

when he learned that he had been exposed to anthrax at work. He stopped work on October 24, 2001. After initially denying appellant's claim, the Office accepted his claim on March 26, 2003 for an acute reaction to stress, resolved.

On CA-7 "Claim for Compensation" forms dated December 13, 2001 to March 21, 2003 the question in section 3 on each form asked, "[h]ave you worked outside your federal job during the period(s) claimed in [s]ection 2? (Include salaried, self-employed, commissioned, volunteer, etc.)" Appellant left section 3 blank on his CA-7 forms submitted for the period December 13, 2001 to March 21, 2003. In a February 11, 2002 letter, appellant indicated that he had worked part time as a realtor for the past 15 years. On CA-7 forms dated May 21 and June 11, 2003 he listed his employment with a real estate company.

The Office paid appellant compensation in the amount of \$38,542.54 for temporary total disability for the period December 13, 2001 to March 21, 2003.

On January 28, 2004 the Office received a telephone call from the U.S. Postal Investigative Service, Washington Division. A postal inspector stated that appellant had earned approximately \$100,000.00 since his employment injury, working as a real estate agent.

By letter dated April 30, 2003, appellant indicated that he wished to amend his previous CA-7 forms to reflect that he had been working an outside job as a realtor since his October 24, 2001 employment injury.

By decision dated April 28, 2004, the Office found that appellant had forfeited his entitlement to compensation for the period December 13, 2001 to March 21, 2003 on the grounds that he knowingly failed to report earnings as required under section 8106(b) of the Federal Employees' Compensation Act.¹ The Office stated that appellant knowingly omitted his outside earnings on all his CA-7 forms from December 13, 2001 to March 21, 2003 and therefore forfeited all compensation for that period.

In a May 13, 2004 letter, the Office issued a preliminary determination that an overpayment had occurred in the amount of \$38,842.54 for the period December 13, 2001 to March 21, 2003, pursuant to section 8106 of the Act, due to appellant's failure to report his earnings from outside employment on his CA-7 forms. The Office further found that appellant was not without fault in the creation of the overpayment because he knowingly omitted his earnings from outside employment. The Office informed appellant that, if he disagreed with the preliminary determination, he could, within 30 days, submit evidence or argument to the Office, or request a precoupment hearing with the Branch of Hearings and Review.

Appellant requested a hearing that was held on December 7, 2004.

By decision dated May 18, 2005, an Office hearing representative affirmed the April 28, 2004 forfeiture decision and finalized the preliminary determination that a \$38,542.54

¹ 5 U.S.C. § 8106(b).

overpayment occurred because appellant failed to furnish material information and he was at fault in the matter and ineligible for waiver.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the Act 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 under section 8129 of this title, unless recovery is waived under that section.”²

The Board has held that it is not enough merely to establish that there were unreported earnings or employment. Appellant can be subjected to the forfeiture provision of section 8106(b) only if he “knowingly” failed to report “earnings” from employment.³ The term “knowingly,” as defined in the Office’s implementing regulations, means “with knowledge, consciously, willfully or intentionally.”⁴ The Board has held that forfeiture, being a penalty provision, must be narrowly construed.⁵

The Board has held that the language of some versions of Office Form CA-7, “Claim for Compensation,” is not specific enough to reasonably put an injured employee on notice that he is required to report all earnings, no matter the source, for the period of claimed compensation.⁶

ANALYSIS -- ISSUE 1

The Office found that appellant forfeited his right to compensation for the period December 13, 2001 to March 21, 2003, pursuant to section 8106(b)(2) on the basis that he knowingly failed to report employment and earnings on Office CA-7 forms.

² 5 U.S.C. § 8106(b).

³ *Karen Spurling*, 56 ECAB __ (Docket No. 04-1233, issued December 16, 2004); *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁴ 20 C.F.R. § 10.5(n).

⁵ *Karen Spurling*, *supra* note 4; *Christine P. Burgess*, 43 ECAB 449 (1992).

⁶ *See Karen Spurling*, *supra* note 4; *Carol M. Gianfrancisco*, 47 ECAB 205 (1995).

However, the question presented to appellant on each of the CA-7 forms was phrased in the following manner: “[h]ave you worked outside your federal job during the period(s) claimed in [s]ection 2? (Include salaried, self-employed, commissioned, volunteer, etc.)” The question presented to appellant did not inquire as to his “earnings” from employment. Section 8106(b)(2) requires that there be a knowing omission or understatement of “earnings.” The Board finds that the CA-7 forms of record do not reasonably put appellant on notice that he had to report earnings. The forms in question did not indicate that appellant had to report “earnings,” but merely requested general employment information. Consequently, the Board finds that the forms of record were insufficient to put appellant reasonably on notice of his responsibility to report “earnings” as required under section 8106(b). Appellant’s failure to report the fact of his real estate employment for the period in question does not invoke a penalty under section 8106(b). As clearly stated in the statute, an employee must “knowingly” fail to report “earnings” from employment. As appellant was not specifically requested to provide any “earnings” information, he cannot be found to have knowingly omitted or understated such information so as to require invoking the penalty provision of forfeiture under section 8106(b)(2).⁷ Accordingly, the Office did not meet its burden of proof to establish that appellant forfeited his right to compensation for the period December 13, 2001 to March 21, 2003.

Because the Board finds that there was no forfeiture of compensation for the period December 13, 2001 to March 21, 2003, the Board also finds that the Office erred in determining that an overpayment of compensation was created as a result of forfeiture. Consequently, it is not necessary for the Board to further address the overpayment issues.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to establish that appellant forfeited his right to compensation or that he received an overpayment resulting from forfeited compensation.

⁷ See *Christine P. Burgess*, *supra* note 6 (forfeiture, being a penalty provision, must be narrowly construed).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 18, 2005 is reversed.

Issued: February 13, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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