

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFF M. BURNS and U.S. POSTAL SERVICE,
BROOKLYN GENERAL POST OFFICE, Brooklyn, NY

*Docket No. 97-2058; Submitted on the Record;
Issued December 21, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation.

On April 9, 1987 appellant, then a 23-year-old mailhandler, was pushing carts of mail onto a truck when he developed back pain. He stopped working on April 10, 1987. In an April 13, 1987 form report Dr. Irwin Miller, a Board-certified orthopedic surgeon, diagnosed a traumatic ligamentous and soft tissue injury to the lumbosacral spine. Appellant received continuation of pay from April 10 through May 24, 1987. The Office accepted appellant's claim for ligamentous strain of the lumbosacral spine and began payment of temporary total disability compensation effective May 25, 1987. Appellant returned to limited-duty work on September 28, 1987 but stopped again on December 3, 1987 and filed a claim for recurrence of disability. The Office resumed payment of temporary total disability compensation.

A June 11, 1988 CT (computerized tomography) scan showed diffuse annular bulging at L4-5 with some narrowing of the neural foramina. The Office referred appellant, together with the statement of accepted facts and the case record to Dr. Alexander Afalonis, a Board-certified orthopedic surgeon, for an examination and second opinion. In a July 21, 1988 report, Dr. Afalonis stated that appellant's examination showed mild discomfort in the lower back in the extreme of range of motion testing. He found no local tenderness or abnormal neurological signs from the arms or legs. He diagnosed post lumbosacral strain with no objective findings of orthopedic disability. He commented that he failed to find any indication for further orthopedic treatment due to the April 9, 1987 employment injury. Dr. Afalonis indicated that, although appellant may have had a transient period of temporary orthopedic disability in the first few weeks after the employment injury, he found no current evidence that would lead to the conclusion that appellant was orthopedically disabled. He noted that appellant may have occasional back pain or discomfort after strenuous physical activity. He concluded that appellant was able to work but should avoid bending frequently or doing heavy lifting.

Appellant returned to work on July 14, 1988 in a position as a modified clerk typist. He stopped again on September 12, 1988 and returned to work, four hours a day, on September 14, 1988. The employing establishment referred appellant for a fitness-for-duty examination. In a September 23, 1989 report, Dr. Salvatore Lenzo, a Board-certified orthopedic surgeon, indicated that appellant had decreased strength in the right leg and decreased sensation in the dorsal aspect of the right foot. He noted that there was no evidence of a frank herniated disc despite appellant's symptoms. Dr. Lenzo stated that appellant's current symptoms were related to the employment injury. He commented that it was too early to determine whether appellant had any permanent residuals due to the employment injury. Dr. Lenzo indicated that appellant could work eight hours a day in a sedentary position so long as he avoided heavy lifting and filing.

In an October 27, 1988 report, Dr. Leo Parnes, an osteopath, stated that appellant had severe lumbosacral derangement with sciatica and chronic low back pain. He indicated that appellant was subject to severe exacerbation of pain and spasm and had problems keeping up with his part-time work. Appellant stopped working on January 26, 1989 and filed a claim for recurrence of disability. The Office resumed payment of temporary total disability compensation.

In a March 29, 1989 report, Dr. Emil C. Zuckermann, a Board-certified neurologist, indicated that an EMG (electromyogram) was consistent with and suggestive of a nerve root lesion involving the right L4-5 nerve roots and nerve root irritation of the S1 nerve root. He commented that these findings were compatible with lumbosacral radiculopathy. In a July 21, 1991 report, Dr. Irwin S. Singer, a Board-certified radiologist, indicated that an MRI (magnetic resonance imaging) scan showed herniated discs at L4-5 and L5-S1.

The Office referred appellant to Dr. Enrique Ergas, a Board-certified orthopedic surgeon, for an examination and second opinion. In a November 19, 1991 report, Dr. Ergas recommended consultation with a spinal surgeon based on persistent low back pain with paresthesias, abnormal electrical studies consistent with radiculopathy and an MRI scan showing herniated L4-5 and L5-S1 discs. He concluded that appellant was unable to perform the duties of his job at the employing establishment. Dr. Ergas further concluded, with a reasonable degree of medical certainty, that appellant's employment injury was the competent producing cause of his condition.

The Office, in a CA-1032 form, requested from appellant a report as to whether he was engaged in employment while receiving compensation. In a February 1, 1991 response, appellant indicated that the question was not applicable to him because he was covered only by the employing establishment. In a June 4, 1994 letter, the Office requested that appellant complete another CA-1032 form for the period after February 1, 1991. In a June 9, 1994 response, appellant indicated that the question was not applicable because he was totally disabled. In a form dated October 1995 appellant indicated that he had not been employed for the prior 15 months.

The Office referred appellant to Dr. Milton Smith, an orthopedic surgeon and Board-certified pediatrician, for an examination.¹ In a September 22, 1995 report, Dr. Smith indicated that appellant walked with a normal gait, had a full range of motion of the spine, negative straight leg raising test, no motor or sensory deficit and no atrophy. He stated that appellant had no objective findings and concluded that there was no objective evidence of a disability or a need for further treatment.

In a January 30, 1996 letter, the Office notified appellant that it proposed to terminate his compensation on the grounds that the weight of the medical evidence established that the disability resulting from the factors of employment had ceased. The Office indicated that appellant had 30 days to submit additional evidence if he disagreed with the proposed action. In a March 1, 1996 decision, the Office terminated appellant's compensation effective March 2, 1996.

In a February 27, 1997 letter, appellant requested reconsideration of the Office's decision. He submitted in support of his request, a February 20, 1997 report from Dr. Parnes, who indicated that appellant had severe low back pain with spasms, positive straight leg raising tests in both legs, evidence from an MRI scan of herniated discs and evidence from an EMG suggestive of nerve root lesions. He stated that due to the employment injury appellant had significant loss of use and function of the lumbar spine preventing him from performing all of the duties of usual and customary daily functions. Dr. Parnes concluded that appellant had become chronically, totally and permanently disabled. Appellant also submitted a May 10, 1996 report from Dr. Lloyd G. Bayme, who indicated that appellant had been advised to resume work at a job offered by the employing establishment for a three-month trial period. He stated that with the recent period of inclement weather appellant experienced severe pain and was unable to resume any type of work.

The employing establishment submitted an April 24, 1996 investigative memorandum, which indicated that appellant had sought and obtained employment as an actor while receiving temporary total disability compensation. A postal inspector indicated that on July 10, 1991 appellant worked on corporate training videos for which he had received payment. On December 9, 1991 he appeared in the movie "Malcolm X" and received payment for his work. On December 5, 1994 he was paid for his work as an extra on the television program "The Guiding Light." The postal inspector stated that appellant was arrested on February 23, 1996 and charged with making false statements in support of his compensation claim. The employing establishment subsequently submitted a copy of a February 14, 1997 judgment in a criminal case from the United States District Court for the Southern District of New York, in which, appellant pleaded guilty to two counts of making false statement to obtain federal benefits. The judgment indicated that the dates of the offenses were June 1, 1994 and October 1, 1995. Appellant received a sentence of 18 months, probation and a fine of \$500.00.²

¹ In an August 10, 1995 decision, the Office suspended appellant's compensation on the grounds that he had failed to appear for a scheduled examination with Dr. Smith. Appellant contended that he had been unable to appear because he had undergone surgery for a hernia on August 5, 1995. In an October 13, 1995 decision, the Office vacated its August 10, 1995 decision.

² The employing establishment, in a March 13, 1997 letter, stated that appellant appeared in court on

In an April 15, 1997 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was irrelevant and therefore, insufficient to warrant review of the prior decision. In an accompanying memorandum, a senior Office claims examiner stated that, under section 8148 of the Federal Employees' Compensation Act, appellant was not entitled to further compensation because he had been convicted of a criminal statute relating to fraud in receipt of compensation benefits. The senior claims examiner concluded that the medical evidence submitted by appellant, therefore, was irrelevant because he was not entitled to compensation.

The Board finds that the Office improperly terminated appellant's compensation effective March 2, 1996.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³

The Office based its March 1, 1996 decision to terminate appellant's compensation on the September 22, 1995 report from Dr. Smith. In that report, Dr. Smith stated that appellant had no objective findings and therefore was no longer disabled. However, the record contains objective findings of an EMG showing radiculopathy involving the L4-5 nerve roots and an MRI scan, which was interpreted as showing herniated discs at L4-5 and L5-S1. A prior Office referral physician, Dr. Ergas, had related these conditions to the April 9, 1987 employment injury. Dr. Smith did not address the findings arising from these prior tests and did not give any explanation on how appellant could have no objective findings in his examination even though there had been evidence of objective findings in previous examinations, which the examiners related to the employment injury. Dr. Smith's rationale, therefore, was incomplete in its failure to address the prior medical evidence of record and, as a result, his report has limited probative value. The Office, therefore, did not meet its burden of proof to terminate appellant's compensation effective March 2, 1996.

The Board, however, finds that the Office properly terminated appellant's compensation effective February 14, 1997.⁴

November 13, 1996 and pled guilty to the two counts of making false statements to obtain compensation benefits. However, there is no document of record which supports the employing establishment's statement. As the evidence of record shows that the judgment was imposed on February 14, 1997, that date will be considered the date of conviction.

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁴ The Office's April 15, 1997 decision denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant. However, that decision was based on the new evidence submitted by the employing establishment that appellant had been convicted of making false statements to obtain compensation benefits. As the Office made its decision based on independent evidence submitted by the employing establishment, it will be considered as a reconsideration by the Office on its own motion and, as it was based on new and relevant

Section 8148(a)⁵ of the Act states:

“Any individual convicted of a violation of section 1920 of title 18, or of any other Federal or State criminal statute relating to fraud in the application for a receipt of any benefit under this subchapter or subchapter III of this chapter [compensation for local police officers], shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under this subchapter or subchapter III for any injury occurring on or before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 [forfeiture] or 8129 [recovery of overpayments].”

In this case, appellant’s injury occurred on April 9, 1987. On February 14, 1997 the U.S. District Court entered judgment, finding that appellant had pleaded guilty to two counts of making false statement to receive compensation and imposing a sentence of 18 months, probation and a fine of \$500.00 In the CA-1032 forms, signed by appellant on June 9, 1994 and October 1995, appellant had been informed that he had to report any employment to the Office as part of the condition of continuing to receive compensation. Appellant reported that he was totally disabled during the period covered by these CA-1032 forms and, therefore, questions relating to employment were not applicable to him. However, the employing establishment submitted evidence showing that appellant had employment during the periods covered by both of the CA-1032 forms at issue and did not report such employment and the salary received, as required. He, therefore, made false statements so as to continue to receive compensation benefits under the Act. In making such statements, appellant engaged in fraud in applications to continue receiving compensation benefits. He, therefore, must forfeit all entitlement to compensation for the period after February 14, 1997 for any disability arising from the April 9, 1987 employment injury. As the record shows that appellant’s sentence was imposed on February 14, 1997 by a court of law, this will be taken as the evidence of the date of the conviction, absent any written evidence that a judgment of conviction by such court was made at an earlier date. This forfeiture is a permanent forfeiture which bars appellant from any further entitlement to compensation for any employment-

evidence, will be treated as a merit decision.

⁵ 5 U.S.C. § 8148.

related injuries or conditions which arose prior to February 14, 1997.⁶ The Office, therefore, properly found that appellant was no longer entitled to compensation.⁷

The decision of the Office of Workers' Compensation Programs, dated April 15, 1997, is hereby affirmed as modified by this decision.

Dated, Washington, D.C.
December 21, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁶ Section 8148(a) is to be distinguished from section 8148(b) which bars receipt of compensation by any person imprisoned for a felony conviction during the period of such imprisonment.

⁷ If the Office has not met its burden of proof in terminating compensation, it must reinstate payment of compensation. *Wilbur W. McInerney*, 8 ECAB 615 (1956). Therefore, under other circumstances, appellant would be paid compensation for the period March 2, 1996 to February 14, 1997. However, the Office has not yet considered whether appellant, under section 8106(b) of the Act, should forfeit compensation for knowingly omitting any statement of his earnings in a report required by the Office. Such a forfeiture determination is specifically not excluded by any determination of forfeiture of entitlement to compensation under section 8148(a). In this circumstance, therefore, the Office can withhold payment of compensation that appellant otherwise would be entitled to until it determines whether he should forfeit compensation under section 8106(b). If the Office should determine that appellant should forfeit compensation, the compensation withheld for the period March 2, 1996 to February 14, 1997 can be applied to reduce the amount of compensation subject to forfeiture under section 8106(b).