U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS LIROT and U.S. POSTAL SERVICE,
POST OFFICE, Terre Haute, Ind.

Docket No. 97-2144; Submitted on the Record;
Issued June 14, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on January 8, 1996; (2) whether appellant forfeited his right to compensation for the period February 26, 1991 to May 24, 1992 when he knowingly failed to report earnings; and (3) whether the Office properly found that appellant was at fault in the creation of an overpayment of $21,705.90, thus precluding waiver of the overpayment.

The Board has duly reviewed the case on appeal and finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

Appellant, a letter carrier, filed claims on September 3, 1986 and January 26, 1987 alleging that he injured his back, lifting in the performance of duty. The Office accepted his claims on April 13, 1987 for lumbosacral strain and psychological factors affecting physical condition. He claimed recurrences of disability on July 22 and October 8, 1987. The Office entered appellant on the periodic rolls on August 15, 1988. On November 22, 1995 the Office proposed to terminate appellant's compensation benefits. By decision dated January 8, 1996, the Office terminated appellant's compensation benefits. Appellant requested an oral hearing and by decision dated March 13, 1997 and finalized March 18, 1997, the hearing representative affirmed the Office's January 8, 1996 decision.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2] Furthermore, the right to medical

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] *Id.*

benefits for an accepted condition is not limited to the period of entitlement for disability.[3] 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.[4]

In a report dated August 31, 1993, appellant's attending physician, Dr. Alois E. Gibson, a Board-certified orthopedic surgeon, provided appellant's history of injury and diagnosed lumbosacral strain with psychological factors as well as degenerative disc disease at the L5 level. Dr. Gibson stated, "[f]rom a purely physical standpoint, [appellant] has subjective complaints and some orthopedic findings. I suspect that a considerable overlying factor is the psychological aspects in this case." On June 23, 1994 Dr. Gibson stated that appellant's condition had not changed since 1993 and diagnosed chronic pain syndrome and degenerative disc disease. Dr. Gibson stated, "[f]rom a purely physical standpoint, I believe that [appellant] could be gainfully employed with some restrictions…." He stated that appellant should lift no more than 20 pounds and limit bending at the waist as well as make frequent changes of position. Dr. Gibson completed a form report providing restrictions and did not state which of the restrictions were due to the employment injury. He further listed the nonwork-related limitations as "[f]unctional magnification of subjective complaints probably due to psychosocial factors."

The Office referred appellant for a second opinion evaluation with Dr. Pedro Ortegon, a Board-certified orthopedic surgeon. In a report dated May 30, 1995, he provided a history of injury and physical examination. Dr. Ortegon noted appellant's continued complaints of low back pain with radiation to the right thigh. He found no neurological complaints in the lower extremities, no evidence of atrophy and that the neurovascular status of the extremities were satisfactory. Dr. Ortegon stated, "[a]t this time it is very difficult to separate the physical signs or symptoms from those which do not have any specific anatomical base. The low back discomfort he has is compatible with early degenerative changes of the spine, but I have not reviewed any x-rays." On June 29, 1995 he noted that x-rays revealed narrowing of the L5-S1 interspace. Dr. Ortegon stated, "[t]his could be designated clinically as a degenerative disc disease and it fits with the patient's history and clinical findings."

Dr. Ortegon completed a form report on May 25, 1995 and provided work restrictions for appellant including lifting, reaching, twisting, bending, standing and kneeling. In answering which of the limitations were due to the employment injury, he stated, "[a]ll of them. We assume that all the symptoms present today are secondary to the original injury."

The Office also referred appellant for a psychiatric evaluation with Dr. Larry Davis, a Board-certified psychiatrist. In a report dated May 25, 1995, he stated that appellant was not totally disabled, but "I think it is very unlikely that this patient would return to gainful employment, but with the restrictions outlined by Dr. Gibson, I see no psychiatric or organic reasons preventing him from doing so."

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

[4] *Id.*

In this case, appellant's attending physician, Dr. Gibson, and Dr. Ortegon, both indicated that appellant had restrictions that would prevent him from returning to his date-of-injury position. Dr. Ortegon specifically stated that appellant's restrictions were due to his employment conditions. Dr. Gibson, in the form report, did not specify which restrictions were due to appellant's employment injury. It does not seem reasonable to assume, as the Office did, that Dr. Gibson provided physical restrictions due to appellant's condition of degenerative disc disease, which was not accepted by the Office, without a clear statement from Dr. Gibson that this is the case.

As the record does not include a well-rationalized medical report establishing that appellant has no work restrictions due to his accepted employment injuries, the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

The Board further finds that appellant forfeited his right to compensation for the period February 26, 1991 to May 24, 1992 when he knowingly failed to report earnings.

On May 24, 1992 appellant completed a report to the Office and indicated that he had neither been employed nor self-employed during the 15 months prior to the date of the form. The employing establishment completed an investigative memorandum on October 13, 1995 and submitted evidence that appellant had earnings from employment during the period covered by the May 24, 1992 Form 1032. By decision dated January 8, 1996, the Office found that appellant had forfeited his compensation benefits from February 26, 1991 through May 24, 1992 as he received earnings from employment which he did not report to the Office on his May 24, 1992 Form 1032. The Office issued a preliminary notice of overpayment on January 8, 1996 in the amount of $21,705.90. Appellant requested an oral hearing on the issue of fault on January 11, 1996. By decision dated March 13, 1997 and finalized March 19, 1997, the hearing representative found that appellant had forfeited his compensation benefits from February 26, 1991 through May 24, 1992, that he received an overpayment of compensation in the amount of $21,705.90 and that as he was at fault in the creation of the overpayment, the overpayment was not subject to waiver. The hearing representative found that appellant was capable of repaying the overpayment by $150.00 per month.[5] The Office issued a decision on April 14, 1997 finalizing the finding of overpayment.

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

> "[t]he 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 time the Secretary specifies.... An employee who -- (1) fails to make an affidavit or report when required; or (2) *knowingly omits* or understates

[5] With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. When appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office's recovery of an overpayment under the Debt Collection Act; *see Lewis George*, 45 ECAB 144, 154 (1993).

any part of his earnings, forfeits his right to compensation with respect to any period for which the affidavit or report was required."[6] (Emphasis added.)

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he "knowingly" failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty and, as a penalty provision, it must be narrowly construed.[7] The term "knowingly" is not defined within the Act or its regulations. The Board has adopted the common usage definition of "knowingly": "with knowledge; consciously; intelligently; willfully; intentionally."[8]

The Board finds that on the 1032 form he signed on May 24, 1992 covering the period from February 26, 1991 to May 24, 1992, appellant consciously omitted relevant information concerning his employment activities with the employing establishment which generated earnings in appellant's name. He responded "No" to questions concerning employment or self-employment and answered "Yes" to the question inquiring whether he was unemployed for all periods during the previous 15 months. In response to the Office's inquires, appellant signed the 1032 form certifying that all statements provided in response to the questions on the form were true, complete and correct to the best of his knowledge and belief. The clear weight of the evidence of record establishes that appellant knowingly failed to report his earnings from employment. Accordingly, the Board finds that appellant thereby forfeited his right to compensation received for that period.

In the investigative memorandum, the employing establishment provided forms from the employing establishment signed by appellant accepting routes to deliver telephone books and accepting payment for the delivery of those routes. The employing establishment also included signed statements from witnesses that either saw appellant make the deliveries or aided appellant in the delivery of the telephone books.[9] These factual circumstances of record, together with appellant's certification to the Office on Form 1032 that he had no employment or earnings, provides persuasive evidence that appellant "knowingly" misrepresented and omitted his earnings and employment activities.[10] The Office, therefore, properly found appellant forfeited his compensation for the periods covered by the May 24, 1992 1032 form in the amount of $21,705.90.

The Board further finds that the Office properly found that appellant was at fault in the creation of an overpayment of $21,705.90, thus precluding waiver of the overpayment.

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[6] 5 U.S.C. § 8106(b).

[7] *Anthony A. Nobile*, 44 ECAB 268 (1992).

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

[9] At the oral hearing, appellant and his wife alleged that appellant's son, also named Thomas Lirot, performed the work and that appellant merely signed for the routes which his wife delivered. The Board does not find this testimony persuasive.

[10] *Mamie L. Morgan*, 41 ECAB 661 (1990).

Section 8129(a) of the Act[11] provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "[a]djustment 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 the Act or would be against equity and good conscience."[12] 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 10.320(b) of the Office's regulations[13] 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
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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."

In this case, the Office applied the second standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that appellant failed to furnish information which he knew or should have known to be material.

As noted previously, the evidence of record establishes that appellant performed work for the employing establishment and that he received payment for this work. In completing his Form 1032 on May 24, 1992, appellant indicated that he had not received earnings from employment nor self-employment during the previous 15 months. He knew or should have known from his reading of the Form 1032 that his earnings were a material fact that should be reported. Therefore, appellant made an incorrect statement regarding a material fact. Appellant, therefore, was at fault in the creation of the overpayment and is not entitled to waiver of the overpayment.

[11] 5 U.S.C. §§ 8101-8193, 8129(a).

[12] 5 U.S.C. § 8129(b).

[13] 20 C.F.R. § 10.320(b).

The decision of the Office of Workers' Compensation Programs dated March 18, 1997 terminating appellant's compensation benefits is hereby reversed. The March 18 and April 14, 1997 decisions regarding forfeiture and overpayment of compensation are hereby affirmed.

Dated, Washington, D.C.
June 14, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member