U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES E. NANCE and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, GA

Docket No. 01-1923; Oral Argument Held November 19, 2002;
Issued February 28, 2003

Appearances: *Charles E. Nance, pro se*; *Thomas G. Giblin, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work; (2) whether the Office properly determined that appellant forfeited his compensation benefits for the period November 8, 1999 to July 13, 2000; (3) whether the Office properly determined that appellant was at fault in the creation of an overpayment of compensation in the amount of $16,366.79; and (4) whether the Office properly denied appellant's request for an oral hearing following the April 3, 2001 decision finalizing the finding of overpayment.

Appellant, a 36-year-old mail processor, filed a notice of traumatic injury on July 17, 1997 alleging that he injured his right hand in the performance of duty. The Office accepted appellant's claim for contusion of the right hand and right ulnar neuropathy. Appellant underwent surgery for right carpal tunnel release and ulnar nerve transposition in the right elbow. The Office granted appellant a schedule award for a 10 percent permanent impairment of his right upper extremity. Appellant returned to light-duty work on September 12, 1998. By decision dated February 12, 1999, the Office terminated appellant's compensation benefits finding that the light-duty position of modified mailhandler represented his wage-earning capacity.

Appellant filed a second claim on May 20, 1998 for an occupational disease alleging that he developed bursitis of the right arm due to his employment duties. The Office accepted appellant's claim for bursitis right elbow. Appellant underwent additional surgery on January 15, 1999. The Office entered appellant on the periodic rolls on January 28, 1999 and he received wage-loss compensation until March 24, 1999. On February 16, 1999 the Office expanded appellant's claim to include right shoulder tendinitis. Appellant underwent further surgery on November 8, 1999 for excision neuroma, medial antebrachial cutaneous nerve, and

again received wage-loss benefits as of that date. On July 29, 2000 the Office accepted the additional condition of right ulnar neuropathy.

The employing establishment offered appellant a light-duty position on August 24, 2000 requiring that he use his left hand only. Appellant refused the position on September 2, 2000 stating that he was in constant pain. The Office informed appellant that this position was suitable on September 12, 2000. By letter dated October 12, 2000, the Office informed appellant that his reasons for refusing the position were not acceptable and allowed him an additional 15 days to accept the position. Appellant responded and stated that he wished to pursue disability retirement. By decision dated November 15, 2000, the Office terminated appellant's wage-loss compensation benefits after December 2, 2000 for failure to accept suitable employment.

By decision dated November 20, 2000, the Office found that appellant had forfeited his compensation benefits from November 8, 1999 to July 13, 2000 as he was self-employed and failed to report his earnings as requested. In a letter dated November 20, 2000, the Office informed appellant that an overpayment in the amount of $16,366.79 resulted as he forfeited his compensation benefits from November 8, 1999 to July 13, 2000. Appellant was advised that he could request a prerecoupment hearing addressing the overpayment determination. He did not exercise the option at that time. By decision dated April 3, 2001, the Office finalized the overpayment.

On April 26, 2001 appellant requested an oral hearing on the issue of fault. By decision dated July 3, 2001, the Office informed appellant that he was not entitled to a hearing after a final decision on an overpayment.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits as he refused an offer of suitable work.

Section 8106(c) of the Federal Employees' Compensation Act[1] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. The Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[2] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2),[3] which is a penalty provision,

[1] 5 U.S.C. § 8106(c)(2).

[2] *Albert Pineiro*, 51 ECAB 310, 312 (2000).

[3] Section 8106(c) serves as a bar to claimant's entitlement to further compensation for total disability, partial disability or a schedule award for permanent impairment arising out of an accepted employment injury. *Albert Pineiro, supra* note 2 at 313.

the Office has the burden of showing that the work offered to and refused or neglected by the claimant was suitable.[4]

Appellant's attending physician, Dr. Scott M. Levere, a Board-certified orthopedic surgeon, completed a report dated July 10, 2000 and opined that appellant could work eight hours a day with limitations on reaching for 2 hours with a 10-minute break and repetitive movements of the right elbow. He indicated that appellant could lift up to 10 pounds. On July 27, 2000 he stated that appellant could only use his left arm. The employing establishment offered appellant a light-duty position on August 24, 2000 which required no use of the right arm and granted appellant a 10-minute break after every 2 hours. The position required appellant to stand, walk, sit, bend, reach, input data on the computer, write and lift up to five pounds. On September 18, 2000 Dr. Levere reviewed photographs of appellant at a job and stated that movements of appellant's right upper extremity appeared to be within normal limits. He stated that appellant could use his right upper extremity and indicated that he could lift up to 20 pounds.

The position offered by the employing establishment complies with the restrictions imposed by Dr. Levere. Appellant did not provide an acceptable reason for refusing the position offered as retirement is not a reason for refusing suitable work.[5] The position complied with appellant's medical restrictions but appellant did not offer an acceptable reason for refusing the position. The Board finds that appellant refused an offer of suitable work and the Office properly terminated his compensation benefits.

The Board further finds that appellant forfeited his compensation benefits for the period November 18, 1999 through July 13, 2000.

The employing establishment submitted an investigative memorandum which established that appellant worked as a sales manager for Prestige Imports, an automobile dealership from the second quarter of 1999 through the first quarter of 2000 and that he had earnings in the amount of $22,476.00 for that period. The investigative memorandum included photographs of appellant conversing with customers and opening doors to vehicles.

Appellant completed a Form CA-1032 on July 13, 2000 and affirmed that he worked for the employing establishment from April 13 to November 18, 1999 and that he had not been self-employed nor involved in any business enterprise in the past 15 months.

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 the time the Secretary specifies.... An employee who -- (1) fails to make an affidavit or report when required; or (2) *knowingly omits* or understates

[4] *Id.* at 311-12.

[5] *See Stephen R. Lubin*, 43 ECAB 564 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1997).

any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required."[6] (Emphasis added.)

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he "knowingly" failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.[7] The term "knowingly" is not defined within the Act or its regulations. The Board has adopted the common usage definition of "knowingly:" "with knowledge; consciously; intelligently; willfully; intentionally."[8]

The Board finds that on the CA-1032 form he signed on July 13, 2000, covering the period April 13, 1999 to July 13, 2000, appellant knowingly omitted relevant information concerning his employment activities with Prestige Imports which generated earnings. He responded "No" to questions concerning employment or self-employment other than with the employing establishment. Even though appellant may have performed work or had earnings on an irregular basis during this period, he knew that he was required to report any earnings produced from his work activities.[9] Nevertheless, in response to the Office's inquiries, appellant signed the CA-1032 form certifying that all statements provided in response to the questions on the form were true, complete and correct to the best of his knowledge and belief. The clear weight of the evidence of record establishes that appellant knowingly failed to report his earnings from employment. Accordingly, the Board finds that appellant thereby forfeited his right to compensation received for the period November 18, 1999 to July 13, 2000.

The earnings reported to the Social Security Administration, appellant's business card and the photographs of appellant at Prestige Imports, together with appellant's certification to the Office on Form CA-1032 that he had no employment or earnings, provides persuasive evidence that appellant "knowingly" misrepresented and omitted his earnings and employment activities.[10] The Office, therefore, properly found that appellant forfeited his compensation for the periods covered by the July 13, 2000 CA-1032 in the amount of $16,366.79.

The Board finds that appellant received an overpayment of compensation in the amount $16,366.79.

Section 8129(a) of the Act[11] provides that, where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the

[6] 5 U.S.C. § 8106(b).

[7] *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

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

[9] *Charles Walker*, 44 ECAB 641, 645 (1993).

[10] *Mamie L. Morgan*, 41 ECAB 661 (1990).

[11] 5 U.S.C. §§ 8101-8193, 8129(a).

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."[12] Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.433(a) of the Office's regulation[13] provides in relevant part:

> "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
> >
> > (3) Accepted a payment which he or she knew or should have known was incorrect. (This provision applies only to the overpaid individual.)"

The Office applied the second standard in determining that appellant was at fault in creating the overpayment. Under the circumstances, appellant's failure to report his earnings and employment activities during the period November 18, 1999 to July 13, 2000 constitutes a failure to furnish information which he knew or should have known to be material. Consequently, appellant was properly deemed to be at fault in creating the overpayment of compensation. As appellant was at fault in creating the overpayment pursuant to section 10.433(a)(2), recovery of the overpayment of compensation may not be waived.[14]

With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases which the Office seeks recovery from continuing compensation benefits under the Act. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office's recovery of an overpayment under the Debt Collection Act.[15]

The Board further finds that the Office properly denied appellant's request for an oral hearing following the April 3, 2001 decision finalizing the finding of overpayment.

The Office issued its final decision regarding the overpayment of compensation in this case on April 3, 2001. In a letter dated April 26, 2001, appellant requested a hearing on this issue of fact of overpayment. By decision dated July 3, 2001, the Office denied appellant's

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[12] 5 U.S.C. § 8129(b).

[13] 20 C.F.R. § 10.433(a).

[14] *Linda Coggins*, 51 ECAB 300, 306-07 (2000).

[15] *See Lewis George*, 45 ECAB 144, 154 (1993).

request for a hearing stating that a final decision on an overpayment was not subject to the hearing provisions.

The Office's regulations provide that the only review of a final decision concerning an overpayment is by the Board.[16] The provisions of the Act regarding hearings and reconsiderations do not apply to an overpayment decision.[17] The Board has found that the implementation of this regulation is a proper exercise of the Director's discretion and that a claimant has no further right to review by the Office once a final decision on the issue of overpayment has been issued.[18] As the Office issued a final decision concerning appellant's overpayment on April 3, 2001 appellant was not entitled to a hearing before the Office on this issue after that date.

The July 3 and April 3, 2001 and November 20 and November 15, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
February 28, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

[16] 20 C.F.R. § 10.440(b).

[17] *Id.*

[18] *Philip G. Feland*, 48 ECAB 485, 488 (1997).