United States Department of Labor
Employees' Compensation Appeals Board

SHEDRICK B. FEARS, Appellant	)	
and	)	**Docket No. 04-129**
	)	**Issued: July 23, 2004**
DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD, Long Beach, CA, Employer	)	

Appearances:
Shedrick B. Fears, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

Appellant filed an appeal on October 15, 2003 of a July 8, 2003 decision of the Office of Workers' Compensation Programs finding that he had forfeited his compensation for the period December 17, 2001 to March 17, 2003 and an August 8, 2003 decision terminating his entitlement to medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the forfeiture and termination of medical benefits issues in this case.[1]

ISSUES

The issues on appeal are: (1) whether the Office properly found that appellant forfeited his compensation for the period December 17, 2001 to March 17, 2003 as he underreported and failed to report his earnings; and (2) whether the Office properly terminated appellant's

[1] As it was issued more than one year prior to the date appellant filed his appeal, the Board does not have jurisdiction over a February 18, 2000 decision reducing appellant's compensation effective February 11, 2000 based on his capacity to earn wages in the constructed position of data entry clerk.

entitlement to medical benefits on the grounds that he no longer had residuals of his accepted injury.

FACTUAL HISTORY

The Office accepted that, on October 13, 1995, appellant, then a 24-year-old equipment cleaner, sustained a left knee strain requiring February 29, 1996 arthroscopic surgery to reconstruct the anterior cruciate ligament.[2] Appellant stopped work on October 13, 1995 and did not return.[3] He received compensation benefits beginning on approximately November 28, 1995. In a May 2, 1996 letter, the Office advised appellant to notify the office "immediately" when he returned to work. His case was placed on the periodic rolls as of July 21, 1996.

Dr. Emmett Cox, II, a Board-certified orthopedic surgeon and second opinion physician, noted in a January 22, 1997 report that a January 17, 1997 magnetic resonance imaging (MRI) scan showed mild degenerative disc disease at L5-S1 and a disc bulge at L4-5. Dr. Cox opined that these findings preexisted the October 1995 injury.[4]

In affidavits of earnings and employment (Form EN1032) dated March 26, 1997, September 14, 1998 and March 17, 1999, appellant stated that he had not worked during the 15-month period preceding the dates of the forms. The forms advised appellant that false or evasive answers or omissions may be grounds for forfeiting his compensation benefits and could subject him to criminal prosecution. His signature on the forms indicated his assertion that his answers were "true, complete and correct."

In April 1997, appellant sought treatment from Dr. J. Anthony Walker, a Board-certified orthopedic surgeon, who found instability of the left knee and prescribed physical therapy. Appellant then sought treatment from Dr. Andrew P. Kant, who performed notchplasty and excised a cyclops lesion on March 17, 1998. The procedure was authorized by the Office. Dr. Marc A.S. Stuart, an associate of Dr. Kant, found that appellant had reached maximum medical improvement as of April 23, 1998 and could "resume full regular activities." A May 15, 1998 functional capacity evaluation found appellant fit for light-duty work, with maximum lifting of 20 pounds occasionally and 10 pounds frequently. Dr. Kant noted in a July 15, 1998 report that a thickening of the Achilles tendon above the right ankle was unrelated to appellant's left knee condition. In an August 18, 1998 report, Dr. Kant released appellant to full-time work with permanent limitations on kneeling, standing, bending, twisting and lifting.

In a January 6, 1999 report, Dr. Kant noted that sitting for 8 to 10 hours a day in vocational training classes, as well as carrying heavy books, caused an increase in low back and left knee pain. He diagnosed a recurrent lumbosacral strain and a left knee strain. Dr. Kant

[2] Appellant underwent arthroscopic repair of the left medial meniscus on July 9, 1995 related to a nonoccupational injury.

[3] Appellant's temporary appointment expired on November 22, 1995.

[4] An August 1, 1997 electromyogram (EMG) showed possible S1 radicular irritation. An August 26, 1997 lumbar MRI showed a "broad based diffuse disc bulge at L5-S1 with slight foraminal encroachment on the left.

noted appellant's continuing left knee, low back and right Achilles tendon complaints in reports through November 1, 1999.

By notice dated January 7, 2000 and finalized February 18, 2000, the Office reduced appellant's compensation based on his ability to earn wages in the constructed position of data entry clerk,[5] based on Dr. Kant's August 18, 1998 restrictions. The Office noted that appellant's current pay rate for his WG 5, Step 2 position was $12.79 an hour or $513.32 a week, and that the pay rate for the selected position of data entry clerk was $340.00. The Office calculated that at the 75 percent rate, appellant had a loss of wage-earning capacity of $315.48 a week.

In a Form EN1032 dated March 17, 2000, appellant stated that he was self-employed for an unspecified period as a dispatcher by Milstead Automotive earning $6.00 an hour with total wages of $250.00. He also noted working for Milstead Automotive as a dispatcher from May 2 to July 20, 1999, earning a total of $1,000.00 at $6.00 an hour. In a March 18, 2001 Form EN1032, appellant stated that he worked in September 2000 selling office supplies for Office Depot, earning between $6.25 and $6.75 an hour. Appellant did not report his total earnings.

In a May 7, 2001 report, Dr. Kant noted that appellant was working "as a sales clerk" doing "light stocking. He does not lift heavy materials." On examination, Dr. Kant noted some limitation of lumbar range of motion and that x-rays revealed "no major abnormalities." Dr. Kant also noted "persistent problems in the left knee," with no changes in bony alignment or in the placement of the two fixation screws by x-ray. Dr. Kant found the left knee to be stable. The Achilles tendon on the right above the ankle was "thicker … but intact." Dr. Kant opined that appellant could "return to his present employment" with limited squatting and kneeling and lifting limited to 30 pounds. In an accompanying work capacity evaluation (Form OWCP-5), Dr. Kant noted that appellant's right Achilles tendon tear needed to be considered when formulating work restrictions. He limited appellant to squatting for 2 hours and kneeling for 1 hour a day, with pulling, pushing and lifting limited to 30 pounds.

In a December 10, 2001 report, Dr. Alan Rosen, an attending Board-certified orthopedic surgeon, noted that appellant had an onset of back pain after an automobile accident on December 19, 2001. Dr. Rosen diagnosed a T8 compression fracture attributable to the automobile accident.

In a March 13, 2002 Form EN1032, appellant noted that he worked on September 21, 2000 at Office Depot on the office supplies sales floor, earning $8.30 an hour. Appellant did not indicate his total earnings. In a March 17, 2003 Form EN1032, appellant noted earning $850.00 working as a salesman at Office Depot beginning in September 2000.

In a July 7, 2003 investigative report, the Department of Labor's Office of the Inspector General alleged that appellant had underreported his earnings to the Office. In EN1032 forms dated March 17, 2000, March 18, 2001, March 13, 2002 and March 17, 2003, appellant asserted

[5] The position of data entry clerk was selected following appellant's participation in a vocational rehabilitation program. From March 1996 to December 1999, appellant received nurse intervention and vocational rehabilitation services, including vocational and functional capacity evaluations, a year of business training and a placement effort. The vocational rehabilitation effort was closed as of December 1, 1999 as appellant had not found employment.

that he worked at Office Depot earning from $6.00 to $8.00 per hour, without revealing his total earnings. Data obtained from the Texas Wage Database System showed that appellant earned the following wages at Office Depot: $4,588.96 in the fourth quarter of 2001; $4,560.05 in the first quarter of 2002; $4,809.47 in the second quarter of 2002; $7,713.88 in the third quarter of 2002; $7,181.16 in the fourth quarter of 2002; $5,556.41 in the first quarter of 2003. Appellant also earned $272.00 during the first quarter of 2003 at JayCee's Children Center, employment which he failed to report to the Office. Also, appellant earned $224.00 during the second quarter of 2002, $3,108.21 in the third quarter of 2002 and $2,118.83 in the fourth quarter of 2002 working at Changing the World. Appellant failed to report this employment to the Office.

By decision dated July 8, 2003, the Office found that appellant had forfeited compensation in the amount of $9,070.33 for the period December 17, 2001 to March 17, 2003 as he knowingly omitted his earnings from JayCee's Children Center and Changing the World and underreported his earnings from Office Depot.

By notice dated July 8, 2003, the Office issued a preliminary notice that an overpayment of $9,070.33 was created as appellant had forfeited his compensation for the period December 17, 2001 to March 17, 2003.[6]

By notice dated July 8, 2003, the Office proposed to terminate both appellant's wage-loss compensation and his medical benefits on the grounds that the residuals of his accepted conditions had ceased as of May 7, 2001 based on the report of Dr. Kant. The Office found that Dr. Kant had released appellant to return to his date-of-injury position as an equipment cleaner.

By decision dated August 8, 2003, the Office terminated appellant's medical benefits on the grounds that residuals from the October 13, 1995 injury had ceased.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the Federal Employees' Compensation Act provides in pertinent part:

> "The Secretary of Labor may require a 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
>
> (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 under section 8129 of this title, unless recovery is waived under that section."[7]

[6] In a July 27, 2003 letter, appellant requested a telephone conference on the issue of waiver, asserting that recovery of the proposed overpayment would cause financial hardship.

[7] 5 U.S.C. § 8106(b).

The Office periodically requires each employee who is receiving compensation benefits to complete an affidavit as to any work or activity indicating an ability to work, that the employee has performed for the prior 15 months.[8] If an employee who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage loss is suspended until the Office receives the requested report.[9] Further, section 10.529 of the 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.
>
> "(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."[10]

In order to establish that appellant should forfeit the compensation he received for the periods he completed EN1032 forms, the evidence must establish that he knowingly omitted or understated his employment and earnings.[11] As forfeiture is a penalty, it is not enough merely to establish that there were underreported earnings from employment. The inquiry is whether appellant knowingly omitted or understated his earnings from employment for the periods covered by the EN1032 forms. The language on the Form EN1032 is clear and unambiguous in requiring a claimant to report earnings from self-employment or a business enterprise in which he worked.

ANALYSIS -- ISSUE 1

The Office found that appellant forfeited compensation in the amount of $9,070.33 for the period December 17, 2001 to March 17, 2003 on the grounds that he knowingly omitted his earnings from JayCee's Children Center and Changing the World and underreported his earnings from Office Depot.

The record demonstrates that appellant did not report his employment at Changing the World. Information from the Texas Wage Database system shows that appellant earned $3,108.21 in the third quarter of 2002 and $2,118.53 in the fourth quarter of 2002 at Changing the World. The third and fourth quarters of 2002 (July 1 to December 31, 2002) were covered by the Form EN1032 appellant submitted on March 17, 2003, which encompassed the 15-month period from December 17, 2001 to March 17, 2003. However, this form reports only that

[8] 20 C.F.R. § 10.528 (2003).

[9] *Id*. at § 10.528. At that time, the Office will reinstate compensation retroactively to the date of suspension if the employee remains entitled to compensation.

[10] *Id*. at § 10.529.

[11] *Albert A. Garcia*, 54 ECAB ___ (Docket No. 00-2510, issued December 4, 2002).

appellant earned $850.00 working as a salesman at Office Depot beginning in September 2000. Thus, the Board finds that appellant failed to report his income at Changing the World, earnings of $5,556.74. Also, as appellant earned a total of $25,064.56 at Office Depot during 2002 according to the Texas Wage Database, his March 17, 2003 assertion that he earned only $850.00 at Office Depot beginning in September 2000 is clearly false. Therefore, the Board finds that appellant knowingly underreported his earnings at Office Depot by more than $24,000.00 for the period December 17, 2001 to March 17, 2003 as he did not report the full extent of his earnings when he completed the March 17, 2003 Form EN1032.[12]

Appellant was advised in EN1032 forms from March 26, 1997 onward of his obligation to report all earnings and employment to the Office. These forms also warned appellant that his false or evasive answers regarding material information such as the amount of his earnings would result in forfeiture of his compensation. Despite these advisements, appellant failed to report more than $24,000.00 in earnings at Office Depot for 2002, and $5,556.74 in earnings at Changing the World. The Board finds that the nature and quality of these omissions rise to the level of "knowingly" underreporting his earnings to the Office. Therefore, the Office properly found that appellant had forfeited some portion of his compensation for the period covered by the March 17, 2003 form under section 8106(b)(2) based on appellant's knowing omission and understatement of his earnings.[13] Appellant's signature on the March 17, 2003 Form EN1032 certified that "all the statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief." The failure to fully report and underreport earnings is found to be a knowing omission by appellant.[14] Accordingly, appellant forfeited his right to compensation for this period.

The Board notes that, on the March 17, 2003 Form EN1032, appellant failed to report that he was employed by JayCee's Children Center. However, the Board notes that the Texas state database showed only that appellant earned $272.00 during the first quarter of 2003, but not the dates of employment. As the first quarter of 2003 encompasses the period January 1 to March 31, 2003, it is possible that appellant earned the $272.00 between March 18 and April 1, 2003, a period not covered by the March 17, 2003 form. Therefore, the Office has not established that appellant failed to report his earnings at JayCee's Children Center as his obligation to report those earnings has not been clearly established.

The Board further finds that the amount of the forfeited compensation has not been clearly established. The Office did not include its calculations as to how the $9,070.33 figure was derived.[15] Therefore, the case must be returned to the Office for recalculation of the forfeited amount of compensation.

LEGAL PRECEDENT -- ISSUE 2

[12] *Roger Seay*, 39 ECAB 441, 445 (1988).

[13] The Board notes the overlapping nature of the periods for several of the forms.

[14] *Christine C. Burgess*, 43 ECAB 449 (1992).

[15] The Board notes that the record does not contain an overpayment decision relative to any forfeited amounts.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. The Office may not terminate or modify compensation without establishing that the disabling condition ceased or that it was no longer related to the employment.[16] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[17] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[18] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[19]

ANALYSIS -- ISSUE 2

In this case, the Office terminated appellant's entitlement to medical benefits on the grounds that all residuals of the October 13, 1995 left knee injury had ceased as of May 7, 2001, according to the opinion of Dr. Kant, an attending Board-certified orthopedic surgeon. In his May 7, 2001 report, Dr. Kant found appellant's left knee to be stable, with no changes in bony alignment, although appellant still complained of pain. The Board notes that pain in the absence of objective findings is a symptom and not a diagnosis and is therefore not compensable.[20] Dr. Kant opined that appellant could continue performing his present position of sales clerk, with limitations of squatting, kneeling and lifting. Dr. Kant noted, however, that these restrictions were also due, in part, to a right Achilles tendon tear that he had previously found unrelated to the accepted left knee condition. Dr. Kant also noted no objective findings related to appellant's lumbar complaints and did not state that those symptoms were related to the left knee injury.[21] Dr. Kant did not recommend any further treatment.

The Board finds that Dr. Kant's May 17, 2001 report is sufficient to establish that appellant no longer had residuals of the October 13, 1995 accident requiring further medical treatment. Therefore, the Office properly terminated his entitlement to medical benefits.[22]

[16] *David W. Green*, 43 ECAB 883 (1992).

[17] *See Del K. Rykert*, 40 ECAB 284 (1988).

[18] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[19] *Id*.

[20] *See Ruth Seuell*, 48 ECAB 188 (1996).

[21] The Board notes that the December 10, 2001 report of Dr. Rosen, a Board-certified orthopedic surgeon, stated that appellant sustained a T8 compression fracture in a December 19, 2001 motor vehicle accident. Dr. Kant did not submit any reports on or after December 9, 2001 and thus did not comment as to the effect of this accident on appellant's condition or whether the accident was sufficient to break the chain of causation from the October 13, 1995 injury.

[22] *Franklin D. Haislah*, 52 ECAB 457 (2001).

CONCLUSIONS

The Board finds that the Office properly found that appellant forfeited compensation for the period December 17, 2002 to March 17, 2003. However, the case must be remanded to the Office for calculation of the correct amount of the forfeited compensation as it is unclear from the record as to how the Office arrived at the $9,070.33 amount. The Board further finds that the Office properly terminated appellant's entitlement to medical benefits as the medical record demonstrated that residuals of the accepted October 13, 1995 injury had ceased.[23]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 8, 2003 is affirmed. The decision of the Office dated July 8, 2003 is affirmed in part regarding the issue of forfeiture and the case remanded for calculation of the forfeited amount of compensation.

Issued: July 23, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[23] The Board notes that the record contains a March 2, 2004 letter from the Office regarding appellant's request for an oral hearing. The letter does not discuss the subject matter of the hearing. Therefore, it cannot be determined if the Office and the Board had contemporaneous jurisdiction over any aspect of appellant's claim. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case, and those Office decisions, which change the status of the decision on appeal are null and void. *Douglas E. Billings*, 41 ECAB 880, 895 (1990).