

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT K. SWETT and U.S. POSTAL SERVICE,
POST OFFICE, Portland, OR

*Docket No. 01-1018; Submitted on the Record;
Issued June 17, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his right to compensation in the amount of \$8,946.35 from August 8, 1992 to March 5, 1993 and from August 29, 1993 to April 1, 1994 because he knowingly failed to report earnings from his employment during this period; and (2) whether the Office properly determined that appellant was at fault in the creation of an overpayment, which was, therefore, not subject to waiver.

The Office accepted appellant's claim for a herniated disc at L5-S1 and paid appellant compensation for periods of wage loss from January 28, 1992 to September 16, 1994.

In an investigative memorandum dated April 21, 1994, the postal inspector, D.P. Callan, stated that appellant underwent a second surgery in April 1993 and subsequently alternated between being totally and partially disabled. Mr. Callan stated that from August 10, 1992 through March 5, 1993 and from August 22, 1993 through February 18, 1994 appellant received \$8,466.81 in gross compensation benefits. He found that appellant completed nine CA-8 forms (claims for continuing disability) during these time periods and left blank item "No. 9" where he was supposed to report any salaried employment. Mr. Callan stated that from August 1992 through February 1993 and from August 1993 through February 1994 appellant received five checks totaling \$8,205.00 for coaching basketball and football at the Lyman Moore Middle School. Appellant had provided his supervisors with letters from the athletic director from the Lyman Moore Middle School, which stated that he was coaching in the 1992 and 1993 season, described the coaching as a "civic duty" and did not mention that it was a salaried or paid position. By letters to his supervisors in 1992, appellant also specifically requested a change in his schedule to enable him to coach.

Mr. Callan stated that, based on interviews he had with postal inspectors and physicians, they interpreted "civic duty" referred to in the letters as a volunteer, nonpay or recreation-type coaching job. He stated that on March 10, 1994 a former Tour 2 superintendent, Robert Balko, stated that he was aware that appellant was coaching but he did not realize it was a paid job.

Further, on March 10, 1994 the injury compensation specialist, Greg Grassi, stated that his only knowledge of appellant's coaching was "Dr. Brinkman's memo reflecting the coaching position as being therapeutic." Mr. Callan stated that, on numerous dates between October 1993 and January 27, 1994, appellant was observed frequently bending, squatting, kneeling and stooping while coaching although he was unable to perform those activities in his job.

In a preliminary determination dated March 24, 1999, the Office found that an overpayment in the amount of \$3,065.17 had been created because appellant forfeited his compensation for the periods October 3, 1992 through March 5, 1993 and from October 16 through December 10, 1993 because he failed to report his earnings. The Office found that he was at fault in the creation of the overpayment.

By decision dated March 24, 1999, the Office finalized the preliminary determination, finding that appellant forfeited his right to compensation from October 3, 1992 through March 5, 1993 and from October 16 through December 10, 1993, that an overpayment was created in the amount of \$3,065.17 and that appellant was at fault in the creation of the overpayment. A decision dated April 7, 1999 duplicated verbatim the Office's March 24, 1999 decision.

By letter dated April 15, 1999, appellant requested an oral hearing before an Office hearing representative.

By decision dated August 16, 1999, the Office hearing representative found that the Office erred in its calculation of the time periods, in which the overpayment was created and in the amount of the overpayment. The Office, therefore, ordered that the preliminary determination dated March 24, 1999 and the March 24, 1999 decision be set aside and the case remanded for the Office to calculate the amount of compensation paid to appellant from August 8, 1992 through March 5, 1993 and from August 29, 1993 through April 1, 1994. The Office hearing representative instructed the Office to issue a new decision finding forfeiture during those time periods and to issue a new preliminary determination concerning the amount of the overpayment.

In a preliminary determination dated September 15, 1999, the Office found that appellant was overpaid in the amount of \$8,946.35 and that appellant was at fault in the matter of the overpayment because he failed to report his earnings. The Office referred to the memorandum to its Director dated September 15, 1999 for details.

By decision dated September 15, 1999, the Office found that appellant forfeited his compensation for the periods from August 8, 1992 through March 5, 1993 and from August 29, 1993 through April 1, 1994 for failure to report his earnings.

By letter dated October 5, 1999, appellant requested an oral hearing before an Office hearing representative, which was held on September 13, 2000. At the hearing, his representative, Robert Lloyd, stated that appellant went to the Office and asked Mr. Grassi how to complete the CA-8 forms and Mr. Grassi told appellant that it was not necessary for appellant to complete item No. 9 because his coaching involved work outside the scheduled work hours. Mr. Lloyd stated that appellant also asked the nurse who was treating him, Ms. Stemple, with help to complete the forms and also discussed how to complete the forms with the office

manager, Doug Bailey, who accepted the way appellant completed it. He stated that the Portland office had one “outlook,” *i.e.*, item No. 9 did not have to be completed and the Boston office had “another.” Mr. Lloyd stated that for a couple of years, that Boston office accepted the Form CA-8 with item No. 9 left blank and granted appellant a change of schedule to go out and do his coaching duties in the local community within his limitations and restrictions.

During his testimony, appellant reiterated that he went over the paperwork with his rehabilitation nurse, Ms. Stemple, that he discussed it with Mr. Grassi and that everyone knew of his coaching but he was told he did not have to report earnings from coaching because it was after work hours. He stated that he was “not trying to take advantage” of the Office. Appellant testified that he performed his coaching duties prior to his injury as well. He described some of the history of his injury, the surgery he underwent on December 11, 1991 and his second surgery. Appellant testified that he had no idea who initiated the investigative memorandum. He testified that, over the past 10 years, he did not remember coaching when he was unable to work. Appellant testified that he completed the paperwork the “best” that he could. He testified that he would probably need to obtain a loan if he was required to pay back the money.

Appellant submitted an overpayment recovery questionnaire dated October 2, 2000, showing that he had total monthly income of \$5,000.00, total monthly expenses of \$3,839.00 and total funds of \$163,333.00. He indicated that he was not receiving monetary compensation.

By decision dated December 4, 2000, the Office hearing representative affirmed the Office’s September 15, 1999 decision and finalized the preliminary overpayment determination. The hearing representative directed that appellant remit \$200.00 monthly to repay the overpayment.

The Board finds that appellant forfeited his right to compensation from August 8, 1992 to March 5, 1993 and from August 29, 1993 to April 1, 1994 because he knowingly failed to report earnings from salaried employment during this period.

Section 8106(b) of the Federal Employees’ Compensation Act provides that 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.”¹

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. Appellant can be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) only if he “knowingly” failed to report employment or earnings.² The term “knowingly” is not defined in the Act or its implementing regulations. In common usage, the

¹ 5 U.S.C. § 8106(b).

² *Robert Ringo*, 53 ECAB _____ (Docket No. 99-2281, issued December 11, 2001); *Barbara L. Kanter*, 46 ECAB 165 (1994).

Board has recognized that the definition of “knowingly” includes such concepts as “with knowledge,” “consciously,” “intelligently,” “willfully” or “intentionally.”³

The evidence of record establishes that appellant earned income as a football and basketball coach at the Lyman Moore Middle School from August 1992 through February 1993 and from August 1993 through February 1994. The evidence also establishes that, from September 14, 1992 through April 1, 1994, appellant submitted nine CA-8 forms, approximately covering the periods from August 8, 1992 through April 1, 1994 and that appellant did not report on item No. 9 of any of these forms that he had earnings from employment and in fact left the box blank. The CA-8 forms appellant completed during the relevant time periods clearly state that appellant should report any earnings from employment. They advise the signer that any person who knowingly makes “any false statement, misrepresentation, concealment of fact or any other act of fraud” in order to obtain compensation under the Act is subject to various civil, administrative and criminal penalties. Specifically, Form CA-8 requires that the injured employee provide certain information if he or she “worked anywhere” during the period of compensation claimed.⁴ Since appellant did not respond to the questions regarding employment and earnings on the CA-8 forms he submitted, he knowingly failed to report earnings during the time period in question, and forfeited his compensation for the time periods from August 8, 1992 to March 5, 1993 and from August 29, 1993 to April 1, 1994.⁵

Appellant contends that he was informed by certain individuals at the employing establishment that it was unnecessary to complete item No. 9 on the CA-8 claim form. In essence, appellant’s argument is that the overpayment arose based on misinformation provided by government employees such that the Office should be estopped from finding that appellant received an overpayment of compensation. In *Office of Personnel Management v. Richmond*,⁶ the United States Supreme Court held that judicial use of equitable estoppel cannot grant a claimant a money remedy that Congress has not authorized. In *John L. Wolf*,⁷ the Board noted that the employee could not invoke equitable estoppel to keep funds he had received contrary to the statutory provisions of the Act. Assuming therefore that appellant received erroneous information from individuals at the employing establishment concerning his completion of Office CA-8 claim forms, this would not preclude the Office from seeking recovery of the overpayment in this case. As noted above, however, it does not appear that appellant ever advised those he spoke to that his coaching position earned income payable to him. This further supports that appellant “knowingly” omitted his earnings.

³ *BLACK’S LAW DICTIONARY* (5th ed. 1979); see *Linda L. Coggins*, 51 ECAB ____ (Docket No. 98-172, issued January 24, 2000); *Glenn Robertson*, 48 ECAB 344, 349 (1997).

⁴ Item No. 9 on Form CA-8 requests information about salaried employment and commission and self-employment, including name and address of business or employer, dates and hours worked, pay rate, total amount earned or income derived and type of work activity performed. With respect to commission and self-employment, Form CA-8 instructs the employee to “show all activities, whether or not income resulted from [such] efforts.”

⁵ *Linda L. Coggins*, *supra* note 3; *Glenn Robertson*, *supra* note 3; *James H. Hopkins*, 48 ECAB 281, 286-87 (1997).

⁶ 496 U.S. 414 (1990).

⁷ 48 ECAB 148, 154 (1996).

The Board finds that the Office properly determined that appellant was at fault in the creation of the \$8,946.35 overpayment which, therefore, was not subject to waiver.

Section 8129(b) of the Act⁸ provides that “[a]djustment 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 this subchapter or would be against equity and good conscience.” Section 10.433 of the Office’s implementing regulations⁹ provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(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 to be incorrect.”

The Board finds that appellant failed to furnish information to the Office, which he knew was material, when he knowingly failed to report his earnings from his coaching employment in the relevant CA-8 forms. Pursuant to section 8106(b), appellant has forfeited his right to compensation during those periods. This forfeiture has resulted in an overpayment of compensation in the amount of \$8,946.35 and appellant is at fault in the creation of this overpayment. Accordingly, no waiver of collection of the overpayment is possible under section 8129(b) of the Act.

Finally, regarding repayment of the overpayment in compensation, the Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where, as in this case, a claimant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.¹⁰

⁸ 5 U.S.C. § 8129(b).

⁹ 20 C.F.R. § 10.433.

¹⁰ See *Robert S. Luciano*, 47 ECAB 793 (1996).

The December 4, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 17, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member