U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH ALEXANDER and U.S. POSTAL SERVICE,
POST OFFICE, South Suburban, IL

Docket No. 01-1564; Submitted on the Record;
Issued November 14, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective September 8, 1999; (2) whether the Office properly found that appellant forfeited her compensation from July 27, 1989 through July 22, 1999; (3) whether the Office properly found that an overpayment of $215,962.06 was created; (4) whether the Office properly found appellant to be at fault in creating the overpayment; and (5) whether the Office properly denied appellant's request for a postponement of her hearing.

On March 2, 1989 appellant, then a 41-year-old mailhandler sustained injuries to her back while lifting trays of mail in the course of her federal employment duties.[1] On March 15, 1989 the Office accepted appellant's claim for a lumbosacral strain and paid appropriate compensation and benefits.

Dr. Jerome J. Frankel, a Board-certified internist and appellant's treating physician, reported from August 11, 1989 to August 1994 that appellant could not work an eight-hour day and was suffering from a low back strain, bulging discs at L4-5, and deconditioning syndrome.

On or about September 13, 1989 a CA-1049 form was issued to appellant notifying her of her placement on the periodic rolls and advising her of her entitlement to ongoing disability payments. The form advised:

> "If you return to your former job or employer or obtain any other employment, submit the following information to the Office at once: (1) Name and address of employer; (2) Date you returned to work; (3) Type of work you are performing; (4) Your weekly pay rate; and (5) Number of hours worked per week. Your rate

[1] The record reveals that appellant was involved in a nonwork-related motor vehicle accident on July 7, 1989. The evidence also shows that appellant injured her back on June 22, 1994 when she fell in a store.

of pay should include not only cash but also 'wages in kind,' such as board and lodging."

Further, the form indicated:

"If you are self-employed (such as farming, operating a store or business, etc.) your rate of pay should be what it would have cost you to hire someone else to do the same work."

The Office advised appellant that "In order to avoid an overpayment of compensation NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this Office, even if you have already advised the [Office] that you are working."

Further, the Office sent appellant several CA-1032 forms requesting employment information. The form letters stated:

"1. Employment other than Self-Employment. Under this heading, you must report all employment, other than self-employment, for which you received salary, wages, sales commissions, piecework, or other payment. If you performed work in furtherance of a relative's or spouse's business, you must show as 'rate of pay' what it would have cost the employer or organization to hire someone to perform the work you performed. The value of housing, meals, food allowance, clothing, equipment, reimbursed expenses in a business, corporation, partnership or sole proprietorship, or other things of value must be included in the rate of pay.

"2. Self-Employment. Earnings from self-employment (such as farming, sales, service, operating a store, business, etc.) must be report. Report any such enterprise in which you worked, and from which you received revenue, even if it operated at a loss or if profits were reinvested. You must show as 'rate of pay' what it would have cost you to have hired someone to perform the work you did."

On a May 10, 1990 CA-1032 form, appellant responded "no" to question one. In response to question two, appellant also checked "no."

In a May 1, 1991 CA-1032 form, appellant responded "no" to question one. In response to question two, appellant answered "no."

In a May 1, 1992 CA-1032 form, appellant responded "no" to both questions.

In a May 10, 1993 CA-1032 form, appellant again responded no the questions.

In April 22, 1994 and April 21, 1995 CA-1032 forms, appellant responded "no" to both questions.

On February 28, 1995 the Office referred appellant to Dr. Richard H. Sidell, a Board-certified orthopedist, for a second opinion examination and evaluation.

In an April 4, 1995 report, Dr. Sidell indicated that appellant's back appeared normal to inspection and there was no evidence of muscle irritability. He found that appellant's range of motion of the lumbar spine was not too limited, but did demonstrate some stiffness, he noted that extension was full to 20 degrees with some complaint of discomfort. Dr. Sidell found that lateral bending was normal to 30 degrees and the toe to heel stand was normal. He found that there were no radicular symptoms and the stretch test and bowstring test were negative. Dr. Sidell found that the hip range of motion was full and the deep tendon reflexes were physiologic. Further, Dr. Sidell found that appellant's sensory examination and motor examinations were normal. He reviewed the diagnostic test results and noted that they were normal." Dr. Sidell diagnosed chronic pain syndrome. He explained that there were very minimal objective findings present. Dr. Sidell noted that appellant presented a severe case of deconditioning and chronic mild low back pain syndrome. He explained that there was no way that he could significantly relate the long-term problems to the specific injury of March 2, 1989, finding no objective findings other than appellant's symptoms and complaints of pain. He concluded that there were no objective findings, stemming from the accepted work-related injury, to support appellant's continued disability.

On June 2, 1995, during a telephone conversation with the claims examiner, appellant acknowledged that she was the owner/director of a day care center. She insisted that she did not perform any physical duties or receive any income from the family-owned business.

In her July 26, 1995 Form EN-1032, appellant responded "no" to question one, but reported "yes" and "no" to question two regarding employment and self-employment. Appellant explained that she was a corporation president and major decision-maker in a business enterprise.

By letter dated March 18, 1996, the Office requested additional information about appellant's self-employment at the Prince and Princess Day Care Center.

By letter dated April 18, 1996, appellant indicated that she did not receive income from the business, but noted that she received corporate distributions as a shareholder. She stated that she did not perform any specific duties or render any services.

By letter dated February 12, 1997, the Office requested additional information from Dr. Jerome J. Frankel, appellant's treating physician.

In a report dated February 27, 1997, Dr. Frankel responded to the Office's request and reported that appellant's current condition was the direct result of the work injury in 1989. Dr. Frankel again noted that appellant was unable to work as a mailhandler.

By letters dated April 22, 1997, the Office referred appellant, a statement of accepted facts and the medical record, to Dr. Shing I. Yen, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve a conflict in the medical evidence.

In a May 1, 1997 CA-1032 form, appellant responded "no" to question one. In response to the question two, "[w]ere you self-employed or involved in any business enterprise in the past

15 months?," appellant also checked "no." She noted that she was a corporate shareholder and no work was involved.

In an undated report received by the Office on May 15, 1997, Dr. Yen reported that his examination revealed a very generalized type of nonspecific pain in the right side of the lower back. He added that there was no sign of muscle atrophy or nerve impingement and no medical reason for appellant's inability to work. Dr. Yen indicated that he suspected that there was an emotional component to appellant's continued complaints of disability. He indicated that appellant was able to work, in a very limited capacity initially, with no lifting over 20 pounds and limited bending and lifting. Dr. Yen concluded that appellant would be able to return to work in a full-duty capacity. In a supplemental report dated July 24, 1997, Dr. Yen stated that there were no neurological findings and only localized muscle pain. Dr. Yen opined that the condition was mild and that appellant had recovered from the work-related low back strain. Dr. Yen indicated that his opinion was based on the normal physical examination findings and lack of objective findings to support the claimed subjective complaints of pain.

By letters dated January 16, 1998, appellant was also referred to Dr. Marie-Claude Rigaud, a Board-certified psychiatrist, for a second opinion evaluation on February 6, 1998. Dr. Richard Alford, a psychologist, also examined appellant.

In a February 9, 1998 report, Dr. Rigaud concluded that appellant did not meet any of the DSM-IV criteria for any of the mood disorders including major depression. She indicated that appellant could return to work. In a June 17, 1998 addendum, Dr. Rigaud confirmed that appellant had pain associated with psychological factors, that were chronic; however, they were not associated with the March 2, 1989 injury.

In an April 21, 1998 CA-1032 form, appellant again checked "no" to both questions regarding employment on the CA- 1032 form.

On June 8, 1998 the Office received a June 4, 1998 investigative report conducted by postal inspectors from March 1994 to June 1995. The report documented surveillance of appellant on April 13, 1994, at a restaurant, moving about without any apparent pain or discomfort; on May 10, 1994, gardening in her yard with no obvious signs of discomfort; and on June 21, 1994 at Harrah's Casino. It also included surveillance of appellant bending, twisting and sitting for three and a half hours, and on June 13, 1995, at a park picking up children, pushing them on a swing, and running to attend to the children. The report documented appellant or her known automobile at the Prince and Princess Day Care Center from October 13 to December 27, 1994 on 18 occasions for as long as 9 or 10 hours a day. The report noted that, on April 3, 1995, appellant confronted the investigator and asked why she was being followed. Further, the surveillance also included a witness statement from an undercover agent who received a guided tour of the facility on April 21, 1995 by appellant, who stated that the "school had been there for 26 years and she had been there for 25 years." Additionally, documents were obtained showing that the day care business was started in 1968 and incorporated on June 17, 1968, noting that it was sold to appellant in May 1993 for $55,000.00. The Prince and Princess facility was identified as a corporation and privately owned small business with annual sales estimated at $42,000.00. In one corporate document, appellant was listed as the registered agent and the last agent change was noted as July 8, 1993. In a licensing compliance record dated

July 27, 1989, appellant was listed as a teacher with eight years of early childhood experience. It was also confirmed that licensing documents identified appellant as president, registered agent, a teacher, childcare worker and administrative director of the day care center. Further, appellant's intent on continuing work at the center was noted on applications for licensing dated August 30, 1989 when the facility was sold to appellant when her loan went through. Appellant was also listed as employed with the facility on a form entitled "information on person employed in a child care facility" listing her as a child care worker employed since December 1967. The record also contained statements from Earl McKinney, President of Tri-State Investments, Inc., Jean McKinney, and Alice Arnold, dated July 24, 1989, where they indicated that appellant was qualified to own and operate a day care center. The record also contains various documents indicating that appellant was running the business, including license renewal applications, position dates with appellant as director since 1968.

In a June 13, 1998 report, Dr. Alford diagnosed pain disorder associated with psychological factors and indicated that appellant's lumbosacral strain played only a minor role in appellant's pain disorder and was not a factor in her continued claims of disability.

In a September 9, 1998 addendum, Dr. Rigaud noted that appellant's lumbar strain played a minor role in the onset of the Axis I, pain disorder, noting that it had no direct relationship to the lumbosacral strain, but was directly linked to Axis II, personality patterns of adjustment, which related in some manner to appellant's experience of pain.

On July 23, 1999 the Office proposed to terminate appellant's entitlement to compensation benefits as the weight of medical evidence established that her work-related lumbosacral strain had resolved and there was no psychiatric condition related to the work injury.

In her July 27, 1999 CA-1032 form, in response to question two, "[w]ere you self-employed or involved in any business enterprise in the past 15 months?," appellant also checked "no." She added; "[h]owever, I do hold ownership interest in Prince and Princess Day Care Center, Inc."

By letter dated August 18, 1999, appellant disagreed with the proposed decision to terminate her entitlement to benefits and enclosed an August 3, 1999 report from Dr. Frankel, who advised that appellant's condition had not resolved, the most likely cause of her disability was the deconditioning syndrome and nerve damage, and that she remained disabled. Further, he advised that the reports of personality patterns of adjustment, obsessive compulsion and histrionic features were not present in appellant over his long period of observations and there was no sign of a psychiatric condition.

By decision dated September 8, 1999, the Office terminated appellant's compensation benefits effective September 8, 1999 on the grounds that her work-related lumbar strain had resolved.

By decision of September 8, 1999, the Office found that appellant had forfeited her entitlement to monetary compensation for the period July 27, 1989 through July 27, 1999 on the grounds that she knowingly failed to report her self-employment and earnings during that period.

By separate letter dated September 8, 1999, the Office advised appellant of a preliminary finding of an overpayment of compensation in the amount of $215,962.06 for the period July 27, 1989 through July 27, 1999. A preliminary finding was also made that appellant was at fault in the creation of the overpayment on the basis that she knowingly withheld information concerning the nature and extent of her self-employment activities with the Prince and Princess Day Care Center. In addition, a preliminary finding was made that appellant failed to furnish complete and accurate information concerning her earnings from self-employment activities which she knew or should have known to be material and relevant to her claim.

By letter dated September 23, 1999, appellant's representative requested an oral hearing.

The hearing was scheduled for February 24, 2000 in Chicago, Illinois.

By letter dated February 18, 2000, the Office received a letter from the attorney's office requesting a postponement as the attorney had suffered a heart attack on February 15, 2000.

By letter dated March 1, 2000, the Office advised appellant's attorney that a telephone conference should be considered in lieu of rescheduling the oral hearing.

On April 18, 2000 the attorney's secretary advised the Office that he would like to schedule a hearing by telephone but he was still recuperating.

On April 21, 2000 the attorney was advised that a postponement could not be granted for the oral hearing and if he wanted to pursue this avenue, the request needed to be made in writing.

By letters dated June 16, 2000, the Office indicated that appellant had made a timely request for an examination of the written record and a decision would be forthcoming.

By letter dated June 26, 2000, appellant requested a postponement.

By decision dated November 22, 2000, an Office hearing representative affirmed the September 8, 1999 decision to terminate appellant's benefits on the grounds that her work-related disability had ceased.

By decision dated November 22, 2000, an Office hearing representative affirmed the September 8, 1999 forfeiture decision finding that appellant was at fault in creating the overpayment and that there was an overpayment in the amount of $215,962.06.

The Board finds that the Office properly terminated appellant's compensation benefits effective September 8, 1999 on the grounds that her work-related condition had ceased.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify 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

[2] *Lawrence D. Price,* 47 ECAB 120 (1995).

has ceased or that it is no longer related to the employment.[3] The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

In this case, the Office accepted that appellant sustained a lumbosacral strain and paid appropriate benefits. Appellant's physician, Dr. Frankel, reported that appellant had continuing total disability, while Dr. Sidell, the physician to whom appellant was referred for a second opinion, indicated that appellant had no objective findings stemming from the work-related injury to support appellant's continued disability. Based on this conflict in medical opinion, as to whether appellant continued to have residuals of her accepted employment injuries and remained disabled for work, the Office referred appellant to Dr. Yen for an impartial examination.[5]

The Board finds that, at the time the Office terminated medical benefits, the weight of the medical evidence rested with Dr. Yen who submitted a thorough medical opinion based upon a complete and accurate factual and medical history. He performed a complete examination, reviewed the record and advised that appellant had no continued disability from her accepted employment injury, was capable of performing her usual employment and that further medical treatment was unnecessary. Dr. Yen reviewed the medical evidence noting that she had a very generalized nonspecific pain in the right side of the lower back. He also observed subjective complaints from appellant when he performed specific tests on appellant and there were little objective findings to substantiate appellant's complaints. Dr. Yen concluded his report by indicating that there were no neurological findings and only localized muscle pain and that appellant had recovered from her work-related low back strain. He also noted that there may be an emotional component to appellant's condition and suggested a psychiatric examination.

When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6] The Board finds that the report of Dr. Yen represents the weight of medical opinion in this case and contains a well-rationalized opinion negating any continuing residuals due to the accepted employment injuries.

Further, Dr. Rigaud's opinion that appellant did not have a work-related psychiatric disorder was the only rationalized opinion from a psychiatrist. Dr. Alford also was of the same opinion. Dr. Frankel concurred that he did not believe that appellant had a psychiatric condition.

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[3] *Id; see Patricia A. Keller,* 45 ECAB 278 (1993).

[4] *Raymond W. Behrens,* 50 ECAB 221 (1999).

[5] 5 U.S.C. § 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third person shall be appointed to make an examination to resolve the conflict. *Henry P. Eanes,* 43 ECAB 510 (1992).

[6] *Carl Epstein,* 38 ECAB 539 (1987); *James P. Roberts,* 31 ECAB 1010 (1980).

The weight of the medical opinion evidence, Dr. Yen's and Dr. Rigaud's reports, support the Office's termination of appellant's compensation benefits effective September 8, 1999. The burden of proof, thereafter, shifted to appellant.[7]

Appellant submitted a report dated August 3, 1999 from her treating physician. Dr. Frankel, who continued to state that appellant was totally disabled and could not return to her preinjury job. However, he did not explain how and why the accepted employment injury would continue to cause appellant's continuing disability for work or how the employment injury would have caused her condition. Dr. Frankel did not explain how she continued to be disabled due to the employment injury as opposed to her 1989 motor vehicle accident or June 22, 1994 fall in a store. Further, he did not explain how such a lumbosacral strain would continue for 10 years. Without such medical rationale addressing the crucial issues of causal relationship and continuing disability, his reports are of greatly diminished probative value.[8] Furthermore, as Dr. Frankel was on one side of the conflict that Dr. Yen resolved, the additional report from Dr. Frankel is insufficient to overcome the weight accorded Dr. Yen's report as the impartial medical specialist or to create a new conflict with it.[9]

As the weight of the medical evidence establishes that appellant has no employment-related condition or residuals after September 8, 1999, the Office met its burden of proof to terminate appellant's compensation benefits.

The Board finds that the Office properly found that appellant forfeited her compensation for the period July 27, 1989 through July 22, 1999.

[7] After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability, which continued after termination of compensation benefits. *Talmadge Miller,* 47 ECAB 673, 679 (1996); *Wentworth M. Murray,* 7 ECAB 570, 572 (1955).

[8] *Lucrecia M. Nielsen,* 42 ECAB 583 (1991).

[9] *Dorothy Sidwell,* 41 ECAB 857, 874 (1990).

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

> "The Secretary of Labor may require a 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."[10]

Section 10.5(g) of the implementing regulations defines "earnings" to include "a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration."[11] Section 10.529 provides that an employee who knowingly omits or understates any earnings or work activity in making a report shall forfeit the right to compensation with respect to any period for which the report was required.[12]

An employee can only be subjected to the forfeiture provision of section 8106 of the Act if he or she "knowingly" omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. The Office procedure manual recognizes that forfeiture is a penalty[13] and, as a penalty provision, it must be narrowly construed.[14] The term "knowingly" is not defined within the Act or its regulations. In common usage, "knowingly" is defined as: "[w]ith knowledge; consciously; intelligently; willfully; intentionally."[15]

In this case, the Office determined that appellant forfeited her right to compensation for the period July 27, 1989 to July 22, 1999 because she did not indicate on her CA-1032 forms that she was self-employed by the Prince and Princess Day Care Center. Documentation contained in the investigative report shows corporate documents identifying appellant as a teacher with the day care center as far back as July 27, 1989 with eight years of experience. The documentation shows that the facility was sold to appellant in May 1993 for $55,000.00. The Prince and Princess facility was identified as a corporation and privately owned small business with annual

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[10] 5 U.S.C. § 8106(b).

[11] 20 C.F.R. § 10.5(g) (1999).

[12] 20 C.F.R. § 10.529.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

[14] *See Christine P. Burgess*, 43 ECAB 449, 458 (1992).

[15] BLACK'S LAW DICTIONARY (5th ed. 1979); *see Linda L. Coggins*, 51 ECAB 300 (2000); *Glenn Robertson*, 48 ECAB 344, 349 (1997).

sales estimated at $42,000.00. In one corporate document, appellant was listed as the registered agent and the last agent change was noted as July 8, 1993. It was also confirmed that licensing documents identified appellant in various capacities within the corporation as president, registered agent, a teacher, childcare worker, and administrative director of the day care center. Appellant was also listed as employed with the facility on a form entitled "information on person employed in a child care facility" listing her as a child care worker employed since December 1967. The record also contained statements from Mr. McKinney, President of Tri-State Investments, Inc., Ms. McKinney, and Ms. Arnold, dated July 24, 1989, wherein they indicated that appellant was qualified to own and operate a day care center. These statements confirm that appellant was performing duties in furtherance of the facility. The record contains various other documents indicating appellant was running or participating in the business, including license renewal applications and position dates showing appellant as director since 1989. Additionally, the report confirms that appellant was observed on at least 18 occasions for 9 to 10 hours a day at the center, and conducted a tour to a prospective family, that she had been with the center for 25 out of its 26 years and passed out her card identifying herself as the assistant director of the day care center.

Appellant submitted Office CA-1032 forms and EN-1032 forms dated May 10, 1990, May 1, 1991, May 1, 1992, May 10, 1993, April 22, 1994, April 21, 1995 and April 21, 1998, in which she indicated that she had not been employed or self-employed during each of the previous fifteen months. She also confirmed in her CA-1032 form dated July 26, 1995 that she was a corporation president and major decision-maker of the day care center. In a statement dated April 18, 1996, appellant stated that she did not receive any payment from the company, only corporate distributions as a shareholder. In her May 1, 1997 CA-1032 form, she indicated no to questions one and two but said she did receive shareholder distributions and did not work. In her CA-1032 form dated July 27, 1999, she also answered no to question one and two. However, in question two, acknowledged that she was a president. The record thus demonstrates that she worked at a family-owned business but did not report as income, on Office 1032 forms what would have had to be paid to someone else to perform such duties. Appellant contended that she was unaware of this requirement and received no remuneration for her duties. While the Board has distinguished between income received from investment and earning received from performing work, appellant's business activities were not passive in nature.[16] The evidence of record reflects appellant's activities in managing the day care center can be considered employment from which she derived earnings as a product of her work. The investigative report documents that appellant did perform activities such as showing prospective clients the facility, tending to construction matters, watching the children and ensuring that employees are performing their duties, and obtaining licensing. In the instant case, appellant signed the EN-1032's dating from May 10, 1990 to July 27, 1999 covering the period March 1989 to July 27, 1999. In each of these forms, she was clearly informed earnings from self-employment (such as farming, sales, service, operating a store, business, etc.) must be reported and to report any such enterprise in which she worked and received revenue, even if it operated at a loss or if profits were reinvested. She was also informed that she must show as 'rate of pay' what it would have cost to have hired someone to perform the work she did. Appellant did not report her self-

[16] *See Anthony V. Knox*, 50 ECAB 402 (1999).

employment as required. Although she acknowledged that she was a corporation president on June 2, 1995, she continued to insist that she did not perform any work activities or receive any income from the business. In her subsequent EN-1032 forms dated July 26, 1995 and May 1, 1997, she stated no to questions one and two, and added that she was a corporate president. In the EN-1032 dated April 21, 1998, she merely stated no to both questions and in the EN-1032 dated July 27, 1999, she answered no to both questions and added that she had an ownership interest in the Prince and Princess Day Care Center. The record reflects that appellant was made aware of the reporting requirement but did not report what it would cost to hire someone else to do the same work. The record establishes that appellant was doing work required as an owner of a day care center and performing work in the form of a teacher, administrator, director and president in some capacity or another for at least 25 years. The Board, therefore, finds that the Office properly determined that appellant knowingly omitted and or understated her earnings for the period July 27, 1989 to July 22, 1999, in violation of 5 U.S.C. § 8106(b) and, thereby, forfeited the total amount of compensation she received for that period.

The Board also finds that an overpayment of $215,962.06 in compensation occurred as a result of the forfeiture.

On August 26, 1999 the Office generated a computer printout of all compensation payments made from September 8, 1989 to July 22, 1999. The printout documents the payment of $215,962.06 in gross compensation from September 8, 1989 to July 22, 1999. Appellant forfeited her right to this compensation during this period, creating the overpayment found in this case.

The Board further finds that appellant is at fault in creating the overpayment.

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, an overpayment cannot be waived by the Office unless appellant was without fault.[18]

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

"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

[17] 5 U.S.C. § 8129.

[18] *See, e.g., Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

(3) Accepted a payment which he or she knew or should have known to be incorrect."[19]

In this case, the Office applied the second standard in determining that appellant was at fault in creating the overpayment. Appellant is at fault under the second standard because she stated that she was not employed between July 27, 1989 to July 22, 1999 when, in fact, the record establishes that she was working under various titles and duties as a corporation president, assistant director, tour guide, coordinator, teacher and owner with the Prince and Princess Day Care Center. Appellant knowingly failed to disclose this information to the Office. The forms plainly advised appellant that she must report earnings from self-employment regardless of income. Finally, upon realizing that she was under surveillance, appellant alluded to her role in the business. The evidence is sufficient to show that appellant failed to provide information which she knew or should have known to be material. The Board finds that the Office properly determined that appellant was not without fault in the creation of the overpayment of compensation under section 8129 and therefore the overpayment was not eligible for waiver.[20]

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

Section 10.622(b) states that the Office will entertain any reasonable request for scheduling the oral hearing, but such requests should be made at the time of the original application for hearing. Scheduling is at the sole discretion of the hearing representative, and is not reviewable. Once the oral hearing is scheduled and the Office has mailed appropriate written notice to the claimant, the oral hearing cannot be postponed at the claimant's request for any reason except those stated in paragraph (c) of this section, unless the hearing representative can reschedule the hearing on the same docket (that is, during the same hearing trip). When the request to postpone a scheduled hearing does not meet the test of paragraph (c) of this section and cannot be accommodated on the docket, no further opportunity for an oral hearing will be provided. Instead, the hearing will take the form of a review of the written record and a decision issued accordingly. In the alternative, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative.[21]

In the present case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on February 24, 2000. The record supports that appellant's representative requested a postponement on February 18, 2000 due to a heart attack. However, the regulations do not provide any provision for postponement of an oral hearing for any one other than appellant. Section 10.622(c) allows postponements where:

[19] 20 C.F.R. § 10.433(a).

[20] As appellant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment; *see Lewis George*, 45 ECAB 144 (1993); *Levon H. Knight*, 40 ECAB 658 (1989); *Edward O. Hamilton*, 39 ECAB 1131 (1988).

[21] 20 C.F.R. § 10.622(b).

> "the claimant is hospitalized for a reason which is not elective, or where the death of the claimant's parent, spouse or child prevents attendance at the hearing, a postponement may be granted upon proper documentation."[22]

As appellant's request for postponement did not meet any of the above criteria, the Office properly advised appellant and her representative of the possibility of a telephone conference, which was not accepted and the Office, pursuant to its regulations, properly converted the request to a review of the written record.

The November 22, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 14, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[22] 20 C.F.R. § 10.622(c).