

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

J.J., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Mobile, AL, Employer**

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**Docket No. 09-911
Issued: January 15, 2010**

Appearances:
William Fenaughty, Esq., for the appellant
No appearance, for the Director

Oral Argument November 19, 2009

DECISION AND ORDER

Before:

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

JURISDICTION

On February 25, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs merit decision dated January 15, 2009 with respect to an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the January 15, 2009 decision.

ISSUES

The issues are: (1) whether the Office properly found an overpayment of \$195,318.25 was created; (2) whether the Office properly determined appellant was not "without fault" in creating the overpayment and therefore not entitled to waiver; and (3) whether the Office properly found the overpayment should be recovered by deducting \$620.00 every 28 days from continuing compensation payments.

FACTUAL HISTORY

The case was before the Board on a prior appeal. In a decision dated June 3, 2008, the Board held that appellant forfeited his compensation from January 1, 1995 to April 21, 1997 and

January 16, 1998 to April 7, 2004 because he knowingly omitted earnings.¹ The history of the case is provided in the Board's prior decision and is incorporated herein by reference.

By letter dated June 17, 2008, the Office advised appellant of a preliminary determination that an overpayment of compensation of \$195,318.25 was created. The accompanying memorandum stated the gross compensation for the periods January 1 to April 27, 1995 and January 16, 1998 to April 7, 2004 was \$195,318.25. The record contains a worksheet containing compensation amounts added for the relevant period without explanation as to the specific period for each amount. The Office also made a preliminary finding that appellant was at fault in creating the overpayment.

On July 17, 2008 appellant requested a prerecoupment hearing and submitted an overpayment recovery questionnaire (Form OWCP-20). He reported \$2,389.00 in monthly income and \$2,489.00 in monthly expenses. At a November 7, 2008 hearing, appellant provided additional information regarding his income and expenses. On December 15, 2008 he submitted a December 2, 2008 letter indicating that his monthly income was \$2,478.00 and his monthly expenses \$2,445.00.

By decision dated January 15, 2009, the hearing representative finalized the preliminary findings of a \$195,318.95 overpayment and fault in creating the overpayment. With respect to repayment, he found that appellant had provided "incomplete, conflicting and undocumented" information regarding his income and expenses. The hearing representative noted that appellant had provided an undocumented contention in the December 2, 2008 letter that he was paying certain bills for his mother and his niece. He concluded that appellant could repay the overpayment by deducting \$620.00 from continuing compensation. Based on Office procedures regarding interest, the hearing representative stated that the debt was compromised to \$162,241.84.

LEGAL PRECEDENT -- ISSUE 1

If a claimant has any earnings during a period covered by a Form EN1032, which he knowingly fails to report, he is not entitled to compensation for any portion of the period covered by the report.² Where the right to compensation is forfeited, the Office shall recover any compensation already paid for the period of forfeiture.³

ANALYSIS -- ISSUE 1

The Board previously reviewed the forfeiture issue and found that appellant had forfeited his right to compensation for the periods January 1, 1995 to April 21, 1997 and January 16, 1998 to April 7, 2004. The compensation paid to him during those periods represents an overpayment of compensation.

¹ Docket No. 08-263 (issued June 3, 2008).

² *Cheryl Thomas*, 55 ECAB 610, 617 (2004); *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

³ 20 C.F.R. § 10.529(b).

With respect to the amount of \$195,318.25, the Office provided calculations regarding the amount of compensation paid appellant for the periods of the forfeiture. No contrary evidence or argument was presented. The Board finds that the amount of the overpayment was \$195,318.25 based on the evidence of record.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act⁴ provides: "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 the Act or would be against equity and good conscience."⁵ Waiver of an overpayment is not permitted unless the claimant is "without fault" in creating the overpayment.⁶

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: "(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect."

ANALYSIS -- ISSUE 2

As the Board noted in its prior decision, appellant knowingly omitted earnings from the EN1032 forms covering the periods January 1, 1995 to April 21, 1997 and January 16, 1998 to April 7, 2004. The standards set forth at 20 C.F.R. § 10.433 clearly state that fault is established when a claimant fails to provide information which he knew or should have known was material. Appellant signed certification clauses on EN1032 forms that advised him in specific language that he might be subject to civil, administrative or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. In signing the forms he acknowledged his duty to fill out the form properly, including the duty to report income.⁷ The Board finds that appellant failed to provide information that he knew or should have known was material and the Office properly found him at fault in creating the overpayment. Since appellant was not "without fault," he is not entitled to waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

The Office's regulations provide:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ *Id.* at § 8129(b).

⁶ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁷ *See Harold F. Franklin*, 57 ECAB 387, 395 (2006).

the same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”⁸

ANALYSIS -- ISSUE 3

The above standard indicates that the Office must consider the financial circumstances of the individual so as to minimize hardship. In this case, the hearing representative reviewed the financial information provided by appellant in detail. He noted a monthly income of \$2,656.00, based on \$2,267.00 in compensation benefits and \$389.00 in social security benefits.⁹ The hearing representative accepted “without complete documentation” the \$2,445.00 in monthly expenses reported in the December 2, 2008 statement. With respect to additional expenses listed, such as telephone bills for appellant’s mother and niece, as well as car insurance for his niece, the hearing representative found that these expenses were new and undocumented. He added the undocumented expenses to the \$211.00 in excess income and found that appellant could repay the overpayment by deducting \$620.00 from continuing compensation.

On appeal, appellant argues that the repayment amount should be \$211.00, the difference between income and expenses. However, the standard at 20 C.F.R. § 10.441 does not require that repayment be limited to the difference in income and expenses. As noted above, the Office must consider the extent of future payments, rate of compensation, financial circumstances and other relevant factors to minimize hardship. The overpayment must be recovered and the hearing representative considered the evidence of record, the amount of the overpayment and the financial information. He properly considered the relevant factors and attempted to “minimize any hardship” by requiring repayment at \$620.00 from continuing compensation. The Board finds the repayment amount was determined in accord with Office regulations on recovery of an overpayment.

It is also noted that on appeal appellant wished to submit additional financial information. The Board’s jurisdiction is limited to review of the evidence that was before the Office at the time of its final decision.¹⁰

CONCLUSION

The Board finds an overpayment of \$195,318.25 was created and appellant was at fault in creating the overpayment. The Office properly considered the relevant factors in requiring repayment by deducting \$620.00 every 28 days from continuing compensation.

⁸ 20 C.F.R. § 10.441.

⁹ Appellant reported \$2,089.00 in monthly compensation; his actual net compensation every 28 days was \$2,092.70 or \$2,267.00 per month (1/12 of the annual compensation).

¹⁰ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 15, 2009 is affirmed.

Issued: January 15, 2010
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