

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDY WDOWIAK and U.S. POSTAL SERVICE,
POST OFFICE, Santa Clarita, CA

*Docket No. 98-499; Submitted on the Record;
Issued January 20, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, 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; (2) whether appellant forfeited his right to monetary compensation from September 29, 1994 to May 5, 1997; and (3) whether appellant was at fault in the creation of an overpayment in the amount of \$24,308.77.

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, a casual letter carrier, filed a claim on August 26, 1992 alleging that he developed bilateral inguinal hernias due to factors of his federal employment. The Office accepted appellant's claim for bilateral inguinal hernias on November 14, 1992. The employing establishment terminated appellant's employment on June 26, 1992. In a letter dated July 16, 1997, the Office proposed to terminate appellant's compensation benefits as he had undergone surgery and was released to return to full duty. By decision dated August 19, 1997, the Office terminated appellant's compensation benefits effective August 19, 1997.¹

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² 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 Furthermore, the right to medical

¹ This case has previously been on appeal before the Board. In a decision dated August 21, 1995, the Board found that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective September 23, 1993 and reversed the Office's September 22, 1993 decision. Docket No. 94-403.

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ *Id.*

benefits for an accepted condition is not limited to the period of entitlement for disability.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁵

The Office referred appellant for a second opinion evaluation with Dr. James J. Greenberg, a Board-certified surgeon, on August 29, 1996. In a report dated September 11, 1996, Dr. Greenberg noted appellant's history of bilateral inguinal hernias and stated that he planned to perform surgical repairs on September 30, 1996. The Office requested a supplemental report on January 6, 1997 and on January 8, 1997, Dr. Greenberg opined that appellant's hernias were causally related to his employment activities, that the condition was permanent without surgical repair and that appellant was not capable of lifting over 15 pounds until the hernias were repaired. The Office authorized this surgery on February 26, 1997. In a note dated May 14, 1997, Dr. Greenberg indicated that appellant could return to work on June 2, 1997 with no restrictions. The Office requested additional information in a letter dated May 21, 1997. In a report dated May 21, 1997, Dr. Greenberg stated:

“As of June 2[, 1997] there will be no remaining residuals from the bilateral hernia repair.... In reference to the second question, the patient will not be further disabled by his hernias as of June 2[, 1997]. In reference to the [third] question, [appellant] does indeed have unrestricted activity as of June 2, 1997. This is our routine clearance for any vocation after hernia repair, and [appellant’s] case is no exception. However, lifting or transporting devices up to 1,000 pounds certainly could exacerbate a hernia in any individual.”

In this case, Dr. Greenberg examined appellant and performed the surgical repair of his inguinal hernias. He opined that appellant could return to regular duty with no restrictions and no medical residuals. As there is no contemporaneous medical evidence to the contrary, the Board finds that the Office has met its burden of proof to terminate appellant's compensation benefits.

The Board further finds that appellant forfeited his right to monetary compensation from September 29, 1994 to May 5, 1997.

In this case, the Office accepted appellant's claim for bilateral inguinal hernias on November 14, 1992. The Office entered appellant on the periodic rolls on December 28, 1995 and authorized compensation payment from September 24, 1993 to December 9, 1995 in the amount of \$27,103.95.⁶ The Office indicated that appellant would receive periodic payments in the amount of \$961.00. Appellant completed a Form 1032 on December 29, 1995 and indicated that he was neither employed nor self-employed during the 15-month period covered by the form. Appellant completed a Form 1032 on May 10, 1996 and indicated that he was neither

⁴ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁵ *Id.*

⁶ The Office reduced the amount of compensation actually received by appellant to \$10,143.80 due to an outstanding overpayment in a separate claim.

employed nor self-employed during the 15-month period covered by that form. On May 5, 1997 appellant completed a Form 1032 and indicated that he was neither employed nor self-employed during the 15-month period covered by the form. These forms advised appellant that he must report all employment for which he received a salary, wages, income, sales commissions, piecework or payment of any kind. The forms further required that appellant report all self-employment or involvement in business enterprises. The forms specifically warned appellant that anyone "who fraudulently conceals or fails to report income or other information which would have an effect on benefits, or who makes a false statement or misrepresentation of a material fact" in claiming a payment or benefit under the Federal Employees' Compensation Act might be subject to criminal prosecution.

The employing establishment submitted an investigative memorandum dated July 16, 1997 including evidence that appellant had worked during the periods covered by the 1032 forms. The Office issued a decision on September 17, 1997 finding that appellant forfeited his compensation benefits for the period of September 29, 1994 through May 5, 1997. In a letter dated September 17, 1997, the Office notified appellant of a preliminary finding of overpayment in his case in the amount of \$24,308.77. The Office finalized the overpayment in a decision dated November 10, 1997.

Section 8106(b) of the 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 time the Secretary specifies.... An employee who--

fails to make an affidavit or report when required; or

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."⁷ (Emphasis added.)

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he "knowingly" failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.⁸ The term "knowingly" is not defined within the Act or its regulations. The Board has adopted the common usage definition of "knowingly": "with knowledge; consciously; intelligently; willfully; intentionally."⁹

The Board finds that on the 1032 forms he signed on December 29, 1995, covering the period from September 29, 1994 to December 29, 1995, and May 10, 1996, covering the period

⁷ 5 U.S.C. § 8106(b).

⁸ *Anthony A. Nobile*, 44 ECAB 268, 271-72(1992).

⁹ *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

from February 10, 1995 to May 10, 1996, appellant consciously omitted relevant information concerning his employment activities with Interamer Realty Company which generated earnings in appellant's name.¹⁰ He responded "No" to questions concerning employment or self-employment and answered "Yes" to the question inquiring whether he was unemployed for all periods during the previous 15 months. In a broker verification of experience, appellant indicated that he worked for Interamer Realty Company from March 8, 1995 to September 17, 1996. A report to the Internal Revenue Service indicated that appellant earned \$1,101.25 in 1995. Even though appellant may have performed work or had earnings on an irregular basis during this period, he knew that he was required to report *any* earnings produced from his work activities.¹¹ Nevertheless, in response to the Office's inquiries, appellant signed the 1032 form certifying that all statements provided in response to the questions on the form were true, complete and correct to the best of his knowledge and belief. The clear weight of the evidence of record establishes that appellant knowingly failed to report his earnings from employment. Accordingly, the Board finds that appellant thereby forfeited his right to compensation received for that period.

Appellant completed a Form 1032 on May 5, 1997 covering the period from February 5, 1996 to May 5, 1997. In this form, appellant indicated that he was neither employed nor self-employed during the 15-month period covered by the form. The record indicates that appellant was employed by Orbit Restaurant and Lounge during the period covered by this form. In a letter dated May 2, 1997, the manager of the Orbit Restaurant and Lounge stated that appellant worked in December 1996 as a part-time piano player earning tips only. He further stated that appellant returned to work in May 1997 earning \$600.00 a month.

On March 7, 31 and April 23, 1997 appellant showed several properties listed for sale to postal inspectors. Appellant stated that he was operating his own business and performed the duties of a real estate broker by showing properties for sale to the inspectors. Considering all of the circumstances and the evidence of record, the Board concludes that appellant "knowingly" omitted his self-employment and real estate earnings under section 8106(b)(2) of the Act by failing to report his real estate broker activities on the Form 1032 completed. The Board finds that appellant forfeited his right to compensation for the period from September 29, 1994 through May 5, 1997.

The Board further finds that appellant was at fault in the creation of the overpayment in the amount of \$24,308.77.

Section 8129(a) of the Act¹² provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the

¹⁰ The investigative memorandum indicated that appellant worked for Balas Incorporated in 1994. However, these dates of employment were not covered by a form 1032 completed by appellant.

¹¹ *Charles Walker*, 44 ECAB 641, 645 (1993).

¹² 5 U.S.C. §§ 8101-8193, 8129(a).

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.”¹³ 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 regulations¹⁴ 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.”

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

Appellant indicated on 1032 forms covering the period from September 29, 1994 through May 5, 1997 that he was neither employed nor self-employed during the periods in question. However, based on the evidence contained in the investigative memorandum, appellant was employed by Interamer Realty Company and the Orbit Restaurant and Lounge during 1995 and 1996. Furthermore, appellant informed undercover investigators that he was self-employed as a real estate broker and performed the duties of that position by showing properties for sale. Appellant, therefore, is at fault in the creation of the overpayment and it is not subject to waiver.

With respect to recovery of an overpayment, the Board’s jurisdiction is limited to reviewing those cases whether the Office seeks recovery from continuing compensation benefits under the Federal Employees’ Compensation Act. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office’s recovery of an overpayment under the Debt Collection Act.¹⁵

The decisions of the Office of Workers’ Compensation Programs dated November 10, September 17 and August 19, 1997 are hereby affirmed.

Dated, Washington, D.C.
January 20, 2000

¹³ 5 U.S.C. § 8129(b).

¹⁴ 20 C.F.R. § 10.320(b).

¹⁵ See *Lewis George*, 45 ECAB 144, 154 (1993).

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member