

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

B.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Billings, MT, Employer**

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**Docket No. 09-741
Issued: May 14, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 23, 2009 appellant filed a timely appeal from an October 7, 2008 merit decision of the Office of Workers' Compensation Programs terminating her compensation benefits due to a fraud conviction, a November 14, 2008 decision finding forfeiture and a December 10, 2008 decision finding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.¹

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective October 1, 2008 on the grounds that she was convicted of fraud; (2) whether the Office properly found that she forfeited her right to further compensation after that date retroactively from November 18, 2004 through September 27, 2008; (3) whether the Office properly determined that appellant received an overpayment in the amount of \$135,432.25 based

¹ For Office decisions issued prior to November 19, 2008, a claimant has 90 days or up to one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

on the forfeiture; and (4) whether the Office properly found that appellant was at fault in creating the overpayment and that it was not subject to waiver.

FACTUAL HISTORY

This case has previously been before the Board. In an August 24, 1995 decision, the Board found that appellant was not entitled to travel expenses or an attendant's allowance for her mother.² The facts of the case as set out in the Board's prior decision are incorporated herein by reference.³

Based on her receipt of compensation for total disability, appellant was periodically asked to complete Office EN1032 forms to report any earnings from employment or self-employment. She completed forms on January 28, 2002, January 29, 2003, February 3, 2004, January 18, 2005, February 6, 2006, February 15, 2007 and February 8, 2008. Appellant advised the Office that she was not self-employed, employed by others or received any earnings during the 15-month period preceding the date that she signed each form.

By letter dated March 25, 2008, the U.S. Department of Justice advised the Office of a criminal action filed against appellant for Federal Program Fraud.

The United States District Court issued a criminal summons to appellant on February 25, 2008 and included a four-count indictment against her charging her with disability claim fraud, mail fraud, wire fraud and theft of Federal Government money. The prosecutor charged that beginning in January 2006 appellant knowingly made material false representations to the employing establishment, her physicians and the Office that her medical condition severely limited her ability to perform any significant physical activities by depositing in the mail fraudulent Office 1032 forms without reporting any improvements in her medical condition to the Office in violation of 18 U.S.C. § 1341. The indictment stated that appellant reported that she was totally disabled and could not stand, sit or walk for prolonged periods of time or to bend over to perform routine actions on a regular basis. The indictment found that in fact appellant could stand or sit for prolonged periods while, "hunting, fishing, stacking and cutting firewood and operating a tractor, and could bend from the waist to perform manual labor such as clearing debris from fence lines, and lifting and hauling firewood, all of which would well qualify her for employment at the [employing establishment]." Appellant also committed wire fraud by receiving direct electronic deposits from the Office in violation of 18 U.S.C. § 1343 in the amount of \$68,726.00. On October 1, 2008 a jury entered guilty verdicts on all four counts of the indictment and that the loss to the government exceeded \$1,000.00.

By decision dated October 7, 2008, the Office terminated appellant's compensation benefits effective October 1, 2008 on the grounds that she was found guilty of fraud related to

² Docket No. 94-344 (issued August 24, 1995).

³ The Office accepted appellant's April 11, 1977 claim for a herniated disc at L5-S1 with surgery on January 9, 1978. It subsequently accepted carpal tunnel syndrome, thoracic outlet syndrome and Grade 2 spondylolisthesis. Appellant was placed on the periodic rolls as of August 14, 1987. The Office accepted an adjustment disorder on January 20, 1989 and appellant underwent additional spinal surgery on January 28, 1989.

the application for or receipt of benefits under the Federal Employees' Compensation Act. The Office noted that, because of her conviction, appellant was not entitled to receive further benefits under the Act.

On November 4, 2008 the Office informed appellant that it made a preliminary determination that she received an overpayment of compensation in the amount of \$135,432.25 because she was "found guilty of fraud against the Act and thus not entitled to disability benefits from November 18, 2004 to September 27, 2008." It found that she was at fault in the creation of the overpayment because she "willfully and knowingly misrepresented information to the Office regarding your work injury and physical disability." The Office found that on January 18, 2005, February 2, 2006, February 15, 2007 and February 8, 2008 appellant signed EN1032 forms indicating that she was totally disabled and had no earnings. Based on the criminal indictment, it stated that appellant presented herself to her physician with false statements of residual symptoms of her work injuries and that her physician relied on these statements in supporting her claim for ongoing compensation benefits. The Office found that the overpayment began 15 months prior to February 18, 2006, the period identified by the court as when the intent to defraud began and that appellant's total gross compensation from November 18, 2004 to September 27, 2008 was \$135,432.25. It stated, "[s]ection 8148(a) provides that an individual convicted of a federal or state 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 of any injury occurring on or before the date of the conviction. Such forfeiture shall be in addition to any action take under section 8106 or 8129 for recovery of an overpayment." The Office notified appellant as to her appellate rights regarding the notice of overpayment.

In a November 14, 2008 decision, the Office found that appellant forfeited her benefits under section 8148 of the Act. It found that she was not entitled to further medical and compensation benefits subsequent to being found guilty of fraud related to her claim for compensation. The Office also found that appellant had completed EN1032 forms and that the guilty verdict established that she had falsely presented herself and her information to her attending physician to effectuate a determination of total disability for all work. It concluded that the date of the forfeiture would be retroactive to November 18, 2004.

In a December 10, 2008 decision, the Office found that appellant was at fault in the creation of an overpayment in the amount of \$135,432.25 from November 18, 2004 to September 27, 2008, which was created when she was found guilty in federal court of knowingly and willingly falsifying information for the purpose of obtaining compensation benefits.

LEGAL PRECEDENT -- ISSUE 1

Section 8148 of Title 5 of the United States Code, states, in part:

"(a) Any individual convicted of a violation of section 1920 of Title 18 or any other [f]ederal or [s]tate criminal statute relating to fraud in the application for or a 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.”

Section 10.17 of the implementing federal regulations provide, as follows:

“When a beneficiary either pleads guilty to or is found guilty on either [f]ederal or [s]tate criminal charges of defrauding the Federal Government in connection with a claim for benefits, the beneficiary’s entitlement to any further compensation benefits will terminate effective the date either the guilty plea is accepted or a verdict of guilty is returned after trial.”⁴

Public Law 103-112, 107 Stat. 1089, enacted on October 21, 1993, prohibits individuals who have been convicted of fraud related to their claims from receiving further benefits paid under the Act. Subsequently, Public Law 103-333, enacted on September 30, 1994, added section 8148, which provides for (a) the termination of benefits payable to beneficiaries who have been convicted of defrauding the program and (b) the suspension of benefits payable to beneficiaries imprisoned as a result of a felony conviction.⁵

Office procedures require that, to support termination or suspension of benefits under section 8148, the case record must contain a copy of the indictment or information; a copy of the plea agreement, if any; a copy of the document containing a guilty verdict; and/or a copy of the court’s docket sheet. Further, this evidence must establish: (1) the individual was convicted; and (2) the conviction is related to the claim for or receipt of benefits under the Act.⁶ The effective date of termination in fraud cases under section 8148(a) is the date of conviction, which is the date of the verdict or in cases of a plea agreement, the date the claimant made the plea in open court (not the date of sentencing or when the court papers were signed).⁷ Due to the nature of the termination involving fraud, no pretermination notice is required before issuing a final decision.⁸

ANALYSIS -- ISSUE 1

The Board finds that the Office properly terminated appellant’s compensation benefits on the grounds that she was convicted in federal court on four counts, including mail fraud, wire fraud and theft of Federal Government money related to her receipt of benefits under the Act.

Under section 8148(a), a claimant who is convicted of fraud in obtaining compensation benefits under 18 U.S.C. § 1920 or any other statute relating to fraud in the application for or receipt of any benefit under the Act, will have his or her compensation terminated. Such a

⁴ 20 C.F.R. § 10.17.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.144.12(a) (March 1997); see 5 U.S.C. § 8148. See also *Joan Ross*, 57 ECAB 694 (2006); *Terry A. Keister*, 56 ECAB 559 (2005).

⁶ Federal (FECA) Procedure Manual, *supra* note 5.

⁷ *Id.* at Chapter 2.1400.12(e)(1).

⁸ *Jorge E. Sotomayor*, 52 ECAB 105 (2000); see also *id.* at Chapter 2.1400.12(f)(2).

claimant is thereafter permanently barred from receiving any compensation under the Act. The guilty verdict returned by the jury on October 1, 2008 found appellant guilty of two counts of wire fraud, one count of mail fraud and one count of theft of Federal Government money as it related to her benefits under the Act. The jury verdict is sufficient evidence for the Office to terminate appellant's compensation benefits under section 8148(a) effective that date. The Board will affirm the termination of appellant's compensation benefits based on her conviction for fraud under section 8148.

LEGAL PRECEDENT -- ISSUE 2

Section 8106(b) of the Act provides in pertinent part:

“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 time the Secretary specifies.... An employee who --

- (1) fails to make an affidavit or report when required; or
- (2) 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.”⁹

The Office's regulations state 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.¹⁰ An employee, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if she “knowingly” failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty and, as a penalty provision, it must be narrowly construed.¹¹ The term “knowingly” is defined in the Office's regulations as “with knowledge, consciously, willfully or intentionally.”¹²

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. It also means a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the characterization of the duties as a hobby, removes an

⁹ 5 U.S.C. § 8106(b).

¹⁰ 20 C.F.R. § 10.529.

¹¹ *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

¹² 20 C.F.R. § 10.5(n).

unremunerated individual's responsibility to report the estimated cost to have someone else perform his duties.¹³

The test of what constitutes reportable earnings is not whether the claimant received a salary but what it would have cost to have someone else to do the work. Where a claimant takes an active role in the operation of a business, the claimant is obligated to report as earnings the amount that would have been paid to a person doing such work.¹⁴

ANALYSIS -- ISSUE 2

In the November 18, 2008 decision finding forfeiture of benefits, the Office relied on appellant's conviction for fraud to forfeit further medical and wage-loss compensation under the Act. As noted, section 8148 clearly provides that such forfeiture is effective as of the date of conviction, in this case October 1, 2008 when the jury returned guilty verdicts on the four-count indictment. Because of her conviction, the Office properly found that appellant was not entitled to receive further benefits under the Act. It noted that her compensation benefits had previously been terminated in the October 7, 2008 decision. The Office properly determined that appellant forfeited her entitlement to further benefits under the Act as of October 1, 2008.

The Office's November 18, 2008 decision also found that the period of the forfeiture would be retroactive to November 18, 2004, 15 months prior to the January 18, 2006 EN1032 form completed by appellant. In so doing, the Office relied on the EN1032 forms completed by appellant to find that she fraudulently answered questions pertaining to her receipt of compensation benefits that resulted in her criminal prosecution. The EN1032 form requires the employee to answer all questions pertaining to employment for which she received a salary, wages, income or sales commissions or payment of any kind or self-employment or involvement in business enterprises for which she provided services.¹⁵ It is readily apparent that forfeiture under section 8106(b)(2) is premised on the knowing omission or understatement of any part of the employee's earnings.

In *R.W.*,¹⁶ the employee pled guilty in federal court on August 29, 2004 in violation of 18 U.S.C. § 1920 for making false statements to obtain compensation benefits. The Office subsequently terminated his compensation benefits and issued an overpayment, finding that he received compensation to which he was not entitled from July 14, 2002 through December 27, 2003. It found that the employee's guilt constituted acknowledgement of false statements which he knew or should have known to be incorrect. In this case, the Board reversed the Office's decision. It noted that the Office's decision appeared to find forfeiture under section 8106(b)(2) but had relied solely on the District Court's finding that the employee violated the

¹³ *Id.* at § 10.5(g),

¹⁴ *J.S.*, 58 ECAB 515 (2007); *Anthony A. Nobile*, *supra* note 11 at 271 (the claimant worked at a liquor store owned by his family but contended that he received no salary for his work).

¹⁵ The kinds of services which a recipient must report includes activities such as carpentry, mechanical work, painting, contracting, child care and odd jobs.

¹⁶ Docket No. 07-902 (issued June 9, 2008).

criminal statute. The Board noted that the Office should have based its finding of forfeiture on a determination of whether the employee failed to report earnings on Office forms as required.

In the present appeal, the Office now relies on the EN1032 forms submitted by appellant to find forfeiture of her benefits from November 18, 2004 to September 27, 2008. The November 14, 2008 forfeiture decision stated:

“The information presented in the U.S. District Court showed that the claimant falsely presented herself and information to the attending physician to effectuate determination for total disability for all work. On October 1, 2008 a jury found her guilty of misrepresenting information with intent to fraud the government and to obtain benefits to which she was not entitled.”

* * *

“The evidence of record shows a conviction of intent to fraud the government thereby forfeiting entitlement to medical and compensation benefits under the FECA program. The court records show that the intent to fraud began on February 19, 2006. The signed Form CA-1032 on February 6, 2006 providing information for the 15 months prior to the signature date is taken [as] the first date of intent to misrepresent information and commit fraud of government benefits. The forfeiture of all compensation then would be retroactive to November 18, 2004 (15 months prior to January 18, 2006).”

The decision reflects that the Office forfeited appellant’s compensation for the period commencing November 18, 2004 based on the District Court’s finding that she engaged in fraud related to her receipt of compensation benefits and misrepresentation of information provided her physician. Her receipt of compensation for wage loss from November 18, 2004 through September 27, 2008 was found fraudulent in light of her conviction and in representing that she remained totally disabled to the government and her physicians. While the record supports that appellant committed fraud, section 8106(b) of the Act requires that the fraud must be in terms of her earnings or work activities, not simply in misreporting or misrepresenting her physical condition. The decision of the Office provides no further legal basis for its decision which the Board can evaluate.

It is well established that forfeiture under section 8106(b) is a penalty and, as a penalty provision, will be narrowly construed by the Board.¹⁷ The indictment brought against appellant states that she was capable of extensive physical activities including hunting, fishing, stacking and cutting firewood and operating a tractor, cleaning debris from a fence line and lifting and hauling firewood. The Office, however, did not further develop the evidence to determine whether any of these activities pertained to self-employment activities or services that would subject appellant to the forfeiture penalty of section 8106(b) were it established that she knowingly omitted them from the forms she was required to submit. Section 8106 is not a general penalty provision for fraud. When invoking section 8106(b), the Office must establish that a recipient of benefits under the Act knowingly failed to report employment earnings or

¹⁷ See *Charles E. Nance*, 54 ECAB 447 (2003).

activities, as required. It did not address any evidence that appellant performed the activities noted in the indictment in the furtherance of any employment, self-employment or related services.

While the Board has defined work activities and earnings broadly to include receipt of other advantages such as free travel, lodging or food, pursuant to the Act,¹⁸ the Board has consistently held that the Office must establish work activities or earnings before proceeding with the forfeiture penalty. The evidence in this case does not establish that appellant received any earnings during the period November 18, 2004 through September 27, 2008 or that the activities in which she was engaged were in furtherance of any self-employment. With no evidence of work activities in the furtherance of employment or self-employment, the receipt of earnings or other remuneration, the record provided no basis for invoking the penalty provision of 5 U.S.C. § 8106(b)(2) commencing November 18, 2004.

The Board finds that the Office improperly determined that appellant forfeited her right to compensation from November 18, 2004 through September 27, 2008. The Office found that appellant forfeited past earnings in the amount of \$135,432.25, but there is no evidence of record that she had earnings from employment or self-employment activities during that period. It did not properly invoke the penalty provision under 5 U.S.C. § 8106(b)(2) to find forfeiture retroactive to November 18, 2004. That portion of the forfeiture decision and the overpayment based on the retroactive application of the forfeiture provision in this case will be reversed.¹⁹

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective October 1, 2008 the date she was convicted of fraud. The Board further finds that the Office met its burden of proof to forfeit appellant's further compensation benefits after that date. However, in the retroactive application of section 8106(b) to find forfeiture and an overpayment from November 18, 2004 to September 27, 2008, the Office did not meet its burden of proof.

¹⁸ *Christine P. Burgess*, 50 ECAB 444 (1999). In *Burgess*, the Board found that the records established that the employee received reimbursed expenses and other advantages as part of wages or remuneration in the form of free travel, lodging, food and transportation costs as a result of performing the duties of an escort for a travel service. Based on these reimbursed expenses and payments in kind, the Board found that appellant had earnings as defined under section 8106(c) which she was required to report to the Office.

¹⁹ *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT October 7, 2008 decision of the Office of Workers' Compensation Programs terminating appellant's benefits is affirmed. The November 14, 2008 decision is affirmed finding that appellant forfeited her entitlement to compensation under the Act as of October 1, 2008. The November 14 and December 10, 2008 decisions are reversed as to the finding of retroactive forfeiture.

Issued: May 14, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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