

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOIS BRIDGEWATER and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Capitol Heights, MD

*Docket No. 99-2441; Submitted on the Record;
Issued February 21, 2001*

DECISION and ORDER

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

The issues are: (1) whether appellant forfeited her entitlement to compensation during the periods from February 6, 1990 to May 6, 1991 and January 21, 1992 to May 28, 1998 for knowingly omitting or underreporting earnings during these periods; (2) if so, whether appellant was without fault in the resulting overpayment of compensation in the amount \$78,364.38; (3) whether appellant received an overpayment of compensation in the amount of \$770.00 during the period from May 29 to November 7, 1998; and (4) whether the Office of Workers' Compensation Programs abused its discretion by deducting \$222.00 from each of appellant's continuing compensation payments to collect the overpayments.

On June 26, 1990 appellant, then a 42-year-old casual mailhandler, filed a claim for an injury to her low back and left shoulder sustained on June 19, 1990 by pulling hampers of mail. The Office accepted that appellant sustained an acute lumbosacral strain. Appellant received continuation of pay from June 20 to August 3, 1990, after which the Office began paying her compensation for temporary total disability.

By decision dated October 26, 1998, the Office found that appellant had forfeited her entitlement to compensation during the periods from February 6, 1990 to May 6, 1991 and January 21, 1992 to May 28, 1998 for knowingly omitting or underreporting earnings during these periods. On October 26, 1998 the Office also issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$78,364.38 due to her forfeiture of compensation. The Office found that appellant was at fault in the matter of the overpayment on the basis that she knew that she was not entitled to compensation for total disability while she was working and that she should have reported her earnings. On December 10, 1998 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$770.00 on the basis that she was "receiving compensation for temporary total disability and also had actual earnings for the period [May 29,] to [November 7, 1998]." The Office also found that appellant was at fault in the matter of this overpayment for the reason she knew or should have known that she was not entitled to compensation for total disability when she had actual earnings.

By decision dated January 7, 1999, the Office found that appellant received an overpayment of compensation in the amount of \$78,364.38 due to her forfeiture of compensation during the periods from February 6, 1990 to May 6, 1991 and January 21, 1992 to May 28, 1998. The Office found that appellant was at fault in the matter of the overpayment on the basis that she failed to furnish material information. The Office determined that the overpayment would be collected by deducting \$197.00 from appellant's continuing compensation checks. By decision dated January 10, 1999, the Office found that appellant received an overpayment of compensation in the amount of \$770.00 on the basis that she was "receiving compensation for temporary total disability and also had actual earnings for the period [May 29] to [November 7, 1998]." The Office also found that appellant was at fault in the matter of this overpayment for the reason she knew or should have known that she was not entitled to compensation for total disability when she had actual earnings.

The Board finds that appellant forfeited her entitlement to compensation during the periods from February 6, 1990 to May 6, 1991 and January 21, 1992 to May 28, 1998 for knowingly omitting or underreporting earnings during these periods.

Section 8106(b) of the Federal Employees' Compensation Act¹ provides in pertinent part:

"The Secretary of Labor may require a partially disabled employee to report her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the 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 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."

On May 6, 1991, April 21, 1993, May 20, 1994, May 23, 1995, April 23, 1996, May 2, 1997 and May 28, 1998, appellant completed Office CA-1032 forms. On all these forms but the last two, appellant indicated that she had not worked during the 15 months preceding her completion of the form. The evidence, however, shows that appellant worked for an employer or was self-employed during each of the 15-month periods covered by the CA-1032 forms she completed from May 6, 1991 to April 23, 1996: the Social Security Administration reported that appellant worked for Accounting Service Center in the last half of 1990, that she was self-employed in 1991 and that she worked for Hutch Temporaries in 1993 and for AAA Mailing in 1994. British Investment Group reported that appellant worked there from January 2 to April 3, 1996. Since appellant had earnings during the periods covered by these reports, she is

¹ 5 U.S.C. § 8106(b).

not entitled to compensation for any portion of the periods covered by these reports, even though during portions of those periods she had no earnings.²

On the CA-1032 form she completed on May 2, 1997 appellant reported that she worked for printing professionals for three days during February 1997. The Social Security Administration reported that appellant worked for this company in 1996 and appellant also worked for British Investment Group during the 15 months covered by the May 2, 1997 form. On the CA-1032 form she completed on May 28, 1998 appellant reported that she had worked for AAA Mailing in 1994 and that she had worked for printing professionals. Accustaff, Inc. reported that she worked for that company from May 1997 to March 29, 1998, earning a total of \$6,470.34. Appellant understated her earnings on the CA-1032 forms she completed on May 2, 1997 and May 28, 1998 and she, therefore, forfeited her entitlement to compensation during the 15 months covered by each form.

The Board finds that appellant's omissions and underreporting of earnings on her CA-1032 forms were "knowingly" done. By letters dated February 28, 1991, the Office advised appellant that she must notify the Office immediately if she returned to work, that she must return any checks received after her return to work and that compensation was paid on the basis of the difference between an employee's monthly pay and his or her wage-earning capacity as determined by the Office or by the employee's actual earnings. As appellant knew she had to report any earnings, her failure to do so supports the Office's determination that she knowingly omitted or underreported her earnings.³

The Board further finds that appellant was at fault in the matter of the overpayment of compensation in the amount of \$78,364.38 that arose from her forfeiture of compensation.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or 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 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."⁴ No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or, alternatively, "with fault," section 10.433 of Title 20 of the Code of Federal Regulations states in pertinent 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 *Armando Barbosa*, 36 ECAB 474 (1985).

³ *Charles Walker*, 44 ECAB 641 (1993).

⁴ 5 U.S.C. § 8129.

(2) Failed to furnish information which the individual knew or should have known to be material; or

(3) Accepted a payment which he knew or should have known to be incorrect.”⁵

Appellant failed to furnish information on her CA-1032 forms -- that she had earnings -- that she knew or should have known was material. She is, therefore, with fault in the creation of the overpayment arising from her forfeiture of compensation for omission or underreporting of her earnings.

The Board further finds that appellant did not receive an overpayment of compensation in the amount of \$770.00.

The Office found that appellant received an overpayment of compensation in the amount of \$770.00 on the basis that she had actual earnings during the period from May 29 to November 7, 1998, a period during which she received compensation for temporary total disability. The evidence, however, does not establish that appellant had any earnings during this period. On October 28, 1998 appellant reported that she last worked for Accustaff, Inc. on March 29, 1998; this was confirmed by the company’s July 30, 1998 letter to the Office. On July 13, 1998 the Office reduced appellant’s compensation effective May 3, 1997 based on her earnings at Accustaff, Inc., which the Office noted did not represent her wage-earning capacity. Under these circumstances, the Office’s July 13, 1998 reduction of appellant’s compensation effective May 3, 1997 constitutes a deduction of earnings and this deduction is applied only to the period of earnings.⁶ Given that appellant had no earnings from May 29 to November 7, 1998 and no loss of wage-earning capacity determination applying to that period, the Board finds that she did not receive an overpayment of compensation during that period.

The Board further finds that the Office improperly determined that the overpayment of compensation should be collected by deducting \$197.00 from each of appellant’s continuing compensation payments.

The Office’s regulation on collection of overpayments requires that the Office collect the overpayment by decreasing later payments of compensation but that it must “tak[e] into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”⁷ The Office’s January 7, 1999 decision does not indicate that any of these factors were considered in determining the rate of collection of the overpayment. The case will be remanded to the Office

⁵ 20 C.F.R. § 10.433.

⁶ See *Lawrence D. Price*, 47 ECAB 120 (1995) for a discussion of reductions of compensation for actual earnings that do not represent an employee’s wage-earning capacity.

⁷ 20 C.F.R. § 10.441(a).

for a determination of the appropriate amount by which to decrease appellant's future payments of compensation, taking into account the factors set forth in the Office's regulation.⁸

The decision of the Office of Workers' Compensation Programs dated October 26, 1998 is affirmed. The decision of the Office dated January 7, 1999, is affirmed with regard to the amount of the overpayment and the finding of fault; this decision is set aside with regard to the rate of collection of the overpayment. The decision of the Office dated January 10, 1999 is reversed.

Dated, Washington, DC
February 21, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁸ *William E. Steadman*, 38 ECAB 688 (1987).