

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FAYE PREYOR and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Perry Point, MD

*Docket No. 02-633; Submitted on the Record;  
Issued March 14, 2003*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly found that appellant forfeited her wage-loss compensation for the period February 13, 1998 through July 31, 2000.

On August 9, 1992 appellant, then a 58-year-old housekeeper, sustained an employment-related contusion of the right knee and right wrist sprain. She stopped work on August 12, 1992 and returned to light duty on October 19, 1992. On December 21, 1993 she sustained a recurrence of disability. Appellant thereafter received appropriate compensation and was placed on the periodic rolls effective September 26, 1994. The accepted conditions were later expanded to include de Quervain's synovitis on the right, for which she underwent surgery in 1994.

Appellant submitted Office EN-1032 forms dated July 12, 1997, July 26, 1999 and July 31, 2000 in which she indicated that she had not been employed or self-employed during each of the previous 15 months. In an EN-1032 form dated September 15, 1998, she listed employment from December 15, 1997 to September 2, 1998. Appellant also provided an EN-1032 form dated May 13, 1999 in which she advised that she had been employed from April 16 to August 30, 1998 for 24 hours a week. These Office forms provided notice to appellant of her responsibility to complete the forms and provide relevant information concerning her employment status and earnings during the periods covered by the forms. In a January 30, 2001 investigative report, which includes supporting documentation, the employing establishment informed the Office that appellant had outside employment for various periods from April 15, 1998 to the date of the report.

By decision dated November 20, 2001, the Office found that appellant forfeited compensation for the period February 13, 1998 through July 31, 2000 because she failed to report income from employment as required by section 8106(b) of the Federal Employees'

Compensation Act on EN-1032 forms that she submitted on May 13, 1999 and July 31, 2000, thus making a false statement.<sup>1</sup> The instant appeal follows.<sup>2</sup>

The Board finds that the Office properly found that appellant forfeited her compensation for the period February 13, 1998 through July 31, 2000 because she knowingly failed to fully and truthfully complete Office EN-1032 forms signed by her on May 13, 1999 and July 31, 2000 and that her certification on these forms was false.<sup>3</sup>

Section 8106(b) of the Act<sup>4</sup> 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 times the Secretary specifies.”

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“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.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193. By letter dated November 21, 2001, the Office informed appellant that it was reducing her monetary compensation effective November 4, 2001 based on her actual earnings. On January 31, 2002 after appellant filed her appeal with the Board, the Office issued a formal wage-earning capacity decision and by letter dated February 5, 2002, the Office informed appellant that it had made a preliminary determination that an overpayment in compensation in the amount of \$35,187.00 had been created. Appellant did not file an appeal with the Board regarding the November 2001 wage-earning capacity finding.

<sup>2</sup> By decision dated February 1, 2002, the Office modified the November 20, 2001 decision, amending the period of forfeiture to June 15, 1997 through July 31, 2000. The Office noted that, on the Form EN-1032 signed by appellant on September 15, 1998, while she reported employment with Lorien Nursing and Rehabilitation from December 15, 1997 to April 6, 1998, she did not report employment with Union Hospital from April 16 to August 30, 1998 and, thus, underreported her income for this period. The Office and the Board may not have simultaneous jurisdiction over the same issue in the same case. Following the docketing of an appeal with the Board, the Office does not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction. Any decision rendered by the Office on the same issues for which an appeal is filed, such as the February 1, 2002 decision in the instant case, is null and void; *see Noe L. Flores*, 49 ECAB 344 (1998).

<sup>3</sup> *Linda K. Richardson*, 47 ECAB 171 (1995).

<sup>4</sup> 5 U.S.C. § 8106(b).

Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”<sup>5</sup>

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.”<sup>6</sup> 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.<sup>7</sup>

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<sup>8</sup> and, as a penalty provision, it must be narrowly construed.<sup>9</sup> 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.”<sup>10</sup>

Office EN-1032 forms provide that “severe penalties may be applied for failure to report all work activities thoroughly and completely.” In Part G of the form, a compensation claimant acknowledges that he or she “know[s] that anyone who fraudulently conceals or fails to report income or other information which would have an effect on benefits or who makes a false statement or misrepresentation of a material fact in claiming a payment or benefit under the Act may be subject to criminal prosecution, from which a fine or imprisonment or both, may result.” Part G concludes, with the certification that “all the statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief.”

In the instant case, the Office determined that appellant forfeited her right to compensation for the period February 13, 1998 through July 31, 2000 because she falsely did not indicate on EN-1032 forms that she was employed or that she understated her employment. The record includes a Form EN-1032, signed by appellant on May 13, 1999, in which she reported that she had been employed at Union Hospital from April 16 to August 30, 1999 for 24 hours a

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<sup>5</sup> While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and therefore a statutory provision about such earnings would be meaningless. *Id.*

<sup>6</sup> 20 C.F.R. § 10.5(g) (1999).

<sup>7</sup> 20 C.F.R. § 10.529 (1999).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

<sup>9</sup> See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

<sup>10</sup> *Black's Law Dictionary* (5<sup>th</sup> ed. 1979); see *Glenn Robertson*, 48 ECAB 344 (1997).

week. The record, however, demonstrates that she also worked at Laurelwood Care Center for the period February 8, 1999 to February 21, 2000. She, therefore, underreported her income for the 15 months prior to May 13, 1999, the date she signed the above-mentioned Form EN-1032. Appellant also submitted a Form EN-1032, signed by her on July 31, 2000, in which she reported that she had not been employed for the previous 15 months. The record, however, provides that she was employed at Union Hospital until August 30, 1999 and at Laurelwood Care Center from February 8, 1999 to February 21, 2000. The record further shows that appellant was hired at Lorien Nursing and Rehabilitation Center, to begin work on July 31, 2000. She was, therefore, employed for periods during the 15 months prior to July 31, 2000 the date she signed an Office form EN-1032.

The Board further finds that by certifying the EN-1032 forms, appellant consciously omitted relevant information about her employment. On the form signed by her on July 31, 2000 she responded, “no” to questions concerning employment or self-employment and answered “yes” to a question inquiring whether she was unemployed for all periods during the previous 15 months covered by the form. On the form signed by appellant on May 13, 1999 she merely indicated employment with Union Hospital and did not state that she had been previously employed by Laurelwood Care Center. Appellant thereby underreported her earnings for the 15 months prior to May 13, 1999. The clear weight of the evidence, therefore, establishes that appellant knowingly failed to report her full earnings from employment and the Office properly found that appellant forfeited her compensation for the covered periods.<sup>11</sup>

The decision of the Office of Workers’ Compensation Programs dated November 20, 2001 is hereby affirmed.

Dated, Washington, DC  
March 14, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>11</sup> See *Robert C. Gillian*, 50 ECAB 334 (1999).