

The issues are: (1) whether the Office properly determined that appellant forfeited her right to compensation for the period April 30 to August 27, 2004 as she knowingly failed to report her employment activities and earnings; (2) whether the Office properly determined that appellant received a \$10,276.39 overpayment of compensation for the period April 30 to August 27, 2004 based on her forfeiture of compensation; and (3) whether the Office properly found that appellant was at fault in creating the overpayment such that it was not subject to waiver.

FACTUAL HISTORY

On June 27, 2002 appellant, a 37-year-old mail handler, filed a Form CA-2 claim for benefits, alleging that she developed an abdominal condition causally related to factors of employment. The Office accepted the claim for left inguinal hernia by aggravation. It accepted two additional claims for right groin sprain, on October 8, 2003 and for resolved right-side abdominal strain, on September 11, 2004. Appellant stopped work on October 8, 2003, returned to work on November 2, 2003 and stopped working again from February 7 until September 11, 2004. The Office paid appellant appropriate compensation for periods of total disability.

In its February 10, 2004 acceptance letter, the Office advised appellant that a person who knowingly makes any false statement, misrepresentation, concealment of fact, or any other act of fraud to obtain compensation, or who knowingly accepted compensation to which he or she is not entitled, was subject to felony criminal prosecution. It instructed appellant that she was required to notify it immediately if she returned to work or obtained new employment and to return immediately any compensation check including payment for a period she had worked, to prevent an overpayment of compensation.

Appellant filed Forms CA-7 on April 29, May 27, June 1, July 9, August 11 and September 12, 2004, seeking compensation for wage loss. On the form dated April 29, 2004 appellant indicated that she was employed outside her federal job at Rutland Learning Center as an administrative executive director, in which capacity she had served since October 1992. However, on the forms dated May 27, 2004, June 1, July 9, August 11 and September 12, 2004 appellant left the form blank on the lines wherein outside work was to be listed. The forms completed between May 27 and September 12, 2004 claimed wage-loss benefits for the period April 30 to August 27, 2004.

In a May 5, 2005 memorandum, the employing establishment inspection service advised the Office that appellant continued to be employed outside her federal job as a self-employed administrative executive director at the Rutland Learning Center in Brooklyn, N.Y., from April 30 through October 29, 2004. Appellant had worked at the Rutland Learning Center since October 1992 but had neglected to state on her CA-7 forms that she continued to be employed there from April 30 through October 29, 2004. She admitted that she was paid \$277.00 every two weeks by the Rutland Learning Center.

By decision dated April 4, 2007, the Office terminated appellant's compensation pursuant to section 8148 of the Federal Employees' Compensation Act¹ in light of appellant's September 19, 2006 guilty plea in the Criminal Court of Queens, N.Y. It found that in light of appellant's conviction for disorderly conduct in connection with receipt of her FECA benefits she was not entitled to receive further compensation under the Act.

By decision dated August 2, 2007, the Office vacated the April 4, 2007 termination decision. It noted that the Office of the Inspector General had submitted a November 4, 2006 memorandum to the Office, which stated that while the evidence of record supported that

¹ 5 U.S.C. § 8148.

appellant did plead guilty to violating NYPL 240.20, disorderly conduct, there was no evidence that she was convicted on any counts of fraud in connection with a claim for or receipt of benefits under the Act.

In a decision dated August 6, 2007, the Office determined that appellant submitted copies of CA-7 forms for the period April 30 through August 27, 2004. Appellant did not list her work or earnings at the Rutland Learning Center on the CA-7 forms covering these periods and any claim for compensation was forfeited.

On August 6, 2007 the Office also issued a preliminary determination that an overpayment had occurred in the amount of \$10,276.39 for the period April 30 to August 27, 2004 because appellant failed to report work activity and earnings on CA-7 forms during this time period and had forfeited compensation received during this time period. It found that appellant was at fault in the matter because she knew or should have known that she was to report profitable activity on section 3 of the CA-7 form. The Office advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention.

In a decision dated October 16, 2007, the Office finalized the preliminary determination regarding the overpayment of \$10,276.39. It noted that appellant had been advised by letter dated August 6, 2007 that a preliminary finding had been made that an overpayment had occurred and that she was at fault in the matter, but she had not responded within 30 days to the preliminary finding of overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the Act provides that an employee who fails to make an affidavit or report when required, or knowingly omits or understates any part of her earnings; forfeits his right to compensation with respect to any period, for which the affidavit or report was required.²

The Board has held that it is not enough merely to establish that there was unreported employment or earnings. Appellant can only be subjected to the forfeiture provisions of 5 U.S.C. § 8106(b) if he or she knowingly failed to report employment or earnings.³ The term knowingly as defined in the Office's implementing regulations, means with knowledge, consciously, willfully or intentionally.⁴ The Board has found that the Office can meet this burden of proof in several ways, including by appellant's own admission to the Office that she failed to report employment or earnings which she knew she should report or by establishing that she has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form EN1032.⁵

² 5 U.S.C. § 8106(b).

³ *Harold F. Franklin*, 57 ECAB 387 (2006).

⁴ 20 C.F.R. § 10.5(n).

⁵ See *supra* note 3.

ANALYSIS -- ISSUE 1

The factual evidence developed in this case indicates that appellant engaged in outside employment from April 30 through August 27, 2004. Appellant had previously admitted that she had worked at the Rutland Learning Center since October 1992 but had neglected to state on her CA-7 forms from April 30 through August 27, 2004 that she continued to be employed at Rutland Learning Center during this period. She was aware that she was required to state that she was employed outside of her duties with the employing establishment because she had been so informed by the Office in its February 10, 2004 acceptance letter and the CA-7 form clearly required appellant to report any outside employment. In addition, appellant had previously indicated in CA-7 forms that she had filed prior to April 30, 2004 that she was employed outside her federal job, at Rutland Learning Center. The Board also notes that subsequently during an interview with the Postal Service Inspection Service appellant admitted that she had been earning \$277.00 every two weeks during the period in question. Thus, with regard to the CA-7 forms appellant signed on May 27, June 1, July 9, August 11 and September 12, 2004, the evidence of record establishes that appellant “knowingly and willingly” falsified, concealed, or covering up a material fact and made false, fictitious and fraudulent statements and representations. The Board therefore finds that, regarding the CA-7 forms she signed on the dates listed above, appellant consciously and knowingly omitted relevant information concerning her employment activities and earnings with Rutland Learning Center. Even though appellant may have performed work or had earnings on an irregular basis during this period, she knew that she was required to report any employment and earnings produced from her work activities. Nevertheless, in response to the Office’s inquiries, appellant signed the CA-7 forms certifying that all statements provided in response to the questions on the form were true, complete and correct to the best of her knowledge and belief. Appellant failed to report that she was engaged in outside salaried employment, despite the fact that the Office’s investigation revealed that she was actively engaged in employment with earnings with Rutland Learning Center during the periods in question.⁶

Under these circumstances therefore the Board concludes that appellant “knowingly” omitted her earnings under section 8106(b)(2) of the Act by failing to report her employment activities and earnings on the applicable CA-7 forms for the period April 30 to August 27, 2004. The Board will affirm the Office’s determination that appellant forfeited the total amount of compensation she received for that period.⁷

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of the Office’s implementing regulations provide 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

⁶ See *Carol Gianfrancisco*, 47 ECAB 205 (1995), in which Form CA-8 required that appellant report all salaried employment held during the period in question. The form advised of penalties for fraud. The Form CA-7’s in the instant case contain the same requirements for employment reporting and penalty notice as in *Gianfrancisco*.

⁷ *Joseph M. Popp*, 47 ECAB 624 (1997); *Wayne P. Hammer*, 44 ECAB 286 (1992).

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.⁸

“(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.”

ANALYSIS -- ISSUE 2

As noted, Office regulations provide that the Office may declare an overpayment of compensation for the period of a given forfeiture of compensation. If a claimant has any earnings during a period in 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.⁹ The Office paid appellant compensation in the amount of \$10,276.39 for the period April 30 to August 27, 2004. It properly found that appellant forfeited her entitlement to compensation during this time because she failed to report employment activities and earnings from employment on her CA-7 forms. Therefore, there exists an overpayment of compensation in the amount of \$10,276.39.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of the Act provide 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.¹⁰ 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.¹¹ No waiver of payment is possible if the claimant is not without fault in helping to create the overpayment.

In determining whether an individual is without fault, section 10.433(a) of the Office’s federal regulations provide, in relevant part:

“A recipient who has done any of the following will be found 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

⁸ 20 C.F.R. § 10.529. *See supra* note 3.

⁹ *Robert Ringo*, 53 ECAB 258 (2001).

¹⁰ 5 U.S.C. § 8129(a).

¹¹ 5 U.S.C. § 8129(b).

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

(3) Accepted a payment, which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”¹²

ANALYSIS -- ISSUE 3

In this case, the Board finds that appellant was at fault under the second standard as she failed to provide information, which she knew or should have known to be material from April 30 through August 27, 2004, which she knew or should have known to be incorrect.¹³ As discussed previously, appellant had filed several CA-7 forms on which she indicated that she worked outside her federal employment at Rutland Learning Center. However, for the period April 30 through August 27, 2004 she completed CA-7 forms and failed to report her continuing employment and earnings. Therefore, appellant is at fault in the creation of the \$10,276.39 overpayment, such that it was not subject to waiver.¹⁴

CONCLUSION

The Board finds that appellant forfeited her entitlement to compensation for the period April 30 to August 27, 2004. It finds that appellant received an overpayment of compensation in the amount of \$10,276.39 for the period April 30 to August 27, 2004. The Board finds that she was at fault in the creation of the overpayment, such that it was not subject to waiver.

¹² 20 C.F.R. § 10.320(b).

¹³ See *Bob R. Gilley*, 51 ECAB 377 (2000).

¹⁴ *Albert Pineiro*, 51 ECAB 310 (2000).

ORDER

IT IS HEREBY ORDERED THAT the October 16 and August 6, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 2, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board