U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROLAND S. ROLLINS and U.S. POSTAL SERVICE,
POST OFFICE, Newark, DE

Docket No. 97-2029; Submitted on the Record;
Issued January 12, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work; (2) whether appellant forfeited his entitlement to compensation for the period October 11, 1991 to January 11, 1993 for failure to report earnings; (3) whether an overpayment had been created for the period of the forfeiture; (4) whether appellant was without fault in the creation of the overpayment; and (5) whether waiver of the overpayment is warranted.

The Board has duly reviewed the case on appeal and finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Appellant filed a claim on October 24, 1988 alleging that he injured his back on October 21, 1988 and compensation was paid. The Office paid him intermittent periods of total disability on periodic rolls from December 10, 1988 to April 6, 1990 and placed him on the periodic rolls for compensation effective April 8, 1990. By decision dated July 22, 1994, the Office terminated appellant's compensation benefits finding that he had refused an offer of suitable work. Appellant requested reconsideration on September 23, 1994 and by merit decision dated December 6, 1994, the Office affirmed the termination of benefits. Appellant requested reconsideration again in letters dated May 16 and August 20, 1995 and in a letter received on April 19, 1996. The Office, in a decision dated May 12, 1997, affirmed the July 22, 1994 decision terminating appellant's compensation benefits.

It is well settled that once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.[1] As the Office in this case, terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

Act[2] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered, procured by, or secured for the employee is not entitled to compensation. Section 10.124(c) of the applicable regulations[3] provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4]

In this case, appellant's attending physician, Dr. Kenny Cooper, a Board-certified orthopedic surgeon, indicated on a work restriction form (Form OWCP-5) dated February 15, 1993 that appellant was capable of working eight hours per day with strict adherence to his restrictions and limitations.[5] The restrictions were noted as intermittent sitting for three to four hours per day, intermittent walking for three to four hours per day, intermittent lifting for one to two hours per day, no bending, intermittent squatting one to two hours per day, intermittent climbing for one hour per day, intermittent kneeling for one to two hours per day, intermittent twisting for one to two hours per day and intermittent standing for two to four hours per day. Dr. Copper noted a lifting restriction of 10 to 20 pounds, no simple grasping or fine manipulation with the hands although appellant could use his hands to push and pull and no working or reaching above the shoulder. Regarding use of his feet in repetitive movements and operating a motor vehicle, Dr. Cooper stated that he could do these activities with limitations as to time and mobility. Lastly, it was stated that appellant must be in a controlled environment to limit his exposure to cold, dampness and abrupt temperature changes. Dr. Cooper indicated that appellant required training, evaluation and a trial period in any new position.

The employing establishment provided appellant with a limited-duty job description of modified clerk. The duties of the position included sit or stand to tolerance in a straight-back chair, working inputting data at a computer with physical restrictions of no sedentary work, no bending or reaching above or below the waist, no lifting over 10 pounds.

The Office referred this position to Dr. Cooper and on June 25, 1993 stated that appellant could perform the duties described with the modification that he sit to rest every 2 hours for at least 10 to 15 minutes.

The employing establishment advised appellant in a letter dated November 4, 1993 that the position of modified clerk had been approved by Dr. Cooper and the Office medical adviser as being within his physical restrictions.

---

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.124(c).

[4] *Arthur C. Reck*, 47 ECAB 339 (1995).

[5] Appellant was referred on January 23, 1992 for vocational rehabilitation.

By letter dated March 23, 1994, the employing establishment offered appellant the limited-duty position of modified clerk and advised him that the position was available to him effective April 4, 1994.

In a letter dated May 18, 1994, the Office advised appellant that the offered position of modified clerk had been determined to be suitable to his work capabilities and advised him that the position was still available. The Office informed appellant that he had 30 days to either accept the position or provide a reason for refusing. Lastly, the Office advised appellant of the penalty provisions of section 8106(c) regarding the unreasonable refusal of suitable work by an employee.

In a letter dated June 17, 1994, appellant refused the offered position as he preferred to be employed in the Wilmington office, which is closer to his home than the Newark office where the position was offered and he also believed that the offered position did not take into account his many disabilities. No new medical evidence was submitted.

The Board finds that the medical evidence of record established that appellant could perform the duties of the offered position. Dr. Cooper provided work restrictions in his February 15, 1993 Form OWCP-5 and reviewed the position finding that it was within appellant's capabilities with one modification regarding appellant being able to rest every 2 hours for 10 to 15 minutes, on June 25, 1993. Appellant has not offered any medical evidence stating that he could not perform the position offered. As there was no medical evidence supporting that the offered position was unsuitable, the Office properly terminated appellant's compensation benefits as he refused an offer of suitable employment.

Next, the Board finds that the Office properly found that appellant forfeited his right to compensation for the period October 11, 1991 to January 11, 1993.

In a decision dated August 24, 1995, the Office issued an order finding that appellant forfeited compensation for failure to report earnings he made while self-employed. In the attached memorandum, the Office noted that appellant completed a Form CA-1032 on January 11, 1993 indicating that he had not been employed or self-employed. The Office found that information submitted by the employing establishment showed that appellant began operating a barbershop business on November 20, 1991 based upon his business application with the State of Delaware for the business called "A Gentleman's Touch Barbershop," sworn testimony in a court hearing and tax records. Based upon the information submitted, the Office found that appellant had been self-employed, that he had not noted the self-employment on the January 11, 1993 CA-1032 and declared that compensation received during this period be forfeited.

Appellant requested a hearing which was held on April 3, 1996. In a decision dated June 11, 1996, the Office hearing representative affirmed the August 24, 1995 decision declaring appellant's compensation to be forfeited and declaring an overpayment for the period October 11, 1991 through January 11, 1993.

Section 8106(b) of the Act[6] states 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--
>
> (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 of 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."[7]

The Office, however, to establish that appellant should forfeit the compensation he received during the period, must establish that he knowingly failed to report employment or earnings. As forfeiture is a penalty, it is not enough that there were unreported employment activities and earnings. The term knowingly is not defined within the Act or its implementing regulations. In common usage, the Board had recognized that the definition of "knowingly" includes such concepts as "with knowledge," "consciously," "willfully" or "intentionally."[8]

In this case, appellant completed and signed Form CA-1032 on January 11, 1993 stating that he was not employed. The employing establishment submitted an investigative report, which included state and federal income tax returns for 1991, 1992 and 1993 showing income from rents, royalties, partnerships, etc., a partnership tax return for 1993, a copy of sworn testimony from appellant during a February 16, 1994 trial, a copy of his business license application indicating that he was owner and the person to be contacted for tax matters. Appellant, in his testimony at the February 16, 1994 trial, stated that he leased a building, which contained a barbershop, which he operated. He also testified the he rented cars, was a notary public and that his business made a lot of money. Appellant has argued that the tax returns were not professionally done by a tax service and that he was never self-employed as evidence by the fact that no social security or self-employment tax was withheld. The Office properly determined that appellant forfeited his right to compensation because he engaged in self-employment in connection with the operation of a Gentleman's Touch Barbershop between November 20, 1991, the date the business began operating as noted on his business license and

[6] 5 U.S.C. § 8106(b).

[7] While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and therefore a statutory provision about such earnings would be meaningless. 24 ECAB at 260.

[8] *Charles Walker*, 44 ECAB 641 (1993); *Christine P. Burgess*, 43 ECAB 449 (1992).

registration form and the January 11, 1993 CA-1032 on which he did not report such activities. Thus, the Office properly found that appellant forfeited his compensation from October 11, 1991 to January 11, 1993 as he knowingly failed to report his self-employment activities on the forms covering the period in question.

The Board further finds that the Office properly found that appellant was at fault in the creation of an overpayment in compensation and the overpayment, therefore, was not subject to waiver.

Section 8129(a) of the Act provides, "Adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when recovery would defeat the purpose of the Act or would be against equity and good conscience."[6] Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault section 10.320(b) of the Office's 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
>
> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[9]

In this case, the Office applied the second standard in determining that appellant was at fault in creating the overpayment.

In the instant case, appellant filled out and signed a CA-1032 form dated January 11, 1993 on which he wrote "N/A," not applicable, in response to the question concerning self-employment activities whether or not he derived income from his efforts. In the signature block of these forms, it indicates that any knowing false statements, misrepresentations, concealment of fact or any other act of fraud are subject to felony criminal prosecution. Thus, the forms clearly provide severe consequences for failing to properly execute the document; and by signing the forms, appellant is deemed to have acknowledged his duty to fill the form out properly, including the duty to report any self-employment activities or income. On the form on which the appellant wrote "N/A" he met the first standard for determining fault. As appellant made incorrect statements as to material facts which he knew or should have known to be incorrect, he is at fault in the creation of the overpayment and therefore is not entitled to waiver of the overpayment.

[9] 20 C.F.R. § 10.320(b).

The decision of the Office of Workers' Compensation Programs May 12, 1997 and June 11, 1996 are hereby affirmed.

Dated, Washington, D.C.
January 12, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member