U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN LOMBARDO and U.S. POSTAL SERVICE,
POST OFFICE, Toms River, NJ

Docket No. 01-814; Submitted on the Record;
Issued July 1, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether appellant has a permanent impairment of his right upper extremity entitling him to schedule award; (2) whether appellant has more than 26.2 percent loss of hearing of the right ear for which he received a schedule award; and (3) whether the Office of Workers' Compensation Programs properly found that appellant had forfeited his right to compensation for the period March 20, 1991 to June 27, 1995 as he knowingly failed to report earnings.

On April 27, 1978 appellant, a 27-year-old carrier, alleged that he injured his right arm and skull in an employment-related motor vehicle accident. The Office accepted appellant's claim for fractured humerus, skull fracture, fracture of the temporal bone and multiple trauma.

The Office stopped paying compensation on July 20, 1995 based on his earnings of $500.00 per week with Eagle Millwork.

By decision dated May 12, 1999, the Office found that appellant forfeited his compensation for the period March 20, 1991 to June 27, 1995. The Office found that appellant was employed in family businesses of Trim Plus and Eagle Millwork and failed to report such employment to the Office. The Office issued a preliminary finding of overpayment in the amount of $92,719.35 on the same date finding that appellant was at fault in the creation of the overpayment as he knowingly omitted reporting work activities.

Appellant requested an oral hearing on May 17, 1999. By decision dated February 3, 2000, the hearing representative found that appellant forfeited his compensation benefits from March 20, 1991 to June 27, 1995.[1]

[1] The hearing representative set aside the Office's May 12, 1999 decision addressing overpayment. Concurrently with the January 25, 2001 schedule award decision, the Office issued a second preliminary determination of overpayment. However, as there is no final decision on overpayment, the Board will not address this issue on appeal. 20 C.F.R § 501.2(c).

Appellant requested a schedule award on December 29, 1995. By decision dated January 25, 2001, the Office denied appellant's claim for a schedule award for his right upper extremity. The Office granted appellant a schedule award for 26.2 percent loss of hearing in his right ear.

The Board finds that the Office properly found that appellant had forfeited his right to compensation for the period March 20, 1991 to June 27, 1995 as he knowingly failed to report earnings.

On June 20, 1992 appellant completed a Form 1032 and indicated that he was neither employed nor self-employed during the 15 months covered by the form. He completed similar forms on May 26, 1993 and June 6, 1994. In a Form 1032 dated June 27, 1995, appellant stated that he began work on June 26, 1995 for Eagle Millwork and that he had volunteered in an office/administrative capacity from January to June 23, 1995, five to seven hours a week.

In this case, the employing establishment submitted an investigative memorandum indicating that appellant was employed or self-employed during the period covered by his 1032 forms. Appellant listed himself as the registered agent of Trim Plus, Inc., incorporated on January 1, 1992. He was also a member of the Board of Directors of this corporation. On February 27, 1995 appellant signed the incorporation documents for Eagle Millwork Corporation and listed himself as the registered agent and President. In a statement dated June 21, 1996, appellant's accountant, Raymond R. Ciccone, stated that appellant maintained all records for Trim Plus and Eagle Millwork. Mr. Ciccone opined that this would entail working two to eight hours a day, five days a week. The employing establishment submitted statements from witnesses including Trim Plus employees stating that appellant worked in an administrative capacity for Trim Plus.

At the oral hearing, appellant testified that he had no duties as President of Trim Plus. He stated in 1994 he began computer work for the company two or three hours a week and that he considered this to be volunteer work as he did not receive a salary. In January 1995, appellant began to work two to seven hours a week in the family business. He stated that the mill work began in June 1995. Appellant alleged that he answered the 1032 forms correctly.

Section 8106(b) of the Federal Employees' Compensation 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 time 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."[2] (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,

[2] 5 U.S.C. § 8106(b).

as a penalty provision, it must be narrowly construed.[3] 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."[4]

The Board finds that on the 1032 forms he signed on June 20, 1992, May 26, 1993, June 6, 1994 and June 27, 1995 covering the period March 20, 1991 to June 27, 1995, appellant consciously omitted relevant information concerning his employment activities with Trim Plus 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. The 1032 forms clearly indicate that, if work was performed in furtherance of a relative's business, the employee must show as the rate of pay what it would have cost the employer or organization to hire someone to perform the work performed. The Board has held that the test of what constitutes reportable earnings is not whether appellant received a salary but what it would have cost to have someone else do the work.[5]

In this case, the Office has statements from appellant's employees including his accountant indicating that appellant worked for Trim Plus and Eagle Millwork. Mr. Ciccone indicated that appellant maintained immaculate books for these corporations which would require two to eight hours of work a day, for five days a week. Several workers noted that appellant performed in an administrative capacity including paying bills and writing invoices. The Board further notes that the Office previously investigated appellant's self-employment as gun repair shop owner. These factual circumstances of record, together with appellant's certification to the Office on 1032 forms that he had no employment or earnings, provides persuasive evidence that appellant "knowingly" misrepresented and omitted his earnings and employment activities.[6] Even though appellant may have performed work or had earnings on an irregular basis during this period, he knew that he was required to report *any* earnings produced from his work activities.[7] Nevertheless, in response to the Office's inquiries, appellant signed the 1032 forms 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 the period March 20, 1991 to June 27, 1995.[8]

The Board further finds that appellant has not established a permanent impairment of his right upper extremity entitling him to a schedule award.

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[3] *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

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

[5] *See Anthony Derenzo*, 40 ECAB 504 (1988); *see also Monroe E. Hartzog*, 40 ECAB 322 (1988).

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

[7] *Charles Walker*, 44 ECAB 641, 645 (1993).

[8] The Board notes that the Office has not issued a final decision regarding the amount of the overpayment as a result of appellant's forfeiture of compensation.

Under section 8107 of the Act[9] and section 10.404 of the implementing federal regulations,[10] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants the Office adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[11] as a standard for determining the percentage of impairment, and the Board has concurred in such adoption.[12]

In this case, appellant submitted a report dated December 6, 1995 from Dr. David Weiss, an osteopath, who examined appellant and found that he had right brachial plexus neuropathy. He accorded appellant 80 percent impairment due to sensory loss, 25 percent impairment for motor loss and 2 percent impairment for loss of range of motion.

The Office referred appellant for a second opinion evaluation with Dr. Marc L. Kahn, a Board-certified orthopedic surgeon. In a report dated March 11, 1998, Dr. Kahn noted appellant's history of injury and performed a physical examination. He found that appellant had decreased sensation in the right arm following the ulnar nerve distribution, gross weakness in external rotation as well as abduction. Dr. Kahn found that appellant had loss of range of motion in flexion, extension, abduction, external and internal rotation as well as 30 percent sensory deficit of the ulnar nerve.

Section 8123(a) of the Act,[13] provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." Due to the difference in the percentage of permanent impairment between Drs. Kahn and Weiss, the Office properly referred appellant to an impartial medical examiner to resolve the issue of degree of permanent impairment.[14]

The Office referred appellant, a statement of accepted facts and list of questions to Dr. Howard Zeidman, a Board-certified orthopedic surgeon. In a report dated January 2, 2001, Dr. Zeidman noted appellant's history of injury, reviewed the medical reports and performed a physical examination. He found that appellant had a loss of range of motion in his right shoulder of 10 degrees of abduction and 10 degrees of external rotation. Dr. Zeidman stated, "Although

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R § 10.404.

[11] A.M.A., *Guides* 4th ed. (1993).

[12] *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[13] 5 U.S.C. §§ 8101-8193, 8123(a).

[14] The Office initially referred appellant to Dr. John C. Baker, a Board-certified orthopedic surgeon, as the impartial medical examiner. Dr. Baker submitted an August 7, 2000 report noting loss of range of motion, but failing to provide his impairment rating. The Office requested a supplemental report on August 23, 2000 and Dr. Baker failed to respond.

he has some reported symptomatic difficulties with sensory problems in his right upper extremity, there is no objective evidence of any neurologic loss on physical examination."

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[15] In this case, Dr. Zeidman's report is entitled to the weight of the medical evidence. He provided a detailed history of injury, medical history and provided his findings on physical examination. Dr. Zeidman found that appellant had no permanent impairment due to neurologic loss and minimal loss of range of motion.

The district medical director reviewed Dr. Zeidman's report and found that appellant had no ratable impairment of his right shoulder as a loss of 10 degrees of abduction was not compensable under the A.M.A., *Guides*.[16] The A.M.A., *Guides* also indicate that a loss of 10 degrees of external rotation was a 0 percent impairment.[17] As the weight of the medical evidence establishes that appellant does not have a ratable impairment of his right shoulder in accordance with the A.M.A., *Guides*, he is not entitled to a schedule award.

The Board further finds that appellant has 30 percent loss of hearing in his right ear.

The Office considered the medical evidence submitted in support of appellant's claim and applied the A.M.A., *Guides*. A medical report was submitted from Dr. Patrick Houston, a Board-certified otolaryngologist, which conforms to applicable criteria. The losses at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second were added and averaged and the "fence of 25 decibels was deducted.[18] The remaining amount was multiplied by 1.5 to arrive at the percentage of monaural hearing loss. For a binaural hearing loss, the loss in each ear is calculated using the above formula. The lesser loss is then multiplied by five and added to the greater loss. This amount is then divided by six to arrive at the total binaural hearing loss. For levels recorded in the left ear of 5, 5, 5 and 5, the above formula derives 0 percent monaural loss and for levels recorded in the right ear of 50, 45, 40 and 45, the above formula derives 30 percent monaural loss. According to the accepted formula these combine to reach a five percent binaural loss of hearing.

The schedule award provisions of the Act specify the number of weeks of compensation to be paid for each permanent impairment listed in the schedule.[19] For a 5 percent bilateral loss of hearing 5 percent of 200 weeks of compensation is 10 weeks. For a monaural loss of hearing of the right ear, 30 percent of 52 weeks is 15.6 weeks of compensation. FECA Program

[15] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

[16] A.M.A., *Guides*, 44, Figure 41.

[17] *Id.* at 45, Figure 44.

[18] The A.M.A., *Guides* points out that the loss below an average of 25 decibels is deducted as it does not result in impairment in the ability to hear everyday sounds under everyday listening conditions.

[19] 5 U.S.C. § 8107; 20 C.F.R. § 10.304(b).

Memorandum No. 181 (issued November 26, 1974) provides that when the allowance for loss of hearing computed separately provides a greater award than the combined bilateral value, the employee should be given the benefit of the more favorable allowance.[20]

The Board finds that the evidence establishes that appellant has a 30 percent loss of hearing in his right ear for which he is entitled to 15.6 weeks of compensation.

The January 25, 2001 decision of the Office of Workers' Compensation Programs is affirmed as modified. The February 3, 2000 decision of the Office is hereby affirmed.

Dated, Washington, DC
July 1, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

[20] *See Jeffrey J. Stickrey*, 51 ECAB ___ (Docket No. 99-1659, issued August 7, 2000).