U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE HUNTER and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, Va.

Docket No. 95-3112; Submitted on the Record;
Issued February 19, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his right to compensation for the period June 1, 1989 to February 9, 1994; (2) whether there was an overpayment of compensation in the amount of $91,084.08 created; and (3) whether the Office properly determined that appellant was at fault in the creation of the overpayment.

In the present case, the Office accepted that appellant sustained muscle strains to the lumbar area and left groin, and a herniated nucleus pulposus in the performance of duty on December 15, 1985. While receiving compensation, appellant completed Forms CA-1032 regarding his employment activity and other information. The signature dates on these forms are September 9, 1990, March 24 and August 3, 1992, March 10, 1993, and February 9, 1994. By decision dated August 16, 1994, the Office determined that appellant forfeited his compensation for the period June 1, 1989 to February 9, 1994, based on the failure to report employment activity as required on the Forms CA-1032. On August 26, 1994 the Office made a preliminary determination that an overpayment of $91,084.08 was created, and that appellant was not without fault in the creation of the overpayment. By decision dated August 17, 1995, an Office hearing representative affirmed the August 16, 1994 forfeiture decision and finalized the preliminary overpayment determination.

The Board has reviewed the record and finds that appellant has forfeited his compensation only for the period May 3, 1991 to March 10, 1993.

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 times the Secretary specifies.… An employee who--
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> (1) fails to make an affidavit or report when required; or
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> (2) knowingly omits or understates any part of his earnings;
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> "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 … under section 8129 of this title, unless recovery is waived under that section."[1]

In the present case, the Office based its finding of forfeiture on the omission of earnings on the Form CA-1032 signed by appellant on September 9, 1990, March 24 and August 3, 1992, March 10, 1993, and February 9, 1994. The period covered by each CA-1032 is the 15 months prior to signing. The Board notes that the Forms CA-1032 dated September 9, 1990, March 24, and August 3, 1992 were the subject of a criminal indictment for making false statements in violation of 18 U.S.C. §§ 1001 and 1002. By decision dated May 11, 1993, appellant's Motion for Directed Verdict of Acquittal was granted. It should be noted that the criminal action does not involve the Federal Employees' Compensation Act; 18 U.S.C. §§ 1001-1002 is a criminal statute that is separate and distinct from the proceedings under the Act. The issue presented before the Board is whether, for each period covered by the signed Form CA-1032, there was an omission of earnings, and if so, whether the omission was "knowingly" made.

The Form CA-1032 advises a claimant that all employment must be reported, and "if you performed work 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 you performed." Under "Self-Employment," a claimant is notified that "earnings from self-employment (such as farming, sales, service, operating a store, business, etc.) must be reported. Report any such enterprise in which you worked, and from which you received revenue, even if it operated at a loss or if profits were reinvested. You must show as 'rate of pay' what it would have cost you to have hired someone to perform the work you did."

Appellant has indicated that, prior to his employment injury, he opened a martial arts training school, a for-profit business known as the Authentic School of Karate. He asserted that during the period in question the school was operated by his wife and his son. The initial question presented is whether appellant omitted earnings on the specific CA-1032's he completed. It is the Office's burden to establish that appellant had employment earnings.[2]

[1] 5 U.S.C. § 8106(b).

[2] *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

With respect to the Form CA-1032 signed by appellant on September 9, 1990, appellant indicated that he was not employed or self-employed. The Board finds no evidence of record with regard to employment activity during the 15-month period covered by the form. The investigative memorandum prepared by the Office of Inspector General (OIG), and the accompanying evidence, refer only to alleged activity after September 9, 1990. In the August 16, 1994 decision, the Office stated that the evidence showed appellant had self-employment earnings from 1989 through 1992, noting tax returns filed for these years. While the Office acknowledged that the proprietor of the karate school on the tax returns was appellant's wife, the Office stated that other documents listed appellant as either president or instructor. The listing of appellant as "President" of the karate school on business cards does not, however, establish specific employment activity during a specific time period.[3] Neither the tax returns nor other documents of record establish that appellant had earnings during the period June 1, 1989 to September 9, 1990. In the absence of any probative evidence, the Board finds that the Office has not established that appellant omitted earnings during this period.

The CA-1032 signed on March 24, 1992 covers the period December 24, 1990 to March 24, 1992. During this period, the evidence of employment activity is of such limited probative value that the Board again finds that the Office has not established that appellant omitted earnings. The record contains a report of interview dated December 11, 1992, stating that a witness reported that she had received karate instruction at the Authentic School of Karate from January 1992 through April 1992, and that "on occasion" appellant would assist his son in the instruction of younger students. The report does not provide further information from the witness regarding the frequency of appellant's activities, nor does it specifically indicate that instruction was performed prior to March 24, 1992. The record also contains an April 21, 1993 memorandum indicating that a witness reported that in late April or early May 1991 appellant inquired about leasing property for the school. The actual lease, however, is dated May 1, 1992, and it is not clear from the record whether the alleged activity took place in 1991 or 1992. Based on the limited evidence of record, the Board cannot find that the record establishes that appellant failed to properly report employment activity on the March 24, 1992 Form CA-1032.

With respect to Forms CA-1032 signed on August 3, 1992 and March 10, 1993, the Board finds that the evidence does establish that appellant failed to report employment activity. The investigative evidence from the OIG primarily concerns the period from May 1992 to October 1992, and there is significant evidence of employment activity during this period. For example, an investigative report dated May 27, 1992 indicates that appellant was observed in a traditional karate outfit and he advised the investigator that he was an instructor at the school; on June 25, 1992 appellant was observed providing instruction to students and handling other duties; a witness indicated that he took lessons from August 1992 to October 1992 and appellant was a teacher of the class on at least two occasions. This type of activity clearly should have been reported on the Form CA-1032, even if appellant did not receive a salary.[4] The rate of pay is the amount it would have cost to hire someone to do the work performed. The Board therefore

[3] There is an order for business cards, with appellant listed as President, dated April 30, 1992.

[4] Appellant asserted that he did not receive wages and there is no contrary evidence.

finds that appellant omitted earnings on August 3, 1992 and March 10, 1993.[5] The period covered by these forms is May 3, 1991 to March 10, 1993.

As to the final Form CA-1032, signed on February 9, 1994 covering the period from November 9, 1992 until February 9, 1994, the Board finds no evidence regarding employment activity during this period. There is a witness reporting that appellant was present at an October 7, 1992 meeting regarding a contract proposal, but there does not appear to be any evidence regarding any activity after November 9, 1992. Accordingly, the Board finds that the Office has not established that appellant omitted earnings during the period November 9, 1992 to February 9, 1994.

In summary, the Board finds that only for the period May 3, 1991 to March 10, 1993 has the Office established that appellant omitted earnings in his reports to the Office. The next question is whether the omission was "knowingly" made. The term "knowingly" is not defined within the Act or its implementing regulations. In common usage, the Board has recognized that the definition of "knowingly" includes such concepts as "with knowledge," "consciously," "intelligently," "willfully," or "intentionally."[6] The Board reviews the particular circumstances of the case to determine if the claimant knowingly omitted or understated earnings.[7]

At a June 7, 1995 hearing before an Office hearing representative, appellant stated that he understood the questions of the form regarding self-employment as referring to "owning a business, are you working for yourself, you work and you get paid for yourself." He did not provide further explanation. Given appellant's educational and vocational background, his ability to operate a business, the level of employment activity during the period in question, and the clear language of the Form CA-1032, the Board finds that appellant was aware of the requirement to report his work at the karate school and to declare as his rate of pay the amount that would have to be spent to hire someone to perform those duties.[8] His failure to provide this information in the August 3, 1992 and March 10, 1993 Form CA-1032 constitutes a "knowing" omission of earnings that is subject to the forfeiture provisions of 5 U.S.C. § 8106(b).

Since the forfeiture period is limited to May 3, 1991 to March 10, 1993, the case will be remanded to the Office to properly calculate the amount of the overpayment.

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[5] In the March 10, 1993 CA-1032, appellant did not complete the employment history section, stating in a separate letter that he could not complete the section until his criminal action was completed. The failure to disclose the employment activity under these circumstances is an omission of earnings.

[6] *See Lewis George*, 45 ECAB 144 (1993).

[7] *See Gary L. Allen*, 47 ECAB __ (Docket No. 93-2448, issued February 23, 1996). Office procedures state that the case will be evaluated with respect to the claimant's age, education level and familiarity with reporting requirements, as well as the nature of the employment/earnings and any other relevant factors. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (September 1995).

[8] It is also noted that with respect to the March 10, 1993 CA-1032, the indictment filed in February 1993 constitutes an additional factor supporting appellant's awareness of the reporting requirements.

With respect to the overpayment created during the period May 3, 1991 to March 10, 1993, the Board finds that appellant is at fault in the creation of the overpayment.

Section 8129(b) of the Act[9] provides: "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."[10] No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.[11] On the issue of fault, 20 C.F.R. § 10.320(b) provides in pertinent 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, appellant failed to furnish earnings information that he knew or should have known to be material. He is therefore at fault in the creation of an overpayment during the period May 3, 1991 to March 10, 1993, and the overpayment is not subject to waiver.

[9] 5 U.S.C. §§ 8101-8193.

[10] 5 U.S.C. § 8129(b).

[11] *Gregg B. Manston*, 45 ECAB 344 (1994).

The decision of the Office of Workers' Compensation Programs dated August 17, 1995 is affirmed with respect to a finding that appellant forfeited his compensation during the period May 3, 1991 to March 10, 1993 and was at fault in the creation of an overpayment for that period. The decision is reversed with respect to the period June 1, 1989 to May 2, 1991 and March 11, 1993 to February 9, 1994, and the case is remanded to the Office for calculation of the amount of overpayment for the period May 3, 1991 to March 10, 1993.

Dated, Washington, D.C.
February 19, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member