

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOLLY J. FLEMING and DEPARTMENT OF JUSTICE,
FEDERAL CORRECTIONAL INSTITUTION, LaTuna, TX

*Docket No. 01-2183; Submitted on the Record;
Issued October 4, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective March 26, 2001 on the basis of her wage-earning capacity as a secretary; (2) whether appellant forfeited her right to compensation for the periods from April 10, 1997 to July 10 and September 31, 1998 to December 31, 1999 for failing to make a report of earnings and knowingly omitting or understating her earnings; and (3) whether appellant was at fault in the matter of an overpayment in the amount of \$52,494.81 that arose from the forfeiture of compensation.

The Office accepted that appellant sustained a lumbar strain and a contusion of both knees in a fall at work on March 29, 1993.

On February 20, 2001 the Office, which was paying compensation for temporary total disability, issued a notice of proposed reduction of compensation on the basis that appellant had the capacity to earn wages as a secretary. By decision dated March 26, 2001, the Office reduced appellant's compensation on the basis of her wage-earning capacity in the position of secretary.

By decision dated March 27, 2001, the Office found that appellant forfeited her right to compensation for the periods from April 10, 1997 to July 10 and September 31, 1998 to December 31, 1999 on the basis that she "knowingly failed to report periods of employment." The Office found that appellant did not respond to the Office's July 10, 1998 request for information on her earnings and that her December 31, 1999 report on Office Form CA-1032 did not report all her earnings during the previous 15 months.

On March 27, 2001 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$52,494.81 that arose from the forfeiture of compensation and that she was at fault in the creation of the overpayment due to her knowing failure to report employment.

By decision dated July 20, 2001, the Office found that appellant received an overpayment of compensation in the amount of \$52,494.81 that arose from the forfeiture of compensation for the periods from April 10, 1997 to July 10 and September 31, 1998 to December 31, 1999 and that she was at fault in the creation of the overpayment due to her knowing failure to report employment.

The Board finds that the Office did not establish that appellant has a wage-earning capacity as a secretary and that the Office improperly reduced appellant's compensation effective March 26, 2001.

Section 8115 of the Federal Employees' Compensation Act,¹ titled "[d]etermination of wage-earning capacity" states in pertinent part:

"In determining compensation for partial disability, *** if the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to --

- (1) the nature of his injury;
- (2) the degree of physical impairment;
- (3) his usual employment;
- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment; and
- (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

Once the Office determines that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction in compensation benefits.² As part of its burden, the Office must show that the employee is physically capable of performing the duties of the job selected as representative of his or her wage-earning capacity.³

¹ 5 U.S.C. § 8115.

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ Section 8115(a) of the Act (5 U.S.C. § 8115(a)) requires that, in determining wage-earning capacity, due regard be given to the nature of the injury and the degree of physical impairment.

In the present case, the basis of the Office's finding that appellant was physically capable of performing the duties of a secretary was a February 13, 2001 report from her attending physician, Dr. Dean E. Smith, who stated:

"After looking over the job description of secretary, we felt that [appellant] could possibly tolerate this type of work. [She] has been returning for continued lumbar back pain and is still being followed, but we feel that this is a low[-]stress occupation that [appellant] could possibly do. [She] would probably have to be trained in that area and if she uses proper body mechanics, she should have no problems."

The Board finds that the above-quoted medical opinion is too indefinite and speculative to establish that appellant was physically capable of performing the selected position of secretary. Dr. Smith's statement that appellant "possibly" could perform the position is not sufficient to meet the Office's burden of proof.⁴ Dr. Smith's concluding statement that "if she uses proper body mechanics, she should have no problems" is also speculative and imposes a condition with which appellant may or may not comply. There is no other medical evidence indicating appellant was physically capable of performing the position of secretary.

The Board finds that appellant forfeited her right to compensation for the periods from April 10, 1997 to July 10 and September 31, 1998 to December 31, 1999 for failing to make a report of earnings and knowingly omitting or understating her earnings.

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 § 8129 of this title, unless recovery is waived under that section."

⁴ See *Nino V. Digrezio*, 39 ECAB 366 (1988); *Arthur L. Simpson*, 33 ECAB 230 (1981) (The Board found that the use of the term "possibly" rendered medical reports too indefinite or speculative to meet the claimant's burden of proof).

⁵ 5 U.S.C. § 8106(b).

With regard to the period from April 10, 1997 to July 10, 1998, there is no evidence in the case record that appellant completed and submitted the Form CA-1032 the Office sent her on July 10, 1998, which covered the previous 15 months. Appellant failed to make a report of her earnings when required and, therefore, under the terms of section 8106(b)(1), forfeited her right to compensation for the period covered by the form.⁶

With regard to the period from September 31, 1998 to December 31, 1999, appellant completed an Office Form CA-1032 on December 31, 1999. This form requested that she report her employment for the past 15 months and advised her that a false or evasive answer may be grounds for forfeiting her compensation and that severe penalties may be applied for failure to report all work activities thoroughly and completely. On this form appellant reported her employment at the SOS, a bar, from December 29, 1998 to December 29, 1999. An investigation by the employing establishment's Office of the Inspector General revealed that appellant also had earnings in the last quarter of 1998 in the amount of \$920.00, paid by Kum Sun Walker. As appellant did not report all her earnings during the 15 months covered by the Form CA-1032 she completed on December 31, 1999, she forfeits her right to compensation during the entire 15 months covered by the form.⁷

The Board finds that appellant was at fault in the creation of the overpayment in the amount of \$52,494.81 that arose from her forfeiture of compensation.

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. 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 the Act or would be against equity and good conscience."⁸ No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or, alternatively, "with fault," section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (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

⁶ *Cecil S. Ortagus, Jr.*, 38 ECAB 141 (1986).

⁷ *Armando Barbosa*, 36 ECAB 474 (1985).

⁸ 5 U.S.C. § 8129.

(3) Accepted a payment which he or she knew or should have known was incorrect. (This provision applies only to the overpaid individual.)”⁹

Appellant was at fault for the earlier period of the forfeiture due to her failure to provide information which she knew or should have known to be material. She failed to provide information on her employment from April 10, 1997 to July 10, 1998 by failing to complete the Office’s Form CA-1032. For the later period of the forfeiture appellant was at fault for making an incorrect statement as to a material fact which she knew or should have known to be incorrect. Her incorrect statement on the Form CA-1032 completed on December 31, 1999 that she had only one employer, when she had two, was a material fact she knew or should have known was incorrect.

The March 26, 2001 decision of the Office of Workers’ Compensation Programs is reversed. The July 20 and March 27, 2001 decisions of the Office are affirmed.

Dated, Washington, DC
October 4, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ 20 C.F.R. § 10.433(a).