U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK E. RODGERS, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, Mich.

Docket No. 97-1139; Submitted on the Record;
Issued June 10, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his right to compensation for the periods of August 4, 1986 through November 4, 1987, August 10, 1988 through January 16, 1992 and May 31, 1992 through April 28, 1994; (2) whether the Office properly determined that appellant was at fault in the creation of the $60,492.05 overpayment of compensation and therefore not subject to waiver; and (3) whether the Office abused its discretion when it refused to reopen the relevant portion of appellant's claim for a merit review of its forfeiture determination.

On November 16, 1972 appellant, then a 23-year-old distribution clerk, sustained an injury in the performance of duty. The Office accepted the conditions of right midtrapezius strain and back strain. In November 1977, the Office found that the position of general clerk fairly and reasonably represented appellant's wage-earning capacity. Accordingly, the Office paid appellant partial disability compensation on the basis of his loss of wage-earning capacity. On March 6, 1987 appellant resigned from federal employment "to seek other employment."

The Office sent appellant EN-1032 forms to be completed to report any employment or earnings and the status of dependents. The Office advised that earnings from self-employment from farming, sales, service, operating a store or similar employment for the prior 15 months must be reported. The Office stated that appellant should report any such enterprise in which he worked from which he received revenue even if it operated at a loss or if profits were reinvested and must show as a rate of pay what it would have cost him to have hired someone to perform the work he did. On CA-1032 forms completed November 4, 1987, November 10, 1989, November 16, 1990, January 6, 1992, August 31, 1993 and April 28, 1994 appellant indicated that he had not been engaged in any type of self-employment by responding in the negative to this section of the form.

In a memorandum dated June 2, 1994, postal inspector R. Murphy indicated that appellant had been investigated for operating a business from his residence while not reporting

any income or self-employment and simultaneously obtaining workers' compensation (Federal Employees' Compensation Act) payments. The investigation disclosed that on September 4, 1987, appellant and his wife filed an assumed name certificate with the Harris County Clerks Office for a business by the name of Kustomized Komplaints and Consumer Investigations. The evidence showed that on October 31, 1987, appellant began issuing receipts from income received under the business known as Kustomized Komplaints and Consumer Investigations. Gross receipts for Kustomized Komplaints and Consumer Investigations for the period of 1987 to March 23, 1994 totaled $2,065.00.

On a EN-1032 form dated November 7, 1994, appellant indicated that he was self-employed as a consumer complaints representative, that the name of his business was Kustomized Komplaints and Consumer Investigations, that his rate of pay was $65.00 per case, and that he was operating the business at a loss with no actual earnings.

On January 9, 1995 a notice of proposed termination of compensation was issued as the weight of the medical evidence established that appellant had no continuing disability or medical condition causally related to his November 16, 1972 employment injury. By decision dated February 9, 1995, the Office terminated appellant's entitlement to compensation benefits effective March 5, 1995 as additional medical evidence was not received.

In another decision dated February 9, 1995, the Office declared a forfeiture of appellant's compensation for the periods August 4, 1986 to November 4, 1987, August 10, 1988 to January 16, 1992, and May 31, 1992 to April 28, 1994, on the grounds that appellant knowingly failed to report self-employment as required under section 8106(b) of the Act. The Office consequently found that appellant had received an overpayment in the amount of $60,492.05 during the forfeiture period. The Office then made a preliminary finding that appellant was at fault in the creation of the overpayment for failing to report his employment. The Office informed appellant that he had the right to submit any arguments or evidence if he disagreed that the overpayment occurred, disagreed with the amount of the overpayment, believed that the overpayment occurred through no fault of his own or believed that recovery of the overpayment should be waived. The Office informed appellant that he had a right to a prerecoupment hearing before an Office hearing representative.

A prerecoupment hearing was held and in a decision dated May 10, 1996, an Office hearing representative affirmed the earlier determination that appellant had forfeited his right to compensation for the periods August 4, 1986 through November 4, 1987, August 10, 1988 through January 16, 1992, and May 31, 1992 through April 28, 1994 under section 8106(b) of the Act when he knowingly failed to report his self-employment activities to the Office. The Office hearing representative further finalized a preliminary finding that appellant was at fault in the creation of the resulting $60,492.05 overpayment. The Office hearing representative declared the overpayment "due and payable in full" and directed the Office to take "further action regarding recovery."

Appellant requested reconsideration of the Office hearing representative's forfeiture decision and submitted additional evidence and arguments in support of his request. In his August 16, 1996 letter, appellant alleged that the Office hearing representative's rejection of his argument that he was not self-employed due to the lack of profits from his business constituted

evidence of racism. A copy of Acting Chief Administrative Law Judge B.R. Houston's decision, in which appellant was found guilty of violating the Program Fraud Civil Remedies Act of 1986[1] for submitting five false claims for disability compensation, was submitted along with his appeal of that decision.

By decision dated October 24, 1996, the Office issued a decision in which it denied appellant's request, without reviewing the case on its merits, on the grounds that the evidence and arguments submitted were insufficient to warrant review of the forfeiture determination.

The Board finds that the Office properly determined that appellant forfeited his right to compensation for the periods of August 4, 1986 through November 4, 1987, August 10, 1988 through January 16, 1992 and May 31, 1992 through April 28, 1994 based on his failure to report earnings.

Section 8106(b) of the Act[2] states in pertinent part:

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at times the Secretary specifies.… An employee who--
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> (1) fails to make an affidavit or report when required; or
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> (2) knowingly omits or understates any part of his earnings;
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> forfeits his right to compensation with respect to any period for which the affidavit of 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, unless recovery is waived under that section."[3]

The Office, however, to establish that appellant should forfeit the compensation he received during the period, must establish that he knowingly failed to report employment or earnings. As forfeiture is a penalty, it is not enough to establish that there were unreported earnings from employment. The term knowingly is not defined within the Act or its implementing regulations. In common usage, the Board had recognized that the definition of

[1] 31 U.S.C. §§ 3801-3812 and 39 C.F.R. Parts 273 and 962.

[2] 5 U.S.C. § 8106(b).

[3] While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings, and therefore, a statutory provision about such earnings would be meaningless.

"knowingly" includes such concepts as "with knowledge," "consciously," "willfully," or "intentionally."[4]

In this case, appellant was informed by the EN-1032 forms that he was to report any work performed in self-employment enterprises such as farming, store operation, service, etc. Appellant completed six EN-1032 forms between 1987 and 1994 wherein he indicated that he was not employed or self-employed. The evidence of record clearly establishes that appellant was engaged in extensive self-employment activities during the periods in questions which he knowingly failed to report to the Office. The employing establishment's investigative report with accompanying exhibits and appellant's own admissions clearly establishes that beginning in 1987 appellant owed and operated with his wife a business enterprise known as Kustomized Komplaints and Consumer Investigations.

Appellant has not disputed the fact that he had engaged in the activities supported by the evidence in the case file. Instead, he has asserted he does not believe his activities constituted self-employment due the lack of profits. Thus, appellant asserts that he did not "knowingly" fail to report his self-employment.

Section 10.125(c) specifically states that "[w]here self-employment is in the form of a corporation, partnership, or sole-proprietorship, a lack of profits for such entity does not remove the employee's obligation to report the employment or the rate of pay."[5]

The record reflects that from his business enterprise, appellant received revenues totaling $35.00 in 1987, $150.00 in 1988, $380.00 in 1989, $320.00 in 1990, $385.00 in 1991, $405.00 in 1992, and $390.00 in 1993 and 1994 combined (ending March 3, 1994). The Form EN-1032 specifically instructed appellant to report any "enterprise" in which he "worked," and for which he "received revenue, even if it operated at a loss or if profits were reinvested." Thus, appellant's contention that his business operated at a loss is without merit. Moreover, the evidence of record demonstrates that appellant spent a substantial amount of time engaged in activities related to his business, working up to 20 hours a week on average answering 25 telephone inquiries a week.

Under these circumstances, the Board concludes that appellant knowingly omitted his earnings under 5 U.S.C. § 8106(b)(2) by failing to report his employment activities and earnings on the applicable Forms EN-1032. Thus, since appellant was informed of his responsibility to report all self-employment on the EN-1032 forms he filled out and submitted to the Office, his knowing omission of his self-employment with "Kustomized Komplaints and Consumer Investigations" is sufficient to support the finding that appellant has forfeited his right to compensation for intermittent periods between August 4, 1986 and April 28, 1994.[6]

[4] *Charles Walker*, 44 ECAB 641 (1993); *Christine P. Burgess*, 43 ECAB 449 (1992).

[5] 20 C.F.R. § 10.125(c) (1998).

[6] *See Charles Walker*, 44 ECAB 641 (1993).

The Board further finds that appellant was at fault in the creation of the $60,492.05 overpayment and therefore not subject to waiver.

Section 8129(b) of the Act provides, "Adjustment of 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 of recovery would defeat the purpose of the Act or would be against equity and good conscience."[7] Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.32(b) of the Office's regulations provide in relevant part:

"An individual is with fault in the creation of an overpayment who:

> (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
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> (2) Failed to furnish information which the individual knew or should have known to be material; or
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> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[8]

In this case, the Office applied the first and second standard in determining that appellant was at fault in creating the overpayment.

The evidence of record demonstrates that appellant was repeatedly informed of the necessity and importance of reporting his self-employment to the Office. The evidence of record also demonstrates that appellant indicated on the EN-1032 forms he signed during the periods in question that he was not engaged in self-employment. However, the evidence of record, including appellant's own testimony that he was actively involved in the business enterprise known as "Kustomized Komplaints and Consumer Investigation" and his receipts of checks for such activities establish that appellant's negative responses to questions regarding self-employment were incorrect. Appellant did not report his business activities, a material fact specifically noted on the EN-1032 forms. Appellant failed to report a material fact and present information on employment which he knew or should have known to be incorrect. Therefore, appellant was at fault under the first standard in the creation of the overpayment. Appellant is also at fault under the second standard as he knew or should have known that he had earnings from his self-employment and failed to furnish material information to the Office. Appellant knew or should have known of the material nature of the information regarding his employment activities and earnings because the EN-1032 forms which he completed repeatedly advised him of the requirement to accurately report his employment activities and earnings and informed him

[7] 5 U.S.C. § 8129(b).

[8] 20 C.F.R. § 10.32(b).

of the consequences of failing to do so. Thus, appellant knew or should have known that he was required to report this material information on the EN-1032 forms he signed and submitted to the Office. Accordingly, under these circumstances, appellant was not without fault and therefore recovery of the $60,492.05 overpayment may not be waived.[9]

The Board finds that the Office properly found a $60,492.05 overpayment of compensation was created for the stated period, based on the fact that appellant was self-employed at the time and only entitled to receive compensation for loss of his wage-earning capacity, not total disability.[10]

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[11] The Office, through its regulations, has imposed a one-year time limitation for a request of review to be made following a merit decision of the Office.[12] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[13] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[14] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[15] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[16] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[17]

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[9] *Anthony DeRenzo*, 40 ECAB 504 (1989).

[10] The Board notes that the Office received appellant's completed overpayment recovery questionnaire after it had rendered its decision. Accordingly, the Board can not address this information on appeal as the Office had not considered it in reaching its final decision. Moreover, as the Office hearing representative's decision that the overpayment was "due and payable in full" was rendered under a different statute and not under 5 U.S.C. § 8129(a), the Board lacks jurisdiction to review it on the instant appeal. *Marshall L. West*, 36 ECAB 490 (1985).

[11] 5 U.S.C. § 8128(a); *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[12] 20 C.F.R. § 10.138(b)(2).

[13] 20 C.F.R. § 10.138(b)(1).

[14] *Supra* note 12.

[15] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[16] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[17] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

In support of his request for reconsideration, appellant alleged that the May 10, 1996 decision by the Office hearing representative was influenced by racial bias. To support his charge, appellant submitted a copy of the initial decision of Acting Chief Administrative Law Judge Houston in the matter of the employing establishment complaint against him for submitting five false claims for disability compensation. He also submitted a copy of his appeal of that decision.

The Board finds that appellant's contention based on an allegation of bias does not have a "reasonable color of validity."[18] Appellant asserted that the Office's hearing representative's rejection of his argument that he was not self-employed due to the lack of profits from his business constituted racism. In support of his allegations of racism, appellant attempted to argue that the Office hearing representative had "erroneously applied or interpreted a point of law" when he affirmed the earlier finding that appellant was self-employed. However, since appellant presented no evidence in support of his allegation of bias on the part of the hearing representative, this argument lacks a "reasonable color of validity" and fails to meet any of the requirements for reopening a case for a merit review under the Office's regulations.

Inasmuch as appellant failed to submit any new and relevant evidence or advance substantive legal contentions in support of his request for reconsideration, appellant's reconsideration request is insufficient to require the Office to reopen the claim for further consideration of the merits.

[18] *Nora Favors*, 43 ECAB 403 (1992); *Constance G. Mills*, 40 ECAB 317 (1988).

The decisions of the Office of Workers' Compensation Programs dated October 24 and May 10, 1996 are hereby affirmed.

Dated, Washington, D.C.
June 10, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member