

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

C.R., Appellant)

and)

**DEPARTMENT OF THE NAVY, PEARL
HARBOR NAVAL SHIPYARD,
Pearl Harbor, HI, Employer**)

**Docket No. 08-2425
Issued: August 3, 2009**

Appearances:

Stephen M. Shaw, Esq., for the appellant

No appearance, for the Director

Oral Argument March 10, 2009

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 8, 2008 appellant filed a timely appeal of the June 9, 2008 merit decision of the Office of Workers' Compensation Programs, which found a forfeiture of compensation and an overpayment of benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant forfeited his compensation for the period December 3, 1996 through October 29, 2005, thus creating an overpayment in the amount of \$302,146.88, for which he was deemed at fault.

FACTUAL HISTORY

Appellant, a 55-year-old former pipe insulator, sustained a head injury at work on November 10, 1980. The Office accepted his traumatic injury claim for concussion, cervical strain and temporomandibular joint dysfunction. Appellant stopped work on December 17, 1985

due to his employment injuries. The Office paid appropriate wage-loss compensation and placed him on the periodic compensation rolls effective March 16, 1986.

On January 6, 1998 appellant started a home repair business. His 1998 federal individual income tax return (Form 1040) indicated that he was self-employed as a handyman. Appellant reported gross receipts of \$41,757.00 from his handyman services business in calendar year 1998. On January 6, 1999 he filed articles of incorporation for his handyman services business, which he named Repairs With Care Home Service, Incorporation (Repairs With Care). Appellant and his spouse each held a 50 percent interest in the newly-incorporated business. He was president of the company and performed handyman/carpentry services. Fees for the work appellant performed were paid directly to the company. Appellant did not draw a salary or any other type remuneration from the company for the services provided. Repairs With Care reportedly ceased conducting business in the latter part of 2004.

As a benefits recipient under the Federal Employees' Compensation Act (FECA or the Act), appellant was periodically required to submit information regarding his employment activities, earnings and dependents. Financial disclosure statements (Form CA-1032) dating back to March 3, 1998 reflected his involvement with the family-owned business. Appellant did not report, however, any earnings from his carpentry and handyman work. The CA-1032 forms submitted on March 3, 1998, September 20, 1999, April 9, 2001, June 3, 2002 and February 18, 2003 all reported a \$0.00 rate of pay and \$0.00 actual earnings with respect to appellant's handyman business activities.¹

The employing establishment conducted an investigation into appellant's employment activities. Appellant was twice interviewed; first on July 28, 2004 and again on July 7, 2005.² In the first interview, he described the type of work he generally performed, which included cabinet repair, replacing garbage disposals, repairing and replacing doors and some painting. This work was usually performed at single-family dwellings or apartments. Appellant described a job he had recently completed on July 27, 2004, which involved trimming out a door. When asked how much he would likely charge for the job, he replied "probably about \$300" or "\$350" for six hours of work. Appellant indicated that he did not accept cash for the work he performed and that all checks were written to the company. He also stated that, although he and his wife were in business together, he did "90 percent of it." Appellant's wife was employed elsewhere, but she helped out with the company's paperwork.

In the July 7, 2005 interview, appellant provided similar background information about the family-owned business. He also reviewed the company's tax returns dating back to 1999 and various CA-1032 forms he had submitted over the years. Appellant explained that he was not an employee of the company, did not draw a salary from the company and any profits earned by the company were not distributed to its owners, but reinvested in the company for equipment purchases. He did, however, borrow money from the company, which as of the date of the interview he had not repaid. Appellant's wife also attended the July 7, 2005 interview. She

¹ Each affidavit covered the 15-month period preceding the date appellant signed the CA-1032 form.

² Appellant's remarks were not made under oath and he was not represented by counsel during either interview. Both interviews were taped and subsequently transcribed.

explained that she did not have a regular work week. Some days were good days and appellant would go out and work and there were days when he did not work.

In a written statement dated July 7, 2005, appellant indicated that he had “intentionally failed to report [his] earnings ... from Repairs with Care Inc.” on CA-1032 forms he submitted “September 1999, April 9, 2001, June 3, 2002 [and] February 18, 2003.” He said that he did this “so that [the Office] would not reduce [his] benefit check.”

In a decision dated October 13, 2005, the Office suspended appellant’s wage-loss compensation pursuant to 20 C.F.R. § 10.528 because he had not submitted a recent CA-1032 form. Appellant last submitted a CA-1032 form on February 18, 2003. The Office had requested an updated CA-1032 form on June 18, 2004, March 14 and May 2, 2005. Appellant, however, did not comply with the Office’s numerous requests. Although the decision indicated that benefits were suspended effective October 2, 2005, the Office continued to pay appellant wage-loss compensation through October 29, 2005.

On June 22, 2006 appellant was indicted on two counts of fraud under 18 U.S.C. § 1920.³ The first count pertained to fraudulent information he allegedly provided in his February 18, 2003 CA-1032 form. The second count included similar allegations with respect to appellant’s June 3, 2002 CA-1032 form.

On November 20, 2006 appellant entered a guilty plea to one count of knowingly and willfully making materially false and fraudulent written representations in connection with the receipt of the FECA benefits.⁴

In light of appellant’s November 20, 2006 guilty plea, the Office issued a December 4, 2006 decision terminating compensation and medical benefits pursuant to 5 U.S.C. § 8148(a).⁵

³ False statement or fraud to obtain federal employees’ compensation: 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 1 or 3 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 five 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 one year or both. 18 U.S.C. § 1920 (2006).

⁴ Appellant pled guilty to Count 1 of the indictment, which pertained to the February 18, 2003 CA-1032 form. In exchange for his guilty plea to Count 1, the U.S. Attorney agreed to move for dismissal of Count 2 after sentencing. Additionally, the U.S. Attorney agreed not to prosecute appellant for any additional offenses arising from his filing of CA-1032 form on September 9, 1999, April 9, 2001, June 3, 2002 and February 18, 2003. As part of the plea, appellant agreed that the court may award restitution as to the loss underlying each count of the indictment even though he pled guilty to only one count.

⁵ 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 receipt of any benefit under this subchapter or subchapter 3 of this chapter, shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under this subchapter or subchapter 3 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. 5 U.S.C. § 8148(a).

On February 7, 2007 the Office issued a decision finding that appellant had forfeited his right to compensation for the period December 3, 1996 through October 29, 2005. That same day it issued a preliminary overpayment finding in the amount of \$302,146.88. The Office also informed appellant that he was at fault in creating the overpayment due to his failure to report earnings as required on CA-1032 form. Appellant later requested an oral hearing on the forfeiture decision and a prerecoupment hearing regarding the overpayment.

On March 20, 2007 appellant was sentenced to five years probation for having pled guilty to Count 1 of the June 22, 2006 indictment. Additionally, the court ordered him to make restitution to the Department of Labor in the amount of \$45,119.29. Appellant made restitution in full on October 24, 2007.

An oral hearing was held on March 26, 2008 before the Branch of Hearings & Review. By decision dated June 9, 2008, the Office hearing representative affirmed the decision regarding forfeiture for the period December 3, 1996 through October 29, 2005. The hearing representative also finalized the Office's preliminary determination regarding overpayment in the amount of \$302,146.88. She further found that appellant was at fault in creating the overpayment. Because he was at fault, appellant was not entitled to a waiver of recovery of the overpayment. The hearing representative credited appellant with the \$45,119.29 paid in restitution.

LEGAL PRECEDENT

A partially disabled employee may be required to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times specified by the Office.⁶ Earnings from employment or self-employment means: (1) gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or (2) a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration.⁷ Neither, lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his duties.⁸

If an employee knowingly omits or understates any earnings or work activity in making a report, he shall forfeit the right to compensation with respect to any period for which the report was required.⁹ 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

⁶ 5 U.S.C. § 8106(b); 20 C.F.R. § 10.525 (2008).

⁷ 20 C.F.R. § 10.5(g).

⁸ *Id.*

⁹ 5 U.S.C. § 8106(b); 20 C.F.R. § 10.529(a). *Knowingly* means with knowledge, consciously, willfully or intentionally. 20 C.F.R. § 10.5(n).

prosecution.¹⁰ Forfeiture results in an overpayment of compensation for the period of the forfeiture and is subject to recovery under 5 U.S.C § 8129.¹¹

An individual who is found at fault in either accepting or creating an overpayment is not eligible for a waiver of recovery of overpayment.¹² A benefits recipient will be found at fault if the individual: (1) made an incorrect statement as to a material fact which he knew or should have known to be incorrect; (2) failed to provide information which he knew or should have known to be material; or (3) accepted a payment which he knew or should have known to be incorrect.¹³

ANALYSIS

The Office premised its forfeiture decision on incomplete or inaccurate information provided by appellant in a series of CA-1032 forms dated March 3, 1998, September 20, 1999, April 9, 2001, June 3, 2002 and February 18, 2003. While appellant disclosed his ongoing involvement with Repairs With Care, each of the above-noted forms reported a rate of pay of \$0.00 and actual earnings of \$0.00. When he met with an employing establishment investigator on July 28, 2004, he indicated that he performed 90 percent of the business-related activities. Appellant's counsel argued that, because appellant was not an employee of Repairs With Care and did not draw a salary or any other type remuneration, the information he provided on CA-1032 form was, in fact, accurate. However, his decision to work and not draw a salary from his family-owned business is not the issue.

A CA-1032 form advised appellant of his reporting obligations and the consequences of providing false, misleading or incomplete information. The first page of the information package he regularly received included a warning that a false or evasive answer to any questions or the omission of an answer, may be grounds for forfeiting compensation benefits. The instructions for completing the affidavit explained that the statement covered the 15 months prior to the date the form was completed and signed. It also advised that, by signing the form, appellant would be certifying that he had supplied all information requested for that period of time.

Part A of CA-1032 form, entitled "Employment," includes the following instruction:

Report ANY work or ownership interest in any business enterprise, even if the business lost money or if profits or income were reinvested or paid to others. If you performed any duties in any business for which you were not paid, you must show as a rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties you did, even if your work was for yourself or a family member or relative.

¹⁰ 20 C.F.R. § 10.529(a).

¹¹ 5 U.S.C. § 8106(b); 20 C.F.R. § 10.529(b).

¹² 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433(a), 10.434.

¹³ 20 C.F.R. § 10.433(a).

While appellant was free to structure his business such that he did not draw a salary, he was nonetheless obligated to provide the Office information regarding the value of the services he performed for and on behalf of Repairs With Care. The CA-1032 form is very specific as to how a benefits recipient should report unremunerated work activities. During his July 28, 2004 interview appellant exhibited an ability to price a six-hour job “trimming out a new door.” He indicated that he would probably bill the client \$300.00 to \$350.00 for the work he had completed just one day prior. It is also noteworthy that appellant’s individual tax return for 1998 and Repair With Care’s corporate tax returns from 1999 to 2002 (Form 1120) all included deductions for the cost of materials and supplies. Appellant’s ability to price a job on a time and material cost basis is indicative of an ability to place a value on the services he provided on behalf of Repairs With Care.

The CA-1032 form clearly advised appellant of his obligation to provide information about what it would have cost Repair With Care to hire someone to perform the work or duties he performed. But instead of providing the requested information, he routinely reported \$0.00 as his rate of pay and earnings. Counsel’s argument that appellant lacked the mental capacity to knowingly omit or understate any earnings or work activity is without merit. While there is evidence of treatment for major depression and a reported long history of prescription drug use and abuse, counsel has not identified any medical evidence that addresses appellant’s mental capacity during the relevant time frame. Moreover, appellant’s purported diminished capacity is undermined by the fact that he worked and managed a profitable family-owned business for approximately seven years.

By failing to report the value of the services appellant performed for and on behalf of his family-owned business, the Board finds that he knowingly omitted his earnings on CA-1032 forms dated March 3, 1998, September 20, 1999, April 9, 2001, June 3, 2002 and February 18, 2003. The penalty for violating 5 U.S.C. § 8106(b) is forfeiture of the right to compensation with respect to any period for which the affidavit or report was required. CA-1032 form covers the 15-month period preceding the date appellant signed the form. The entire period of compensation is forfeited regardless of whether he had earnings for only a part of the 15-month period.¹⁴

The Office found that appellant forfeited compensation for the period December 3, 1996 through October 29, 2005. However, the five CA-1032 forms in question do not cover the entire period identified by the Office. The March 3, 1998 CA-1032 form covered the 15-month period dating back to December 3, 1996. The next CA-1032 form appellant filed was dated September 20, 1999, which was more than 15 months after the March 3, 1998 CA-1032 form. The September 20, 1999 CA-1032 form covered the 15-month period beginning June 20, 1998. As a result, there is no CA-1032 form that covered the period March 4 through June 19, 1998. There is a similar gap in coverage between the CA-1032 forms appellant filed on September 20, 1999 and April 9, 2001. The latter CA-1032 form covered the 15-month period beginning January 9, 2000. Consequently, there is a gap in coverage between September 21, 1999 and January 8, 2000. The two remaining CA-1032 forms, filed June 3, 2002 and February 18, 2003, are sufficient to justify forfeiture for the uninterrupted period April 10, 2001 through

¹⁴ *Id.* at § 10.529(a); *Cheryl Thomas*, 55 ECAB 610, 616-17 (2004).

February 18, 2003. Despite the fact that the last CA-1032 form filed was dated February 18, 2003, the Office found that appellant forfeited compensation for approximately 32 months thereafter. There are no CA-1032 forms covering the period February 19, 2003 through October 29, 2005.

Without benefit of a CA-1032 form, the period of forfeiture is limited to the period that appellant actually worked and did not report earnings.¹⁵ Appellant's wife indicated that her husband did not work a regular weekly schedule. Some days he would go out and work and there were days when he did not work. The Board also notes that appellant's counsel represented that his client shuttered his business in the latter part of 2004, yet the Office found a forfeiture of compensation through October 29, 2005. The Office must match the actual unreported earnings with a corresponding period of compensation received. To date, it has not undertaken this type of analysis with respect to the above-noted periods that were not covered by appellant's CA-1032 forms. Accordingly, the Office's finding with respect to forfeiture and overpayment for the period March 4 to June 19, 1998, September 21, 1999 to January 8, 2000 and February 19, 2003 to October 29, 2005 is set aside.

Based on the CA-1032 forms submitted on March 3, 1998, September 20, 1999, April 9, 2001, June 3, 2002 and February 18, 2003, appellant has forfeited his right to compensation for the following periods: December 3, 1996 to March 3, 1998; June 20, 1998 to September 20, 1999; and January 9, 2000 to February 18, 2003. The amount of wage-loss compensation he received during the above-noted periods is not entirely clear from the record. Therefore, the case shall be remanded to the Office to calculate the amount of overpayment.

Appellant's failure to accurately report his earnings and employment activities on CA-1032 form similarly constitutes a failure to provide information which he knew or should have known to be material.¹⁶ Consequently, the Office properly found appellant at fault in creating the overpayment. Because appellant was at fault, he is not eligible for a waiver of recovery of the overpayment.¹⁷

Appellant paid \$45,119.29 in court-ordered restitution and the hearing representative reduced the balance of his overpayment by this amount. Appellant's counsel argued before the Board that the order of restitution constituted a global settlement of all issues arising from the falsified CA-1032 forms, thereby relieving appellant of any further repayment obligations.

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

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.11(c) (June 2003).

¹⁶ 20 C.F.R. § 10.433(a)(2).

¹⁷ *Gary L. Allen*, 47 ECAB 409, 418 (1996).

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....”

Based on appellant’s November 20, 2006 plea entered in U.S. District Court, he was ordered to pay restitution. In the sentencing order of the U.S. District Court, dated March 27, 2007, appellant was ordered to pay restitution in the amount of \$45,119.29. 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 restitution payment was to be in full satisfaction of the debt due the United States; rather, it states that “restitution of \$45,119.29 is due immediately to U.S. Department of Labor, San Francisco, FECA Office ... and any remaining balance be paid during the period of probation (five years) on an installment basis according to the collection policy of the Probation Office but at a rate of not less than 10 percent of his monthly gross income.” As this was not a global settlement, the Office is not precluded from continuing to pursue recovery of appellant’s overpayment debt.¹⁸

In his brief on appeal, counsel also took issue with the Office’s attempt to garnish appellant’s Office of Personnel Management (OPM) retirement benefits. The scope of the court-ordered restitution and the Office’s efforts to garnish appellant’s OPM benefits are essentially debt collection issues, which are beyond the Board’s current jurisdiction.¹⁹ As a result of his November 20, 2006 guilty plea and conviction, appellant forfeited his right to receive any further benefits under the Act.²⁰ Because he is not currently receiving wage-loss compensation, the Board does not have jurisdiction to consider the Office’s methods for recovering the overpayment.²¹ However, appellant’s counsel is free to raise those particular issues with the Office on remand.

¹⁸ See *Joan Ross*, 57 ECAB 694, 703-04 (2006).

¹⁹ *Danny E. Haley*, 56 ECAB 393, 402-03, n.34 (2005). The Office procedure manual provides specific guidance on debt collection as it relates to court-ordered restitution in fraud cases. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.18 (May 2004).

²⁰ 5 U.S.C. § 8148(a); 20 C.F.R. § 10.17.

²¹ *Joan Ross*, *supra* note 18.

CONCLUSION

The Board finds that appellant forfeited his wage-loss compensation for the period December 3, 1996 to March 3, 1998, June 20, 1998 to September 20, 1999 and January 9, 2000 to February 18, 2003, thus resulting in an overpayment of compensation. However, the exact amount of the overpayment for the above-noted period is yet to be determined. The Board further finds that appellant was at fault in creating this overpayment, thereby precluding waiver of recovery. The Office's finding of forfeiture and resulting overpayment for the period March 4 to June 19, 1998, September 21, 1999 to January 8, 2000 and February 19, 2003 to October 29, 2005 is set aside.

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2008 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further action consistent with this decision.

Issued: August 3, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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