

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL L. LEFFINGWELL and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Anchorage, AK

*Docket No. 00-1411; Submitted on the Record;
Issued January 25, 2002*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant forfeited his right to compensation from February 6, 1994 to July 20, 1996; (2) whether the Office of Workers' Compensation Programs properly found an overpayment of \$32,357.58 from February 6, 1994 to July 20, 1996, and June 28 to August 16, 1997; (3) whether the Office properly determined that appellant was at fault in creating the overpayment; and (4) whether the Office properly determined that the overpayment would be recovered by deducting \$300.00 every four weeks from appellant's continuing compensation.

The Office accepted an entrapment neuropathy of the elbows and wrists causally related to appellant's federal employment. Appellant stopped working in December 1987 and subsequently began receiving compensation for temporary total disability. By decision dated January 3, 1994, the Office reduced appellant's compensation to reflect his wage-earning capacity in the selected position of phlebotomist.

On December 1, 1994 appellant was convicted of violating Alaska Statutes 11.41.434(a)(1) and 11.31.100(a); the court ordered appellant committed to the Department of Corrections for seven years with two years suspended. Alaska Statute 11.41.434 is considered an unclassified felony.¹

Appellant did not notify the Office of his incarceration, and retained a Tacoma, Washington mailing address. While incarcerated, appellant completed two forms dated May 6, 1995 and April 6, 1996, reporting that he did not have any employment in the previous 15 months.

On August 20, 1996 appellant signed a written statement to employing establishment inspectors acknowledging that he had been incarcerated since 1994 and that he had set up a

¹ AS 11.41.434 is sexual abuse of a minor in the first degree; part (b) states that it is an unclassified felony.

mailing address so that the Office would believe he was not in prison. He stated that he worked at two jobs while incarcerated, in furniture upholstery and currently as a tailor. Appellant indicated that he did not report his income to the Office because he was afraid he would lose his compensation benefits.

In a decision dated August 28, 1996, the Office suspended payment of continuing compensation. Appellant was released from prison on June 28, 1997 and began receiving compensation payments. The initial payment covering June 28 to August 16, 1997 was issued for full temporary total disability, without reduction for wage-earning capacity.

In letters dated December 22, 1999, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred. For the period February 6 to April 6, 1994, the Office determined that appellant had forfeited his compensation by failing to disclose earnings, thereby creating an overpayment. The amount of the overpayment for this period was \$27,012.38. For the period April 7 to July 20, 1996, when compensation was suspended, appellant was not entitled to compensation under 5 U.S.C. § 8148, creating an overpayment of \$3,720.00. For the period June 28 to August 16, 1997, appellant was erroneously paid compensation without reduction for wage-earning capacity, creating an overpayment of \$1,625.00. The Office advised appellant that a preliminary determination had been made that he was at fault in creating the overpayments.

By decisions dated February 15, 2000, the Office finalized its preliminary determinations of overpayment and fault. The Office also found that the overpayment would be recovered by deducting \$300.00 every 28 days from appellant's continuing compensation.

The Board finds that the Office properly determined that appellant forfeited his compensation from February 6, 1994 to July 20, 1996.

Public Law No. 103-333, enacted on September 30, 1994, amended the Federal Employees' Compensation Act by adding section 8148, which provides for forfeiture of compensation benefits by an individual convicted of fraud with respect to receipt of compensation, and prohibits the payment of compensation benefits to an individual while incarcerated pursuant to a felony conviction. Section 8148(b) states:

“(1) Notwithstanding any other provisions of this chapter ... no benefits under this subchapter or subchapter III of this chapter shall be paid or provided to any individual during any period during which such individual is confined in a jail, prison, or other penal institution or correctional facility, pursuant to that individual's conviction of an offense that constituted a felony under applicable law.

“(2) Such individual shall not be entitled to receive the benefits forfeited during the period of incarceration under paragraph (1), after such period of incarceration ends.

“(3) If an individual has one or more dependents as defined under section 8110(a), the Secretary of Labor may, during the period of incarceration, pay to such dependents a percentage of the benefits that would have been payable to such

individual computed according to the percentages set forth in section 8133(a)(1) through (5).”

In the present case, appellant was convicted on December 1, 1994 of a felony violation under Alaska law; he was incarcerated from that date through June 1997. Under section 8148(b)(1), he thereby forfeits his compensation during the period of incarceration.

The Office has, however, also relied on an alternative ground for forfeiting appellant’s compensation. On May 6, 1995 and April 6, 1996 appellant completed Forms EN-1032 with respect to his employment activity. He indicated on the forms that he did not have any employment for which he received payment of any kind. The evidence of record, however, establishes that while incarcerated appellant did work and received wages for such work. In an August 20, 1996 statement to an employing establishment inspector, appellant acknowledged that while incarcerated he had worked as a furniture upholsterer. The Alaska Department of Corrections confirmed that appellant worked from March 1, 1995, primarily as an upholsterer and in the general labor pool. The pay rate for general labor was 30 cents per hour and appellant’s earnings were from approximately \$50.00 to \$90.00 per month.

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 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 ... under section 8129 of this title, unless recovery is waived under that section.”²

It is well established that “earnings” includes “gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration.”³ Appellant argues that there was no employer-employee relationship here, but the evidence establishes that he performed work and as result of that work he received an hourly wage. The Board finds that these wages constitute “earnings” under the Act. The EN-1032 required that appellant report all employment for which he received salary, wages, or payment of any kind. Appellant’s failure to report his earnings on the May 6, 1995 and April 6, 1996 Form EN-1032’s is an omission of earnings under section 8106.

² 5 U.S.C. § 8106(b).

³ 20 C.F.R. § 10.5(g)(1)(formerly 20 C.F.R. § 10.125(c)).

The term “knowingly” is not defined within the Act. In common usage, “knowingly” is defined as: “[w]ith knowledge, consciously, intelligently, willfully, intentionally.”⁴ In his August 20, 1996 statement, appellant stated that he was afraid he would lose his compensation while incarcerated and he set up a mail box address so that the Office would not be aware of his incarceration. He also acknowledged that he did not report his jobs on the 1032 forms and further stated, “I did not report the income from the two jobs while I was incarcerated because I could have lost my benefits if I did.” The Board finds that appellant’s August 20, 1996 statement clearly indicates that he was aware that the income from his prison employment should be reported on the EN-1032 forms. Appellant “knowingly” omitted his earnings on the Form EN-1032’s, and under section 8106 he forfeits compensation “with respect to any period for which the affidavit or report was required.” The EN-1032 form requests information with respect to the 15 months preceding completion of the form. Appellant therefore forfeits his compensation for the period February 6, 1994 to April 6, 1996 based on a knowing omission of earnings.

The Board further finds that the Office properly determined that an overpayment of \$32,357.58 was created.

From February 6, 1994 to July 20, 1996, the Office determined that appellant received \$30,732.38 in compensation for wage loss. Since appellant forfeited his compensation during this period, he was not entitled to compensation and the amount paid represents an overpayment of compensation. In addition, from June 28 to August 16, 1997, appellant was paid compensation for total disability, without reduction for his wage-earning capacity. Appellant should have been paid at a reduced rate, based on the January 3, 1994 Office decision. The Office properly determined that an overpayment of \$1,625.00 was created.

The Board finds that the Office properly denied waiver of the overpayment from February 6, 1994 to July 20, 1996.

Section 8129(b) of the Act⁵ provides: “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.”⁶ Waiver of an overpayment is not permitted unless the claimant is “without fault” in creating the overpayment.⁷

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”

⁴ See *Carl C. Green, Jr.*, 47 ECAB 737 (1996); see also 20 C.F.R. § 10.5(n).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8129(b).

⁷ *Norman F. Bligh*, 41 ECAB 230 (1989).

Appellant's failure to provide earnings information on the reporting forms implicates both the first and second standard. As the Board's finding on forfeiture illustrates, appellant knew that he did not provide material information with regard to earnings and he knew his statement that he had no employment activity was incorrect. Moreover, appellant's August 20, 1996 statement indicates that he knew he was not entitled to compensation while incarcerated. With respect to the period April 7 to July 20, 1996, appellant accepted payments that he knew or should have been expected to know were incorrect. Accordingly, he is properly found at fault with respect to the overpayment created from February 2, 1994 to July 20, 1996.

The Board finds, however, that for the period June 28 to August 16, 1997, the evidence is not sufficient to establish fault.

The memorandum accompanying the December 22, 1999 preliminary determination on overpayment states that appellant should have known that the June 28 to August 16, 1997 payment was incorrect because it was nearly twice his entitlement. The record indicates, however, that appellant had not been receiving compensation for approximately one year, that the payment represented his first since being released from prison, and that the period covered was more than the normal 28 days for compensation payments. Under these circumstances, the Board finds that the evidence is insufficient to establish that appellant should have known the payment was incorrect. On remand, the Office should consider the issue of waiver for the \$1,625.00 overpayment from June 28 to August 16, 1997.

The Board further finds that the Office improperly determined that the overpayment should be recovered by deducting \$300.00 every four weeks from appellant's continuing compensation.

Section 10.441(a) of the Office's regulations provides states that, with respect to collecting overpayments, the Office "shall decrease later payments of compensation, taking 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."⁸

In considering appellant's financial circumstances, the Office determined that appellant had a "total earning ability (LWEC [loss of wage-earning capacity] plus WEC [wage-earning capacity])" of more than \$2,000.00 a month. With monthly expenses of \$931.65 reported on the recovery questionnaire (OWCP 20), the Office found that appellant had discretionary income of more than \$1,000.00 per month. While noting that appellant reported \$3,370.00 in his current bank accounts, the Office appeared to rely primarily on its finding that appellant had monthly income of over \$1,000.00 in excess of expenses. In making this determination, the Office found that appellant's income included his "capacity" to earn additional wages; appellant's actual income was reported as approximately \$939.00 per month.⁹

The Board has never authorized the use of a wage-earning capacity determination in this manner. In overpayment determinations an individual's income includes funds that "may

⁸ 20 C.F.R. § 10.441(a).

⁹ This included approximately \$923.00 in compensation and \$16.00 in self-employment.

reasonably be considered available for his or her use,” such as government benefits, wages and self-employment income, investment income, regular payments such as rent or pensions, and alimony or child support.¹⁰ All of these are tangible sources of funds that are reasonably available to a claimant. A wage-earning capacity does not represent actual income and cannot be considered a relevant factor in collecting overpayments. The Board finds that the Office erred in considering appellant’s wage-earning capacity on the repayment issue. The case will be remanded for a proper consideration of the relevant factors under section 10.441(a).

The decisions of the Office of Workers’ Compensation Programs dated February 15, 2000 are affirmed with respect to forfeiture and amount of overpayment. With respect to fault, the decisions are affirmed as to the overpayment for the period February 6, 1994 to July 20, 1996; the decisions are reversed with respect to fault on the \$1,625.00 overpayment from June 28 to August 16, 1997, and the case remanded for consideration of waiver; and with respect to the repayment, the decisions are set aside and the case remanded for a proper determination as to repayment of the overpayment.

Dated, Washington, DC
January 25, 2002

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(2) (September 1994).