 2002, an Office hearing representative affirmed the April 2, 2001 decision and finalized the overpayment of compensation in the amount of \$15,658.35 and that he was at fault in the creation of the overpayment. The record indicates that the Office took no additional action in appellant's case prior to July 20, 2005.

By decision dated July 20, 2005, the Office affirmed the November 8, 2002 findings of a \$15,658.35 overpayment of compensation and that appellant was at fault in its creation. The Office further found that the information appellant supplied on the Form OWCP-20 completed May 18, 2001 was too old to provide an accurate financial accounting. The Office therefore requested that appellant fill out a new Form OWCP-20. The Office did not specifically affirm the November 8, 2002 finding of forfeiture.

Appellant completed an overpayment recovery questionnaire (Form OWCP-20) on August 15, 2005. He listed \$3,095.00 in total monthly income, \$2,574.00 in monthly expenses and \$11,630.00 in assets. Appellant requested that the Office recover the overpayment by applying the full amount of his continuing compensation payments, then \$205.00 every 28 days, to the overpaid amount.

² In a February 18, 2000 investigative memorandum, appellant contended that his employment with Mazzone Management Group and Union College "slipped his mind" and that he did not report other income as he felt "unjustly punished" by the employing establishment because he did not receive retained pay. The employing establishment's criminal investigation unit obtained payroll records from Union College showing appellant's employment as a bartender from May 25, 1994 to July 18, 1997. In a May 23, 2000 investigative memorandum, the employing establishment determined that appellant submitted "false statements in the [F]orm CA-1032's, dated August 25, 1996, July 28, 1997, August 10, 1999 ... when he falsely certified that he had not been employed outside his position ... for the preceding fifteen months, a statement he knew to be false."

By decision dated September 14, 2005, the Office finalized the overpayment and directed its recovery. The Office found that appellant had \$521.00 per month in disposable income or \$480.92 every 28 days. Therefore, the Office directed recovery of the overpayment by deducting \$205.00 every 28 days from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

The Office's implementing regulation provides that the Office may declare an overpayment of compensation for the period of a given forfeiture of compensation.³ Section 10.529 of the Office's 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.

“(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.”⁴

If a claimant has any earnings during a period covered by a Form EN1032 which he knowingly fails to report, he 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.⁵

ANALYSIS -- ISSUE 1

In this case, the Office paid appellant compensation in the amount of \$ 15,658.35 for the period May 25, 1994 to August 23, 2000. Appellant submitted EN1032 forms covering the periods May 25, 1994 to May 25, 1995 and August 25, 1996 to August 23, 2000. In these forms, he failed to report earnings and income from jobs outside of the employing establishment. The Office found that appellant forfeited his entitlement to compensation from May 25, 1994 to August 23, 2000, due to his failure to report earnings from employment on EN1032 forms. The Office then found an overpayment of compensation based on this forfeiture.

The Board finds an overpayment of compensation for the periods May 25, 1994 to May 25, 1995 and August 25, 1996 to August 23, 2000, based on appellant's forfeiture of compensation for these intervals. However, the Board finds that the case is not in posture for a decision regarding whether there was an overpayment created for the period August 24, 1994 to May 25, 1995. There is no Form EN1032 covering this period. Appellant submitted EN1032 forms dated August 23, 1994 and August 25, 1996 but there is no form of record between those

³ *Harold F. Franklin*, 57 ECAB ____ (Docket No. 05-1559, issued February 8, 2006).

⁴ 20 C.F.R. § 10.529.

⁵ *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

two dates. Therefore, there is no evidence of record that appellant forfeited his compensation and was thus overpaid from August 24, 1994 to May 25, 1995. The case will be remanded to the Office for further development to determine if an overpayment exists for this period. Following such development, the Office shall issue an appropriate decision in the case.

On appeal, appellant contends that he reported all his employment on his income tax returns and that this constituted sufficient notice to the Office. The Board does not agree.

Appellant sustained injury while in the performance of duty and filed a claim for benefits with the Office. His claim was accepted and he received appropriate benefits under the Federal Employees' Compensation Act. As the Board has noted, the Act is remedial in character and the Office has the duty of administering the provisions of the law with due regard to the rights of the employees and intent of Congress.⁶ Under section 8106(b) of the Act, the Office may require a recipient of compensation benefits to report his or her earnings from employment or self-employment by affidavit or otherwise, in the manner and at such times as the Office specifies.⁷ An employee who fails to make an affidavit or report when required or who knowingly omits or understates any part of his earnings, forfeits his or her right to compensation with respect to any period for which the affidavit or report was required.⁸ Upon his receipt of wage-loss compensation benefits, appellant became subject to the reporting requirements implemented under the Act.⁹ The report required under the implementing regulations is not achieved by forms or reports to another department or agency of the United States. Rather, the employee in receipt of compensation for wage-loss is required to report earnings from employment or self-employment directly to the Office on such forms as it may require.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act¹⁰ provides that 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. Section 10.433 of the Office's implementing regulation¹¹

⁶ See *John J. Feeley*, 8 ECAB 576 (1956).

⁷ 5 U.S.C. § 8106(b).

⁸ *Id.* See *Alan L. Trindle, Sr.*, 53 ECAB 487 (2002); *Gary L. Allen*, 47 ECAB 409 (1996).

⁹ See 20 C.F.R. § 10.525 which provides that an employee who received compensation for partial or total disability must advise the Office immediately of any return to work, either part time or full time. In addition, the employee will be periodically required to submit a report of earnings from employment or self-employment, either part time or full time.

¹⁰ 5 U.S.C. § 8129(b).

¹¹ 20 C.F.R. § 10.433.

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 2

The Office properly determined that appellant was at fault in the creation of the overpayment because he failed to provide information which he knew or should have known to be material on EN1032 forms covering the 15-month periods prior to completing each form. Appellant completed and signed EN1032 forms on August 23, 1994, August 25, 1996, July 28, 1997, September 3, 1998, August 10, 1999, August 23, 2000 and December 10, 2001. The record establishes that appellant had unreported earnings from employment during these periods and knowingly failed to furnish this material information to the Office.

Appellant signed a certification clause on the EN1032 forms, which advised him in explicit language that he might be subject to civil, administrative or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing the form, appellant is deemed to have acknowledged his duty to fill out the form properly, including the duty to report any employment or self-employment activities and income. Appellant failed to furnish information which he knew or should have known to be material to the Office. As he is not without fault in creating the overpayment for the periods May 25, 1994 to May 25, 1995 and August 25, 1996 to August 23, 2000, the overpaid amounts are not subject to waiver. However, as set forth above, the case requires further development on the issue of whether an overpayment was created in appellant's case for the period August 24, 1994 to May 25, 1995. There is no Form EN1032 of record covering this period. Therefore, it cannot be ascertained if appellant was at fault in creation of an overpayment for this period.

Regarding the third issue, the Board finds that as the case is not in posture for decision regarding the amount of the overpayment, it is premature to address its recovery. Therefore, the case is not in posture for a decision regarding recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation due to his forfeiture from May 25, 1994 to May 24, 1995 and August 26, 1996 to August 23, 2000. The Board further finds that appellant was at fault in creation of the overpayment for those periods. However, the case must be remanded to the Office for further development to determine if there was an overpayment of compensation for the period May 25, 1995 to August 25, 1996, the

amount of such overpayment and if appellant was at fault in its creation. The Board further finds that the case is not in posture for a decision regarding recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 14, 2005 is set aside. The July 20, 2005 decision is affirmed as modified and the case remanded for further development consistent with this opinion.

Issued: April 11, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board