

On appeal, appellant, through counsel, contends that the Office hearing representative failed to consider that the February 3, 2003 decision finding an overpayment in compensation was premature and whether repayment of the overpayment would defeat the purpose of the Federal Employees' Compensation Act or be against equity and good conscience. He further contended that the hearing representative did not consider issues raised in a June 2, 2003 letter.

FACTUAL HISTORY

On May 29, 1990 appellant, then a 47-year-old special agent, filed a Form CA-1, traumatic injury claim, alleging that he injured his back that day when he slipped and fell while disembarking from a boat. On June 19, 1990 the Office accepted that appellant sustained an employment-related lumbar strain. He underwent authorized surgery for a herniated disc at L3-4 and was placed on the periodic rolls effective January 15, 1991.¹

In June 1991, appellant was referred for vocational rehabilitation and attendance at Corpus Christi State University was authorized. In August 1994, appellant began employment as a teacher with the Corpus Christi Independent School District (CCISD). By decision dated October 31, 1994, the Office determined that appellant's actual wages of \$411.30 per week as a school teacher fairly and reasonably represented his wage-earning capacity and reduced his compensation accordingly.

Appellant subsequently submitted Office CA or EN1032 forms which reported employment activity dated October 19, 1994, October 1, 1995, October 1 and 11 and December 14, 1996, November 30² and December 14, 1997, September 9, 1998, September 24, 1999, October 1, 2000, October 11 and November 11, 2001 and October 2, 2002.

In a report dated June 30, 1997, Donna Johnson, M. Ed., a vocational rehabilitation counselor, advised that appellant's case was being closed. She noted that appellant had completed a masters degree in occupational training and would soon get a second masters degree.³ In August 1998, appellant began employment with Del Mar College as an instructor in criminal justice. He continued to receive wage-loss compensation based on the October 31, 1994 wage-earning determination.

On December 18, 2002 the Office of Inspector General (OIG) of the Department of Labor transmitted an investigative memorandum dated December 16, 2002 to the Office. The OIG's office which advised that appellant had underreported his earnings on 1032 forms signed on October 1, 1996, November 20, 1997, September 1, 1998, September 24, 1999, October 6, 2000 and October 11, 2001. The OIG attached the appropriate 1032 forms, reports of appellant's earnings as reported by the Social Security Administration (SSA) for the years 1993 through 2000 and by the Texas reporting system for the period 1998 through the third quarter of 2002.

¹ It is unclear from the record when appellant stopped work.

² The Board notes that this Form CA-1032 was unsigned but was received by the Office on November 30, 1997.

³ The record indicates that appellant received a bachelor of arts degree on May 13, 1994, a master of science on May 9, 1997 and a master of public administration on August 7, 1998, all from Texas A & M University at Corpus Christi.

These were summarized in a wage report for the years 1997 to 2002 that compared earnings appellant reported on 1032 forms and his actual earnings.

On January 6, 2003 the Office issued a preliminary decision finding that appellant forfeited compensation for the period July 1, 1995 through October 16, 2002 because he underreported his earnings for that period. In a letter that same date, the Office made a preliminary determination that he had received an overpayment in compensation in the amount of \$182,861.03 for that period. The Office found appellant at fault in the creation of the overpayment because he had knowingly omitted or underestimated his earnings on the Office 1032 forms submitted during the period in question which resulted in forfeiture.

In a decision also dated January 6, 2003, the Office modified the October 31, 1994 wage-earning capacity decision to reflect appellant's actual earnings of \$978.25 a week as a college professor teaching criminal justice at Del Mar College, effective August 1998, fairly and reasonably represented his wage-earning capacity. His compensation was reduced to \$11.00 every four weeks.

On January 31, 2003 appellant, through his attorney, requested a hearing on the "alleged overpayment" and the "proposed reduction in compensation." Appellant submitted a statement, an overpayment questionnaire and additional financial information.

By decisions dated February 7, 2003, the Office finalized both the finding that appellant forfeited compensation for the period July 1, 1995 through October 16, 2002 and that he was at fault in creating an overpayment in compensation in the amount \$182,861.03. The Office advised appellant that he should forward a check for the full amount to the Office, but if he was unable to refund the full amount, to contact the Office within 30 days so that alternative arrangements such as installment payments could be made.

In a letter dated February 12, 2003, appellant's attorney reiterated his request for a hearing. On February 28, 2003 the Office issued an amended loss of wage-earning capacity decision, again finding that appellant's actual earnings of \$978.25 a week as a professor of criminal justice, beginning in August 1998, fairly and reasonably represented his wage-earning capacity. The Office determined that appellant's compensation every four weeks would be \$70.00.⁴ By letter dated March 31, 2003, the Office again requested that appellant respond regarding his overpayment in compensation and informed him of the policies and procedures for collection.

By letter dated May 1, 2003, appellant, through his attorney, argued that an overpayment in compensation did not exist, that, in the alternative, appellant was not at fault and recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. He further stated that section 8129 of the Act prohibited recovery from appellant personally because he continued to receive wage-loss compensation from the Office.

⁴ The Board notes that the January 6, 2003 decision contains a mathematical error in calculating appellant's wage-earning capacity, which was corrected in the February 28, 2003 decision. The wording of the decisions is identical with the exception that the sentence "[t]here is no evidence that the position is temporary" was added to the February 28, 2003 decision.

At a hearing held on May 15, 2003, appellant testified that he thought that he had been informed by the Office to merely report his base salary and that, because he signed releases for the Office to obtain information from the SSA, it would be informed of any additional earnings. He testified that the difference in income reported and received was based on teaching extra classes and at summer school. Appellant described his educational and employment histories and discussed his monthly expenses and income. Appellant's attorney, Thomas Baker, argued that appellant was not at fault in the creation of the overpayment and was entitled to waiver. A second representative, Edward Daniels, contended that appellant had not knowingly misreported his income and stressed that, as the February 7, 2003 decisions were issued prematurely, a final decision had not been rendered regarding the overpayment; thus, the Office was not entitled to collect the overpayment. Mr. Daniels further argued that, as appellant had rehabilitated himself, any overpayment would only be created beginning in 1998. Appellant also submitted additional evidence regarding his employment and finances.

In a letter dated June 2, 2003, counsel argued that the Office improperly found appellant to be at fault in the creation of the overpayment in compensation and therefore waiver was appropriate. He reiterated that the Office had prematurely issued the final overpayment decision on February 7, 2003 and contended that appellant's wage-earning capacity should have been modified in August 1998 when he secured employment at Del Mar College. He stated that the amount of the overpayment was inaccurate as it should not cover the period July 1, 1995 through October 16, 2002 but should merely cover the period covered by the wage-earning capacity decision, August 1, 1998 through January 1, 2001.

By decision dated December 15, 2003, the Office hearing representative identified the issues as "whether claimant forfeited his right to compensation benefits he received for the period July 1, 1995 through October 16, 2002 because he knowingly failed to disclose his earnings" and whether the Office "properly determined that claimant was not 'without fault' in the creation of the resulting overpayment of \$182,861.03 and therefore the overpayment was not subject to waiver." He found that appellant forfeited his right to compensation for the period July 1, 1995 through October 16, 2002, because he knowingly failed to report employment on the Office 1032 forms and concluded by stating that the January 6 and February 7, 2003 decisions "are affirmed."

LEGAL PRECEDENT -- ISSUE 1

"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. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under [section]

8129 of this title [Recovery of Overpayments], unless recovery is waived under that section.”⁵

In order to establish that appellant forfeited compensation he received for the periods he completed on the Office 1032 forms, the evidence must establish that he knowingly omitted or understated his employment and earnings.⁶ 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 1032 forms. The term “knowingly” is defined under the implementing federal regulation to mean “with knowledge, consciously, willfully or intentionally.”⁷ The language on the Office CA-1032 and 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 business enterprise in which he worked. The forms further emphasize that penalties may be applied for failure to report all work activities thoroughly and completely.

ANALYSIS -- ISSUE 1

The Office found that appellant forfeited compensation for the period July 1, 1995 through October 16, 2002, because he knowingly underreported his earnings on Office CA and EN1032 forms that he signed on October 1, 1996, November 20, 1997, September 1, 1998, September 24, 1999, October 6, 2000, October 11, 2001 and October 2, 2002.

The record before the Board contains Office 1032 forms signed by appellant on October 11, 1996, December 14, 1997, September 9, 1998, September 24, 1999, October 1, 2000, October 11, 2001 and October 2, 2002. These forms encompass the period May 11, 1995 to October 2, 2002 and the language on the forms is clear and unambiguous in requiring that appellant report all earnings.

The Board notes that, as the period October 2 to 16, 2002 is not covered by a report requesting earnings information, the Office cannot find forfeiture for this period. For the period July 1, 1995 to October 2, 2002, however, the Board finds that appellant’s failure to fully report his earnings was a knowing omission such that he forfeited his right to compensation for this period.

The Office 1032 forms explicitly advised appellant that all his earnings must be reported and his knowledge of the reporting requirement was documented by his reporting some of his earnings. His signature on the 1032 forms certified: “all the statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief.” Evidence of record indicates that on a CA-1032 form signed by appellant on October 11, 1996 he reported an annual salary of \$23,530.00 from the CCISD for the years 1994 and 1995, whereas SSA statements indicate that, in 1995, he earned \$25,139.73 from CCISD plus \$1,853.00 from

⁵ 5 U.S.C. § 8106(b).

⁶ *Robert R. Holmes*, 49 ECAB 161 (1997).

⁷ 20 C.F.R. § 10.5(n).

the Corpus Christi Junior College. On a Form EN1032 signed by appellant on December 14, 1997 he advised that his earnings for 1996 to 1997 were \$2,422.26 per month (or \$29,067.12 per year). SSA statements indicate that in 1996 appellant earned \$26,083.96 and in 1997 earned \$30,341.48. On a Form EN1032 signed by appellant on September 9, 1998 he reported no employment. An unsigned form in the record advised that he earned \$31,320.00 for the period August 1998 to May 1999.⁸ SSA statements indicate that, for the year 1998, appellant earned \$18,193.72 from CCISD and \$16,269.84 from Del Mar College. On a Form CA-1032 signed by appellant on September 24, 1999 he reported wages of \$31,320.00 per year for the period August 1998 to August 1999. SSA statements indicate that for the year 1999 appellant earned \$40,083.39 from Del Mar College. Appellant also signed a Form CA-1032 on October 1, 2000 in which he reported earnings of \$37,764.78 for the period September 30, 1999 to September 30, 2000 from Del Mar College and \$500.00 from the Gulf Coast Training Academy for the period May 1 through May 7, 2000. SSA statements indicate that for the year 2000 appellant earned \$51,846.36 from Del Mar College. On October 11, 2001 appellant signed a Form CA-1032 in which he reported earnings of \$36,446.00 as his 12-month teaching salary from Del Mar College plus \$1,000.00 from the Gulf Coast Training Academy. Employer Tax System Wage Detail Inquiry forms from the State of Texas indicate that, for the year 2001, appellant had earnings of \$50,869.00 from Del Mar College. Finally, on October 2, 2002 appellant signed a Form EN1032 in which he reported earnings of \$37,413.00 from Del Mar College for 2001 to 2002 and an additional \$500.00 from Gulf Coast Training Academy for the period June 8 through 12, 2001. The Texas reporting system indicates that appellant had earnings of \$39,993.80 from Del Mar College for the first three quarters of 2002.

The Board finds that appellant's failure to fully report his earnings is found to be a knowing omission by appellant.⁹ The Office forms explicitly directed appellant to report all earnings yet the record establishes that his earnings were underreported. Accordingly, appellant forfeited his right to compensation for the period July 1, 1995 to October 2, 2002.

LEGAL PRECEDENT -- ISSUES 2 & 3

If an appellant has any earnings during a period covered by a report which he or she knowingly fails to report, appellant 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.¹⁰

Section 8129 of the Act¹¹ provides that an overpayment must be recovered 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." Office regulations provide that the Office may consider waiving an overpayment only if the

⁸ The form appears to be in appellant's handwriting.

⁹ *Albert A. Garcia*, 54 ECAB ____ (Docket No. 00-2510, issued December 4, 2002); *Christine C. Burgess*, 43 ECAB 449 (1992).

¹⁰ *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

¹¹ 5 U.S.C. § 8129(a).

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 are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.¹² However, an individual who is found to have been at fault in helping to create the overpayment is not eligible for a waiver of recovery of overpayment.¹³ With respect to determining fault, section 10.433(a) states:

“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).”¹⁴

ANALYSIS -- ISSUES 2 & 3

The Board notes, as appellant timely requested a precoupment hearing on January 31, 2003 the Office prematurely issued a final overpayment decision on February 7, 2003. However, appellant was thereafter granted a hearing held on May 15, 2003 at which time he testified regarding the issues in this case. The procedural error in prematurely issuing the final overpayment decision is therefore deemed harmless.¹⁵

The Board finds that the Office properly determined that appellant was at fault in creating an overpayment in compensation based on application of the forfeiture provision for the period July 1, 1995 to October 2, 2002, and therefore the overpayment is not subject to waiver. With respect to the issue of whether appellant received an overpayment for the period October 2 through 16, 2002, the Board finds this case is not in posture for decision.

The record establishes that appellant underreported his earnings on 1032 forms provided to him for financial disclosure to the Office. His failure to fully report his earnings and employment activities during the period July 1, 1995 to October 2, 2002 constitutes a failure to furnish information which he knew or should have known was material pursuant to section 10.433(a)(2). Consequently, appellant was properly deemed to be at fault in creating an overpayment in compensation such that he is not entitled to waiver for the above period. The

¹² 20 C.F.R. § 10.432(a).

¹³ *Linda L. Coggins*, 51 ECAB 300 (2000); *Bonnye Mathews*, 45 ECAB 657 (1994).

¹⁴ 20 C.F.R. § 10.433(a).

¹⁵ *See generally Joan F. Martin*, 51 ECAB 131 (1999).

case, however, will be remanded to the Office for calculation of the amount of compensation appellant received for the forfeiture period, July 1, 1995 to October 2, 2002. Once calculated, this figure would also represent the amount of the overpayment appellant received during the applicable period and, as stated earlier, as appellant is found to be at fault in its creation, the overpayment in compensation is not subject to waiver.

LEGAL PRECEDENT -- ISSUE 4

The Office regulations found at 20 C.F.R. § 10.126 provide that a decision shall contain findings of fact and a statement of reasons.¹⁶ The Office procedures provide that a decision should contain a discussion of the issues, requirements for entitlement, a background framework so that the reader can understand the issues at hand, a discussion of the relevant evidence, a basis for the decision and a conclusion.¹⁷ The procedures further state that, following a hearing, an Office hearing representative “will issue a decision which affirms, reverses, remands, or modifies the [District Office] decision.”¹⁸ Regarding action following a preliminary finding of “with fault” in an overpayment case, the Office procedures state that the hearing representative “will prepare a written decision, either affirming or modifying the preliminary finding of fault.”¹⁹ Thus, a final decision must include findings of fact and a description of the basis for the findings so that the parties of interest will have a clear understanding of the reasoning behind the decision.²⁰

ANALYSIS -- ISSUE 4

The Board finds that, in his December 15, 2003 decision, the Office hearing representative made no specific finding regarding whether the Office properly modified appellant’s wage-earning capacity. The facts in this case indicate that on January 6, 2003 the Office also issued a decision which found that appellant’s actual earnings as a college professor represented his wage-earning capacity. The wage-earning capacity decision was amended by a decision dated February 28, 2003 because the initial decision contained a calculation error,²¹ and the Board notes that appellant had requested a hearing on the reduction of his compensation. His representative, Mr. Daniels, presented arguments in that regard at the May 15, 2003 hearing, and in a June 2, 2003 letter submitted to the Office hearing representative subsequent to the hearing, counsel argued that, as appellant’s wage-earning capacity should have been modified in August 1998 when he secured employment at Del Mar College, the amount of the overpayment was inaccurate and should only cover August 1, 1998 through January 1, 2001. Thus, the issue

¹⁶ 20 C.F.R. § 10.126; see *Robert L. Johnson*, 51 ECAB 480 (2000).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (March 1997).

¹⁸ *Id.* at Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.8(e) (January 1999).

¹⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Preliminary and Final Decisions*, Chapter 6.200.4(b)(2) (July 1997).

²⁰ See generally *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

²¹ *Supra* note 4.

of whether the Office correctly modified appellant's wage-earning capacity on February 28, 2003 was properly before the Office hearing representative. Because the Office hearing representative made no findings in this regard, the case will be remanded for the Office, as part of its adjudicatory function, to make detailed findings of fact, in conformance with its regulation and procedures and Board precedent.

CONCLUSION

The Board finds that the Office properly determined that appellant forfeited his right to compensation for the period July 1, 1995 to October 2, 2002, and was at fault in the creation of the overpayment for that period and is not entitled to wavier. The case will be remanded to the Office to determine the amount of the overpayment. The Board also finds that the December 15, 2003 decision of the Office did not contain adequate findings regarding the wage-earning capacity issue, and will remand the case for further proceedings consistent with this decision.

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2003 decision of the Office of Workers' Compensation Programs is affirmed, as modified with regard to the finding that appellant forfeited his right to compensation for the period July 1, 1995 to October 2, 2002 and was at fault in creating an overpayment in compensation for that period. The case is set aside and remanded to the Office to determine the correct amount of the overpayment and whether the Office properly modified appellant's wage-earning capacity on February 28, 2003.

Issued: September 30, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
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