

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALLEN B. AINSWORTH and U.S. POSTAL SERVICE,
WESTLAND PLAZA STATION, Jackson, Miss.

*Docket No. 97-1535; Submitted on the Record;
Issued April 22, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant forfeited his right to compensation for the period May 1, 1988 through June 20, 1992 due to failure to report earnings from part-time work; (2) whether the Office properly found that appellant was at fault in the creation of an overpayment of \$85,468.46, thus precluding waiver of recovery of the overpayment; and (3) whether the Office properly set a repayment schedule of \$500.00 a month to recover the overpayment.

On December 26, 1974 appellant, then a 30-year-old letter carrier, filed a notice of traumatic injury, claiming that he hurt his back when he fell down some porch steps while delivering some mail. The Office accepted the claim for a herniated disc and two back surgeries in 1976 as well as lumbosacral strain and contusion of the coccyx and placed appellant on the periodic rolls for disability compensation.

Appellant returned to a modified clerk's position for two hours a day on September 5, 1981 but again became disabled. He was hospitalized for severe back pain and did not return to work. Subsequently, the Office accepted the claim for consequential anxiety/depression and paid appropriate compensation.

On December 26, 1996 the Office made a preliminary determination that an overpayment of \$85,468.46 had occurred because appellant failed to report earnings on the CA-1032 forms, as required, from May 1, 1988 through June 20, 1992. The Office found appellant to be at fault and provided him with 30 days to request a telephone conference or a precoupment hearing. The Office also found that appellant had forfeited his right to compensation during 1988 through 1992, based on an investigation by the employing establishment.

Appellant responded that he had never "worked" for P and W Furniture and Appliance, Incorporated and had never been paid by check or cash. He admitted that one of the owners, Mildred White, bought him meals, that he drank vodka with Mrs. White and the other owner,

Bernice Peoples, as friends, that he bought furniture from them but paid the regular price and that he got a key to the building so that he could help them in case of an emergency. Appellant also demanded verification of the overpayment.

On March 19, 1997 the Office finalized its overpayment determination and found that recovery would be made by deducting \$500.00 a month from appellant's continuing disability compensation, leaving him with a net of \$1,334.86 every four weeks. The Office noted that appellant had not returned the overpayment recovery questionnaire.

The Board finds that appellant forfeited his right to compensation from March 1, 1988 through June 20, 1992 because he knowingly failed to report earnings from P and W Furniture and Appliance, Inc.

Section 8106(b) of the Federal Employees Compensation Act¹ provides that a partially disabled employee must report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times specified by the Secretary of Labor. The penalty for failing to make an affidavit or report when required or knowingly omitting or understating any part of an employee's earnings is forfeiture of his or her right to compensation during the period for which the affidavit or report was required.²

Under section 8106(b), the Office must establish that appellant knowingly failed to report employment or earnings.³ The term knowingly is not defined in the Act but the Board has recognized that the definition includes such concepts as "with knowledge," "consciously," "willfully," "intelligently," or "intentionally."⁴ To meet its burden of proof, the Office must closely examine appellant's activities and statements in reporting earnings; it is not enough merely to show that appellant received such earnings.⁵

In this case, the Board finds that appellant was well aware of the requirement that he report any employment and earnings to the Office. The record shows that appellant first returned to his regular duties in November 1975 for three days but failed to return his compensation check, thus creating a small overpayment, which was recovered from his continuing compensation when he again became disabled.

Appellant went on the periodic payment system in April 1975 and on May 27, 1976 signed and returned to the Office a form requiring that he report all employment during the past 12 months and his rate of pay, including "the value of housing, board, laundry, or any other

¹ 5 U.S.C. § 8101 *et seq.*; 5 U.S.C. § 8106(b).

² *Charles Walker*, 44 ECAB 641, 644 (1993).

³ *John M. Walsh*, 48 ECAB ___ (Docket No. 96-1801, issued April 25, 1997).

⁴ *Glenn Robertson*, 48 ECAB ___ (Docket No. 95-639, issued February 20, 1997).

⁵ *Barbara Hughes*, 48 ECAB ___ (Docket No. 94-2533, issued March 13, 1997); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

advantages received.” (Emphasis added). Appellant signed and returned similar forms on June 11, 1977, July 21, 1978, March 2, 1979 and March 10, 1980.

The Form CA-1032 was revised to state: “[y]ou must also report separately your employer’s value of housing meals, food allowance, clothing and any other advantages received.” Appellant signed this version of the form on February 18 and June 12, 1981, and June 20 and September 10, 1983.

Beginning in 1984, the Office provided appellant with a revised CA-1032 reporting form which instructed him to report all employment for which he received salary, wages, sales commissions, piecework, or other payment. The form added that if he had performed work in furtherance of a relative’s or spouse’s business, he must show as ‘rate of pay’ what it would have cost the employer or organization to hire someone to perform the work he did. The value of housing, meals, food allowance, clothing, equipment, reimbursed expenses in a business, corporation, partnership or sole proprietorship, or other things of value must be included in the rate of pay.

This form required appellant to answer “yes” or “no” to the question, “[w]ere you employed by an employer during the time period covered by this form?” (the previous 12 or 15 months). The form specifically warned appellant that fraudulently concealing or failing to report “income or other information which would have an effect on benefits,” or making a false statement or misrepresentation of a material fact, might subject appellant to civil liability or result in criminal prosecution.

Appellant signed this form on August 6, 1984, July 29, 1985, September 4, 1986, June 2, 1987, July 19, 1988, August 1, 1989, August 18, 1990, October 1, 1991, and June 1 and 20, 1992. Based on appellant’s long-term familiarity with the compensation system, there can be no question that appellant fully understood that he was required, while receiving total disability compensation, to report any employment and earnings from that work.

Appellant stated in an interview with the postal inspectors who conducted an investigation of appellant’s activities that he considered himself “officially retired” and that he never worked for P and W Furniture and Appliance, Inc. Appellant explained that he had gone to P and W Furniture Appliance, Inc. because he got bored sitting around the house alone. While at the store, he sat in a recliner, watched television and answered the telephone. Appellant added that he did “patchwork” on, and staining of, the used furniture the company bought to resell. Appellant also drank “a little vodka” with the owners, whom he considered friends.

The investigators interviewed Mrs. White on October 17, 1996. She stated that appellant helped them from 1988 to 1992 when Mrs. Peoples retired. Mrs. White recalled that she was not at the store half the time because of her husband’s heart condition, that appellant answered the telephone and stained furniture, that the owners never wrote him a check for wages because appellant told them he was disabled and could not accept a salary and that they compensated him with furniture, food and gas money or sometimes \$20.00 to take his wife out to eat.

The investigators also interviewed Mrs. Peoples, who stated that appellant was a long-time friend. He “hung around” her furniture store a lot and helped her by talking with customers

and answering the telephone, but was never an employee. Each day he was there Mrs. Peoples fed him lunch and he was compensated by receiving furniture, appliances and gifts. Mrs. Peoples stated that appellant was “good” at patching and repairing furniture for resale.

After meeting with the company’s accountant, Mrs. Peoples estimated that appellant would have earned around \$6,000.00, using a rate of pay of \$5.00 an hour, for the time he spent at the store. Mrs. Peoples added that appellant was not at the store on a regular basis and had moved twice during the four-year period, but would come in three or four times a week. Appellant was “not on the payroll.”

By his own words, appellant admitted doing work for P and W Furniture and Appliance Inc. -- he said that he answered the telephone and stained and patched furniture. While he may have considered this work a favor, if he had not done this work, the owners would have had to pay someone for these jobs. The forms appellant signed clearly stated that he must report the amount of pay it would have cost an employer to hire someone to do the work he performed.⁶ Appellant failed to report any of this work during 1988 through 1992.

Further, both of the owners related that appellant told them he was on disability and thus could not accept any salary. The fact that he advised the two women of his disabled employment status demonstrates that he knew he was performing work for which he was entitled to be paid. Also, appellant’s admission that he had keys to the store indicates that he had more of an employer-employee relationship with the two owners. Thus, the Board finds that appellant knowingly concealed the fact that he was working during 1988 through 1992 when completing the required CA-1032 forms.

Appellant stated that he never received any \$6,000.00 from P and W Furniture and Appliance Inc. but he admitted that Mrs. Peoples “fed me and gave me good deals” on furniture. The forms appellant signed during the 17 years he was on the periodic compensation rolls specifically referred to the requirement of reporting “any other advantage received” and the value of meals, food allowances and other things of value. Certainly, daily lunch and good deals on furniture and appliances have a monetary value, not to mention the occasional \$20.00 for gasoline or dining out. Thus, the Board finds that appellant forfeited his right to compensation during 1988 through 1992 because he failed to report any earnings pursuant to section 8106(b)(2), resulting in an overpayment.⁷

The Board also finds that appellant was with fault in creating the overpayment, thus precluding waiver of recovery.

⁶ See *Burnett Terry*, 46 ECAB 457 (1995) (finding that income directly traceable to the product of an employee’s work is considered earnings or wages).

⁷ See *Iris E. Ramsey*, 43 ECAB 1075, 1091 (1992) (finding that appellant’s plea of guilty to filing false documents in violation of federal law constituted persuasive evidence that she “knowingly” omitted her earnings when she completed Office affidavits, notwithstanding her attempts to explain away the plea).

Section 8129 of the Act⁸ 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 be against equity and good conscience.⁹ Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.¹⁰

The implementing regulation¹¹ provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.

The Office has the burden of proof in establishing that appellant was with fault in helping to create the overpayment.¹² In determining whether a claimant is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition.¹³ Factors to be weighed are the individual's understanding of reporting requirements and the obligation to return payments which were not due, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported and ability, efforts and opportunities to comply with reporting requirements.¹⁴

Thus, an individual will be found to be with fault in the creation of an overpayment if the evidence shows either a lack of good faith or a failure to exercise a high degree of care in reporting changes in circumstances which may affect entitlement to, or the amount of, benefits.¹⁵ It is axiomatic that no waiver is possible if the claimant is with fault in helping to create the overpayment.¹⁶

Appellant knew or should have known that the monetary payments and value of the items he received from P and W Furniture and Appliance Inc. were material facts that must be reported to the Office because the forms he signed clearly stated that the information provided would be used to determine whether he qualified for continued benefits or whether an adjustment in

⁸ 5 U.S.C. § 8129(b).

⁹ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹⁰ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994); *see Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is with fault in helping to create the overpayment).

¹¹ 20 C.F.R. § 10.320(b).

¹² *Danny L. Paul*, 46 ECAB 282 (1994).

¹³ *Stephen A. Hund*, 47 ECAB 432 (1996).

¹⁴ *Henry P. Gilmore*, 46 ECAB 709 (1995).

¹⁵ *Id.*

¹⁶ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

benefits would be warranted. The forms also warned appellant that a false or evasive answer to any question, or the omission of an answer, could be grounds for the suspension of benefits.

Thus, appellant answered falsely when he certified that he was unemployed during the covered periods -- the affidavits of Mrs. Peoples and Mrs. White demonstrate his knowledge that he knew he could not be an employee or accept a salary and continue to receive compensation for total disability. The Board finds that because appellant failed to furnish information that he knew or should have known to be material pursuant to section 10.320(b)(2), he is with fault in the matter of the overpayment resulting from his forfeiture.

Finally, the Board finds that the Office did not abuse its discretion in deducting \$500.00 a month from appellant's continuing compensation.

Section 10.324 provides that the overpaid individual is responsible for providing financial information to the Office.¹⁷ While waiver is not available in this case, the Office attached to its December 26, 1996 preliminary determination a recovery questionnaire for appellant to complete, listing his monthly expenses and assets. Appellant failed to return this document to the Office so that an equitable repayment schedule could be set.

Consequently, the Office determined, pursuant to section 10.321(a)¹⁸ that repayment at the rate of \$500.00 a month from appellant's continuing compensation, leaving him with a net benefit of \$1,334.86 every four weeks, was a proper adjustment.¹⁹ Nothing in the record indicates that such a repayment schedule -- roughly a quarter of appellant's monthly disability compensation -- would impose any undue hardship upon appellant. Therefore, the Board finds that the Office did not abuse its discretion in setting a repayment schedule of \$500.00 a month.²⁰

In summary, pursuant to section 8106(b) appellant has forfeited his right to compensation from September 8, 1989 through August 20, 1992. This forfeiture has resulted in an overpayment of compensation of \$85,468.46. Appellant is with fault in the creation of this overpayment, and the Office did not abuse its discretion in adjusting appellant's continuing compensation to recover the overpayment.

¹⁷ 20 C.F.R. § 10.324.

¹⁸ 20 C.F.R. § 10.321(a).

¹⁹ See *Forrest E. Brown II*, 44 ECAB 278, 286 (1992) (finding that withholding \$1,000.00 every four weeks from appellant's compensation constituted a reasonable repayment schedule).

²⁰ See *Nina D. Newborn*, 47 ECAB 132 (1995) (finding that recovery of the overpayment in a lump sum was proper because appellant failed to complete the recovery questionnaire).

The March 19, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
April 22, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member