

FACTUAL HISTORY

Appellant, a 65-year-old former engine equipment operator, has an accepted claim for acute lumbosacral sprain and aggravation of lumbar degenerative disc disease, which arose on November 5, 1988.¹ He had been on the periodic compensation rolls for approximately 17 years prior to his election to receive benefits from the Office of Personnel Management (OPM) effective October 30, 2006. Following appellant's election of OPM benefits, he remained eligible for medical benefits related to his November 5, 1988 employment injury. However, by decision dated April 4, 2007, the Office terminated all benefits effective April 15, 2007 because the medical evidence indicated that his employment injury had resolved.²

As a benefits recipient under the Federal Employees' Compensation Act (FECA or the Act), appellant was required to periodically submit information regarding his employment activities, earnings and dependents. Financial disclosure statements (Form CA-1032) dated January 5 and December 22, 2004 and January 27, 2006 reflect that he was not employed during the respective periods covered by the forms.³

On June 13, 2008 the Department of Defense provided an investigative report that revealed appellant had been employed as a dealer exchange driver for both Ramsey Ford Lincoln-Mercury and Bay Country Fleet Services, Inc. Appellant's employment dated back to November 5, 2003. The investigation also revealed that he sometimes worked under an assumed name, Chris Smith. The investigative materials included statements from appellant's employer, various payroll records, endorsed paychecks made out to both Jack Smith and Chris Smith and interviews with appellant conducted by the Federal Bureau of Investigation and the Department of Labor Office of the Inspector General. The latter interview occurred on August 3, 2006 and he was represented by counsel at the time.

In a decision dated November 12, 2008, the Office informed appellant that the compensation he received during the period October 5, 2002 through October 29, 2006 was forfeited because of his repeated failure to report his employment on CA-1032 form.

On November 13, 2008 the Office issued a preliminary overpayment finding in the amount of \$129,447.54. It also informed appellant that he was at fault in creating the overpayment. Appellant was afforded 30 days to respond to the preliminary determination. One of his options was to request a prerecoumment hearing before the Branch of Hearings & Review. Appellant, however, did not respond within the allotted timeframe.

On December 22, 2008 the Office finalized the preliminary determination that appellant forfeited his compensation for the period October 5, 2002 through October 29, 2006, thus

¹ Appellant last worked for the employing establishment on or about June 1, 1989.

² The Office based its decision on the February 20, 2006 report of Dr. Perry A. Eagle, a Board-certified orthopedic surgeon and Office referral physician, who found that appellant no longer suffered residuals of the November 5, 1988 employment injury.

³ Each affidavit covered the 15-month period preceding the date appellant signed the CA-1032 form.

resulting in an overpayment of \$129,447.54. Because appellant was at fault, he was not eligible for a waiver of recovery of the overpayment.

On December 23, 2008 the Branch of Hearings & Review received appellant's request for a prerecoupment hearing. The request was dated December 18, 2008, which was more than 30 days after the November 13, 2008 preliminary notice. On March 18, 2009 the Branch of Hearings & Review advised appellant that he was not entitled to a hearing regarding his overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 10.432 of the Office's regulations⁴ provide that an individual can present evidence to the Office in response to a preliminary notice of overpayment in writing or at a prerecoupment hearing. The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.

ANALYSIS -- ISSUE 1

The Board finds that the Branch of Hearings & Review properly advised appellant that he was not entitled to a hearing as his request was not timely filed. Failure to request a prerecoupment hearing within 30 days of the date of the written notice of overpayment "shall constitute a waiver of that right."⁵ Based on the December 18, 2008 date of appellant's request, it is obvious that he did not timely request a prerecoupment hearing. The only avenue for review of a final decision concerning an overpayment is by appeal to the Board.⁶

LEGAL PRECEDENT -- ISSUE 2

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.⁷ Earnings from employment or self-employment means 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.⁸ While earning income will not necessarily result in a reduction of compensation, failure to report income may result in forfeiture of all benefits paid during the reporting period.⁹

⁴ 20 C.F.R. § 10.432 (2009).

⁵ *Id.* at § 10.432.

⁶ *Id.* at § 10.440(b).

⁷ 5 U.S.C. § 8106(b) (2006); 20 C.F.R. § 10.525 (2009).

⁸ 20 C.F.R. § 10.5(g).

⁹ *Id.* at § 10.525(b).

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.¹⁰ 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.¹¹ Forfeiture results in an overpayment of compensation for the period of the forfeiture and is subject to recovery under 5 U.S.C. § 8129.¹²

ANALYSIS -- ISSUE 2

Appellant does not contest the fact that he was employed and failed to report this information to the Office; rather he challenges the amount of the overpayment on the grounds that he should not be made to repay more than what he received in earnings. The record indicates that he earned approximately \$16,000.00 between November 2003 and September 2005. In contrast to appellant's earnings, the Office declared a forfeiture of approximately \$130,000.00 in wage-loss compensation. Despite the above-noted disparity, the amount of compensation forfeited is not a function of the amount of unreported earnings. The Act and its implementing regulations indicate that failure to report income may result in forfeiture of any and all benefits paid during the reporting period, regardless of the amount of unreported earnings.¹³

Appellant also noted that he is a recovering alcoholic and he claims not to have drawn a sober breath between 1990 and 2007. He also claims that his memory was not too good during the period he was drinking. To the extent that appellant is arguing that he lacked the capacity to knowingly omit or otherwise misrepresent his earnings, he has not submitted any competent medical evidence demonstrating a decreased mental capacity or memory loss.¹⁴

The 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.

¹⁰ 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).

¹¹ 20 C.F.R. § 10.529(a).

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

¹³ 5 U.S.C. § 8106(b); 20 C.F.R. §§ 10.525(b) and 10.529(b).

¹⁴ Appellant underwent an Office-directed psychological evaluation on July 18, 2006. Dr. Edward L. Ansel, Ph.D., a licensed psychologist, noted "alcohol dependence, reportedly in sustained full remission." He reported having stopped drinking some nine years prior to his examination. Dr. Ansel did not identify any psychological impediments.

Part A of Form CA-1032, entitled "Employment," includes the following instruction: "**Report ALL employment for which you received a salary, wages, income, sales commissions, piecework or payment of any kind.**" (Emphasis in the original.) These instructions are straightforward and uncomplicated. When asked whether appellant worked for an employer during the past 15 months, he repeatedly responded no to this question.

By failing to report his employment with Ramsey Ford Lincoln-Mercury and Bay Country Fleet Services, Inc., the Board finds that appellant knowingly omitted his employment activities on CA-1032 forms dated January 5 and December 22, 2004 and January 27, 2006. 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. The CA-1032 form covers the 15-month period preceding the date appellant signed the form. As previously noted, the entire period of compensation is forfeited regardless of whether appellant had earnings for only a part of the 15-month period.¹⁵

The Office found that appellant forfeited compensation for the period October 5, 2002 through October 29, 2006. However, the three CA-1032 disclosure forms in question do not cover the entire period identified by the Office. Despite the fact that the last CA-1032 form filed was dated January 27, 2006, the Office found that appellant forfeited compensation for approximately 10 months thereafter. There is no CA-1032 form covering the period January 28 through October 29, 2006. 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.¹⁶ 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 period January 28 through October 29, 2006 which was not covered by a CA-1032 form.¹⁷ Accordingly, the Office's finding with respect to forfeiture and overpayment for the period January 28 through October 29, 2006 is set aside.

Based on CA-1032 form submitted on January 5 and December 22, 2004 and January 27, 2006, appellant has forfeited his right to compensation for the period October 5, 2002 through January 27, 2006. The amount of wage-loss compensation he received during the above-noted period is not entirely clear from the record. Therefore, the case will be remanded to the Office to recalculate and properly establish the basis for the amount of overpayment.

LEGAL PRECEDENT -- ISSUE 3

An individual who is found at fault in either accepting or creating an overpayment is not eligible for a waiver of recovery of overpayment.¹⁸ A benefits recipient will be found at fault if

¹⁵ 20 C.F.R. § 10.529(a); *Cheryl Thomas*, 55 ECAB 610, 616-17 (2004).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.11(c) (June 2003).

¹⁷ The Board notes that the payroll records submitted do not show either employment or earnings between September 6, 2005 and November 3, 2006.

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

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.¹⁹

ANALYSIS -- ISSUE 3

Appellant's failure to accurately report his earnings and employment activities on a CA-1032 form similarly constitutes a failure to provide information which he knew or should have known to be material.²⁰ Consequently, the Office properly found him at fault in creating the overpayment. Because appellant was at fault, he is not eligible for a waiver of recovery of the overpayment.²¹

CONCLUSION

The Board finds that the Office properly determined that appellant's request for prerecoupment hearing was untimely. The Board also finds that he forfeited his wage-loss compensation for the period October 5, 2002 through January 27, 2006, thus resulting in an overpayment of compensation. 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 January 28 through October 29, 2006 is set aside.

¹⁹ 20 C.F.R. § 10.433(a).

²⁰ *Id.* at § 10.433(a)(2).

²¹ *Gary L. Allen*, 47 ECAB 409, 418 (1996).

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2009 Office of Workers' Compensation Programs' decision is affirmed. It is also ordered that the December 22, 2008 decision of the Office is affirmed in part and set aside in part and the case is remanded for further action consistent with this decision.

Issued: April 1, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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