U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON A. NOWLIN and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Atlanta, GA

Docket No. 97-922; Submitted on the Record;
Issued June 2, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective June 13, 1995 on the grounds that she no longer had any disability causally related to her September 6, 1991 employment injury; (2) whether the Office properly found that appellant forfeited her right to compensation from April 20, 1994 through March 31, 1995 because she knowingly failed to report her employment activities; (3) whether the Office properly determined that an overpayment was created in the amount of $12,785.06; and (4) whether the Office properly determined that appellant was at fault in the creation of the overpayment.

On September 10, 1991 appellant then, a 29-year-old letter sorting machine operator, filed a traumatic injury claim (Form CA-1) alleging that on September 6, 1991 a shelf came down and struck the shin of her ankle. Appellant stopped work on September 8, 1991 and returned to limited-duty work on October 21, 1991. Appellant worked intermittently claiming periods of total and partial disability until she stopped work on August 30, 1994.

The Office accepted appellant's claim for laceration of the right ankle.

On October 4, 1994 appellant filed a claim for continuing compensation on account of traumatic injury or occupational disease (Form CA-7) for the period August 15 through September 30, 1994. Appellant also filed a claim for continuing compensation on account of disability (Form CA-8) for the same period. On October 7, 1994 appellant filed a Form CA-8 for the period June 16, 1993 through July 1994. On these forms, under items number 8 and 9 respectively, appellant indicated that for the claimed period she had not worked and had not received any earnings from salaried employment or commission and self-employment. Regarding the commission and self-employment, appellant was instructed to "[s]how all activities, whether or not income resulted from your efforts."

On October 28, 1994 the Office issued a check to appellant in the amount of $2,553.60 for the period August 15 through September 30, 1994. Subsequently, appellant filed several CA-8 forms covering the period October 1, 1994 through March 31, 1995. In these forms, appellant again indicated under item number 9 that for the claimed period she had not worked and had not received any earnings from salaried employment or commission and self-employment.

The employing establishment's inspection service conducted an investigation of appellant based on information received on December 8, 1995 by Ann Miller, an employing establishment injury compensation specialist, that appellant was working while receiving compensation for total disability. A March 23, 1995 investigative memorandum noted a history of appellant's September 6, 1991 employment injury, medical treatment, acceptance of a limited-duty position at the employing establishment from August 3 to 12, 1994. The investigative memorandum further noted that appellant had signed a letter entitled, "Employees Responsibilities -- On the Job Injury," which advised her that concealment of her ability to perform any type of employment for any duration may result in disciplinary action. The investigative memorandum indicated that Ms. Miller "personally observed appellant present on at least ten occasions at Acra Automotive … during October and November 1994." Ms. Miller stated that, during these observations, appellant was walking or standing, and that she did not appear to be under any duress and stress. The investigative memorandum provided that appellant completed several CA-8 forms, but did not report her employment activities. The memorandum then indicated that appellant was observed accepting payments from customers, completing work orders, distributing fliers advertising the business, making business telephone calls, signing invoices for automobile parts, picking up automobile parts and directing customers into the garage bay.

The investigative memorandum was accompanied by invoices dated April 20, May 19, and June 6, 1994 for automobile parts which were signed by appellant, witness statements from Ms. Miller, postal inspectors and business associates of Acra Automotive regarding appellant's activities at the shop, medical evidence, CA-7 and CA-8 forms signed by appellant, employment records, photographs of appellant at Acra Automotive, sales receipts signed by appellant, an advertisement of the Acra Automotive distributed by appellant and records regarding appellant's September 19, 1993 automobile accident.

The record reveals several medical reports from Dr. George C. Lambros, Jr., an orthopedic surgeon and appellant's treating physician, finding that appellant was disabled from work. By letter dated April 3, 1995, the Office advised Dr. Lambros to submit a rationalized medical report explaining why appellant continued to be disabled due to her employment-related condition in light of its recent discovery that appellant was working at an automotive repair shop while in receipt of compensation for loss of wages.

By letter dated May 12, 1995, the employing establishment terminated appellant's employment effective June 20, 1995 due to her falsification of official records/documents and unacceptable conduct.

On May 22, 1995 the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Douglas Smith, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Smith submitted a June 13, 1995 medical report

providing a history of the September 6, 1991 employment injury, appellant's medical treatment and complaints, and his findings on physical and objective examination. Dr. Smith opined:

> "This orthopedic examination is completely normal. There is no evidence of a chronic, either subacute or chronic, tendentious of the right tendoachilles. There is no evidence of any bursitis involving the right heel. There is no evidence of any tarsal tunnel syndrome. There is no evidence of any peripheral nerve damage and nothing to suggest any arterial or venous abnormalities. There is nothing to indicate any muscle or soft tissue damage and there is nothing to indicate any joint injury. In essence, [appellant's] examination is 100 percent normal. There are no objective findings to support her persistent subjective complaints and quite frankly I [a]m at a loss to explain why this lady, from the information supplied by her and the records, was ever out of work more than possibly one or two days. She has no disability. She needs no further treatment and there is no limitation from a physical point of view for any type of gainful employment that she otherwise would be capable of performing. She needs no further treatment and there is no limitation from a physical point of view for any type of gainful employment that she otherwise would be capable of performing."

By decision dated September 15, 1995, the Office terminated appellant's compensation on the grounds that she no longer had any disability causally related to her September 6, 1991 employment injury. The Office also found that appellant had forfeited $12,2785.07 in compensation for the period April 20, 1994 through March 13, 1995 on the grounds that she failed to report her employment activities. The Office further found that this forfeiture represented an overpayment of compensation which would be addressed in a separate preliminary overpayment finding.

In a September 15, 1995 letter, the Office made a preliminary determination that an overpayment was created in the amount of $12,785.06 because appellant failed to report her employment activities at Acra Automotive, therefore, forfeiting her compensation for the period April 20, 1994 through March 31, 1995. The Office also determined that appellant was at fault in the creation of the overpayment because she knowingly provided erroneous information. The Office advised appellant that she could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if she disagreed that the overpayment occurred, if she disagreed with the amount of the overpayment, if she believed that the overpayment occurred through no fault of her own, and if she believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

On October 2, 1995, appellant requested a hearing before an Office representative on the issue of fault and eligibility for waiver of the overpayment.[1]

Prior to the hearing, appellant submitted a March 15, 1995 statement explaining that she was not an employee of Acra Automotive, that she only did as she was told by the employing establishment in filling out her CA-8 forms and that the employing establishment was aware of the business of Wayne Craig, president of Acra Automotive and appellant's fiancé. Appellant further explained why she was not an employee, specifically noting, *inter alia*, that she did not receive any compensation. Appellant also submitted a notarized statement dated March 26, 1996 indicating that she was not an employee, a consultant, shareholder or co-owner of Acra Automotive. Appellant stated that she did not have any duties, obligations, expectations or otherwise at Acra Automotive. Finally, appellant stated that she did not receive or expect to receive any compensation now or in the future from Acra Automotive. Appellant also submitted a notarized statement of the same date from Mr. Craig reiterating that appellant was not associated with his business and that she did not receive any compensation.

In support of her continued disability, appellant submitted Dr. Lambros' August 15, 1995 medical treatment notes revealing appellant's complaint of bilateral leg and ankle pain. Dr. Lambros noted the medical treatment appellant received from Dr. McDevitt, which revealed a diagnosis of venous reflux in the common superficial vein of the right lower extremity and superficial venous thrombosis of the left lower extremity. Dr. Lambros then indicated Dr. McDevitt's belief that the reflux in appellant's right lower extremity contributed to the chronic symptoms in her right ankle. Dr. Lambros stated that whether this existed before or after appellant's accident was impossible for Dr. McDevitt to determine and that he concurred with this opinion. Dr. Lambros further stated that whether the current superficial venous thrombosis of the left lower extremity was a result of alterations in appellant's ambulation due to pain in the right ankle was also impossible to determine. Dr. Lambros recommended that appellant obtain Jobst compression stockings for both legs. He further recommended that, from an orthopedic standpoint, there was nothing further he could offer appellant. He noted that he suggested that appellant follow up with vascular specialists if her symptoms continued. Dr. Lambros concluded that appellant can return to work with limitations, which included no standing for more than 2 hours with a 15-minute rest every 2 hours.

In further support of her continued disability, appellant submitted Dr. Lambros' September 13, 1995 attending physician's supplemental report (Form CA-20a). Dr. Lambros' report indicated a date of injury as September 6, 1991 and a diagnosis of right Achilles tendinitis. His report further indicated that appellant's condition was due to the injury for which compensation was claimed by placing a check mark in the box marked "yes." Dr. Lambros opined that appellant was disabled from working when her symptoms were acute, that sometimes her disability was total, and sometimes it was partial. Dr. Lambros' Form CA-20a of the same date reiterated his previous diagnosis, the cause of appellant's condition by placing a checkmark in the box marked "yes" and the type of disability appellant experienced. He found that appellant could return to work with physical restrictions. He also found that appellant's

[1] Appellant also requested a telephone conference on the issue of fault and eligibility for waiver of the overpayment.

condition was chronic and that it was not expected to fully resolve. He concluded that appellant was discharged from his care.

At the hearing on March 28, 1996, appellant testified that Acra Automotive was owned by her fiancé, not her husband. Appellant further testified that Ms. Miller was aware of her visits to the automotive shop, that Ms. Miller told her that the visits were not a problem as long as she was not commissioned or self-employed at the shop and that she did not do anything that exceeded her physical restrictions. Additionally, appellant testified that prior to her injury, she would visit the shop for breakfast or lunch on occasion, and that she answered the telephone and gave change to a customer. Appellant denied telling a postal inspector that she was a co-owner. Regarding her signature on invoices, appellant stated that she did this prior to being out on disability and when her fiancé was busy. Appellant further stated that she did not pay any bills and that she was not associated with the business other than by doing what she considered to be a favor. Appellant then stated that she was unable to provide the exact amount of time she spent at the shop, that she did not have any duties and that she did not receive any payment for her activities. Regarding her completion of the CA-8 forms, appellant testified that Ms. Miller instructed her not to complete item number 9 because she was not working at the shop. Appellant stated that she did not have any duties or responsibilities and that she was not a salaried employee, commissioned or self-employed.

In an August 9, 1996 decision, the hearing representative affirmed the Office's September 15, 1995 decision. The Office also finalized its preliminary overpayment determination and finding of fault.

The Board finds that the Office improperly terminated appellant's compensation effective June 13, 1995 on the grounds that she no longer had any disability causally related to her September 6, 1991 employment injury.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying 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]

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[4] When there are opposing reports of virtually equal weight and rationale, the

[2] *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

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

[4] 5 U.S.C. § 8123(a).

case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[5]

In this case, the medical opinion of Dr. Lambros, an orthopedic surgeon and appellant's treating physician, and Dr. McDevitt, appellant's other treating physician, found that appellant was partially disabled, that she had residuals of her employment-related injury and that she had work limitations. Dr. Smith, a Board-certified orthopedic surgeon, to whom the Office referred the case for a second opinion, on whether appellant remained totally disabled due to her accepted employment injury, found that appellant was no longer totally disabled and had no residuals of her employment-related injury. Accordingly, the Board finds that there is a conflict in the medical opinion evidence between appellant's treating physicians, Drs. Lambros and McDevitt, and the Office physician, Dr. Smith, as to whether appellant had any continuing condition or disability caused by the work-related injury. To resolve this conflict, the Office should have referred the case record, including all test results, and a statement of accepted facts to a Board-certified specialist for resolution of the conflict.[6] For these reasons, the Office did not meet its burden of proof to terminate appellant's compensation effective June 13, 1995.

The Board further finds that the Office improperly found that appellant forfeited her right to compensation from April 20, 1994 through March 31, 1995 because she knowingly failed to report her employment activities.

To determine whether an overpayment of compensation occurred in this case, as found by the Office in its August 9, 1996 decision, the Board must review whether appellant forfeited her right to monetary compensation from April 20, 1994 through March 31, 1995 pursuant to 5 U.S.C. § 8106(b).[7]

Section 8106(b) of the Act[8] 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 the times the Secretary specifies.... An employee who--
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> > (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

[5] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

[6] *Robert F. Hamilton*, 41 ECAB 431 (1990).

[7] *See Samuel J. Rosso*, 28 ECAB 43, 46 (1976).

[8] 5 U.S.C. § 8106(b).

(3) title, unless recovery is waived under that section."[9]

This section of the Act is further defined by regulation which provides:

"Affidavit or report by employee of employment and earnings."

* * *

"(c) Earnings from employment referred to in this section or elsewhere in this part means gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses, or any other advantages received in kind as part of the wages or remuneration."[10]

In analyzing whether an employee in receipt of compensation has earnings or wages the Board, in *Christine P. Burgess*,[11] noted wages are defined as:

"Every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and reasonable value of board, rent, housing, lodging, payments in kind, tips and any other similar advantage received from the individual's employer or directly with respect to work for him."[12]

In *Burgess*, the Board found that the record established the employee received reimbursed expenses and "other advantages" as part of wages or remuneration in the form of free travel, lodging, food and transportation costs as a result of performing the duties of an escort for a travel service. Based on these reimbursed expenses and payments in kind, the Board found that appellant had "earnings" as defined under section 8106(c) which she was required to report to the Office. Similarly in *Barbara L. Kanter*,[13] the Board found that the employee received monetary remuneration from the sales of dogs from her self-employment as a dog breeder. The Board noted that appellant's self-employment activities were not so *de minimus* that her earnings did not have to be reported to the Office as required under the Act. In *James M. Steck*,[14] the Board found that appellant had earnings from his self-employment as a youth minister in that he received free housing, living expenses and utilities as remuneration for his work.

In this case, the Office found appellant forfeited her right to compensation for the period April 20, 1994 through March 31, 1995 on the basis that she knowingly failed to report her

[9] *William G. Norton, Jr.*, 45 ECAB 630 (1994); *Garry Don Young*, 45 ECAB 621 (1994); *Gregg B. Manston*, 45 ECAB 344 (1994); *Lewis George*, 45 ECAB 144 (1993).

[10] 20 C.F.R. § 10.125(c).

[11] 43 ECAB 449 (1992).

[12] *Id.* at 457, citing BLACK'S LAW DICTIONARY, (Special Deluxe, 5th ed. 1979).

[13] 46 ECAB 165 (1994).

[14] 49 ECAB ___ (Docket No. 95-2406, issued October 22, 1997).

employment on Office CA- 7 and 8 forms. The Office has not established, as required by section 8106(b), that appellant had "earnings" or other forms of remuneration from her activities at Acra Automotive. The evidence in this case does not establish that appellant received any wages, tips, or other similar advantage from the owner of Acra Automotive, Mr. Craig, who was appellant's fiancé, with respect to her activities, *i.e.*, in the form of a discount on automobile repairs or other services in exchange for her services.[15] The evidence clearly establishes that appellant engaged in work activities at Acra Automotive, for which she was not paid. With no evidence of the receipt of earnings or other remuneration from her efforts, however, the record provides no basis for invoking the penalty provision of section 8106(b)(2). This case is distinguishable from those instances where forfeiture has been invoked based on a claimant's self-employment in a family-owned business or where a personal financial interest is otherwise established as accruing to the benefit of the employee, members of his or her family, or other associates.[16] The record does not demonstrate any financial interest by appellant in Acra Automotive or that any benefit inured to her based on her activities.

As the record on appeal fails to establish that appellant had any earnings or other form of remuneration from her employment activities at Acra Automotive, the Board finds that the Office did not properly invoke the penalty provision under section 8106(b)(2). For this reason, the overpayment of compensation based on the application of the forfeiture provision in this case must be reversed.

[15] *Compare Cecil S. Ortagus*, 38 ECAB 141 (1986) (setting aside a period of forfeiture as there was no evidence that there were earnings); *Jack Langley*, 34 ECAB 1077 (1983) (noting the Office's application of the forfeiture provision of the Act is not proper where an employee has no outside earnings).

[16] *Compare Robert C. Gilliam*, 49 ECAB ___ (Docket No. 97-2588, issued September 17, 1998) (the employee owned and operated motor home rental companies); *Gary L. Allen*, 47 ECAB 409 (1996) (the employee had earnings from a lawn mowing service); *Gary Don Young*, 45 ECAB 344 (1994) (the employee received earnings under his wife's social security number); *Anthony Nobile*, 44 ECAB 268 (1992) (the employee operated a family liquor store).

The August 9, 1996 decision of the Office of Workers' Compensation Programs' hearing representative is hereby reversed.

Dated, Washington, D.C.
June 2, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member