

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

C.M., Appellant)

and)

TENNESSEE VALLEY AUTHORITY,)
PARADISE STEAM PLANT, Drakesboro, KY,)
Employer)

**Docket No. 07-1365
Issued: November 5, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 25, 2007 appellant filed a timely appeal from a January 23, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative, finding that he forfeited his compensation benefits, thereby creating an overpayment in the amount of \$138,120.54, for which he was at fault and directing recovery of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant forfeited his right to compensation for the period April 30, 1999 through April 9, 2002 because he knowingly failed to report earnings from employment, thereby, creating an overpayment of compensation in the amount of \$138,120.54; and (2) whether the Office properly determined that he was at fault in the creation of the overpayment and, therefore, ineligible for waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has been on appeal twice before the Board. In a June 27, 1988 decision, the Board set aside an Office hearing representative's November 9, 1987 decision, which affirmed a finding that appellant did not sustain a recurrence of disability causally related to an August 1, 1967 employment injury.¹ The Board found that, the opinion of an impartial medical examiner, Dr. M. Anwarul Quader, a Board-certified orthopedic surgeon, was not sufficiently rationalized to resolve a conflict in the medical opinion evidence. In a November 30, 2006 decision,² the Board affirmed the Office's February 10, 2006 decision, which terminated appellant's compensation benefits effective February 19, 2005 on the grounds that he was found guilty of violating 18 U.S.C. § 1920,³ by knowingly and willfully making false statements or reports to obtain federal employees' compensation.⁴ The facts and the circumstances of the case as set forth in the Board's prior herein by reference.⁵ The facts and the history relevant to the present issue are hereafter decisions are incorporated set forth.

By decision dated April 17, 2006, the Office found that appellant forfeited his right to compensation benefits by knowingly and willfully understating or omitting his earnings from self-employment for the periods covered by the EN1032 forms dated April 30, 1999, April 25, 2000, April 19, 2001 and April 9, 2002, based on his fraud conviction.

On April 17, 2006 the Office also made a preliminary determination that appellant received an overpayment in the amount of \$138,120.54 during the period April 30, 1999 through April 9, 2002 in light of the April 17, 2006 forfeiture decision. The Office found that appellant was at fault in the creation of the overpayment because he was convicted of knowingly and willfully providing false statements to obtain federal employees' compensation to which he was not entitled on EN1032 forms covering the stated period. Appellant was advised that he could

¹ Docket No. 88-587 (issued June 27, 1988).

² Docket No. 06-1194 (issued November 30, 2006).

³ 5 U.S.C. § 1920 states: "Whoever knowingly and willfully falsifies, conceals or covers up a material fact or makes or uses a false statement or report knowing the same to contain any false, fictitious or fraudulent statement or entry in connection with the application for or receipt of compensation or other benefit or payment under Subchapter I or III of Chapter 81 of Title 5, shall be guilty of perjury and on conviction thereof shall be punished by a fine of not more than \$250,000.00; or by imprisonment for not more than [five] years; or both; but, if the amount of the benefits falsely obtained does not exceed \$1,000.00, such person shall be punished by a fine of not more than \$100,000.00 or by imprisonment for not more than [one] year, or both."

⁴ On February 9, 2005 appellant was convicted by a jury in the United States District Court for the Western District of Kentucky of four counts of making false statements or reports in violation of 18 U.S.C. § 1920. He made a false statement regarding his self-employment and income on EN1032 forms dated April 30, 1999, April 25, 2000, April 19, 2001 and April 9, 2002 to obtain no more than \$1,000.00 in federal employees' compensation. Appellant attested that he had not worked during the previous 15 months notwithstanding being advised by the EN1032 forms that he must "immediately" report all employment for which he received wages or other payment during the 15-month period covered by the form and that fraudulently concealing or failing to report income could subject him to criminal prosecution.

⁵ On August 1, 1967 appellant hurt his back when he slipped on a bank and twisted his back as he fell at work. The Office accepted his claim for lumbar strain.

request a telephone conference, a final decision based on the written evidence only or a prerecoupment hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On April 30, 2006 appellant requested a prerecoupment hearing. In an undated OWCP-20 form, he reported his monthly income and expenses. Appellant's income was \$2,282.00 and his expenses totaled \$2,518.00. He contended that the court in his criminal proceedings found that he was guilty of obtaining less than \$1,000.00 under each count of the indictment. Appellant further contended that a court order required him to pay \$44,000.00 in restitution while the Office determined that he had to repay \$138,120.54. He stated that he had not done anything wrong.

In an undated letter, received by the Office on June 2, 2006, appellant disagreed with the jury's verdict in his case. He contended that he simply made a mistake by checking "no" instead of "yes" on the work questionnaire and that he was found guilty of a misdemeanor charge and not a felony. Appellant did not consider the activity he was involved in as work. He stated that he continued to be disabled by his accepted employment injury and as a result, his Social Security Administration benefits were less than the amount he would have received if he had been able to work. Appellant contended that he did not know that he had done anything wrong and was not guilty of fraud. He stated that, this was the reason why the jury found him guilty of a lesser charge.

At an October 24, 2006 hearing, appellant reiterated that he did not knowingly and willingly make false statements to the Office and that the jury found him guilty of a misdemeanor, which was less than \$1,000.00.

By decision dated January 23, 2007, the hearing representative found that appellant forfeited his compensation benefits because he knowingly and willfully failed to report his earnings from self-employment during the period April 30, 1999 to April 9, 2002, which resulted in his fraud conviction. The hearing representative determined that, during the stated period, appellant received an overpayment in the amount of \$138,120.54 due to the forfeiture. He found that appellant was at fault in the creation of the overpayment because he knowingly failed to report his employment on the EN1032 forms, which thereby precluded waiver of recovery of the overpayment.⁶

⁶ On appeal, appellant has submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

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 Federal or State criminal statute relating to fraud in the application for or a receipt of any benefit under [the Federal Employees’ Compensation 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.”⁷

Section 10.17 of the implementing federal regulations provides, 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.”⁸

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.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant forfeited his compensation benefits for the period April 30, 1999 through April 9, 2002, in the amount of \$138,126.54.

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 forfeited. Such a claimant is thereafter permanently barred from receiving any compensation under the Act.¹⁰ Appellant was convicted by a jury on February 9, 2005 of four counts of knowingly and willfully making

⁷ 5 U.S.C. § 8148(a); *Robert C. Gilliam*, 50 ECAB 334 (1999).

⁸ 20 C.F.R. § 10.17.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(a) (March 1977). See 5 U.S.C. § 8148.

¹⁰ Congress has enacted 5 U.S.C. § 8148(a) as an absolute forfeiture of compensation, without any provision for waiver of the effects of this section of the Act. *Michael D. Matthews*, 51 ECAB 247 (1999). This is a permanent forfeiture which bars appellant from any further entitlement to compensation for any employment-related injuries or conditions. *Jeff M. Burns*, 51 ECAB 241 (1999).

false statements or reports to the Office regarding his self-employment and income, on April 30, 1999, April 25, 2000, April 19, 2001 and April 9, 2002 in violation of 18 U.S.C. § 1920. For this reason, the Board finds that the Office properly invoked the forfeiture provision under section 8148(a).

As appellant was in receipt of compensation benefits from April 30, 1999 to April 9, 2002, an overpayment of compensation was created because he was no longer a beneficiary entitled to receive benefits for his accepted employment-related injury. He disputed the amount of the overpayment. Appellant contended that the jury found him guilty of a misdemeanor which involved less than \$1,000.00 for each of the four counts of an indictment while the Office determined that he had to repay \$138,120.54. The record reflects that from the period April 30, 1999 through April 9, 2002, he received compensation in the amount of \$138,120.54. The regulations provide that compensation paid for the period of the forfeiture shall be recovered in accordance with the Act's provisions concerning recovery of overpayments.¹¹ As appellant's compensation benefits were forfeited for the period April 30, 1999 through April 9, 2002 due to his February 9, 2005 conviction, he was not entitled to the compensation paid during this period. Accordingly, the Board finds that appellant received an overpayment of \$138,120.54 during the period April 30, 1999 through April 9, 2002.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act 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.¹² Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.¹³

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

The Office applied the first standard in determining that appellant was at fault in creating the overpayment, he made an incorrect statement as to a material fact which he knew or should have known to be incorrect. Appellant failed to report his earnings from self-employment during the period April 30, 1999 to April 9, 2002 as required by the Office. He was found guilty by a jury on February 9, 2005 of knowingly and willfully failing to report his earnings during this

¹¹ 20 C.F.R. § 10.529(b).

¹² 5 U.S.C. § 8129(b).

¹³ *Norman F. Bligh*, 41 ECAB 230 (1989).

period. Accordingly, the Board finds that, under section 10.433(1), appellant was at fault in the creation of the overpayment and, therefore, is not entitled to waiver.

CONCLUSION

The Board finds that appellant forfeited his right to compensation for the period April 30, 1999 through April 9, 2002, which resulted in an overpayment of benefits in the amount of \$138,120.54. The Board further finds that the Office properly determined that he was at fault in the creation of the overpayment and, therefore, ineligible for waiver of the recovery of the overpayment.¹⁴

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹⁴ With respect to the recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act. *Terry A. Keister*, 56 ECAB ___ (Docket No. 04-1136, issued May 23, 2005); *see also Albert Pineiro*, 51 ECAB 310 (2000). As appellant was no longer receiving compensation benefits at the time of the Office hearing representative's January 23, 2007 decision, the Board lacks jurisdiction to review the recovery of the overpayment.