

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REGINALD B. REEVES and U.S. POSTAL SERVICE,
NORTH TEXAS PROCESSING & DISTRIBUTION CENTER,
Coppell, TX

*Docket No. 98-2358; Submitted on the Record;
Issued September 5, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his right to compensation for the periods August 6 through November 22, 1996 and January 21 through September 20, 1997 because he knowingly failed to report his earnings from working as a driver and valet; (2) whether the Office properly found that appellant was at fault in the creation of a \$14,161.10 overpayment of compensation and, therefore, the overpayment was not subject to waiver; and (3) whether the Office properly pursued collection of the full amount of the overpayment of compensation.

On April 16, 1995 appellant, then a 32-year-old flat sorting machine operator, filed a claim alleging that he injured his back that day while pulling a mail container. He stopped work that day. After developing the factual evidence, on June 29, 1995, the Office accepted the claim for lumbar strain. Appellant returned to limited duty on May 25, 1996 and missed intermittent periods of work, thereafter, for which he received appropriate compensation based upon his filing of Form CA-8 claims for continuing compensation. He again stopped work on June 4, 1997.

By decision dated September 23, 1997, the Office found that appellant had no employment-related disability from September 21, 1997 "to present."¹ On December 30, 1997 an employing establishment investigative memorandum was submitted to the Office. Appellant returned to limited duty on October 29, 1997. In a decision dated March 18, 1998, the Office found that appellant forfeited compensation for the periods August 6 through November 22,

¹ The Board notes that appellant has not appealed this case to the Board but, rather, by letter dated September 23, 1997, appellant's counsel requested a hearing.

1996 and January 21 through September 20, 1997 because he failed to report earnings from employment as required by section 8106(b) of the Federal Employees' Compensation Act.²

In a letter that same date, the Office informed him that it had made a preliminary determination that he had received a \$14,161.10 overpayment of compensation for the above periods. The Office stated that it had found appellant at fault in the creation of the overpayment because he failed to report earnings during the periods in question. The Office informed him of his rights regarding the overpayment, instructing him to submit the financial information requested on an accompanying overpayment questionnaire. Appellant submitted nothing further and by decision dated May 13, 1998, the Office finalized the overpayment decision. The Office noted that, as he was found to be at fault, he was not entitled to waiver. The instant appeal follows.³

The Board finds that the Office properly found that appellant forfeited his compensation for the periods because he knowingly failed to report earnings from self-employment during the periods August 6 through November 22, 1996 and January 21 through September 20, 1997 and because he failed to report income from employment as required by section 8106(b) of the Act.

Section 8106(b) of the Act⁴ provides 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 the times the Secretary specifies.”

* * *

“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

² 5 U.S.C. §§ 8101-8193.

³ In letters postmarked June 15, 1998, appellant requested a hearing and/or review of the written record by the Branch of Hearings and Review and also appealed to the Board. The Board and the Office, however, may not have concurrent jurisdiction over the same issue in the same case. *Douglas E. Billings*, 41 ECAB 880 (1990).

⁴ 5 U.S.C. § 8106(b).

otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”⁵

The record indicates that during the periods August 6 through November 22, 1996 and January 21 through September 20, 1997 appellant was employed by either Park, Fly, Ride or Ampco Parking System. The record further indicates that during these periods he received wage-loss compensation in the amount of \$14,161.10.

In the present case, the Office determined that appellant forfeited his right to compensation for the periods August 6 through November 22, 1996 and January 21 through September 20, 1997 because he knowingly failed to report his earnings from employment during these period. The record reveals that appellant had employment and earnings during these periods as he was being paid by Park, Ride, Fly from July 29 to November 2, 1996 as a driver, working 202 hours and receiving \$1,123.50 in earnings. He was also employed at Ampco Parking System as a valet from February 1 to June 30, 1997, earning \$2,757.56. Appellant, however, can only be subjected to the forfeiture provision of section 8106 of the Act if he “knowingly” omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. The Office procedure manual recognizes that forfeiture is a penalty⁶ and as a penalty provision, it must be narrowly construed.⁷ The term “knowingly” is not defined within the Act or its regulations. In common usage, “knowingly” is defined as: “[w]ith knowledge; consciously; intelligently; willfully; intentionally.”⁸

The record in this case, establishes that appellant completed Forms CA-8 on September 4 and 30, October 30 and November 26, 1996 and February 17, 21 and 25, March 11, April 14, May 21 and 23, and June 10 and 19, 1997. In the CA-8 forms completed by appellant, the Office clearly notified him of his responsibility to complete the forms and provide relevant information concerning his employment and earnings during the relevant periods covered by the forms. The CA-8 form requests that a claimant indicate whether he or she “worked for anyone” during the period of compensation claimed on the forms, whether in the form of salaried employment, commission employment or self-employment. The broad, inclusive language of this form shows that appellant knew that he was required to report his earnings.⁹ The Board concludes that appellant “knowingly” omitted his earnings as a driver and valet under section 8106(b)(2) of the

⁵ 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. *Id.*

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

⁷ See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

⁸ *Black's Law Dictionary* (5th ed. 1979); see *Anthony A. Nobile*, 44 ECAB 268, 271-73 (1992).

⁹ *James H. Hopkins*, 48 ECAB 281 (1997).

Act by failing to report his earnings on the applicable Forms CA-8 for the periods beginning August 6, 1996. The forms placed appellant on notice that he must report his earnings from salaried or self-employment. The Office, therefore, properly found that appellant forfeited his compensation for these periods.¹⁰

The Board further finds that the Office properly determined that appellant was at fault in creating an overpayment of compensation for the periods August 6 through November 22, 1996 and January 21 through September 20, 1997 and that, therefore, the overpayment for those periods were not subject to waiver.

Section 8129 of the Act 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 would be against equity and good conscience.”¹¹ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.¹²

In determining whether an individual is with fault, section 10.320(b) of the Office’s regulations provides 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

“(2) Failed to furnish information, which the individual knew or should have known to be material; or

“(3) With respect to the overpaid individual only, accepted a payment, which the individual knew or should have been expected to know was incorrect”.¹³

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

With respect to whether an individual is without fault, section 10.320(c) of the Office’s regulations provides in relevant part:

“Whether an individual is ‘without fault’ depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual’s understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8129.

¹² See *Linda E. Padilla*, 45 ECAB 768 (1994).

¹³ 20 C.F.R. § 10.320.

have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments, which were not due and ability to comply with any reporting requirements (e.g., age, comprehension, memory, physical and mental condition).¹⁴

Based on the forfeiture of his right to compensation for the periods August 6 through November 22, 1996 and January 21 through September 20, 1997, appellant received an overpayment in compensation for these periods and was at fault in the creation of the overpayment under the first and second standards described above as the record establishes that he had employment and earnings during the periods in question and knowingly failed to furnish material information to the Office, *i.e.*, that he had employment and earnings. Appellant signed certification clauses on the CA-8 forms, which advised him 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 and, therefore, the evidence of record shows that he was aware or should have been aware of the materiality of the information that he had employment and earnings and the Office informed him that he should notify it of a return to work. As appellant was at fault with regard to the creation of an overpayment for the periods August 6 through November 22, 1996 and January 21 through September 20, 1997, he is not entitled to waiver of the overpayment.¹⁵

Finally, the Board notes that it has no jurisdiction to review the discretionary authority of the Office with regard to the method of recovery provided under the Debt Collection Act where, as in this case, appellant has no continuing compensation under the Act.¹⁶

¹⁴ 20 C.F.R. § 10.320(c).

¹⁵ See *James H. Hopkins*, *supra* note 9.

¹⁶ See *Paul K. Raditch*, 43 ECAB 738 (1992); *Robert N. Vachon*, 36 ECAB 502 (1985).

The decisions of the Office of Workers' Compensation Programs dated May 13 and March 18, 1998 are hereby affirmed.

Dated, Washington, D.C.
September 5, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member