U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THADDIS POUNCEY, JR. and ARMY & AIR NATIONAL GUARD, JACKSON BARRACKS, New Orleans, LA

Docket No. 99-647; Oral Argument Held July 25, 2001;
Issued October 2, 2001

Appearances: *Thaddis Pouncey, Jr., pro se*; *Thomas Giblin, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's position as a substitute teacher fairly and reasonably represented his wage-earning capacity; (2) whether the Office properly determined that appellant forfeited compensation from November 27, 1994 through December 29, 1996 because he knowingly failed to report his employment activities; (3) whether the Office properly denied appellant's request for a hearing as untimely filed; and (4) whether the Office properly found that appellant was at fault in the creation of an overpayment of $41,587.52 which was not subject to waiver.

On February 24, 1992 appellant, then a 24-year-old military pay clerk, filed a traumatic injury claim alleging that he hurt his back on that date when he fell off a step stool. On May 21, 1992, the Office accepted the claim for a lumbar strain and authorized payment of medical benefits. Appellant stopped work on April 27, 1992, and did not return. In a letter dated December 11, 1992, the Office notified appellant that he was entitled to monthly wage-loss compensation. This letter advised appellant that to avoid an overpayment of compensation, he must notify the Office immediately when he returned to work.

Appellant completed and signed forms in connection with his claims for disability compensation, including information requests dated February 27 and December 29, 1996, which covered November 27, 1994 through December 29, 1996.[1] On each of these forms, appellant stated that he was not employed at any time during the previous 15-month period. In addition, each of these forms stated that a false or evasive answer to any questions, or the omission of an

[1] Appellant dated this form December 29, 1997, however, this was clearly meant to be 1996, as the form was mailed to him by the Office on December 1, 1996, and was returned by appellant on February 5, 1997.

answer, might be grounds for forfeiture of compensation and subject the signer to civil liability, or, if fraudulent, might result in criminal prosecution.

On July 31, 1997, the Office received information that appellant had been working and referred this information to the Department of Labor's Office of the Inspector General (OIG) for investigation. In a March 2, 1998 report, the OIG indicated that appellant had received $9,578.25 in earnings for work as a substitute teacher in Detroit, Michigan, between December 1, 1995 and May 17, 1996. The OIG further reported, based on earnings records provided by the Detroit public school system, appellant worked an average of 32.36 hours a week as a substitute teacher.

On March 2, 1998, the Office decided that appellant no longer had an employment-related loss of wage-earning capacity, effective December 1, 1995, based on its determination that appellant's actual earnings as a substitute teacher fairly and reasonably represented his wage-earning capacity. In a second decision also dated March 2, 1998, the Office found that appellant had forfeited his right to compensation from November 27, 1994 through December 29, 1996, because he "knowingly" failed to report his earnings from his employment as a substitute teacher as required by section 8106(b) of the Act. Also on March 2, 1998, the Office issued a preliminary determination that a combined overpayment of compensation in the amount of $41,587.52 had occurred, comprised of $26,260.38 from the period of the forfeiture, and $14,327.14 from December 30, 1996 to February 28, 1998 when the Office terminated wage-loss benefits because appellant had the capacity to earn wages as a substitute teacher. The Office's preliminary determination advised appellant that he had 30 days to request a hearing.

On April 20, 1998 appellant completed an overpayment recovery questionnaire and requested an oral hearing. In a decision dated July 9, 1998, the Office denied appellant's request as untimely. The Office further found that the issue in this case could be equally well addressed by requesting reconsideration.

By decision dated September 10, 1998, the Office finalized its preliminary determination that appellant was at fault in the creation of an overpayment of $41,587.52 and directed him to repay the sum in full.

The Board finds that the Office improperly determined that the position of substitute teacher fairly and reasonably represented appellant's wage-earning capacity.

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[2] Section 8115(a) of the Federal Employees' Compensation Act[3] provides that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity…."[4] Generally, wages actually earned are the best measure of wage-earning capacity, and in the absence of evidence showing they do not

[2] *Curtis Hall*, 45 ECAB 316 (1994).

[3] 5 U.S.C. §§ 8101-8193

[4] *George E. Williams*, 44 ECAB 530, 533 (1993).

fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[5]

Appellant returned to work in a part-time capacity on December 1, 1995, working an average of 32 hours a week. While appellant held the position of substitute teacher for more than 60 days, this fact alone is insufficient to establish that the position represents his wage-earning capacity.[6] In concluding that the substitute teacher position represented appellant's wage-earning capacity, the Office neglected to consider that the position was a part-time position. Inasmuch as appellant's date-of-injury position was both full time and permanent, the Office erred in concluding that his part-time position as a substitute teacher fairly and reasonably represented his wage-earning capacity.[7] Therefore, the Office also improperly determined that an overpayment of $14,327.14 occurred because appellant had the capacity to earn wages as a substitute teacher after December 30, 1996.

The Board further finds, however, that the Office properly determined that appellant forfeited his compensation from November 27, 1994 through December 29, 1996 because he knowingly failed to report his employment activities.

Section 8106(b) of the Act[8] provides that a partially disabled employee must report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times specified by the Secretary of Labor. The penalty for failing to make an affidavit or report when required or knowingly omitting or understating any part of an employee's earnings is forfeiture of his right to compensation during the period for which the affidavit or report was required.[9]

To order that appellant should forfeit the compensation he received during the period, the Office must establish that he knowingly failed to report employment or earnings. As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings from employment. The inquiry is whether appellant knowingly failed to report his employment activities and earnings. The term "knowingly" is not defined within the Act or its implementing regulations. In common usage, the Board has recognized that the definition of "knowingly"

[5] 5 U.S.C. § 8115(a).

[6] Office procedure provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993). Appellant's was employed by the Detroit public school system from December 1, 1995 to May 17, 1996, when he was terminated from employment for violating a work rule. While appellant asserted that he actually stopped work in March 1996, even so he still worked more than the requisite 60 days.

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a)(1), (3) (July 1997); *Elbert Hicks*, 49 ECAB 283 (1998).

[8] 5 U.S.C. § 8106(b).

[9] *Charles Walker*, 44 ECAB 641 (1993).

includes such concepts as "with knowledge," "consciously," "intelligently," "willfully," or "intentionally."[10]

In this case, on February 21 and December 29, 1996 appellant signed affidavits covering the previous 15-month period. On each form he answered "no" to the questions, " Did you work for any employer during the past 15 months" and "Were you self-employed or involved in any business enterprise in the past 15 months." In signing each of the forms, appellant certified that he had not worked during the covered period. The forms advised him that he must report all employment. 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 compensation benefits under the Act might be subject to criminal prosecution.

In an investigative memorandum dated March 2, 1998, an employing establishment inspector stated that appellant had worked between December 1, 1995 and May 17, 1996 as a substitute teacher for the Detroit public school system. The investigative report contained copies of payroll records establishing that appellant worked part time as a substitute teacher earning $9.578.25.

The factual circumstances of record, including appellant's level of education and his signing of strongly-worded certification clauses on the forms, provide persuasive evidence that appellant "knowingly" understated his earnings and employment activities.[11] His failure to report his earnings and employment must be considered to have been made with knowledge of the reporting requirements. The Office, therefore, properly found that appellant forfeited his compensation from November 27, 1994 through December 29, 1996.[12]

The Board additionally finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act[13] provides as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative...."

[10] *Christine P. Burgess*, 43 ECAB 449 (1992).

[11] *Mamie L. Morgan*, 41 ECAB 661 (1990). Appellant earned a B.A. Degree from Loyola University in New Orleans, Louisiana, in May 1995.

[12] 5 U.S.C. § 8121 *et seq.*

[13] 5 U.S.C. § 8121 *et seq.*

The regulations interpreting the Act make clear that the request for a hearing must be postmarked within 30 days following the issuance of the decision.[14]

Although the envelope which contained appellant's request for a hearing is not contained in the record, appellant's letter was not signed until April 20, 1998. Because he did not request a hearing within 30 days of the March 2, 1998 compensation orders and notice, he is not entitled to a hearing as a matter of right.[15]

The Office, however, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a) are a proper interpretation of the Act and Board precedent.[16]

The Office in its June 9, 1998 decision noted that appellant's request for a hearing was untimely filed, and that consideration of the issue involved revealed that appellant could request reconsideration before the Office. Therefore, the Office properly exercised its discretion in denying appellant's request for a hearing.

Finally, the Board finds that the Office properly determined that appellant was at fault in creating an overpayment of compensation and that, therefore the overpayment was not subject to waiver.

Section 8129 of the Act provides that an overpayment of compensation shall be recovered by the Office 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."[17] Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.[18]

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:

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[14] 20 C.F.R. § 10.131(a).

[15] Regarding appellant's contention that he did not receive the March 2, 1998 decisions in a timely manner, under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual, and copies of the decisions show appellant's correct address of record. *See Clara T. Norga*, 46 ECAB 473 (1995).

[16] *Henry Moreno*, 39 ECAB 475 (1988).

[17] 5 U.S.C. § 8129.

[18] *See Linda E. Padilla*, 45 ECAB 768 (1994).

> (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.[19]

Section 10.320(c) of the Office's regulations provides in relevant part:

> "Whether an individual is 'without fault' depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual's understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which were not due, and ability to comply with any reporting requirements (*e.g.*, age, comprehension, memory, physical and mental condition).[20]

Based on the forfeiture of his right to compensation from November 27, 1994 through December 29, 1996, appellant received an overpayment in compensation for this period in the amount of $26,260.38. The record establishes that appellant had earnings from his work as a substitute teacher during this period and knowingly failed to furnish this material information to the Office. Appellant signed certification clauses on forms which advised him that he might be subject to civil, administrative or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. The evidence of record shows that he was aware or should have been aware of the materiality of the information that he had employment and earnings in connection with the Detroit public school system. Appellant was at fault in creating the overpayment and therefore, is not entitled to waiver of recovery of the amount of $26,260.38.[21]

[19] 20 C.F.R. § 10.320.

[20] 20 C.F.R. § 10.320(c).

[21] *See James H. Hopkins*, 48 ECAB 281 (1997). As the Office did not seek recovery of the overpayment from continuing compensation benefits under the Act, the Board does not have jurisdiction over the issue of recovery. *Robert S. Luciano*, 47 ECAB 793 (1996).

The Office of Workers' Compensation Programs' September 10, 1998 decision denying waiver of that portion of the overpayment created by the forfeiture, the June 9, 1998 decision denying appellant's request for a hearing, and the March 2, 1998 decision on the issue of forfeiture are hereby affirmed. The March 2, 1998 decision regarding appellant's ability to earn wages as a substitute teacher is hereby reversed.

Dated, Washington, DC
October 2, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member