U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ULYSSES W. McKINNEY, JR. and U.S. POSTAL SERVICE, DOWNTOWN STATION, Long Beach, Calif.

Docket No. 96-1631; Submitted on the Record;
Issued September 21, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant forfeited his right to compensation for the period November 19, 1992 through November 26, 1994; (2) whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of an overpayment of $67,726.69; and (3) whether the Office met its burden of proof in terminating appellant's compensation on the grounds that his accepted condition had resolved.

On June 20, 1990 appellant, then a 50-year-old station manager, filed a notice of occupational disease, claiming that he developed mental stress because of harassment and discrimination from his supervisors. Appellant stopped work on June 18, 1990 and did not return. The Office accepted the condition of adjustment reaction, based on the October 24, 1990 report of Dr. Philip M. Carman, a licensed clinical psychologist, and paid appropriate compensation.

Dr. Carman diagnosed adjustment disorder "with depressed mood, acute, severe, bordering on major depression." On October 19, 1992 Dr. Carman reported that appellant's condition had deteriorated to major depression and recommended twice-weekly psychological treatment. Dr. Carman added that appellant continued to believe that his supervisors engaged in a deliberate effort to sabotage and destroy his postal career.

Subsequently, the Office referred appellant, along with a statement of accepted facts, the medical records, and a list of questions, to Dr. Jay A. Cohen for a psychiatric evaluation. In a report dated May 31, 1995, Dr. Cohen, a Board-certified psychiatrist, stated that appellant no longer suffered from any work-related psychiatric condition.

Dr. Cohen diagnosed adjustment disorder with depressed mood, fully resolved and delusional disorder, paranoid type, nonindustrial. He explained that adjustment disorder generally resolves within six months if the individual is removed from the stressors that caused it. Dr. Cohen reported that appellant's psychological testing showed high levels of paranoia, which still persisted. Dr. Cohen concluded that appellant could return to his previous job because his previous supervisors had left.

Based on his report, the Office issued a notice of proposed termination on September 13, 1995. Appellant did not respond to the notice, and on October 26, 1995 the Office terminated appellant's compensation, effective November 12, 1995, on the grounds that his adjustment disorder had resolved.

On November 4, 1995 appellant requested reconsideration and submitted a report from Dr. Carman, who disagreed with Dr. Cohen's diagnosis of paranoia and critiqued his report and testing.

On November 20, 1995 the Office determined that appellant had forfeited his right to compensation[1] from November 19, 1992 through November 26, 1994 because he knowingly failed to report his actual earnings as revealed by the employing establishment's investigation. The Office declared a forfeiture in the amount of $67,726.69.

On November 21, 1995 the Office made a preliminary determination that appellant was with fault in the creation of an overpayment of $67,726.69 because he failed to inform the Office that he had been working and accepted compensation to which he knew or should have known he was not entitled.

Appellant responded with a personal statement that he was not at fault in creating the overpayment because all funds generated by his operation of his wife's airport shuttle van were given to her to help her business venture. Appellant stated that he personally had no earnings from driving the van, which he considered therapeutic in nature. He added that running the van service gave him "something to do with an extensive amount of free time" on his hands.

Appellant submitted copies of his 1993 and 1994 tax returns, personal checks, and a credit report as well as a completed overpayment recovery questionnaire. Appellant noted that he had filed for bankruptcy in 1989 and argued that requiring him to repay the overpayment would create severe financial hardship and force his stepdaughter to forego her education.

On January 24, 1996 the Office issued a final determination that appellant was at fault in creating the overpayment of $67,762.69 because he accepted disability compensation from November 19, 1992 through November 26, 1994 during which time he was also working.

The Board finds that appellant forfeited his right to compensation for the period November 19, 1992 through November 26, 1994 because he knowingly failed to report earnings from his work driving his wife's shuttle van.

Section 8106(b) of the Federal Employees' Compensation Act[2] provides that a partially disabled employee must report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times specified by the Secretary of Labor. The penalty for failing to make an affidavit or report when required or knowingly omitting or understating any

[1] The Office found that appellant was paid disability compensation from October 20, 1991 through November 12, 1995.

[2] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(b).

part of an employee's earnings is forfeiture of his or her right to compensation during the period for which the affidavit or report was required.[3]

Because forfeiture is a penalty, the Office must establish that appellant knowingly failed to report employment or earnings.[4] The term knowingly is not defined in the Act but the Board has recognized that the definition includes such concepts as "with knowledge," "consciously," "willfully," "intelligently" or "intentionally."[5] To meet its burden of proof, the Office must closely examine appellant's activities and statements in reporting earnings; it is not enough merely to show that appellant received such earnings.[6]

In this case, appellant was informed on October 28, 1991 that if he returned to his job or obtained other employment he must report the pertinent information to the Office "at once." The letter warned: "In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you return to work." The letter, which appellant signed on November 16, 1991, attested to his knowledge that his failure to comply with the conditions under which he received disability compensation could "result in termination or forfeiture of benefits and liability for resulting overpayments."

Further, the record shows that appellant signed four CA-1032 forms -- on August 8, 1992, January 2, 1993, February 19 and November 26, 1994 -- attesting to the fact that he had no self-employment during the periods covered by the forms. Each of the forms states unequivocally: Earnings from self-employment (such as farming, sales, service, operating a store, business, etc.) must be reported. Report any such enterprise in which you worked, and from which you received revenue, even if it operated at a loss or if profits were reinvested. You must show as "rate of pay" what it would have cost you to have hired someone to perform the work you did.

The form also warns that a false answer to any question may be grounds for suspending compensation and could subject appellant to civil liability or, if fraudulent, to criminal prosecution. To the question, were you self-employed during any time covered by this form, appellant answered "no" on each of the four forms.

Appellant subsequently admitted that he drove the airport shuttle van but argued that he did not keep any of the money he earned and therefore should not be penalized. However, the instruction is clear that appellant is to report any earnings from self-employment such as operating a store or business, and the employing establishment's investigation revealed that the airport shuttle van was driven 350 days in 1994, generating total earnings of $64,750.00. Appellant failed to report any earnings during the two-year period.

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[3] *Charles Walker*, 44 ECAB 641, 644 (1993).

[4] *John M. Walsh*, 48 ECAB ___ (Docket No. 96-1801, issued April 25, 1997).

[5] *Glenn Robertson*, 48 ECAB ___ (Docket No. 95-639, issued February 20, 1997).

[6] *Barbara Hughes*, 48 ECAB ___ (Docket No. 94-2533, issued March 13, 1997); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

Appellant also argues that the van belonged to his wife and that he was just trying to help her run a successful business venture while at the same time keeping himself busy. Regardless of the ownership of the van and appellant's motivation, appellant was, by his own admission, driving the van which was involved in an enterprise that generated earnings. As such he was bound under the Act to report his own actual earnings or show as rate of pay what it would have cost to hire a person to do the work he did. Appellant signified his awareness of the reporting obligation by signing the pertinent forms but reported neither his own earnings nor what he would have paid another person to drive the van.[7] Thus, the Board finds that appellant knowingly failed to report earnings from his self-employment and accepted wage-loss benefits which he knew were not rightfully his.[8]

The Board also finds that appellant was with fault in the creation of the resulting overpayment of $67,726.69 and is, therefore, not entitled to a waiver of recovery of the overpayment.

Section 8129(a)[9] of the Act provides that when a overpayment of compensation occurs "because of an error of fact or law," adjustment or recovery shall be made by decreasing later payments to which the individual is entitled. Section 8129(b)[10] provides that an overpayment of compensation shall be recovered by the Office 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 be against equity and good conscience.[11] Therefore, adjustment or recovery must be made when an incorrect payment has been made to an individual who is found to be with fault.[12]

The implementing regulation[13] provides that a claimant is with fault in the creation of an overpayment when he or she: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) accepted a payment which the individual knew or should have been expected to know was incorrect. Any overpayment

[7] *See Michael H. Wacks*, 45 ECAB 791, 796 (1994) (finding that appellant who signed a plea agreement knew that he was not entitled to the compensation checks he accepted).

[8] *See Linda K. Richardson*, 47 ECAB ___ (Docket No. 93-1781, issued November 3, 1995) (defining wages as every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses, the reasonable value of board, rent, housing, lodging, payment in kind, tips, and any similar advantage received); *Gary L. Allen*, 47 ECAB (Docket No. 93-2448, issued February 23, 1996) (defining earnings from self-employment as a reasonable estimate of the rate of pay it would cost the employee to have someone else perform the work or duties the employee is performing and finding that a lack of profits from self-employment through a corporation, partnership, or sole proprietorship does not remove the employee's obligation to report the employment or rate of pay).

[9] 5 U.S.C. § 8129(a).

[10] 5 U.S.C. § 8129(b).

[11] *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

[12] *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

[13] 20 C.F.R. § 10.320(b).

resulting from the Office's negligence does not permit an employee to accept compensation to which he knew or should have known he was not entitled.[14]

The Office has the burden of proof in establishing that appellant was with fault in helping to create the overpayment.[15] In determining whether a claimant is with fault, the Office will consider all pertinent circumstances including age, intelligence, education, and physical and mental condition.[16] Factors to be weighed are the individual's understanding of reporting requirements and the obligation to return payments which were not due, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, and ability, efforts, and opportunities to comply with reporting requirements.[17]

Thus, an individual will be found to be with fault in the creation of an overpayment if the evidence shows either a lack of good faith or a failure to exercise a high degree of care in reporting changes in circumstances which may affect entitlement to, or the amount of, benefits.[18] It is axiomatic that no waiver is possible if the claimant is with fault in helping to create the overpayment.[19]

In this case, the Board finds that because appellant failed to furnish information that he knew or should have known to be material pursuant to sections 8106(b) and 10.320(b)(2), he is with fault in the matter of the overpayment resulting from his forfeiture of compensation. Thus, appellant has forfeited his right to compensation from November 19, 1992 through November 26, 1994, this forfeiture has resulted in an overpayment of compensation $67,726.69, and appellant is with fault in the creation of this overpayment. Accordingly, no waiver of collection of the overpayment is possible under section 8129(b) of the Act.

Finally, the Board finds that the Office met its burden of proof in establishing that appellant had no continuing disability stemming from the accepted adjustment disorder and therefore properly terminated his compensation, effective November 12, 1995.

Under the Act, the Office has the burden of justifying modification or termination of compensation once a claim is accepted and compensation paid.[20] Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.[21]

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[14] *Russell E. Wageneck*, 46 ECAB 653, 661 (1995).

[15] *Danny L. Paul*, 46 ECAB 282, 285 (1994).

[16] *Stephen A. Hund*, 47 ECAB ___ (Docket No. 94-559, issued March 7, 1996).

[17] *Henry P. Gilmore*, 46 ECAB 709, 719 (1995).

[18] *Id.*

[19] *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

[20] *William Kandel*, 43 ECAB 1011, 1020 (1992).

[21] *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.[22] The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[23]

In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for, and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[24]

In this case, the medical records, a statement of accepted facts and a list of questions were sent to Dr. Cohen, a Board-certified psychiatrist who examined appellant on May 31, 1995 and administered the Minnesota Multiphasic Personality Inventory, the Millon Clinical Multiaxial Inventory, and the Beck Depression Inventory. Dr. Cohen recorded appellant's history and reviewed the October 24, 1990 and October 19, 1992 reports of Dr. Carmen.

Based on the test results, his examination, and appellant's history, Dr. Carmen concluded that appellant's adjustment disorder caused by work factors in 1990 had resolved completely "long ago," but that his diagnosed paranoia persisted. Dr. Carmen added that appellant could return to his previous position inasmuch as the superiors who were instrumental in causing the adjustment disorder had retired or transferred.

Dr. Cohen provided a detailed and well-rationalized medical explanation of why the accepted adjustment disorder condition had resolved and appellant had no continuing disability from the back strain he sustained on May 16, 1986.[25] Thus, the Board finds that Dr. Cohen's conclusion represents the weight of the medical evidence and is sufficient to carry the Office's burden of proof. Therefore, the Board finds that the Office properly terminated appellant's compensation.[26]

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[22] *Dawn Sweazey*, 44 ECAB 824, 832 (1993).

[23] *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

[24] *Connie Johns*, 44 ECAB 560, 570 (1993).

[25] *See Delphine L. Scott*, 41 ECAB 799, 802 (1990) (finding that the second opinion physician's conclusion regarding the improbability of appellant's lumbosacral sprain persisting for so long was sufficient to establish that appellant had recovered from the accepted injury).

[26] *See Larry Warner*, 43 ECAB 1027, 1033 (1992) (finding that the well-rationalized report of the second opinion specialist was sufficient to carry the Office's burden of proof that appellant had no residuals of his work-related carpal tunnel syndrome injury).

The January 24, 1996 and the October 26, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.[27]

Dated, Washington, D.C.
September 21, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[27] Appellant requested reconsideration of the termination of compensation in his letter dated November 4, 1995 and submitted medical evidence. Upon return of the case record, the Office should consider appellant's request for reconsideration.