

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

C.K., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
IMMIGRATION & CUSTOMS)
ENFORCEMENT, Los Angeles, CA, Employer)

**Docket Nos. 11-1183 &
11-1204
Issued: February 8, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 19, 2011 appellant filed a timely appeal from a December 13, 2010 decision of the Office of Workers' Compensation Programs (OWCP) under File No. xxxxxx072 finding an overpayment of compensation for the period March 18, 2007 to October 13, 2009 in the amount of \$183,404.45, for which he was at fault due to forfeiture and affirming the termination of his compensation due to the forfeiture. This was docketed as appeal No. 11-1183. On April 20, 2011 appellant filed a timely appeal from a February 24, 2011 OWCP decision under File No. xxxxxx247 affirming a forfeiture determination for the period October 11, 2005 to March 17, 2007 and finding a \$113,313.08 overpayment of compensation for which he was at fault. This was docketed as appeal No. 11-1204. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claims.

¹ 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant forfeited his right to compensation for the period October 11, 2005 to October 13, 2009 as he knowingly failed to report his employment activities; (2) whether OWCP properly determined that appellant received a \$296,717.53 overpayment of compensation for the period October 11, 2005 to October 13, 2009 based on his forfeiture of compensation; (3) whether OWCP properly found that appellant was at fault in creating the \$296,717.53 overpayment, such that it was not subject to waiver; and (4) whether OWCP properly terminated appellant's compensation effective April 20, 2010 as he was convicted of compensation fraud.

On appeal, appellant asserts that he was not convicted of compensation fraud under 5 U.S.C. § 8148, that OWCP's overpayment proceedings violated the double jeopardy clause of the Constitution of the United States, that OWCP does not have the right to collect overpaid compensation and that it miscalculated the period and amount of the forfeiture.

FACTUAL HISTORY

This is appellant's second appeal before the Board in this case under File No. xxxxxx072. By decision and order issued February 15, 2011,² the Board affirmed a February 19, 2010 OWCP decision finding that the selected position of contract administrator properly represented his wage-earning capacity as of February 26, 2009.³ The law and facts of the case as set forth in the prior decision and order are incorporated by reference.

Under File No. xxxxxx072, OWCP accepted that on August 22, 2005 appellant, then a 34-year-old assistant chief counsel, sustained herniated L4-5 and L5-S1 discs with consequential erectile dysfunction in a traumatic fall. Under File No. xxxxxx247, it accepted lumbar and cervical strains, a lumbar strain and aggravation of a displaced lumbar disc sustained in a traumatic incident on January 17, 2007. Appellant stopped work on January 17, 2007 and did not return. The two referenced claim files have been combined by OWCP.

By decision dated January 17, 2007 under File No. xxxxxx247, OWCP granted appellant a schedule award for six percent permanent impairment of each lower extremity. The period of the award ran from October 30, 2006 to March 16, 2007. Appellant received compensation for temporary total disability beginning March 4, 2007.⁴

² Docket No. 10-1066 (issued February 15, 2011).

³ On February 26, 2009 in File No. xxxxxx072, OWCP reduced appellant's wage-loss compensation effective that day under sections 8106 and 8115 of FECA, based on his ability to earn \$1,646.00 a week in the selected position of contract administrator. After a request for a review of the written record and a reconsideration request, OWCP affirmed the February 26, 2009 decision on July 13, 2009 and February 19, 2010.

⁴ In a January 17, 2008 decision, in File No. xxxxxx247, OWCP finalized as modified a June 22, 2007 preliminary overpayment finding that appellant received a \$3,064.72 overpayment from March 4 to 17, 2007 as he simultaneously received a schedule award under File No. xxxxxx247 and total disability compensation under File No. xxxxxx072. This matter is not before the Board on the present appeal.

In a Form EN1032 dated June 16, 2006 under File No. xxxxxx072, appellant stated that, from June 7, 1998 to August 22, 2005, he worked as a prosecutor at the employing establishment earning \$2,088.50 a week or \$108,602.00 a year. He answered “no” to Question 2: “Were you self-employed or involved in any business enterprise in the past 15 months?” Under File No. xxxxxx072, in a Form EN1032 dated June 8, 2007, appellant stated that he worked from October 2006 through January 17, 2007 as a prosecutor at the employing establishment, with gross earnings of \$2,001.00 a week and actual earnings of \$1,349.00 a week. He indicated that he had no other employment activities or related income. The EN1032 forms advised appellant that a false or evasive answer to any question or the omission of an answer may be grounds for forfeiting compensation and that a fraudulent answer may result in criminal prosecution.

A November 2007 grand jury indictment against appellant filed in the United States District Court for the Central District of California lists four counts of making false statement to obtain federal employees’ compensation, in violation of 18 U.S.C. § 1920. Appellant was alleged to have failed to report income in excess of \$1,000.00 from an alleged criminal enterprise begun in 2003, in which he accepted bribes in exchange for filing false immigration and employment documents.

On June 27, 2008 appellant was arrested and incarcerated due to the charges listed in the grand jury indictment. He was released to home detention on July 18, 2008 and remanded to custody on August 18, 2008.

In Forms EN1032 completed on June 7, 2008 and September 7 and October 13, 2009 under File No. xxxxxx072, appellant listed that he had no employment, self-employment or earnings from employment activities during the 15-month period prior to completing the forms.⁵

OWCP calculated that from October 11, 2005 to October 13, 2009, appellant received a total of \$296,717.53 in temporary total disability compensation: \$113,313.08 from October 11, 2005 to March 17, 2007 under File No. xxxxxx247 and \$183,552.37 from March 18, 2007 to October 13, 2009.

On April 20, 2010 appellant appeared in United States District Court for the Central District of California and was found guilty on four counts of making false statements to obtain FECA benefits under 18 U.S.C. § 1920, a felony offense.⁶ The jury verdict was filed with the court on April 20, 2010.⁷

By decision dated May 14, 2010 under File Nos. xxxxxx072 and xxxxxx247, OWCP terminated appellant’s compensation benefits effective April 20, 2010 based on his April 20, 2010 conviction for making a false statement to obtain benefits under FECA. It found that he

⁵ Appellant’s benefits were suspended temporarily on September 28, 2009 as he failed to timely submit a Form EN1032 as requested. Benefits were reinstated retroactively to September 28, 2009.

⁶ Title 18 of the United States Code is entitled “Crimes and Criminal Procedure.” 18 U.S.C. § 1920 appears in Chapter 93 of Title 18, entitled “Public Officers and Employees.”

⁷ Appellant was also convicted of multiple counts of conspiracy, bribery, obstruction of justice, money laundering and criminal forfeiture.

was found guilty of violating 18 U.S.C. § 1920 by knowingly and willingly falsifying and concealing material facts pursuant to an application for and receipt of FECA benefits. OWCP further found that appellant failed to disclose employment activity and earnings from the criminal enterprise on EN1032 forms dated June 8, 2007, June 7, 2008, September 27 and October 13, 2009.

By decision dated June 30, 2010 under File No. xxxxxx072, OWCP found that appellant forfeited his right to compensation for the period March 18, 2007 to October 13, 2009 as he knowingly failed to report work activities on EN1032 forms dated June 8, 2007, June 7, 2008, September 27 and October 13, 2009. By decision dated July 1, 2010 under File No. xxxxxx247, it found that he forfeited his right to compensation for the period October 11, 2005 to March 17, 2007, as he knowingly failed to report his employment activities.

By notices dated July 1, 2010, OWCP advised appellant of its preliminary determination that he was overpaid \$113,313.08 under File No. xxxxxx247 and \$183.552. 37 under File No. xxxxxx072, as his compensation was forfeit from October 11, 2005 to October 13, 2009 because he knowingly failed to report employment activities and earnings from his criminal enterprise. It found that, on EN1032 forms dated June 16, 2006, June 8, 2007, June 7, 2008, September 27 and October 13, 2009, he knowingly failed to report his illegal work activities and the income received therefore. OWCP found that appellant was at fault in creating the overpayments because he did not provide information that he knew or should have known to be material.

In July 7, 2010 letters, appellant requested an oral hearing regarding the forfeiture determination and a prerecoupment hearing regarding the overpayment determination. He later agreed to a review of the written record on both issues as he could not attend the scheduled hearings due to his incarceration.⁸ Appellant submitted a brief asserting that there was no overpayment of compensation as he had not been convicted of compensation fraud. He contended that OWCP's proceedings violated the double jeopardy clause of the Constitution of the United States. Appellant submitted an overpayment recovery questionnaire. He asserted that his sole asset was \$198.00 in cash. Appellant did not list any expenses.

The employing establishment submitted an October 25, 2010 brief explaining that appellant's April 20, 2010 conviction on four counts of violating 18 U.S.C. § 1920 met FECA definition of compensation fraud under 5 U.S.C. § 8148.

By decision dated and finalized December 13, 2010, an OWCP hearing representative affirmed OWCP's May 14 and June 30, 2010 decisions and affirmed as modified the July 1, 2010 decision. The hearing representative found that OWCP miscalculated appellant's compensation for the period March 18, 2007 to July 5, 2008. The hearing representative noted that from March 18, 2007 to March 15, 2008, appellant was issued 13 payments of \$6,415.89,

⁸ On August 13, 2010 OWCP advised appellant that a video hearing would be held on October 18, 2010. In an August 23, 2010 letter, appellant advised OWCP that he could not attend the scheduled hearing as he was incarcerated. He asserted that he had not been convicted of fraud and requested a continuance. In a September 28, 2010 letter, OWCP advised appellant that he could request a review of the written record or a telephonic hearing. Appellant responded by October 4, 2010 letter that he desired a review of the written record. On November 15, 2010 OWCP advised him that video hearings scheduled for December 3, 2010 would not be held as he could not participate due to his incarceration.

totaling \$83,406.57. For the period March 16 to July 5, 2008, appellant received four payments of \$6,692.00, totaling \$26,768.00. The hearing representative determined that from March 18, 2007 to July 5, 2008, appellant received \$111,606.87 in compensation, not \$111,754.79 as previously calculated, a difference of \$147.92. This modified the total amount of the overpayment from \$183,552.37 to \$183,404.45.

By decision dated February 24, 2011, an OWCP hearing representative finalized the July 1, 2010 notice, finding an \$113,313.08 overpayment of compensation for the period October 11, 2005 to March 17, 2007. The hearing representative further found that appellant was at fault in creation of the overpayment as he forfeited his compensation by committing compensation fraud, as he failed to report earnings from his criminal enterprise on EN1032 forms dated June 16, 2006 under File No. xxxxxx247 and June 8, 2007 under File No. xxxxxx072. Therefore, the overpayment was not subject to waiver.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA provides that an employee who “fails to make an affidavit or report when required or 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 Board has held that it is not enough merely to establish that there was unreported employment or earnings. Appellant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she “knowingly” failed to report employment or earnings.¹⁰ The term “knowingly” as defined in OWCP’s implementing regulations, means with knowledge, consciously, willfully or intentionally.¹¹ The Board has found that OWCP can meet this burden of proof in several ways, including by appellant’s own admission to OWCP that he failed to report employment or earnings which he knew he should report or by establishing that he has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the EN1032 form.¹²

ANALYSIS -- ISSUE 1

The evidence of record establishes that appellant “knowingly” concealed his earnings and employment activities from OWCP. The record reflects that, on April 20, 2010, appellant was convicted in U.S. District Court on four felony counts of making a false statement to obtain FECA benefits in violation of 18 U.S.C. § 1920, as he failed to report earnings and activities related to a criminal enterprise he operated beginning in 2003, in which he received bribes from immigrants in exchange for filing false immigration and employment documents.

⁹ 5 U.S.C. § 8106(b).

¹⁰ *Harold F. Franklin*, 57 ECAB 387 (2006).

¹¹ 20 C.F.R. § 10.5(n).

¹² *Harold F. Franklin*, *supra* note 10.

The Board finds that appellant's conviction in U.S. District Court constitutes persuasive evidence that he knowingly omitted his earnings and activities when he completed the affidavit on EN1032 forms June 16, 2006, June 8, 2007, June 7, 2008, September 7 and October 13, 2009 and that the provisions of 5 U.S.C. § 8106(b)(2) therefore apply to the periods covered by the affidavits. The Board therefore finds that he has forfeited his compensation benefits received during the period October 11, 2005 to October 13, 2009.

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of OWCP's implementing regulations provide as follows:

“(a) 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.

“(b) Where the right to compensation is forfeited, [OWCP] shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”¹³

ANALYSIS -- ISSUE 2

As noted above, OWCP regulations provide that OWCP may declare an overpayment of compensation for the period of a given forfeiture of compensation. 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 any compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.¹⁴ OWCP paid appellant compensation in the amount of \$296,717.53 for the period October 11, 2005 to October 13, 2009: \$113,313.08 for the period October 11, 2005 to March 17, 2007 and \$183,404.45 for the period March 18, 2007 to October 13, 2009. It properly found that appellant forfeited his entitlement to compensation during this time because he failed to report employment activities and earnings related to his criminal enterprise on EN1032 forms. Therefore, there exists an overpayment of compensation in the amount of \$296,717.53.

On appeal, appellant asserts that he was not convicted of compensation fraud under 5 U.S.C. § 1848. As stated, he was convicted of four counts of compensation fraud. Appellant also contends that OWCP miscalculated the amount and period of the forfeiture. The Board finds that OWCP's mathematical and calendrical calculations are correct.

¹³ 20 C.F.R. § 10.529. See also *Harold F. Franklin*, *supra* note 10.

¹⁴ *Robert Ringo*, 53 ECAB 258 (2001).

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁵ The only exception to this requirement is a situation, which meets the tests set forth as follows in section 8129(b): “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 this subchapter or would be against equity and good conscience.”¹⁶ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is “without fault,” section 10.433(a) of OWCP’s federal regulations provide, in relevant part:

“A recipient who has done any of the following will be found at fault with respect to 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.)”¹⁷

ANALYSIS -- ISSUE 3

In this case, the Board finds that appellant was at fault under the second standard as he failed to provide information, which he knew or should have known to be material. As explained above, appellant was found to have knowingly omitted his earnings when he completed the EN1032 forms in question. Under the standards for finding fault in the creation of an overpayment, a claimant is at fault if he failed to provide information that he knew or should have known was material or made an incorrect statement as to a material fact that he knew or should have known was incorrect. The discussion of the evidence on forfeiture establishes that appellant made incorrect statements as to a material fact that he knew or should have known was incorrect. Appellant signed the EN1032 forms which required him to report earnings and activities advised him in explicit language that he might be subject to criminal penalties if he made a false statement or misrepresentation to obtain compensation. By signing the form, is deemed to have acknowledged his duty to fill out the form properly, including the duty to accurately report any employment or self-employment activities and income.¹⁸ The Board finds

¹⁵ 5 U.S.C. § 8129(a).

¹⁶ *Id.* at § 8129(b).

¹⁷ 20 C.F.R. § 10.320(b).

¹⁸ *See P.M.*, Docket No. 07-2169 (issued March 3, 2009).

appellant's failure to state his earnings and employment activities is an incorrect statement as to a material fact that he knew or should have known was incorrect. Therefore, appellant is at fault in creation of the \$296,717.53 overpayment, such that it was not subject to waiver.

On appeal, appellant contends that OWCP's overpayment proceedings violated the double jeopardy clause of the Constitution of the United States. However, the Board does not have jurisdiction to review Constitutional matters.¹⁹ Appellant also asserts that OWCP has no right to collect overpaid compensation. As stated, section 10.529 of OWCP's implementing regulations authorize recovery of compensation paid during a period of forfeiture.²⁰

LEGAL PRECEDENT -- ISSUE 4

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 Federal or State criminal statute relating to fraud in the application for or a receipt of any benefit under [FECA], shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under [FECA] 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 Federal or State 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...”²¹

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 FECA. 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.²²

¹⁹ See *Vittorio Pittelli*, 49 ECAB 181 (1997) (finding that as an administrative body the Board does not have jurisdiction to review a constitutional claim).

²⁰ The Board does not have jurisdiction over manner of recovery as OWCP's decisions did address recovery of the overpayments. See 20 C.F.R. § 501.2(c). In any event, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits under FECA. *D.R.*, 59 ECAB 148 (2007).

²¹ 20 C.F.R. § 10.17.

²² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(a) (March 1977). See 5 U.S.C. § 8148. See also *Terry A. Keister*, 56 ECAB 559 (2005).

OWCP 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 FECA.²³ 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).²⁴ Due to the nature of a termination involving fraud, no pretermination notice is required before issuing a final decision.²⁵

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly terminated appellant's compensation benefits on the grounds that he was convicted of four federal felony counts of making unlawful statements to obtain FECA compensation under 18 U.S.C. § 1920.

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 a receipt of any benefit under FECA, will have his compensation terminated. Such a claimant is thereafter permanently barred from receiving any compensation under FECA. The fact of overpayment is established by the conviction on April 20, 2010 in which appellant was convicted of four counts of making false statements to obtain FECA compensation. Under the terms of the statute, he forfeited his entitlement to compensation benefits following the April 20, 2010 conviction. For this reason, OWCP properly terminated appellant's compensation benefits under section 8148(a).

CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited his right to compensation for the period October 11, 2005 to October 13, 2009, as he knowingly failed to report his employment activities. The Board further finds that OWCP properly determined that he received a \$296,717.53 overpayment of compensation for the period October 11, 2005 to October 13, 2009 based on his forfeiture of compensation. The Board further finds that OWCP properly found appellant at fault in creating the \$296,717.53 overpayment, such that it was not subject to waiver. The Board further finds that OWCP properly terminated his compensation effective April 20, 2010 as he was convicted of compensation fraud.

²³ Federal (FECA) Procedure Manual, *supra* note 22, Chapter 2.1400.12(d) (March 1977).

²⁴ *Id.* at Chapter 2.1400.12(e)(1).

²⁵ *Jorge E. Sotomayor*, 52 ECAB 105 (2000); *see also id.* at Chapter 2.1400.12(f)(2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 24, 2011 and December 13, 2010 are affirmed.

Issued: February 8, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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