

FACTUAL HISTORY

On June 2, 1980 appellant, then a 38-year-old tool operator, filed an occupational disease claim alleging that he sustained hearing loss due to factors of his federal employment. He stopped work in May 1979. The Office accepted the claim, assigned file number 2050180140, for binaural hearing loss and paid appropriate compensation benefits.

On April 24, 1981 the Office granted appellant a schedule award for a 20 percent binaural hearing loss. The period of the award ran from December 4, 1980 through September 8, 1981. By decision dated August 1, 1983, the Office reduced appellant's compensation based on its finding that he had the capacity to earn wages in the selected position of hotel clerk. It paid him compensation of \$421.00 every four weeks for his loss of wage-earning capacity.

Personnel records establish that appellant worked from February 26 through September 29, 1990 as a temporary warehouse worker for the Department of the Army. He began working on September 30, 1990 as a temporary tractor operator for the Department of the Army. On April 7, 1991 the Department of Agriculture hired appellant as a seasonal tractor operator.¹

On June 24, 1991 appellant signed an affidavit of earnings and employment (Form EN1032) covering the prior 15-month period. The form advised that he must report all employment or self-employment from which he received wages or other income and must report what he was paid for any employment. The EN1032 notified appellant that he was obligated to "immediately" report any employment to the Office and that fraudulently concealing or failing to report income could subject him to criminal prosecution. On April 10, 1992 appellant signed another EN1032 covering the previous 15-month period. On both the EN1032 signed June 24, 1991 and the EN1032 signed April 10, 1992, he responded "no" to the question of whether he had any earnings from employment or self-employment.

Records from the Social Security Administration show that appellant earned \$10,555.47 in 1990 and \$2,594.70 in 1991 working for the Department of the Army. He also earned \$469.52 in 1990 working for Modern Moving & Storage, Incorporated and \$9,710.82 in 1991 working for the Department of Agriculture.

In a worksheet dated January 24, 2006, the Office calculated that it paid appellant \$14,275.57 in compensation for the period March 24, 1990 through April 10, 1992. By decision dated January 25, 2006, it determined that he forfeited his entitlement to compensation for the period March 24, 1990 through April 10, 1992 because he knowingly failed to report earnings from employment.² On February 9, 2006 the Office notified appellant of its preliminary

¹ The Office accepted that appellant sustained lumbar strain with radiculopathy under file number 250381887 on April 12, 1991 while working as a seasonal tractor operator.

² In a decision dated January 24, 2006, the Office modified its August 1, 1983 loss of wage-earning capacity. It reduced appellant's compensation retroactive to November 29, 1990. On February 9, 2006 the Office advised him of its preliminary determination that he was at fault in creating an overpayment of \$8,975.70 because he was paid an inaccurate rate from April 11, 1992 through January 24, 2006. In a decision dated April 11, 2006, an Office hearing representative reversed the January 24, 2006 modification of the established wage-earning capacity determination and found that the preliminary determination of overpayment was in error.

determination that he received an overpayment in the amount of \$14,275.57 based on his forfeiture of compensation from March 24, 1990 through April 10, 1992. It made a preliminary determination that he was at fault in creating the overpayment because he knowingly failed to report earnings from employment.

Appellant requested an oral hearing. At the telephonic hearing, held on May 3, 2006, he related that he relied upon other people, including his daughter, to complete the forms for him because he could not read well. Appellant signed the forms without knowledge of the content. Additionally, at the time that he signed the forms he was no longer working. Appellant also challenged the overpayment amount and fault finding. He provided information regarding his financial circumstances. Subsequent to the hearing, appellant submitted financial documentation.

By decision dated September 27, 2006, the hearing representative affirmed the January 25, 2006 forfeiture decision and finalized the finding that appellant received a \$14,275.57 overpayment of compensation during the period of the forfeiture, March 24, 1990 through April 10, 1992. She further concluded that he was at fault in the creation of the overpayment and thus not entitled to wavier. The hearing representative found that appellant's argument that he could not read was not credible as he had read excerpts from Office letters into the telephone in a voice mail message and during an August 22, 2005 oral hearing. She determined that the overpayment was due and payable in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the Federal Employees' Compensation Act 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."³

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. Appellant can be subjected to the forfeiture provisions of 5 U.S.C. § 8106(b) only if he "knowingly" failed to report employment or earnings.⁴ The term "knowingly" as defined in the Office's implementing regulation, means "with knowledge, consciously, willfully or intentionally."⁵

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained employment-related binaural hearing loss. Appellant received compensation beginning August 1, 1983 based on his loss of wage-earning capacity. The Office found that he forfeited entitlement to compensation for the period March 24, 1990 to April 10, 1992. On June 24, 1991 appellant signed an EN1032 form covering

³ 5 U.S.C. § 8106(b).

⁴ *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁵ 20 C.F.R. § 10.5(n).

the period March 24, 1990 to June 24, 1991. On April 10, 1992 he signed an EN1032 form covering the period January 24, 1991 to April 10, 1992. Appellant indicated on the forms that he was not employed or self-employed. Personnel records, however, reveal that he worked from February 26 through September 20, 1990 as a temporary warehouse worker with the Department of the Army. Appellant began working September 30, 1990 for the Department of the Army as a temporary tractor operator. In April 1991 the Department of Agriculture hired him as a tractor operator. The Social Security Administration records establish that in 1990 he earned \$10,555.47 working for the Department of the Army and \$469.52 working for Modern Moving & Storage, Incorporated. Appellant earned \$9,710.82 in 1991 working for the Department of Agriculture. The Board thus finds that the evidence establishes that appellant failed to disclose earnings on EN1032 forms covering the period March 24, 1990 to April 10, 1992.

Appellant can be subject to the forfeiture provision of section 8106(b) only if he “knowingly” failed to report earnings or employment. The Office has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.⁶ Appellant completed EN1032 forms which advised him that he must report both all employment and all earnings from employment and self-employment. The EN1032 forms clearly stated that he could be subject to criminal prosecution for false or evasive answers or omissions. The factual circumstances of record, including appellant’s signing of strongly worded certification clauses on the EN1032 forms, provide persuasive evidence that he “knowingly” understated his earnings and employment information.⁷ The Office, therefore, properly found that appellant forfeited his compensation for the period March 24, 1990 to April 10, 1992.

Appellant contended that he had the forms read to him by others, including his young daughter. He asserted that he did not understand the content of the forms. Appellant also noted that he was not working at the time that he signed the forms and thus believed that he did not need to put down his employment. The Board finds that appellant’s contentions are not persuasive. The EN1032 forms clearly indicate that a claimant must disclose any employment over the prior 15-month period. Further, the hearing representative found that appellant evidenced the ability to read at a prior hearing and on voice mail messages.

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of the Office’s implementing regulations provides 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.

⁶ 20 C.F.R. § 10.5(n).

⁷ See generally *Robert C. Gilliam*, 50 ECAB 334 (1998).

“(b) Where the right to compensation is forfeited, [the Office] 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.”⁸

ANALYSIS -- ISSUE 2

The Office’s regulation provides that the Office shall declare an overpayment of compensation for the period of a given forfeiture of compensation.⁹ If a claimant has any earnings during a period covered by an EN1032 form which he knowingly fails to report, he is not entitled to compensation for any period covered by the report, even though he or she may not have had earnings during a portion of that period.¹⁰ The Office paid appellant compensation in the amount of \$14,275.57 from March 24, 1990 to April 10, 1992. As he forfeited compensation for this period because he omitted earnings and employment on EN1032 forms covering this period, he received an overpayment of compensation in the amount of \$14,275.57.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act¹¹ provides that “[a]djustment 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.” Section 10.433 of the Office’s implementing regulation¹² provides that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(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.”

ANALYSIS -- ISSUE 3

The Office properly determined that appellant was at fault in the creation of the overpayment because he failed to provide information which he knew or should have known to be material on EN1032 forms covering the period March 24, 1990 to April 10, 1992. The factual evidence establishes that appellant had unreported earnings from employment during these

⁸ 20 C.F.R. § 10.529.

⁹ *Id.*

¹⁰ See *Ronald E. Ogden*, 56 ECAB 278 (2005).

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.433.

periods and knowingly failed to furnish this material information to the Office. Appellant signed a certification clause in the EN1032 forms which advised him in explicit 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. By signing the form, he is deemed to have acknowledged his duty to fill out the form properly, including the duty to report any employment or self-employment activities and income. Appellant, therefore, failed to furnish information which he knew or should have known to be material to the Office. As he is not without fault in creating the overpayment, it is not subject to waiver.¹³

CONCLUSION

The Board finds that the Office properly found that appellant forfeited his entitlement to compensation for the period March 24, 1990 to April 10, 1992 because he knowingly failed to report employment. The Board further finds that he received a \$14,275.57 overpayment of compensation during the period of the forfeiture and that he was at fault in creating the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 27 and January 25, 2006 are affirmed.

Issued: July 21, 2008
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

¹³ In his June 13, 2005 decision, the hearing representative found that the overpayment was due and payable but did not decide the rate of recovery. The Board's jurisdiction over recovery of the overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. *George A. Rodriguez*, 57 ECAB 224 (2005).