U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LESLIE L. BURKHARDT and U.S. POSTAL SERVICE,
POST OFFICE, Grand Rapids, MI

Docket No. 03-1928; Submitted on the Record;
Issued April 19, 2004

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective February 18, 2003; (2) whether the Office properly determined that appellant had forfeited her right to compensation for the period May 3 through November 26, 2002; and (3) whether appellant was at fault in the creation of an overpayment in the amount of $16,023.43.

On January 30, 2001 appellant, then a 32-year-old letter carrier, was injured in the performance of duty when she was struck in the head by a piece of ice that fell from the roof of a fast food restaurant while she was delivering the mail. The Office accepted the claim for cervical strain and a concussion. Appellant received compensation for lost wages from January 30 until March 29, 2001, when she returned to limited duty. She stopped work again on November 7, 2001 and was placed on the daily rolls for total disability.

Appellant has been under the care of Dr. Thomas Lipps, a Board-certified family practitioner, for treatment of her work injury. On a Form CA-20 attending physician's report dated January 23, 2002, he maintained that appellant was totally disabled for work due to a traumatic brain injury, for which she was receiving physical therapy and medication. The Office subsequently arranged for appellant to be examined by Dr. Timothy Strange, a licensed psychologist. In a report dated June 4, 2002, Dr. Strange discussed appellant's history of injury, symptoms, physical and objective findings. He acknowledged that appellant's objective tests showed cerebral impairment and that she had not yet returned to her baseline level of cognitive brain functioning. Notwithstanding, Dr. Strange felt that appellant was medically capable of performing her regular work duties first on a part-time basis, then with a gradual return to full duty over a period of six months.

The Office also had appellant examined by Dr. Charles Xeller, a Board-certified orthopedist, who opined, in a September 11, 2002 report, that appellant continued to have a cervical disc bulge at C5-6 confirmed by a magnetic resonance imaging (MRI) scan. He discussed appellant's work injury and her symptoms of neck pain, paralysis of her right arm and

some facial numbness. On physical examination, Dr. Xeller reported that appellant had normal cervical range of motion, no neck or shoulder pain and no impingement of the shoulders. He opined that appellant's symptoms were inconsistent with a neck injury and felt that she had a normal orthopedic examination. Dr. Xeller specifically stated that appellant's disc bulge did not preclude her from returning to work without restrictions.

On January 15, 2003 the Office issued a notice of proposed termination of compensation, finding that appellant was no longer disabled from performing her regular job duties. She was given 30 days to submit additional evidence or argument if she disagreed with the proposed action. In the interim, the Office forwarded copies of the reports from the referral physicians to Dr. Lipps and requested his opinion as to whether appellant could return to her regular job as a letter carrier. In a January 9, 2003 report with an addendum, Dr. Lipps agreed with Drs. Xeller and Strange that appellant could perform her regular duties without restrictions, although he suspected that she would return to see him again with subjective complaints of chronic pain. Dr. Lipps completed forms on January 15 and January 22, 2003 indicating that appellant could return to regular duty effective January 20, 2003. In a decision dated February 18, 2003, the Office terminated appellant's entitlement to wage-loss compensation.[1]

In a September 30, 2002 letter, the Office notified appellant that it had received a copy of a video tape along with an investigative memorandum, provided by the employing establishment, which documented appellant's involvement in a business known as "Garden Accents." A copy of a business card for Garden Accents listed appellant's name as one of the designers. The record also contains a copy of a business license/registration form signed by appellant on June 24, 2002 certifying that she intended to own, conduct and transact a business in the County of Calhoun, State of Michigan under the name of Garden Accents. Appellant's signature was certified by the county clerk. The investigative report states that Garden Accents was first started by appellant's fiancé, Gerald Pipher, who built wooden garden ornaments or furniture to sell out of appellant's garage. Appellant was enlisted to paint on designs. They began selling the garden ornaments at craft shows in July 2002 and usually were paid in cash or by check made out to appellant since the business did not have a separate bank account. The record documents that appellant signed and paid for craft show space on July 27, 2002. In EN-1032 forms dated May 2 and July 25, 2002, appellant indicated that she had no employment or self-employment or earnings for the 15-month period covered by these forms.

In a decision dated March 28, 2003, the Office determined that appellant had forfeited her right to compensation for the period May 3 through November 26, 2002, during which period she failed to report her employment activities with a business identified as "Garden Accents." In a preliminary notice of overpayment issued on April 14, 2003, the Office determined that, since she forfeited her right to compensation from May 3 through November 26, 2002 for failure to report her work activities, an overpayment had occurred in her case in the amount of $16,023.43. The Office found that appellant was at fault in the creation of the overpayment and, therefore, she was not entitled to waiver of the overpayment. Appellant was given 30 days to submit additional evidence or argument relevant to the overpayment issue, request a conference call or

[1] Appellant is still entitled to receive medical benefits as she continues to have residuals of her accepted work injury.

request a recoupment hearing. In response, she submitted a two-page statement requesting that the Office make a final determination based upon the written evidence of record and arguing that she did not intentionally omit pertinent information regarding her employment activities with Garden Accents. No financial information was provided. In a May 2, 2003 decision, the Office concluded that appellant was at fault in the creation of an overpayment of $16,023.43 and ordered repayment of the debt.

The Board finds that the Office properly terminated appellant's compensation effective February 18, 2003.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not termination compensation without establishing that the disability has ceased or that it is not longer related to the employment.[2]

In this case, Dr. Lipps, appellant's treating physician, agreed with the Office referral physician that appellant was capable of performing working in her regular job on a full-time basis. Dr. Lipps approved appellant for a return to regular duty effective January 20, 2003. Dr. Strange had previously stated that appellant could gradually return to full-time duty over a period of six months beginning June 4, 2002.[3] Because the weight of the medical evidence establishes that appellant was no longer disabled for work on or after January 20, 2003, the Office met its burden of proof in terminating appellant's disability compensation effective February 18, 2003.

The Board, however, finds that the Office erred in determining that appellant forfeited her right to compensation benefits for the period May 3 through November 26, 2002.[4]

Section 8106(b) of the Federal Employees' Compensation 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 times the Secretary specifies….
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> An employee who --
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> (1) fails to make an affidavit or report when required; or
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> (2) knowingly omits or understates any part of his earnings;
>
> (3) forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this

[2] *Janice F. Migut*, 50 ECAB 166 (1998); *Vivien L. Minor*, 37 ECAB 541 (1986).

[3] The six-month period would have ended by December 4, 2002.

[4] The Board does not have jurisdiction to review financial information submitted by appellant on appeal that was not before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c).

> 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.[5]

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."[6] 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.[7]

An employee can only be subjected to the forfeiture provision of section 10.529 if he or she "knowingly" omitted or understated earnings or work activity. The Office procedure manual recognizes that forfeiture is a penalty[8] and, as a penalty provision, it must be narrowly construed.[9] The term "knowingly" is defined in the implementing regulations as "with knowledge, consciously; willfully or intentionally.[10]

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 compensationer 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."

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.[11] To meet this burden of proof, the Office is required to closely examine appellant's activities and statements in reporting employment or earnings.[12] 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 she failed to report employment or earnings which she knew she should report. Similarly, the Office may meet this burden by establishing that appellant had pled guilty or was convicted

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[5] 5 U.S.C. § 8106(b).

[6] 20 C.F.R. § 10.5(g) (1999).

[7] 20 C.F.R. § 10.529 (1999).

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

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

[10] 20 C.F.R. § 10.5(n).

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

[12] *Id*.

of violating 18 U.S.C. § 1920 by falsely completing the affidavit section of the EN-1032 form.[13] Furthermore, the Office may meet this standard without an admission by appellant if appellant failed to fully and truthfully complete the EN-1032 form and the circumstances of the case established that appellant failed to fully and truthfully reveal the full extent of 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 on an EN-1032 form, that she was not employed or self-employed, was false.[14]

In this case, the Board finds that the Office failed to meet its burden of proof to establish that appellant knowingly failed to report earnings. The Board notes that while appellant completed EN-1032 forms on May 2 and July 29, 2002 indicating that she had no employment or self-employment for the 15-month period prior to the date of her signature on the forms, the Office erred in penalizing appellant for failure to disclosure her work activity when she did not receive any income from her participation in Garden Accents.[15] The record fails to show that there were any actual earnings or money coming to appellant based on her involvement in the craft show venture. There is also no record of money coming in to the business in general, regardless of appellant's participation. Although appellant concedes that she painted wooden ornaments and tried to sell them at craft shows for Garden Accents, the record before the Office at the time it issued its forfeiture decision did not contain any evidence such as Social Security Administration (SSA) statements of earnings indicating that appellant had earnings attributable to Garden Accents. As well, the record does not establish any income to the business. Appellant has stated that she lost approximately $500.00, and that any monies received were reinvested in the business. The Board notes that appellant signed an authorization for the Office to obtain her SSA records for the period of January 2001 through September 2002 but there was no income reported on the SSA earnings record report for the alleged forfeiture period in question. Because there is no record evidence to corroborate that appellant or the business had earnings during the period of May 3 through November 26, 2002, the Board concludes that she did not knowingly fail to report earnings or work activity as contemplated by the penalty provision at section 8106(b). Therefore, the Office erred in finding that appellant forfeited her right to compensation.[16]

Because the Board finds that that there was no forfeiture of compensation for the period of May 3 through November 26, 2002, the Board also finds that the Office erred in determining that an overpayment occurred in the amount of $16,023.04. The record establishes that appellant received $16,023.04 in compensation paid from May 3 through November 26, 2002. Since she did not forfeit her right to compensation for that period as determined by the Office, the Board concludes that there was no overpayment of $16,023.04 in this case.

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

[14] *See Terryl A.. Geer, supra* note 11.

[15] The question on the form asked whether appellant was self-employed or involved in any business enterprise in the past 15 months, to which she responded "No."

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

The decisions of the Office of Workers' Compensation Programs dated February 18, 2003 is hereby affirmed while the decisions dated May 2 and March 28 2003 are hereby reversed.[17]

Dated, Washington, DC
April 19, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[17] On June 19, 2003 the Office also determined that an overpayment existed in the amount of $461.21 but the Office issued a termination of collection action against the debt under the authority of 4 C.F.R. § 103.4. Since appellant is excused from repaying the debt based on the Office's June 19, 2003 decision, the Board finds the issue of the propriety of the $461.21 overpayment to be moot.