

waiver; (4) whether the Office properly terminated appellant's compensation effective June 24, 2005 on the grounds that she pled guilty to violating 18 U.S.C. § 641, unlawful conversion of government monies, in receipt of her compensation benefits; and (5) whether the overpayment of compensation was "extinguished" by a February 15, 2005 plea agreement regarding an action brought by the employing establishment against appellant in U.S. District Court under 18 U.S.C. § 641. On appeal, appellant does not contest the fact or amount of the overpayment or the Office's termination of her compensation benefits. She contends that the February 15, 2005 plea agreement should prohibit the Office from recovering the \$64,953.86 overpayment as she made \$52,905.44 in restitution to the employing establishment pursuant to the plea agreement.

FACTUAL HISTORY

The Office accepted that, on September 4, 2002, appellant, then a 49-year-old clerk, sustained a lumbosacral strain when she lifted a bucket of flat mail. She stopped work on the date of injury and did not return.¹ In an October 29, 2002 letter, the Office advised appellant that a "person who knowingly makes any false statement, misrepresentation, concealment of fact, or any other act of fraud to obtain compensation, or who knowingly accepted compensation to which he or she is not entitled," was subject to felony criminal prosecution. The Office instructed appellant that she must "notify this office immediately" if she returned to work or obtained new employment and to return immediately any compensation check including payment for a period she had worked.

Appellant filed claims for compensation for the period October 19, 2002 to April 18, 2003. She received compensation for temporary total disability on the daily and periodic rolls beginning October 20, 2002. Appellant moved from New York to Nevada in August 2003.

Appellant submitted EN1032 forms signed April 5 and September 19, 2003, May 8 and August 24, 2004, attesting that she had not worked during the previous 15 months. These forms cover the period September 4, 2002 to August 24, 2004. Appellant continued to receive compensation for temporary total disability through July 8, 2005.

In October 13 and 15, 2004 memoranda, the employing establishment inspection service advised the Office that appellant was observed from May to July 2004 engaging in activities in furtherance of the home-based businesses Body Toolz and Shear Shoppe. Appellant attended trade shows, demonstrated and sold merchandise and loaded cartons of merchandise into a vehicle. She also applied for a post office box for the businesses in August 2003 and directed mail forwarding in May 2004. Both businesses were run out of the residence appellant shared with her husband in Henderson, Nevada.

¹ Appellant's application for disability retirement benefits through the Office of Personnel Management (OPM) was approved, effective November 1, 2002, the date she separated from the employing establishment. In a November 25, 2002 letter, appellant elected to receive compensation benefits under the Federal Employees' Compensation Act.

In a Form EN1032 signed on November 12, 2004, appellant stated that she had not been employed or self-employed during the past 15 months. Under Part B of the form, entitled "Volunteer Work," appellant answered "yes." She described her activities as "[a]nswer [tele]phone, type invoice letter, attend trade show occasionally -- graphic arts occasionally," from "2000 -- to present -- volunteer in my husband business, I received NO money, my husband paid in kind for my plane fare to trade show out of state." She stated that she performed these tasks from one to five hours a week.

On February 15, 2005 appellant appeared in the United States District Court for the District of Nevada and pled guilty to one count of unlawful conversion of government money or property, in violation of 18 U.S.C. § 641, a felony offense.² Appellant admitted filing false EN1032 forms dated April 5 and September 13, 2003, May 8 and August 24, 2004 stating that she had not been employed or self-employed during the 15 months prior to the date on each form. She admitted to conducting commercial activities in furtherance of the home-based businesses Body Toolz and Shear Shoppe, including attending trade shows, demonstrating merchandise and conducting sales. The plea agreement stated that appellant understood that the United States Attorney and her defense counsel had entered a plea negotiation of which she was fully aware and understood. In return, the government dismissed two counts of making false statements to obtain federal workers' compensation benefits, in violation of 18 U.S.C. § 1920, for which she had been indicted by a grand jury on December 22, 2004. The plea agreement stipulated that it could not "bind any other federal, state or local prosecuting, administrative, or regulatory authority" and did not prohibit any agency of the United States "from initiating or prosecuting any civil proceeding directly or indirectly involving" appellant. The Court declared restitution of \$52,905.44 under the terms of the plea agreement.

By decision dated June 29, 2005, the Office terminated appellant's compensation benefits effective June 24, 2005 based on her conviction for unlawful conversion.³

By decision dated January 4, 2006, the Office denied appellant's claim for compensation for the period October 20, 2002 to November 12, 2004 on the grounds that she forfeited her right to compensation benefits by failing to report earnings from self-employment for the periods covered by EN1032 forms signed on April 5 and September 19, 2003, May 8, August 24 and November 12, 2004.

By notice dated January 4, 2006, the Office advised appellant of its preliminary determination that she was overpaid \$64,953.86 in compensation for the period October 20, 2002

² Title 18 of the United States Code is entitled "Crimes and Criminal Procedure." 18 U.S.C. § 641 appears in Chapter 31 of Title 18, entitled "Embezzlement and Theft."

³ Following the termination, the Office received an impartial medical report on August 8, 2005 from Dr. John S. Thalgott, a Board-certified orthopedic surgeon, appointed to resolve a conflict of medical opinion between a second opinion examiner and appellant's physician. Dr. Thalgott found that the September 4, 2002 lifting incident caused L4-5 and L5-S1 disc injuries necessitating surgical fusion. However, as appellant's compensation benefits, including medical benefits, were terminated due to forfeiture, the Office did not accept the lumbar disc injuries or authorize the surgical fusion.

to November 12, 2004 as she plead guilty to unlawful conversion of government funds. The Office found that appellant was at fault in creation of the overpayment as she “knew or reasonably should have known [she] could not work and receive total disability benefits. [She] also should have been aware of the necessity of reporting any employment activity” on EN1032 forms. Appellant submitted no additional evidence regarding the proposed overpayment.

By decision dated February 13, 2006, the Office finalized the preliminary determination of overpayment, finding that a \$64,953.86 overpayment of compensation was created in appellant’s case for the period October 20, 2002 to November 12, 2004 as she received total disability compensation while working. The Office further found that appellant was at fault in the creation of the overpayment as she “knowingly accepted wage-loss compensation to which she was not entitled” as she participated in operating two small businesses while claiming to be totally disabled for work. The Office directed recovery of the overpayment at a rate of \$325.00 a month from February 15, 2006 to July 15, 2020.

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 [her] earnings; forfeits [her] right to compensation with respect to any period for which the affidavit or report was required.”⁴

The Board has held that it is not enough merely to establish that there was unreported employment or earnings. Appellant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she “knowingly” failed to report employment or earnings.⁵ The term “knowingly” as defined in the Office’s implementing regulation, means with knowledge, consciously, willfully or intentionally.⁶ The Board has found that the Office can meet this burden of proof in several ways, including by appellant’s own admission to the Office that she failed to report employment or earnings which she knew she should report, or by establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form EN1032.⁷

ANALYSIS -- ISSUE 1

The evidence of record establishes that appellant “knowingly” concealed her earnings and employment activities from the Office. The record reflects that, on February 15, 2005, appellant plead guilty in U.S. District Court to the felony of unlawful conversion of government money or property, in violation of 18 U.S.C. § 641. Appellant admitted filing false EN1032 forms dated April 5 and September 13, 2003, May 8 and August 24, 2004 stating that she had not

⁴ 5 U.S.C. § 8106(b).

⁵ *Harold F. Franklin*, 57 ECAB ____ (Docket No. 05-1559, issued February 8, 2006).

⁶ 20 C.F.R. § 10.5(n).

⁷ *Harold F. Franklin*, *supra* note 5.

been employed or self-employed. Appellant also admitted to conducting activities in furtherance of the home-based business Body Toolz and Shear Shoppe, including attending trade shows and demonstrating merchandise. Also, on the Form EN1032 she signed on November 12, 2004, appellant admitted that from 2000 onward, she answered the telephone, typed invoice letters and did graphic arts tasks for the beauty implements businesses from one to five hours each week. The Board finds that appellant's guilty plea in the U.S. District Court matter, against her own interest, and her admission in the November 12, 2004 Form EN1032 that she assisted her husband in operating the beauty implements businesses, constitutes persuasive evidence that appellant knowingly omitted her earnings and activities when she completed the affidavit on a Form EN1032 on April 5 and September 13, 2003, May 8 and August 24, 2004, and that the provisions of 5 U.S.C. § 8106(b)(2) therefore apply to the periods covered by the affidavits. The Board therefore finds that appellant has forfeited her compensation benefits received during the period October 20, 2002 to November 12, 2004.

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, 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.”⁸

ANALYSIS -- ISSUE 2

As noted, Office regulations provide that the Office may declare an overpayment of compensation for the period of a given forfeiture of compensation. If a claimant has any earnings during a period covered by a Form EN1032 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.⁹ The Office paid appellant compensation in the amount of \$64,953.86 for the period October 20, 2002 to November 12, 2004. The Office properly found that appellant forfeited her entitlement to compensation during this time because she failed to report employment activities and earnings from employment on EN1032 forms. Therefore, there exists an overpayment of compensation in the amount of \$64,953.86.

⁸ 20 C.F.R. § 10.529. See also *Harold F. Franklin*, *supra* note 5.

⁹ *Robert Ringo*, 53 ECAB 258 (2001).

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁰ The only exception to this requirement is a situation, which meets the tests set forth as follows in section 8129(b): “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.”¹¹ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is “without fault,” section 10.433(a) of the Office’s federal regulations provide, in relevant part:

“A recipient who has done any of the following will be found at fault with respect to creating an overpayment:

- (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. (This provision applies only to the overpaid individual.)”¹²

ANALYSIS -- ISSUE 3

In this case, the Board finds that appellant was at fault under the third standard as she accepted payments of compensation from October 20, 2002 through November 12, 2004 which she knew or should have known to be incorrect.¹³ Appellant had received and signed multiple EN1032 forms which directed her to return any and all checks to which she was not entitled. She, however, accepted incorrect compensation payments for the period October 20, 2002 through November 12, 2004. Therefore, appellant is at fault in the creation of the \$64,953.86 overpayment, such that it was not subject to waiver.¹⁴

¹⁰ 5 U.S.C. § 8129(a).

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.320(b).

¹³ See *Bob R. Gilley*, 51 ECAB 377 (2000).

¹⁴ *Albert Pineiro*, 51 ECAB 310 (2000).

LEGAL PRECEDENT -- ISSUE 4

Section 8148 of Title 5 of the United States Code, states, in part:

“(a) Any individual convicted of a violation of section 1920 of Title 18 or any other Federal or State criminal statute relating to fraud in the application for or a receipt of any benefit under [the Act], shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under [the Act] for any injury occurring on or before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 or 8129.”

Section 10.17 of the implementing federal regulations provides, as follows:

“When a beneficiary either pleads guilty to or is found guilty on either Federal or State criminal charges of defrauding the Federal Government in connection with a claim for benefits, the beneficiary’s entitlement to any further compensation benefits will terminate effective the date either the guilty plea is accepted or a verdict of guilty is returned after trial....”¹⁵

Public Law 103-112, 107 Stat. 1089, enacted on October 21, 1993, prohibits individuals who have been convicted of fraud related to their claims from receiving further benefits paid under the Act. Subsequently, Public Law 103-333, enacted on September 30, 1994, added section 8148, which provides for (a) the termination of benefits payable to beneficiaries who have been convicted of defrauding the program and (b) the suspension of benefits payable to beneficiaries imprisoned as a result of a felony conviction.¹⁶

Office procedures require that, to support termination or suspension of benefits under section 8148, the case record must contain: a copy of the indictment or information; a copy of the plea agreement, if any; a copy of the document containing a guilty verdict; and/or a copy of the court’s docket sheet. Further, this evidence must establish: (1) the individual was convicted; and (2) the conviction is related to the claim for or receipt of benefits under the Act.¹⁷ The effective date of termination in fraud cases under section 8148(a) is the date of conviction, which is the date of the verdict or in cases of a plea agreement, the date the claimant made the plea in open court (not the date of sentencing or when the court papers were signed).¹⁸ Due to the nature of the termination involving fraud, no pretermination notice is required before issuing a final decision.¹⁹

¹⁵ 20 C.F.R. § 10.17.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(a) (March 1997). See 5 U.S.C. § 8148. See also *Terry A. Keister*, 56 ECAB ___ (Docket No. 04-1136, issued May 23, 2005).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(d) (March 1997).

¹⁸ *Id.* at Chapter 2.1400.12(e)(1).

¹⁹ *Jorge E. Sotomayor*, 52 ECAB 105 (2000); see also *id.* at Chapter 2.1400.12(f)(2).

ANALYSIS -- ISSUE 4

The Board finds that the Office properly terminated appellant's compensation benefits on the grounds that she pled guilty to the federal felony of unlawful conversion of government monies.

Under section 8148(a), a claimant who is convicted of fraud in obtaining compensation benefits under 18 U.S.C. § 1920, or any other statute relating to fraud in the application for or a receipt of any benefit under the Act, will have his or her compensation terminated. Such a claimant is thereafter permanently barred from receiving any compensation under the Act. The fact of overpayment is established by the plea agreement entered on February 15, 2005 in which appellant pled guilty in open court to one count of the information charging her with unlawful conversion of government monies under 18 U.S.C. § 641. The plea agreement noted that appellant's defense counsel informed her as to the nature of the charges brought against her, her acknowledgement of having had all her rights explained to her and that she was pleading guilty to the charge. Under the plea, appellant also acknowledged her responsibility for making restitution in the amount determined by the court, later set at \$52,905.44. She also acknowledged that the agreement made no representations or promises regarding the status of benefits paid to her by the Office.

The Board notes that, under the terms of the statute, appellant forfeited her entitlement to compensation benefits following her February 15, 2005 guilty plea. For this reason, the Office properly terminated appellant's compensation benefits under section 8148(a).²⁰

LEGAL PRECEDENT -- ISSUE 5

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.²¹ However, where no further compensation benefits are due an individual, the Board does not have jurisdiction and the recovery of an overpayment remains within the discretion of the Office. The Board's jurisdiction over recovery is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.²²

²⁰ The Office's June 29, 2005 decision terminated appellant's compensation benefits effective June 24, 2005. As she was in receipt of compensation benefits from February 16 to June 24, 2005, an additional overpayment of compensation was created for this period as she was no longer a beneficiary entitled to receive benefits for her accepted injury following forfeiture under section 8148(a). However, there is no decision of record regarding an overpayment for this period.

²¹ 5 U.S.C. § 8129(b).

²² *Albert Pineiro, supra* note 14.

²² 5 U.S.C. § 8129(b).

ANALYSIS -- ISSUE 5

As appellant's right to compensation benefits was terminated under the forfeiture provision of section 8148(a), she is not entitled to continuing compensation benefits and the Board does not have jurisdiction to consider the method of recovery of the overpayment.

Appellant contends, however, that the court ordered restitution of \$52,905.44 to be paid under the plea agreement should be in lieu of any recovery of the overpayment by the Office. The Office's procedure manual addresses the relationship between court ordered restitution in fraud cases and the Office's administrative debt collection process, stating:

"18. *Court Ordered Restitution in Fraud Cases.* When a debtor has been convicted in court of filing a false claim which resulted in an overpayment/debt due the government, the court often orders the defendant to make restitution to the United States as a condition of probation. The amount of restitution may or may not be the full amount of the debt owed to [the Office].

"a. *If the Court Order states that the restitution amount will be in full satisfaction of the debt owed the United States (a 'Global Settlement')*, the Court Order takes precedence over the Office's administrative debt collection process....

"b. *If the Court Order does not represent a 'Global Settlement,'* [the Office] should continue to pursue collection of the full amount of the debt, taking credit for any restitution amounts received...."²³

Based on appellant's February 15, 2005 plea entered in U.S. District Court, she was ordered to pay restitution to the employing establishment in the amount of \$52,905.44. The Board finds that the settlement agreement in this case was not intended to constitute a global settlement. There is no specific language in the agreement stating that the \$52,905.44 payment was to be in full satisfaction of the debt due the United States. Rather, it states that it could not "bind any other federal, state or local prosecuting, administrative, or regulatory authority" and did not prohibit any agency of the United States "from initiating or prosecuting any civil proceeding directly or indirectly involving" appellant. For this reason, the Office is not precluded from continuing to pursue recovery of appellant's overpayment debt in the amount of \$64,953.86.²⁴ As to the method of recovery, the Board does not have jurisdiction over this issue as appellant has no entitlement to continuing compensation benefits.²⁵

²³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.18 (May 2004).

²⁴ See *Robert Ringo*, *supra* note 9.

²⁵ *Albert Pineiro*, *supra* note 14.

CONCLUSION

The Board finds that appellant forfeited her entitlement to compensation for the period October 20, 2002 to November 12, 2004. Regarding the second issue, the Board finds that appellant received an overpayment of compensation in the amount of \$64,953.86 for the period October 20, 2002 to November 12, 2004. Regarding the third issue, the Board finds that she was at fault in the creation of the overpayment, such that it was not subject to waiver. Regarding the fourth issue, the Board finds that the Office properly terminated appellant's compensation benefits on the grounds that she pled guilty to compensation fraud. Regarding the fifth issue, the Board finds that the February 15, 2005 plea agreement did not constitute a global settlement of the claim of the Office against appellant for the debt created by the \$64,953.86 overpayment of compensation for the period October 20, 2002 to November 12, 2004.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 13 and January 4, 2006 and June 29, 2005 are affirmed.

Issued: July 24, 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