



generalized anxiety disorder, severe and post-traumatic stress disorder. He had stopped work on June 24, 1999 and was placed on the periodic rolls.

Appellant submitted Office Forms EN1032 and reported no employment activity. The forms were dated April 2, 2001, April 8 and 10, 2003, March 11 and April 7, 2004 and July 18, 2005. In an undated letter received by the Office on August 13, 2003, he advised that the only wages he received from January 1, 1999 through December 31, 2002 were from the employing establishment through June 24, 1999.

An August 30, 2005 postal inspection service investigative memorandum indicated that on April 7, 2004 appellant told a postal inspector that he only worked at occasional chores at his church. However, the postal inspector reported that from February through May 2003, appellant was observed using his dump truck to pick up 16 loads of rocks. On August 27 and 28, 2003 he worked over seven hours each day moving portable toilets. On September 25 and 26, 2003 appellant used his dump truck to pick up 14 loads of gravel. On October 31, 2003 he used his dump truck to pick up a load of rock and on November 6 and 20, 2003 he was witnessed assisting in work on a sanitation pump truck with Rick A. Harris, who advised that he paid appellant by buying him lunches and by giving him a 1981 Chevrolet pick-up truck, a donkey and sheep. On October 3, 2005 the Office of the Inspector General of the Department of Labor provided supportive documentation including sworn affidavits, a transfer of title for a 1981 truck and a number of receipts dated February 25, 2003 to March 25, 2004 for hauling truck loads of materials signed or initialed by appellant.

By decision dated November 8, 2005, the Office found that appellant knowingly omitted and/or understated work activity and earnings on Forms EN1032 covering the period June 16, 2002 through April 7, 2004.<sup>1</sup> It also made a preliminary determination that he received an overpayment in compensation in the amount of \$73,212.21 because he knowingly failed to report work activity for the period March 24, 2002 to July 3, 2006 and had received compensation in this amount. Computer print-outs and an Office overpayment worksheet indicate that appellant received \$73,212.21 in compensation for this period.

On November 15, 2005 appellant, through his attorney, requested a hearing regarding the final forfeiture decision and the preliminary overpayment finding. On November 16, 2005 appellant elected Office of Personnel Management retirement benefits, effective December 1, 2005. By letter dated October 30, 2007, the Office informed appellant and his attorney that the hearing was scheduled for December 5, 2007. In a letter dated November 13, 2007, appellant's attorney informed the Office that appellant did not wish to proceed with the scheduled hearing. On December 3, 2007 it informed appellant that his request for withdrawal from the hearing had been accepted. In a January 15, 2008 letter, the Office informed appellant that a final overpayment needed to be issued and offered him the option of a telephone conference. An overpayment questionnaire was enclosed. On January 24, 2008 appellant

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<sup>1</sup> The Office stated that appellant had been in receipt of periodic compensation for temporary total disability since June 16, 2002. The record, however, contains computer print-outs indicating that he received wage-loss compensation in 2001 and there is no indication that his compensation stopped until he elected Office of Personnel retirement compensation in December 2005. There is also a Social Security Administration statement showing earnings in 2000 and 2001.

telephoned the Office to discuss the overpayment. He was advised to submit financial information.

On January 24, 2008 appellant submitted an overpayment questionnaire and stated that, under the advice of his psychiatrist, he was only helping friends and was not paid for his work. By decision dated February 28, 2008, the Office finalized the preliminary determination that appellant was at fault in creating the \$73,212.21 overpayment because he failed to provide information that he knew or should have known was material.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of the Federal Employees' Compensation Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.<sup>2</sup> A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period.<sup>3</sup> Office procedures provide that an overpayment in compensation is created when a claimant returns to work and continues to receive compensation.<sup>4</sup>

Section 8106(b) provides that the Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies. It provides that an employee who fails to make an affidavit or report when required or knowingly omits or understates any part of his or her earnings forfeits his or her right to compensation with respect to any period for which the affidavit or report was required.<sup>5</sup>

In order to establish that compensation should be forfeited for the periods covered by completed Office EN1032 forms, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.<sup>6</sup> As forfeiture is a penalty, it is not enough merely to establish that there were underreported earnings from employment. The inquiry is whether appellant knowingly omitted or understated his earnings from employment for the periods covered by the EN1032 forms. The term knowingly is not defined within the Act or its implementing federal regulations. In common usage, the Board has adopted the definition of "knowingly" as "with knowledge, consciously, intelligently, willfully, intentionally."<sup>7</sup> The language on Office EN1032 forms is clear and unambiguous in requiring a claimant to report earnings for the previous 15 months from any employer, self-employment or a

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> *Donna M. Rowan*, 54 ECAB 698 (2003).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

<sup>5</sup> 5 U.S.C. § 8106(b); *see F.C.*, 59 ECAB \_\_\_\_ (Docket No. 07-1541, issued November 16, 2007).

<sup>6</sup> *Robert R. Holmes*, 49 ECAB 161 (1997).

<sup>7</sup> *Harold F. Franklin*, 57 ECAB 387 (2006).

business enterprise in which he or she worked. The forms further emphasize that severe penalties may be applied for failure to report all work activities thoroughly and completely.

Section 10.529 of the Office's regulations provides that, 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. Where the right to compensation is forfeited, the Office shall recover any compensation already paid for the period of forfeiture pursuant to section 8129 and other relevant statutes.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The evidence of record establishes that appellant knowingly failed to report his employment activities on Office EN1032 forms. The language on the forms is clear and unambiguous in requiring that a claimant report all earnings or involvement in business enterprises, including odd jobs even if intermittent and specifically notes that unpaid duties must also be reported and an appropriate rate of pay shown for the activity. Appellant performed work activities including; hauling with his dump truck. His signature on the EN1032 forms dated April 10, 2003, March 11 and April 7, 2004 certified that "all the statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief." On each of these forms, appellant reported no work, no self-employment and no volunteer work of any kind. Each of the forms covered the 15-month period prior to the date of his signature and the answers he provided with regard to his work activities were in violation of section 10.529 of the Office's regulations. Thus, appellant knowingly forfeited his right to compensation for the period June 16, 2002 to April 7, 2004 and an overpayment in compensation was created. In calculating the amount of the overpayment, the Office properly determined that he received wage-loss compensation totaling \$73,212.21 for the period in question. It, therefore, properly found that an overpayment in compensation in the amount of \$72,212.21 had been created for the period June 16, 2002 to April 7, 2004.<sup>9</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act provides that an overpayment in compensation shall be recovered by the Office unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."<sup>10</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *F.C.*, *supra* note 5.

<sup>10</sup> 5 U.S.C. § 8129(b); *see Linda E. Padilla*, 45 ECAB 768 (1994).

Section 10.433(a) of the Office regulations provides:

“[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 receives from [it is] 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 in 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).”<sup>11</sup>

To determine if an individual was at fault with respect to the creation of an overpayment, the Office examines 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.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

The Office found appellant at fault in creating the overpayment in compensation because appellant knowingly failed to report employment activities. Appellant had an obligation to show good faith and to exercise a high degree of care in reporting events that could affect the amount of his compensation.<sup>13</sup> On the Office EN1032 forms dated April 10, 2003 and March 11 April 7, 2004, he indicated that he had no earnings and was not performing work activities. The forms properly advised appellant that a false or evasive answer to any question could be grounds for forfeiting compensation benefits and advised that severe penalties could be applied for failure to report all work activities thoroughly and completely. When he signed the forms, he certified that he understood that he must immediately report to the Office any employment or work activities. Appellant failed to inform the Office of his work activities, information that he knew or should have known was material to the calculation of his wage-loss compensation.<sup>14</sup> The Board finds

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<sup>11</sup> 20 C.F.R. § 10.433(a); see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

<sup>12</sup> 20 C.F.R. § 10.433(b); *Duane C. Rawlings*, 55 ECAB 366 (2004).

<sup>13</sup> *Sinclair L. Taylor*, *supra* note 11.

<sup>14</sup> *Harold F. Franklin*, *supra* note 7.

that he was thus at fault in the creation of the overpayment in compensation.<sup>15</sup> Because appellant is at fault in the creation of the overpayment, he is not entitled to waiver.<sup>16</sup>

**CONCLUSION**

The Board also finds that appellant was at fault in the creation of an overpayment in the amount of \$73,212.21.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 28, 2008 be affirmed.

Issued: May 5, 2009  
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

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<sup>15</sup> *F.C.*, *supra* note 5.

<sup>16</sup> The Board notes that its jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where, as here, a claimant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act. *Albert Pineiro*, 51 ECAB 310 (2000).