

**United States Department of Labor
Employees' Compensation Appeals Board**

DAVID P. BJORNSON, Appellant

and

**U.S. POSTAL SERVICE, WHEELING POST
OFFICE, Wheeling, IL, Employer**

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**Docket No. 04-1339
Issued: March 21, 2005**

Appearances:
David P. Bjornson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 21, 2004 appellant filed a timely appeal from the January 21, 2004 nonmerit decision of the Office of Workers' Compensation Programs, denying his request for a hearing. In a nonmerit decision dated May 1, 2003, the Office found that appellant abandoned his August 20, 2002 request for a hearing. In a May 15, 2003 merit decision, the Office found that appellant received an overpayment in the amount of \$35,766.65 during the period February 8, 1999 through May 8, 2000 as a result of forfeiting his wage-loss compensation because he knowingly failed to report earnings and he was at fault in the creation of the overpayment. The Office ordered appellant to repay the overpayment in full. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit and merit decisions.

ISSUES

The issues are: (1) whether appellant forfeited his right to compensation for the period February 8, 1999 through May 8, 2000 because he knowingly failed to report earnings; (2) whether the Office properly determined that he received an overpayment in the amount of \$35,766.65 due to the forfeiture; (3) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thereby, precluding waiver; (4) whether the Office

properly found that appellant abandoned his August 20, 2002 request for an oral hearing; and (5) whether the Office properly denied appellant's December 7, 2003 request for an oral hearing after issuance of a final overpayment decision.

FACTUAL HISTORY

On September 25, 1995 appellant, then a 59-year-old letter carrier, filed a traumatic injury claim alleging on that date he experienced pain in his lower back and leg when he lifted a heavy sleeve of flats from a bottom shelf and twisted while placing the sleeve on a carrier case. The Office accepted appellant's claim for a lumbosacral strain and aggravation of a herniated disc at L4-5 and L5-S1. It authorized a laser discectomy, which he underwent on June 21, 1996.

On January 5 and June 7, 1996 a Form CA-1049 was issued to appellant notifying him of his placement on the periodic rolls and advising him of his entitlement to ongoing disability payments. The CA-1049 form further advised:

“In order to avoid an overpayment of compensation, *NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK*. Each payment made through this Office's automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result. Also, advise us immediately of any change in address or of any change in the status of your dependents.” (Emphasis in the original.)

Appellant signed the CA-1049 forms on January 11 and June 13, 1996.

On August 2, 1996, April 16, 1998, April 14, 1999 and May 8, 2000 appellant completed CA-1032 forms indicating that, for all periods during the 15 months covered by each form, he was unemployed and did not engage in employment, self-employment, volunteer work, or any business enterprise. These forms clearly advised appellant that with regard to self-employment:

“Report ANY work or ownership interest in any business enterprise, even if the business lost money or if profits or income were reinvested or paid to others. If you performed any duties in any business enterprise for which you were not paid, you must show as rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties you did, even if your work was for yourself or a family member or relative.” (Emphasis in the original.)

The form completed by appellant on May 8, 2000 covered the period February 8, 1999 through May 8, 2000.¹

In investigative memoranda dated September 16, 1999, December 15, 2000 and February 22, 2001, the employing establishment noted that appellant received earnings from the sale and repair of motorcycles apart from his wage-loss compensation benefits. The memoranda indicated that appellant regularly received and documented that he received \$150.00 on October 21, 1999 for participating in a focus group established by undercover postal inspectors acting as marketing representatives for the purpose of test driving a Harley Davidson motorcycle, and \$350.00 on March 30, 2000 for repair work performed on a motorcycle belonging to an undercover postal inspector. During several conversations with undercover postal inspectors, appellant stated that he accepted cash and sometimes a cashier's check for the sale and repair of motorcycles because he did not want "Uncle Sam" to discover his earnings. He also stated that he never put his name on the title of the motorcycles he purchased with the intent to sell.

By decision dated July 31, 2002, the Office found that appellant had forfeited his compensation benefits from February 8, 1999 to May 8, 2000 as he was self-employed and failed to report his earnings as required. The Office's decision was mailed to appellant at 210 White Branch Court, Buffalo Grove, Illinois 60089.²

In a letter dated July 31, 2002, the Office informed appellant that an overpayment in the amount of \$35,766.65 was created as he forfeited his compensation benefits from February 8, 1999 to May 8, 2000. The Office found that he was at fault in the creation of the overpayment because he knowingly failed to report earnings from self-employment while in receipt of compensation. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only, or a precoupment hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

In a letter dated August 20, 2002, appellant requested a precoupment hearing before an Office hearing representative. This letter contained the same mailing address used by the Office. By letter dated March 4, 2003 and sent to appellant's address of record, the Office advised him

¹ Appellant returned to work at the employing establishment on August 14, 2000. He stopped work on August 24, 2000 to undergo intradisc electrothermal therapy treatment. On September 11, 2000 appellant filed a claim alleging that he sustained a recurrence of disability. The Office accepted the claim by letter dated September 20, 2000. In a decision dated February 5, 2002, the Office found that appellant's actual earnings from his modified position, which became effective October 16, 2000, fairly and reasonably represented his wage-earning capacity. The Office further found that appellant had no loss of wages as his actual earnings met or exceeded the current wages for the job he held at the time of his injury. Appellant's entitlement to ongoing medical benefits was not affected by the Office's decision.

² The record reveals that appellant's previous address was 1086 Bernard Drive, Buffalo Grove, Illinois 60089. On January 29, 2002 appellant filed a claim alleging that he sustained a recurrence of disability on January 28, 2002 and indicated that his new address was 210 White Branch Court, Buffalo Grove, Illinois 60089. The Office denied appellant's recurrence claim by decision dated May 6, 2002 and in an addendum to the decision of the same date. The Office mailed these decisions to appellant's new address.

that the hearing was scheduled for Tuesday, April 15, 2003 at 2:00 p.m. at the Department of Labor, 230 South Dearborn, 8th Floor, Chicago, Illinois 60604. Appellant did not appear for the precoupment hearing.

By decision dated May 1, 2003, the Office found that appellant had abandoned his request as he received notice 30 days in advance but did not appear and he did not contact the Office prior to the hearing or within 10 days after the hearing to explain his failure to appear.

In a May 15, 2003 decision, the Office finalized the overpayment determination, the amount of the overpayment and the finding of fault based on appellant's failure to report his earnings. The Office directed him to repay the overpayment in full.

Appellant requested an oral hearing before an Office hearing representative by letter dated December 7, 2003. He argued that the Office's information was not timely, accurate or relevant. Appellant further argued that he requested a prerecoupment hearing but did not hear back from the Office.

On January 21, 2004 the Office denied appellant's request for a hearing because a final decision concerning an overpayment was not subject to the hearing provisions of 5 U.S.C. § 8124(b).

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the Federal Employees' Compensation Act³ states 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) knowingly⁴ 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

³ 5 U.S.C. § 8106(b).

⁴ The Board has held that "knowingly" under this section is defined as "with knowledge; consciously; intelligently; willfully; and intentionally." See *Christine P. Burgess*, 43 ECAB 449 (1992).

the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”⁵

ANALYSIS -- ISSUE 1

On May 8, 2000 appellant completed a Form CA-1032 indicating that he had no employment, employment activity or earnings for the 15 months preceding the date of his signature of this form. However, an investigation who appellant’s employment activities and income received during the time period covered by the CA-1032 form, February 8, 1999 through May 8, 2000, revealed that he had unreported earnings that he received for the repairing and sale of motorcycles.

Appellant did not report his earnings on the May 8, 2000 CA-1032 form which advised him that he must report both all employment and all earnings from employment. The CA-1032 form instructs compensation recipients to report all earnings from self-employment or involvement in business enterprises. The record clearly establishes that appellant was engaged in self-employment activities for which he had earnings during the period in question which he knowingly failed to report to the Office. The investigation report documents that appellant worked as the operator of a business which sold and repaired motorcycles. Appellant has not disputed that he was engaged in self-employment activities and received earnings from his activities. Further, appellant’s signing of certification clauses on the CA-1032 form provides persuasive evidence that he “knowingly” understated his earnings and employment information.⁶ His failure to list his earnings and employment must be considered to have been made with knowledge of the reporting requirements. The Board finds that appellant forfeited his right to compensation during the period February 8, 1999 through May 8, 2000.

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of the Office’s implementing regulation provides as follows:

“(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

⁵ 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. 24 ECAB 260 (1973).

⁶ See generally *Robert C. Gilliam*, 50 ECAB 334 (1998).

“(b) Where the right to compensation is forfeited, [the Office] shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”⁷

If a claimant has any earnings during a period covered by a Form CA-1032 which he or she knowingly fails to report, he or she is not entitled to any compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.⁸

ANALYSIS -- ISSUE 2

The Office paid appellant compensation from February 8, 1999 to May 8, 2000 in the amount of \$35,766.65. The employing establishment’s investigative memoranda documented appellant as having received \$350.00 on March 30, 2000 for repairing a motorcycle, he failed to report this income and employment on the May 8, 2000 CA-1032 form covering the period February 8, 1999 through May 8, 2000. This amount, in addition to his acknowledgement of unreported cash payments, is not *de minimus*. Thus, the Board finds that an overpayment of compensation exists in the amount of \$35,766.65 for this period.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act⁹ provides that an overpayment of compensation shall be recovered by the Office unless “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.”¹⁰ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.¹¹ Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.¹²

On the issue of fault, section 10.433 of the Office’s regulations, provides that an individual will be found at fault if he or she has done any of the following:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect;

“(2) Failed to provide information which he or she knew or should have known to be material; or

⁷ 20 C.F.R. § 10.529.

⁸ *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

⁹ 5 U.S.C. § 8129(b).

¹⁰ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹¹ *Norman F. Bligh*, 41 ECAB 230 (1989).

¹² *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

“(3) Accepted a payment which he or she knew or should have known was incorrect....”¹³

With respect to whether an individual is without fault, section 10.433(b) of the Office’s regulations provides in relevant part:

“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.”¹⁴

ANALYSIS -- ISSUE 3

The Office applied the second standard in determining that appellant was at fault in the creation of the overpayment. Appellant failed to furnish information which he knew or should have known to be material. He reported that he was not employed between February 8, 1999 and May 8, 2000 when, in fact, the record establishes that he was self-employed in the sale and repair of motorcycles. Appellant was advised by CA-1049 forms, which he signed, of his obligation to report his return to work. He was also advised by CA-1032 forms including the one he signed on May 8, 2000, of his obligation to report earnings from employment and self-employment for the period February 8, 1999 to May 8, 2000. He did not report any earnings as required. Further, appellant informed undercover postal inspectors that he only accepted cash and sometimes cashier checks for the sale and repair of motorcycles because he did not report earnings to “Uncle Sam.”

The Board finds that appellant knew or should have known that he was required to report all earnings from self-employment for the periods covered by the CA-1032 forms as the Office fully advised him of his obligation to report earnings from self-employment and the record establishes that he failed to report his earnings from self-employment for the period February 8, 1999 through May 8, 2000 in violation of section 8106(b) of the Act. Consequently, the Board finds that he is at fault in the creation of the overpayment and is not entitled to waiver of the overpayment.

The Board notes that, since appellant is not entitled to any further continuing wage-loss compensation benefits, the recovery of the overpayment is not within the jurisdiction of the Board.¹⁵

¹³ 20 C.F.R. § 10.433(a).

¹⁴ 20 C.F.R. § 10.433(b).

¹⁵ See *Sherry A. Hunt*, 49 ECAB 467 (1998).

LEGAL PRECEDENT -- ISSUE 4

With respect to abandonment of hearing requests, Chapter 2.1601.6(e) of the Office's procedure manual provides in relevant part:

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

“Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district Office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on available evidence, before returning the case to the DO.

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

“This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is therefore expected to attend the hearing, and the claimant does not attend.”¹⁶

ANALYSIS -- ISSUE 4

Based on appellant's August 20, 2002 request, the Office scheduled a prerecoupment hearing before an Office hearing representative in Chicago on April 15, 2003 regarding the preliminary finding that appellant received an overpayment of compensation as a result of the forfeiture and that he was at fault in the creation of the overpayment. The record shows that the Office mailed appropriate notice of this hearing to the claimant at his last known address within 30 days of the scheduled hearing. Although appellant argued before the Office that he did not receive such notice, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by the individual.¹⁷ This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.¹⁸ The appearance of a properly addressed copy in the case record, together with the

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6e (January 1999).

¹⁷ *George F. Gidicsin*, 36 ECAB 175 (1984) (when the Office duly mails a properly addressed letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

¹⁸ *Michelle Lagana*, 52 ECAB 187 (2000).

mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.¹⁹

The record in this case supports that appellant did not request postponement and that he failed to appear at the scheduled hearing and to provide any notification for such failure to appear within 10 days of the scheduled date of the hearing. As this meets the criteria for abandonment specified in Chapter 2.1601.6(e) of the Office's procedure manual, the Board finds that appellant abandoned his request for a prerecoupment hearing before an Office hearing representative.²⁰

LEGAL PRECEDENT -- ISSUE 5

Section 10.440(b) of the Office's regulations provides that "[t]he only review of a final decision concerning an overpayment is to the Employees' Compensation Appeals Board.²¹ The provisions of 5 U.S.C. § 8124(b) (concerning hearings) and 5 U.S.C. § 8128(a) (concerning reconsiderations) do not apply to such a decision."²² The Board has found that the implementation of this regulation is a proper exercise of the Director's discretion and that a claimant has no further right to review by the Office once a final decision on the issue of overpayment has been issued.²³

ANALYSIS -- ISSUE 5

By letter dated December 7, 2003, appellant requested an oral hearing after the Office's May 15, 2003 decision finalizing the overpayment. In its January 21, 2004 decision, the Office denied appellant's request, noting that a final overpayment decision not subject to the section 8124 hearing provisions. No other appeal rights attached. In view of the limitation on appeal rights set forth in section 10.440(b), the Office, in its January 21, 2004 decision, properly denied appellant's request for an oral hearing under section 8124 made after issuance of the final overpayment decision.

CONCLUSION

The Board finds that appellant forfeited his right to compensation for the period February 8, 1999 through May 8, 2000 because he knowingly failed to report earnings. The Board further finds that the Office properly determined that appellant received an overpayment in the amount of \$35,766.65 during the period February 8, 1999 through May 8, 2000 as a result of forfeiture under 5 U.S.C. § 8106(b)(2). In addition, the Board finds that the Office properly determined that appellant was at fault in the creation of the overpayment, thereby precluding

¹⁹ See *Larry L. Hill*, 42 ECAB 596 (1991).

²⁰ *Levi Drew, Jr.*, 52 ECAB 442 (2001).

²¹ 20 C.F.R. § 10.440(b).

²² *Id.*

²³ *Philip G. Feland*, 48 ECAB 485, 488 (1997).

waiver. The Board also finds that the Office properly found that appellant abandoned his August 20, 2002 request for a hearing before an Office hearing representative. Lastly, the Board finds that the Office properly denied appellant's December 7, 2003 request for a hearing before an Office hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2004, May 15 and 1, 2003 and July 31, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 21, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member