

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARVEY M. PORTNOY and U.S. POSTAL SERVICE,
AIRPORT MAIL FACILITY, Jamaica, NY

*Docket No. 99-121; Submitted on the Record;
Issued December 13, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his right to compensation in the amount of \$48,742.45 for the period December 10, 1987 through May 14, 1990 because he knowingly failed to report earnings from employment during this period; and (2) whether the Office properly determined that appellant was at fault in the creation of an overpayment of \$48,742.45, thus precluding waiver of recovery of the overpayment.

Appellant filed a claim on April 28, 1986 alleging that on September 27, 1985 he sustained a hernia in his lower abdomen due to lifting and pulling in the performance of duty.¹ The Office accepted appellant's claim for left inguinal hernia on January 21, 1988 and entered appellant on the periodic rolls on April 9, 1989.²

In completed CA-1032 forms dated March 10 and May 10, 1989 which covered the 15 months prior to the dates of his signature, appellant indicated that he had worked for IBI Security Services from March to July 1988 at a pay rate of \$5.50 per hour. In subsequent completed CA-1032 forms dated May 14, 1990, May 10, 1991 and May 14, 1992, appellant indicated that he had not been self-employed or employed during the periods covered by the forms.

The Office deleted appellant from the periodic rolls effective October 18, 1992 because he returned to work eight hours per day in a limited-duty position on October 17, 1992.

¹ In a decision dated February 24, 1987, the Board affirmed the July 2, 1986 Office decision denying appellant's claim that his hernia was casually related to his September 7, 1985 employment injury.

² Appellant was removed by the employing establishment effective December 9, 1986 due to his failure to meet the medical requirements of his position.

In an investigative memorandum dated September 10, 1994, the employing establishment detailed the various employers appellant had worked for during the years 1988 and 1989 without reporting this income and the different social security numbers appellant used for employment during this period. The memorandum noted that appellant had worked for Manpower, Inc, Pall Corporation, Interim Personnel, Inc., Demand Management Company, Tempo Corporation, Allergon Optical/American Hydron Division, but that appellant had not listed these employers on his signed and completed CA-1032 forms.

By letter dated May 27, 1994, the Office advised appellant as to the possible forfeiture of his compensation.

On September 15, 1994 the Office informed appellant that a preliminary determination had been made that an overpayment in the amount of \$48,742.45 had occurred because he had failed to report earnings while receiving compensation.

By decision dated September 22, 1994, the Office issued a declaration of forfeiture on the basis that appellant had knowingly understated his earnings for the period December 10, 1987 through May 14, 1990 based upon the March 10 and May 10, 1989 and May 14, 1990 CA-1032 forms he had completed and signed. The Office also found that appellant was “not without fault” in the creation of the \$48,742.45 overpayment which had occurred due to the forfeiture of his right to compensation during the period December 10, 1987 through May 14, 1990.

On October 3, 1994 appellant disagreed with the preliminary finding that he had not been “without fault” in the creation of the overpayment and requested a decision on the written record.³

By decision dated August 12, 1998, the Office finalized its preliminary determination that appellant received an overpayment of compensation in the amount of \$48,742.45 and that he was at fault in creating the overpayment. The Office further advised appellant that the circumstances of his case did not warrant a waiver of recovery of the overpayment.

The Board finds that the Office properly found that appellant forfeited his right to compensation in the amount of \$48,742.45 for the period December 10, 1987 through May 14, 1990 because he knowingly failed to report earnings from employment during this period.

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 the times the Secretary specifies....

³ The four-year delay between appellant’s request for a review of the written record and a final decision in 1998 is unexplained.

“An employee who--

(1) fails to make an affidavit or report when required; or

(2) knowingly 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 the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”⁴

In this case, the Office determined that appellant forfeited his right to compensation for the period December 10, 1987 through May 14, 1990 because he knowingly failed to report earnings from employment during this period. The record reveals that appellant worked for various employers during 1988 and 1989 using different social security numbers. Consequently, the Office properly concluded that appellant knowingly failed to report his earnings on the CA-1032 forms when required.

Appellant, however, can be subjected to the forfeiture provision of section 8106 of the Act only if he “knowingly” omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. The Board recognizes that forfeiture is a penalty,⁵ and, as a penalty provision, it must be narrowly construed.⁶ The term “knowingly” is not defined within the Act or its regulations. In common usage, “knowingly” is defined as: “[w]ith knowledge; consciously; intelligently; willfully; intentionally.”⁷

The Office thus has the burden of proof in establishing that appellant did, either with knowledge, consciously, willfully or intentionally, fail to report employment or earnings.⁸ To meet this burden of proof, the Office is required to examine appellant’s activities and statements in reporting employment or earnings.⁹ The Office may meet this burden by appellant’s own subsequent admission to the Office that he failed to report employment or earnings which he knew he should have reported. Similarly, the Office may meet this burden by establishing that appellant has pled guilty to violating 18 U.S.C. § 1920 by falsely completing the affidavit section

⁴ 5 U.S.C. § 8106(b).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Case*, Chapter 2.812.10(c) (July 1993).

⁶ See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

⁷ *Linda L. Coggins*, 51 ECAB ____ (Docket No. 98-172, issued January 24, 2000); *Michael D. Matthews*, 51 ECAB ____ (Docket Nos. 98-2204 & 99-2508, issued December 23, 1999); *Terryl A. Geer*, 51 ECAB ____ (Docket No. 97-223, issued November 18, 1999).

⁸ *Terryl A. Geer*, *supra* note 7; *Anthony A. Nobile*, 44 ECAB 268 (1992).

⁹ *Royal E. Smith*, 44 ECAB 417 (1993).

of the Form CA-1032.¹⁰ Furthermore, the Office may meet this standard without an admission by appellant, if appellant failed to complete the Form CA-1032 fully and truthfully and the circumstances of the case establish that appellant failed to reveal the full extent of his employment activities and earnings. The Office may also meet this burden if it establishes through the totality of the factual circumstances of record that appellant's certification in a Form CA-1032, that he was not employed or self-employed, was false.

In this case, the record establishes that appellant knowingly omitted employment and earnings on the CA-1032 forms covering the period of December 10, 1987 through May 14, 1990 despite the fact that during this time he was engaged in employment and had earnings. The CA-1032 required appellant to report all forms of employment, self-employment and earnings, yet he responded "no" or "not applicable" to the questions concerning employment, self-employment and earnings and responded "yes" to whether he was unemployed for the 15-month period preceding each form. The explicit language of the form advised appellant that all employment must be reported, yet the September 10, 1994 investigative memorandum revealed unreported employers and earnings. Consequently, the Board finds that the Office met its burden of proof to establish that appellant knowingly failed to report his employment or earnings.

Next, the Board finds that the Office properly determined that appellant was at fault in creating an overpayment of compensation for the periods of December 10, 1987 through May 14, 1990 and, therefore, the overpayment was not subject to waiver.

Section 8129 of the Act¹¹ provides that an overpayment must be recovered 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." However, an individual who is found to have been at fault in helping to create the overpayment is not eligible for a waiver of recovery of overpayment.¹²

With respect to determining fault, section 10.320(b) of Title 20 of the Code of Federal Regulations provides in relevant 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
- (2) Failed to furnish information which the individual knew or should have known to be material; or

¹⁰ *Michael D. Matthews, supra* note 7; *Irish E. Ramsey*, 43 ECAB 1075 (1992).

¹¹ 5 U.S.C. § 8129(b).

¹² *Bonnye Mathews*, 45 ECAB, 657, 667 (1994).

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”¹³

While appellant was receiving disability benefits, he was periodically required to submit Form CA-1032 to report employment and other information for the 15 months prior to the date of completion and signature. Question two on this form states:

“Self-employment. 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.

“(a) Were you self-employed during any time covered by this form? Answer Yes or No. ____.”

On CA-1032 forms signed and dated March 10 and May 10, 1989, appellant noted that he had worked for IBI Security Services from March to July 1988 and in a CA-1032 form signed and dated May 14, 1990, appellant answered “no” to the above question.

The September 10, 1994 investigative memorandum from the employing establishment revealed that appellant had not disclosed all the employers for whom he had worked from December 1987 through May 14, 1990 and that he had also used different social security numbers while working for these employers.

On September 22, 1994 the Office issued a decision advising appellant that because of his failure to report his earnings and employment activities on CA-1032 forms, he had forfeited his right to compensation for the periods of December 10 through May 14, 1987. Additionally, the Office informed appellant that it had made a preliminary determination that he received an overpayment of compensation in the amount of \$48,742.45 due to forfeiture. The Office also informed appellant that he was found to be at fault in creating the overpayment due to his failure to report earnings as required on CA-1032 forms.

The record indicates that during the period of December 10, 1987 through May 14, 1990 appellant received compensation in the amount of \$48,742.45. Additionally, the record indicates that the CA-1032 forms submitted by appellant covering the above period do not include information regarding appellant’s employment activities and any income derived therefrom. The only employer noted on the CA-1032 for the period was IBI Securities.

In its September 22, 1994 decision declaring a forfeiture of compensation, the Office determined that appellant knowingly failed to report earnings he received from six employers he had not listed on his CA-1032 forms. Under the circumstances, appellant’s failure to report his earnings and employment activities constitutes a failure to furnish information which he knew or

¹³ 20 C.F.R. § 10.320(b).

should have known to be material.¹⁴ Consequently, appellant was properly deemed to be at fault in creating the overpayment of compensation. Inasmuch as appellant was at fault in creating the overpayment pursuant to section 10.320(b)(2), recovery of the overpayment of compensation may not be waived.¹⁵

The decision of the Office of Workers' Compensation Programs dated August 12, 1998 is hereby affirmed.

Dated, Washington, DC
December 13, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹⁴ 20 C.F.R. § 10.320(b)(2).

¹⁵ See *James H. Hopkins*, 48 ECAB 281 (1997); *Gary L. Allen*, 47 ECAB 409, 418 (1996).