

FACTUAL HISTORY

On April 28, 1994 appellant, then a 47-year-old industrial equipment mechanic, sustained an injury in the performance of duty: "I was walking and carrying material out to truck, as I exited Bldg. 2 I stepped in open ditch. It was dark, didn't see when I stepped down in ditch. I twisted my back and my right knee." The Office accepted appellant's claim for lumbar and right knee sprain. Appellant received compensation for temporary total disability on the periodic rolls.

On November 8, 2004 and July 5, 2005 appellant reported on EN1032 forms that he did not work for any employer and was not self-employed or involved in any business enterprise during the prior 15 months.¹ The Office advised him that a false or evasive answer to any question or the omission of an answer could be grounds for forfeiting his compensation benefits. The forms advised that severe penalties may be applied for failure to report all work activities thoroughly and completely. By signing his name, appellant certified the following:

"I know that anyone who fraudulently conceals or fails to report income or other information which would have an effect on benefits or who makes a false statement or misrepresentation of a material fact in claiming a payment or benefit under the Federal Employees' Compensation Act may be subject to criminal prosecution, from which a fine or imprisonment or both, may result.

"I understand that I must immediately report to [the Office] any improvement in my medical condition, any employment, any change in the status of claimed dependents, any third-party settlement and any change in income from [f]ederally assisted disability or benefit programs.

"I certify that all statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief."

On January 24, 2006 the Department of Labor's Office of the Inspector General (OIG) prepared a memorandum of investigation. After receiving information that appellant was receiving workers' compensation benefits and working as a mechanic at the Marbury Service Station in Marbury, Maryland, investigators obtained video surveillance of him working at the service station and making statements about his length of employment there. When agents arrested him on July 22, 2005 appellant provided a sworn statement that he had been working as a mechanic at the service station for approximately one year and working at his wife's snow removal and lawn care business.

On April 21, 2006 appellant entered into a plea agreement with the United States Attorney's Office for the District of Maryland. He agreed to plead guilty to making a false statement of a material fact for the purpose of obtaining workers' compensation benefits "and

¹ Appellant submitted these forms on November 10, 2004 and July 11, 2005 respectively.

that such statement was made knowingly and willfully.”² Appellant stated that he understood, agreed and stipulated to the statement of facts, which provided in part:

“Beginning the summer of 2004, however, [appellant] was working as an automobile mechanic at Marbury Service Station in Marbury, Maryland. Customers at the service station, who knew [him] through his former government employment, saw him pumping gasoline and working on vehicles in the summer of 2004. On September 18, 2004 [appellant] was clearing trees from a roadway after a storm and he told a Charles County Deputy Sheriff he had been working at the Marbury [Service] Station. The owner of the service station told investigators [appellant] had been working there since the winter of 2004.”

Signing the plea agreement, appellant represented the following:

“I have read this agreement and carefully reviewed every part of it with my attorney. I understand it and I voluntarily agree to it. Specifically, I have reviewed the Factual and Guidelines Stipulation with my attorney and I do not wish to change any part of it. I understand this plea agreement and I voluntarily agree to it. I am completely satisfied with the representation of my attorney.”

On June 27, 2006³ the District Court adjudged appellant guilty of making a false statement on November 10, 2004 to obtain federal employees’ compensation, in violation of 18 U.S.C. § 1920. The court sentenced him to 36 months’ probation and ordered him to make restitution in the amount of \$4,609.92.

In a decision dated September 21, 2006, the Office found that appellant forfeited his right to further compensation because he was convicted of a violation relating to fraud in the application for or receipt of benefits. The Office terminated compensation effective September 3, 2006.

In another decision dated September 21, 2006, the Office found that appellant forfeited his right to compensation from August 8, 2003 to July 5, 2005. It found that he knowingly omitted information pertaining to his self-employment on the EN1032 forms he signed on November 8, 2004 and July 5, 2005.

On September 27, 2006 the Office made a preliminary determination that appellant received a \$51,362.08 overpayment of compensation because of his forfeiture from August 8,

² Section 1920 of Title 18 of the United States Code, “False statement or fraud to obtain federal employees’ compensation,” provides: “Whoever knowingly and willfully falsifies, conceals; or covers up a material fact; or makes a false, fictitious; or fraudulent statement or representation; or makes or uses a false statement or report knowing the same to contain any false, fictitious; or fraudulent statement or entry in connection with the application for or receipt of compensation or other benefit or payment under subchapter I or III of Chapter 81 of Title 5, shall be guilty of perjury and on conviction thereof, shall be punished by a fine under this title; or by imprisonment for not more than 5 years; or both; but if the amount of the benefits falsely obtained does not exceed \$1,000[.00], such person shall be punished by a fine under this title; or by imprisonment for not more than 1 year, or both.” 18 U.S.C. § 1920.

³ June 27, 2006 is the date of imposition of judgment.

2003 to July 5, 2005. It found that he was at fault in creating this overpayment because he omitted pertinent information concerning earnings that he knew or should have known was to be included on the EN1032 forms. Additionally, the Office noted that appellant pleaded guilty to one count of violating 18 U.S.C. § 1920.

Appellant requested a prerecoupment hearing before an Office hearing representative. On the overpayment recovery questionnaire he completed on October 17, 2006, appellant stated that he was employed from November 20, 2004 to July 22, 2005 “est.” During the hearing, which was held on February 7, 2007, he testified that he was not employed prior to November 8, 2004, when he completed the first Form EN1032 at issue: “Someone else left the position that was pumping gas at the Marbury [Service] Station and around Thanksgiving, I spoke to the owner and he says, you know that I could come to work there if I wanted to.” Asked why he indicated on the July 2005 Form EN1032 that he was not employed, appellant explained:

“Ma’am, I’ll be honest with you, it was a total mistake. As you realize, I’m 60 years old and my eyesight is not that good and I had another copy. You know, I’ve been -- I had been filling them out for ten years and I had another one and I didn’t have my glasses on and I just kind of looked at it. I had a copy of one and I looked at it and I just went down, you know, where the blocks were at and checked. I know I was in total error, you know. When I went to court, I was advised not to argue that, just to plead guilty because if I wasted the Judge’s time for a three-day trial, I’d be put in jail, so that’s why I made the guilty plea.”

In a decision dated April 27, 2007, the Office hearing representative finalized the preliminary determination that appellant was at fault in creating the \$51,362.08 overpayment that arose from his forfeiture of compensation. The hearing representative found that by pleading guilty, appellant admitted that he knowingly omitted or underreported his earnings during the periods at issue. She also found that the OIG investigation demonstrated clearly that appellant was employed at the Marbury Service Station prior to November 2004. As appellant was at fault in creating the overpayment, the hearing representative found that the Office could not waive recovery of the overpayment.

On appeal, appellant explains that he pleaded guilty to stay out of jail and that he was pursuing a complaint against the federal public defenders.

LEGAL PRECEDENT -- ISSUE 1

Section 8148 of the Federal Employees’ Compensation Act provides that any individual convicted of a violation of 18 U.S.C. § 1920, or any other Federal or State criminal statute relating to fraud in the application for or 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 of the Act.⁴

⁴ 5 U.S.C. § 8148(a) (forfeiture of benefits by convicted felons).

ANALYSIS -- ISSUE 1

The United States District Court for the District of Maryland found appellant guilty of violating 18 U.S.C. § 1920. Specifically, the court found him guilty of knowingly and willfully making a false statement on November 10, 2004 to obtain federal employees' compensation. Under section 8148 of the Act, appellant thereby forfeits any entitlement to any benefit he would otherwise be entitled to under the Act for any injury occurring on or before the date of such conviction. The Board will affirm the Office's September 21, 2006 decision finding forfeiture under section 8148(a) of the Act, but will modify the decision to reflect that appellant forfeits his entitlement to benefits effective not on September 3, 2006, as the Office found, but on June 27, 2006 the date of his conviction.

LEGAL PRECEDENT -- ISSUE 2

The Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.⁵ Section 8106(b) of the Act, however, 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.⁶ "Knowingly" means with knowledge, consciously, willfully or intentionally.⁷ A claimant who knowingly fails to report earnings on Form EN1032 forfeits his or her benefits for the period specified by the form.⁸

ANALYSIS -- ISSUE 2

The record establishes that appellant swore in a statement after his July 22, 2005 arrest, that he had been working as a mechanic at the Marbury Service Station for approximately one year. He confessed in his plea agreement that he had been working there since the summer 2004. Appellant stipulated that customers at the service station, who knew him through his former government employment, saw him pumping gasoline and working on vehicles in the summer 2004 and he admitted that on September 18, 2004 he told a Charles County Deputy Sheriff that he had been working at the service station. This was well before he completed the November 8, 2004 Form EN1032. Appellant understood, agreed and stipulated to all these things, including the fact that he was completely satisfied with his attorney's representation. In testimony before the Office hearing representative, however, he swore under oath that he was not employed prior to November 8, 2004 and appellant now tells the Board that he is pursuing a complaint against his attorney.

For purposes of this appeal, it is sufficient that the District Court found appellant guilty of "knowingly and willfully" making a false statement to obtain federal employees' compensation.

⁵ *Id.* at § 8102(a).

⁶ *Id.* at § 8106(b).

⁷ 20 C.F.R. § 10.5(n) (1999).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.3.e (March 1997).

This satisfies the requirements of 5 U.S.C. § 8106(b). It establishes that appellant knowingly omitted his earnings on the November 8, 2004 Form EN1032. The Board therefore finds that he forfeited his right to compensation for the 15 months covered by that form.⁹

The Board also finds that appellant forfeited his right to compensation for the 15 months covered by the July 5, 2005 Form EN1032. He did not plead guilty to falsifying that particular form, but he admits that he was “in total error” in reporting no employment and the evidence conclusively establishes that he was working at the Marbury Service Station during the 15 months covered by the form. The question is whether appellant omitted earnings on this form, as he did on the prior form, knowingly.

Appellant’s contention -- he did not have his glasses on when he filled out the form -- is not persuasive. He had been filling out the Office forms for 10 years. It is not convincing that in 2005 he no longer understood, without his glasses, what information the form was asking.¹⁰ Further, it is established that appellant knowingly concealed his earnings on November 8, 2004. Eight months later he acted in the same manner. Appellant provided the same answers to the same questions, all the while continuing in the same employment. He knew that, if he concealed this employment from the federal government, he would continue to receive compensation for total disability, compensation to which he was not entitled. The Board finds that appellant knowingly omitted his earnings on the July 5, 2005 Form EN1032.

LEGAL PRECEDENT -- ISSUE 3

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be 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).¹¹

⁹ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994) (where the claimant attempted on appeal to explain away his guilty plea, the Board stated that it could not overlook the fact that it was made in court and against his own interest); *Louis P. McKenna, Jr.*, 46 ECAB 328, 337 (1994) (where claimant later argued that he did not intend to plead guilty to count one of his indictment, the Board held that the Office may properly rely on a claimant’s guilty plea in finding that he forfeited compensation for the period covered by the indictment); *Iris E. Ramsey*, 43 ECAB 1075, 1091 (1992) (finding that the claimant’s plea constituted persuasive evidence that she knowingly omitted her earnings when she completed the affidavits on EN1032 forms).

¹⁰ The questions on the form are in bold typeface and the warning about failure to report all work activities is in bold and in all capital letters.

¹¹ *Id.* at § 10.433(a).

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹²

ANALYSIS -- ISSUE 3

When appellant forfeited his right to compensation from August 8, 2003 to July 5, 2005, an overpayment arose. The amount of the overpayment is the total compensation paid for that period minus the restitution already ordered by the District Court. Because the court order gave no indication that this restitution was meant to be a "Global Settlement" or in full satisfaction of the debt owed to the United States, the Office is not precluded from recovering the \$51,362.08 overpayment.¹³

The Board finds that appellant is at fault in creating this overpayment because he failed to provide information that he knew or should have known was material. Appellant had an obligation to show good faith and to exercise a high degree of care in reporting events that might affect the amount of his compensation. He knew that he was employed during the periods covered by the EN1032 forms. Appellant knew that this information was material to the calculation of his compensation. The forms properly advised him that a false or evasive answer to any question could be grounds for forfeiting his compensation benefits. The forms also advised that severe penalties may be applied for failure to report all work activities thoroughly and completely. When appellant signed his name, he certified that he understood that he must immediately report to the Office any employment. Nonetheless, when asked whether he was employed or self-employed or involved in any business enterprise during the periods covered by the forms, appellant failed to provide information on his employment, information that he knew or should have known was material. Because appellant is at fault in the creation of the overpayment, he is not eligible for waiver. The Board will affirm the Office's April 27, 2007 decision.

CONCLUSION

The Board finds that appellant forfeited his right to compensation effective the date of his conviction for violating 18 U.S.C. § 1920. The Board finds that he forfeited his right to compensation from August 8, 2003 to July 5, 2005. The Board further finds that appellant was at fault in creating the resulting overpayment and is not eligible for waiver.

¹² *Id.* at § 10.433(b).

¹³ *Clarence D. Ross*, 42 ECAB 556, 565-66 (1991).

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2007 and the two September 21, 2006 decisions of the Office of Workers' Compensation Programs are affirmed, as modified above.

Issued: November 16, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board