U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PARKE S. BLOYER and U.S. POSTAL SERVICE,
POST OFFICE, West Palm Beach, FL

Docket No. 02-876; Submitted on the Record;
Issued April 28, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant forfeited compensation for the period September 1, 1994 through April 16, 1996; (2) whether appellant received a $43,413.74 overpayment in compensation; and (3) whether appellant was at fault in the creation of the overpayment.

On July 14, 1994 appellant, then a 39-year-old mailhandler, was sorting heavy bundles of catalogs, including clearing a jam of bundles and placing them on a slide which involved constant twisting and turning of his back. He felt a pull in his back and then felt great pain in his back, extending down his right leg to his knee. Appellant stopped working July 16, 1994 and began to receive continuation of pay from July 17 through August 30, 1994.

In an August 3, 1994 report, Dr. Matthew L. Visconti, a Board-certified radiologist, stated that a magnetic resonance imaging scan showed moderate posterior annular bulging of the L4-5 disc and posterior annular bulging of the L5-S1 disc with an eccentric right paracentral disc protrusion or herniation. The Office of Workers' Compensation Programs accepted appellant's claim for lumbosacral strain and a herniated nucleus pulposus at L5-S1. The Office began payment of temporary total disability compensation effective September 1, 1994.

In an October 14, 1994 CA-8 claim form for continuing compensation, for the period October 1 through October 14, appellant left blank the spaces for reporting employment or self-employment. The form instructed appellant to report all activities, whether or not income resulted from his efforts. The form warned that any person who knowingly made a false statement, misrepresentation or concealment of fact, or any other type of fraud to obtain compensation or who knowingly accepted compensation to which he was not entitled would be subject to civil or administrative remedies or criminal prosecution. In a CA-8 form for the period October 15 to 28, 1994, appellant again left blank the questions concerning work and activities. In a January 1, 1995 CA-8 form for the period December 30, 1994 to January 13, 1995, appellant left blank the questions concerning work and activities. He left the same areas blank in a January 31, 1995 form covering the period January 14 through February 13, 1995.

The Office asked appellant to complete a CA-1032 form to report income for the prior 15 months and the status of dependents. In a March 16, 1995 response, appellant indicated that he worked at the employing establishment from January 1994 through July 14, 1994. He reported no other work and indicated that he was not self-employed or involved in any business enterprise for the prior 15 months.

In a September 6, 1995 CA-8 form, appellant did not report any earning or activities for the period August 27 through September 10, 1995. In a September 21, 1995 Form CA-8 for the period September 11 to 24, 1995, he left blank the areas asking for employment or activities during the period in question.

In an October 2, 1995 investigative report, a postal inspector stated that appellant had been engaged in the sale of antiques and collectibles, such as baseball and football cards. The postal inspector noted that appellant had not reported the activity on his CA-8 forms or CA-1032 form. He reported that appellant rented exhibitor space from September 17 through 30, 1994 and worked at a show from September 30 through October 2, 1994 and February 3 through 5, 1995. The postal inspector interviewed the head of the company responsible for running the shows who informed the inspector that appellant had rented space for a show running from March 3 to March 5, 1995. He commented that appellant was a regular exhibitor at the shows. The postal inspector observed appellant at that show and saw him collect money for items sold. He also observed appellant disassemble the display and load items in his van, with no apparent discomfort. Appellant was observed again from March 30 to April 2, 1995 and was seen setting up and taking down his display area. The postal inspectors issued a subpoena which produced documents showing that appellant signed contracts to work at various exhibition shows intermittently from October 1, 1993 through November 26, 1995. He was also noted to have submitted checks to pay the rental for the space reserved for the exhibitions.

In an April 16, 1996 CA-1032 form, appellant attached a statement relating to his activities. He stated that his wife had a contract to sell collectibles at eight to nine shows a year. Appellant described these activities as a hobby that his wife had turned into a business. He indicated that he supported his wife in her activities for several years prior to his back injury. Appellant commented that the day for setting up was the same day as dance class for his daughter so he would have to drop off his wife, take his daughter to class and then return. He indicated, however that, because of his back condition, his wife would often have to drive their daughter to her activities. Appellant noted that he also suffered from diabetes, which had become harder to control since his employment injury. He stated that, on a good day, he would help his wife set up or pack out but often she would have to pay a porter to help her set up or pack out. Appellant indicated that he carried light boxes and would help set up the board for her display case. He noted that his wife did all the heavy lifting. Appellant stated that he attended the shows but received no money for his work and did not consider that an hour or two of work every four weeks constituted work.

Appellant was indicted on four counts of fraud in seeking compensation under the Federal Employees' Compensation Act. In a December 13, 1996 hearing, appellant pleaded guilty to one misdemeanor count of fraudulently seeking compensation under the Act which related to the CA-8 form covering the period October 1 to October 14, 1994. The judge accepted the plea at the hearing.

In a January 7, 1997 decision, the Office terminated appellant's compensation for his conviction for fraud in receiving compensation. In an April 16, 1997 decision, the Office found the compensation appellant received for the period September 1, 1994 through April 16, 1996 to be forfeited. In a separate letter of the same date, the Office made a preliminary determination that appellant had received $43,415.74 in compensation because he failed to report his earnings and employment activities on CA-8 and CA-1032 forms and thereby forfeited compensation for the period September 1, 1994 to April 16, 1996. The Office made a preliminary finding that appellant was at fault in the creation of the overpayment because he pleaded guilty to defrauding the Office under the Act by willingly withholding information from the Office regarding his earning and employment activities. The Office found that appellant knew he was being paid compensation to which he was not entitled. Appellant requested a hearing before an Office hearing representative.

In a May 7, 1997 letter, appellant's attorney argued that appellant was helping his wife in a hobby business before his employment injury. After the injury, appellant continued to help his wife. The attorney stated that appellant's compensation should not be affected by engaging in the same activity after the injury as he did before the injury. He claimed that the employing establishment knew of appellant's work on the side. The attorney contended that, therefore, there was no loss to the employing establishment in appellant's work in helping his wife. He stated that, at the time of the hearing before the United States District Court, appellant was not ordered to pay restitution because there was no loss to the employing establishment. The attorney argued that when a federal employee is involved in dual, dissimilar employment at the time of the employment injury, the earnings from the dissimilar employment could not be used to reduce compensation when making a wage-earning capacity determination, nor could the private earnings be used to determine a claimant's compensation, even if he continued in the employment after the employment injury. He declared that appellant's omission of reporting his help to his wife on occasional weekends was not a material fact. The attorney concluded that appellant did not owe any money at all to the Office.

The hearing was conducted on July 29, 1998. In a November 14, 2001 decision, the Office hearing representative found that appellant had forfeited compensation for the period September 1, 1994 through April 16, 1996, that appellant had received a $43,419.74 overpayment of compensation, and that he was at fault in the creation of the overpayment.

The Board finds that the Office properly determined that appellant forfeited compensation for the period September 1, 1994 through April 16, 1996.

Section 8106(b) of the Act[1] 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.[2]

[1] 5 U.S.C. § 8106(b).

[2] *Terryl A. Geer*, 51 ECAB 168 (1999).

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if 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 defined within the implementing regulations as with knowledge, consciously, willfully or intentionally.[3]

Thus, the Office has the burden of proof in establishing that appellant did, either with knowledge, consciously, willfully or intentionally, fail to report employment or earnings.[4] To meet this burden of proof, the Office is required to closely examine appellant's activities and statements in reporting employment or earnings.[5] The Office may meet this burden in several ways. The Office may meet this burden by appellant's own subsequent admission to the Office that he failed to report employment or earnings which he knew he should report. Similarly, the Office may meet this burden by establishing that appellant had pled guilty or was convicted to violating 18 U.S.C. §1920 by falsely completing the affidavit section of the CA-1032 form.[6] Furthermore, the Office may meet this standard without an admission by appellant, if appellant failed to fully and truthfully complete the CA-1032 form and the circumstances of the case establish that appellant failed to fully and truthfully reveal the full extent of his employment activities and earnings. The Office may also meet this burden if it establishes through the totality of the factual circumstances that appellant's certification in a CA-1032 form, that he was not employed or self-employed, was false.

In this case, appellant pled guilty to the misdemeanor count of violating section 1920 by falsely completing one CA-8 form. Appellant failed to describe his employment in similar CA-8 forms and in the March 16, 1995 CA-1032 form. In the April 16, 1996 CA-1032 form, appellant admitted that he occasionally helped his wife set up or take down her display area when his back felt able to handle the work. However, appellant omitted important details in his description of work. Postal inspectors observed appellant not only taking down the display area, but observed him actively engaged in selling collectibles and receiving money for sales. They also established that appellant signed contracts for participation in the exhibitions that he and his wife attended. Appellant's guilty plea shows that he was aware he should have reported his activities and knowingly failed to do so. His statement accompanying the April 16, 1996 CA-1032 form understated his activity in participating in the business of selling collectibles. The Office therefore properly found that appellant forfeited compensation for the period September 1, 1994 to April 16, 1996 because he pled guilty to one count of defrauding the government,[7] and because he knowingly did not report his activities in selling collectibles or understated his role in the selling of collectibles.

Appellant has argued that, as the prosecuting attorney stated that the employing establishment suffered no loss from his activities, he should not have been found to forfeit compensation. However, under Office procedures, if the court ordered restitution in the case states

[3] 20 C.F.R. § 10.5(5)(n).

[4] *Anthony A. Nobile*, 44 ECAB 268 (1992).

[5] *Royal E. Smith*, 44 ECAB 417 (1993).

[6] *Irish E. Ramsey*, 43 ECAB 1075 (1992).

[7] *Michael D. Matthews*, 51 ECAB, 247 (1999).

that the restitution amount would be in full satisfaction of the debt owed to the United States, no other debt collection process would take place. However, if the court order does not specifically state that the restitution order represents a global settlement of the forfeited amount, the Office should continue to pursue full collection of the debt.[8] The judge ordered no restitution in this case. There is no specific statement in the plea agreement that the agreement represented a full settlement of appellant's debt. Therefore, the Office is not barred from seeking repayment of the forfeited amount of compensation.

The Board finds that appellant received a $43,413.74 overpayment in compensation.

The Office found that appellant forfeited compensation for the period September 1, 1994 to April 16, 1996. He therefore is not entitled to compensation for the period in question and any amount paid to him constitutes an overpayment of compensation. Appellant was paid $43,413.74 during the period in question and therefore has an overpayment in that amount.

The Board finds that appellant was at fault in creation of the overpayment.

Section 8129(a) of the Act provides, "Adjustment of 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 of recovery would defeat the purpose of the Act or would be against equity and good conscience."[9] Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

Section 10.433(a) of the Office's implementing regulations[10] provides as follows:

> "[The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payment he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment.
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> (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 furnish information which he or she knew or should have known to be material; or

[8] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.19 (September 1994); *see Joseph M. Popp*, 48 ECAB 624 (1997).

[9] 5 U.S.C. § 8129(b).

[10] 20 C.F.R. § 10.433(a).

(3) Accepted a payment which he or she knew or should have been expected to know was incorrect. (This provision applies to the overpaid individual only)."[11]

In this case, appellant did not report his earnings or activities which would create earnings. He pleaded guilty to one count of fraud in not reporting information to the Office. He therefore failed to furnish information which he reasonably should have known to be material and accepted payments that he should have known were incorrect. He therefore was at fault in creating an overpayment in compensation.

Appellant properly pointed out that, when a claimant has dissimilar employment at the time of injury, the position that is not with the employing establishment cannot be used to determine his wage-earning capacity.[12] He therefore contended that his failure to report his activities in selling collectibles was not a material fact because it could not be used to determine his wage-earning capacity. However, even though dissimilar employment held at the time of injury cannot be used to determine wage-earning capacity, appellant still has an obligation to report any earnings or activities from such dissimilar occupation when requested by the Office. Section 8106(b) of the Act specifically requires a claimant to report his earnings from employment or self-employment.[13] There are no exceptions made in the Act for the requirement to report earnings from employment or self-employment.

The decision of the Office of Workers' Compensation Programs dated November 14, 2001 is hereby affirmed.

Dated, Washington, DC
April 28, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[11] 20 C.F.R. § 10.433(a).

[12] *Steven J. Rose*, 44 ECAB 211 (1992); *Irwin E. Goldman*, 23 ECAB 6 (1971).

[13] 5 U.S.C. § 8106(b).