

)	
R.D., Appellant)	
)	
and)	Docket No. 10-1259
)	Issued: February 24, 2011
U.S. POSTAL SERVICE, CAPITAL)	
PERFORMANCE CLUSTER, Washington, DC,)	
Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

On April 1, 2010 appellant filed a timely appeal from the February 1, 2010 merit decision of the Office of Workers' Compensation Programs finding a forfeiture and overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.¹

The issues are: (1) whether the Office properly determined that appellant forfeited her compensation for the period September 27, 2006 to December 27, 2007; (2) whether the Office properly determined that she received a \$48,333.67 overpayment of compensation; and (3) whether the Office properly determined that she was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

¹ For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

The Office accepted that on May 18, 2005 appellant, then a 33-year-old letter carrier, sustained a work-related aggravation of preexisting brachial neuritis/radiculitis in her left arm. Appellant received compensation for various periods of total disability and was placed on the periodic rolls for compensation on May 13, 2007. The Office required appellant to complete CA-1032 forms which directed her to report any earnings from employment or self-employment while in the receipt of Office compensation benefits.

In an October 1, 2007 letter, appellant advised the Office that she started working for the Kervic Company on September 27, 2007 for 40 hours a week at a pay rate of \$15.00 an hour. The job involved taking calls, greeting visitors and performing clerical tasks.

On November 27, 2007 the Office sent appellant a Form CA-1032 for completion. Appellant was asked if she worked for any employer during the prior 15 months and she answered "Yes," and listed the Kervic Company as the employer and the rate of pay as \$15.00 an hour. She signed the form on December 27, 2007.

In a January 15, 2009 investigative memorandum, the Office of Inspector General for the employer presented evidence which showed that appellant worked for the Kervic Company from September 27, 2007 to September 5, 2008 and received \$29,358.90 in pay during this period. Appellant acknowledged during investigative interviews that she also worked as a data entry clerk for Spherion Atlantic Enterprises from January 29 to February 23, 2007 and as a substitute teacher for the Prince Georges County School system for "less than once a month" during the 15-month period covered by the Form CA-1032 completed on December 27, 2007.²

In a February 11, 2009 decision, the Office determined that appellant forfeited her right to compensation from September 27, 2006 to December 27, 2007 for knowingly omitting earnings information on the Form CA-1032 completed on December 27, 2007. It noted that, although appellant listed information about her work for the Kervic Company on the Form CA-1032 completed on December 27, 2007, she omitted information about the extent of her actual earnings at the Kervic Company, the dates of employment, and the description of the work she performed. The Office found that appellant was required to report information about her actual earnings, dates of employment, and work description and therefore she knowingly failed to report all work activities which she knew or should have known she was required to report.

In a February 11, 2009 letter, the Office advised appellant that it had made a preliminary determination that she received a \$48,333.67 overpayment of compensation because she forfeited her compensation for the period September 27, 2006 to December 27, 2007 when she failed to fully report information about her earnings on a Form CA-1032 completed on December 27, 2007.³ It made a preliminary determination that appellant was at fault in the

² Appellant earned \$1,276.00 during her employment as a data entry clerk and earned \$69.00 per day as a substitute teacher.

³ The record contains evidence indicating that appellant received \$48,333.67 in compensation during the period September 27, 2006 to December 27, 2007.

creation of the overpayment because she failed to report earnings information which she knew or should have known to be material. The Office directed her to complete an enclosed overpayment questionnaire regarding her monthly income, monthly expenses and assets. It advised appellant of various actions she could take including requesting a prerecoupment hearing before an Office hearing representative.

In a March 12, 2009 decision, the Office finalized its finding that appellant received a \$48,333.67 overpayment of compensation. It also found that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

In a March 10, 2009 document received by the Office on March 17, 2009, appellant requested a prerecoupment hearing before an Office hearing representative.

In a December 29, 2009 decision, the Office, on its own motion, set aside the March 12, 2009 decision. It noted that on May 17, 2009 it received information that appellant requested a prerecoupment hearing in order to address the issues of fault and waiver of the overpayment. The Office directed the Branch of Hearings and Review to render a final decision on the overpayment in appellant's case.

A prerecoupment hearing was held on November 19, 2009. Appellant addressed her finances and indicated that she had about \$8,000.00 in monthly income and about \$4,500.00 to \$5,500.00 in monthly expenses.

In a February 1, 2010 decision, the Office hearing representative finalized the preliminary determination that appellant received a \$48,333.67 overpayment of compensation. He found that appellant was at fault in the creation of the overpayment thereby precluding waiver of recovery of the overpayment. The Office hearing representative found that the factual evidence reflected that an overpayment occurred in the amount of \$48,333.67 during the period September 27, 2006 to December 27, 2007, a period for which appellant "knowingly" omitted to report earnings on a Form CA-1032 as required under the Federal Employees' Compensation Act. He stated:

"Although the district office based their decision on the claimant's having worked for a company named Kervic, during the period in question, and not provided full disclosure of such on the Form CA-1032 (indicating only the name of the company and the hourly amount provided), it is the opinion of this reviewer that such is not an appropriate basis for the Office's decision, since the claimant had previously by letter dated October 1, 2007, notified the Office of her having commenced employment effective September 27, 2007, indicated her hours worked, hourly rate, and provided a brief description of the duties of her position. Despite this determination however, it is the opinion of this reviewer, that the claimant did have earnings during the period in question, and "knowingly" failed to declare such on the [Form] CA-1032, completed by her on December 27, 2007. A review of such form fails to reflect the claimant's having been employed by Spherion Atlantic Enterprises from January 29, 2007, through February 23, 2007, and/or the Prince Georges County School system, as substitute school teacher for 'less than a month'.... The claimant's having promptly and carefully having notified the Office with regard to her employment with Kervic, clearly reflects her

knowledge of the Office's reporting requirements, and supports her failure to declare her other employment, as knowing omissions. Accordingly, it is the opinion of this reviewer, that the claimant is at fault with regard to the overpayment which occurred during the 15 months prior to her completion of the [Form] CA-1032, dated December 27, 2007 (September 27, 2006 through December 27, 2007)."⁴

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the Act⁵ 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 otherwise recovered under section 8129 of this title, unless recovery is waived under that section."⁶

ANALYSIS -- ISSUE 1

The record establishes that appellant omitted earnings on a Form CA-1032 covering the period September 27, 2006 to December 27, 2007. In this form, the Office notified appellant of her responsibility to complete the forms and provide relevant information concerning her employment status and earnings during the period covered by the form. The record reveals, however, that appellant had employment and earnings during the period covered by the Form CA-1032 completed on December 27, 2007. Appellant acknowledged to investigators that she was employed as a data entry clerk by Spherion Atlantic Enterprises from January 29, 2007 to February 23, 2007 and as a substitute teacher by the Prince Georges County School system for "less than once per month" from September 27, 2006 to December 27, 2007 and had earnings from this employment. She earned \$1,276.00 during her employment as a data entry clerk and

⁴ The Office found that the full \$48,333.67 overpayment was due but it did not specify a plan for recovery. Therefore, the method of recovery of the overpayment is not a subject of the present appeal.

⁵ 5 U.S.C. § 8106(b).

⁶ 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.* at 260.

earned \$69.00 a day as a substitute teacher. The Board notes that the Office hearing representative properly determined that appellant reported her employment activities and earnings while employed by the Kervic Company beginning September 27, 2007.

Appellant, however, can only be subjected to the forfeiture provision of section 8106 of the Act if she “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 penalty,⁷ and, as a penalty provision, it must be narrowly construed.⁸ 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.”⁹

The present case does not involve any question as to the definition of “earnings” that must be reported. There is no question that appellant was paid wages for her work as data entry clerk and as a substitute teacher. The Form CA-1032 signed by appellant used such terms as “business,” “enterprise,” and “service” to explain the obligation for reporting all forms of employment, self-employment and earnings. The explicit language of the form clearly advised appellant that the nature of her work as a data entry clerk and substitute teacher would require her to report such employment activities on the form. Appellant’s signing of the strongly-worded certification clause on the Form EN1032 shows that she was aware of the materiality of her failure to report her employment.¹⁰

Under these circumstances, the Board finds that appellant “knowingly” omitted her earnings under section 8106(b)(2) of the Act by failing to report all of her employment activities and earnings on the Form CA-1032 covering the period September 27, 2006 to December 27, 2007.¹¹ Accordingly, the Board finds that the Office properly determined that appellant forfeited her right to compensation for the period September 27, 2006 to December 27, 2007.¹²

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of the Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10c (July 1993).

⁸ See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

⁹ BLACK’S LAW DICTIONARY (5th ed. 1979); see *Anthony A. Nobile*, 44 ECAB 268, 271-73 (1992).

¹⁰ Moreover, the Board finds the fact that appellant reported her employment activities and earnings with the Kervic company beginning September 27, 2007 showed that she understood the importance of reporting employment and earnings.

¹¹ See generally *Lewis George*, 45 ECAB 144 (1993).

¹² Although the Office did not explicitly state in its February 1, 2010 decision that it was finding a period of forfeiture of compensation, the effect of the decision was to find that appellant forfeited her compensation for the period September 27, 2006 to December 27, 2007.

performance of his duty.¹³ Section 8129(a) of the Act provides, in pertinent part, “When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”¹⁴

ANALYSIS -- ISSUE 2

Appellant forfeited her right to compensation for the period September 27, 2006 to December 27, 2007 because she knowingly failed to report earnings and employment on a Form CA-1032 covering that period. The record contains payment records showing that appellant received \$48,333.67 in compensation from September 27, 2006 to December 27, 2007. Because appellant forfeited compensation from September 27, 2006 to December 27, 2007 she is not entitled to the compensation she received for this period. The Board finds that the Office properly found that appellant received a \$48,333.67 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁵ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment or 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 or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹⁶ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁷

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal 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 he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or

¹³ 5 U.S.C. § 8102(a).

¹⁴ *Id.* at § 8129(a).

¹⁵ *Id.*

¹⁶ *Id.* at § 8129(b).

¹⁷ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

(3) Accepted a payment which he or she knew or should have known to be incorrect....”¹⁸

Section 10.433(c) of the Office’s regulations provide:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹⁹

ANALYSIS -- ISSUE 3

The Board finds that appellant was at fault in the creation of the overpayment because she failed to provide information about her employment, which she knew or should have known was material. The CA-1032 form completed by appellant on December 27, 2007 specifically advised her to report any employment activity or earnings, including self-employment, even if the business ran at a loss. Appellant was reasonably aware that her employment as a data entry clerk and substitute teacher was material information that should be furnished to the Office. Appellant’s failure to furnish this information created the forfeiture of compensation for the period September 27, 2006 to December 27, 2007 and the resulting overpayment of compensation. The Office properly determined fault under the second standard for failing to provide information appellant knew to be material to her receipt of compensation benefits. Appellant, therefore, was at fault in the creation of the \$48,333.67 overpayment. Recovery of the overpayment is not subject to waiver.²⁰

CONCLUSION

The Board finds that the Office properly determined that appellant forfeited her right to compensation for the period September 27, 2006 to December 27, 2007 and properly determined that she received a \$48,333.67 overpayment of compensation. The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

¹⁸ 20 C.F.R. § 10.433(a).

¹⁹ *Id.* at § 10.433(c).

²⁰ On appeal, appellant argued that she was not at fault in the creation of the overpayment and asserted that, if the Office had been more diligent, the overpayment would not have been created. However, appellant did not explain how any possible negligence by the Office absolved her of the responsibility to fully report her employment activities and earnings.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 24, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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