

**United States Department of Labor
Employees' Compensation Appeals Board**

KAREN SPURLING, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Louisville, KY, Employer**

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**Docket No. 04-1233
Issued: December 16, 2004**

Appearances:
Karen Spurling, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On April 8, 2004 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated January 5 and March 30, 2004 regarding a forfeiture of compensation and resulting overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the forfeiture and overpayment issues.

ISSUES

The issues on appeal are: (1) whether appellant forfeited her compensation for the period June 23, 2001 to July 1, 2002 on the grounds that she knowingly failed to report her income; (2) whether a resulting overpayment of \$15,843.78, in compensation occurred in appellant's case; and (3) whether appellant was at fault in the matter of the overpayment, precluding waiver.

FACTUAL HISTORY

On May 7, 2001 appellant, then a 27-year-old clerk, was injured while lifting boxes and putting them into an all-purpose container. She stopped work on May 7, 2001. The Office

accepted appellant's claim for a cervical sprain. By letter dated July 26, 2001, the Office informed appellant that she would be paid compensation for disability on the periodic rolls. She was further advised to notify the Office immediately upon her return to work or improvement of her condition.

On CA-7 forms dated June 20, 2001 to July 2, 2002 appellant indicated that she did not engage in any salaried employment, commissioned, volunteer or self-employment. She requested compensation by filling in "N/A" (not applicable) or not providing any response. The question on each CA-7 form asked, "[h]ave you worked outside your federal job during the period(s) claimed in [s]ection 2? (Include salaried, self-employed, commissioned, volunteer, etc.)"

In a July 25, 2001 report, Dr. Claude Hazlett, a Board-certified family practitioner, diagnosed cervical sprain/strain and certified that appellant was totally disabled from May 7 to August 2, 2001. On August 29, 2001 Dr. Ty Richardson, a Board-certified orthopedic surgeon, released appellant to light work involving no lifting greater than 30 pounds and no overhead lifting.

On July 9, 2002 the Office referred appellant for a second opinion examination with Dr. Robert L. Keisler, a Board-certified orthopedic surgeon. In a July 22, 2002 report, Dr. Keisler noted appellant's history of injury and treatment and diagnosed early degenerative disc disease. He opined that the condition was not caused or aggravated by lifting, but the symptoms could increase during indirect stresses such as lifting. Dr. Keisler advised that appellant did not have any restrictions and that the accepted cervical sprain had resolved.

By decision dated September 13, 2002, the Office terminated appellant's compensation effective September 13, 2002 on the grounds that she no longer had any employment-related disability.

The Office received an investigative report dated October 9, 2002 from the U.S. Postal Investigation Service, Mid-Atlantic Division. A postal inspector stated that appellant worked in outside employment while receiving workers' compensation benefits. The postal inspector noted that appellant was employed by the medical office of Drs. Haller, Hazlett and Adams as a manager of patient accounts since May 1990, and continued in this capacity after the employment injury of May 7, 2001 while receiving compensation for wage loss from the employing establishment. In addition, the postal inspector noted that Dr. Hazlett was unaware that appellant was receiving disability compensation because of her work injury and would not have allowed appellant to work for his office if he had known. The postal inspector noted that appellant signed and dated two separate CA-7 forms covering a future period from June 22, to July 14, 2001 and responded "N/A" when asked whether she worked outside her federal job during the period claimed in section 2 of the form. The postal inspector noted that appellant had not reported any of her earnings through the period of July 1, 2002. In a postal inspection memorandum of interview, dated September 17, 2002, Dr. Hazlett alleged that he "kept [appellant] off work at the employing establishment" because of her pain complaints, her symptoms and because of the physical therapy recommendations. Dr. Hazlett also indicated that

he did not recall asking appellant if limited duty was available and that she never brought the issue of limited duty to his attention.

In a memorandum of telephone call dated November 21, 2001, the employing establishment advised that appellant returned to work four hours daily on November 20, 2001.

In a December 16, 2002 letter, the Office issued a preliminary determination that an overpayment had occurred in the amount of \$15,843.78 for the period June 23, 2001 through July 1, 2002 pursuant to section 8106 of the Federal Employees' Compensation Act¹ due to appellant's failure to report her earnings from outside employment on numerous CA-7 forms. The Office found that appellant forfeited her compensation from June 23, 2001 through July 1, 2002 because she did not report outside employment and knowingly omitted her earnings. The Office further found that appellant was not without fault in the creation of the overpayment, as she concealed the fact that she was working almost full time, while claiming compensation for total disability. The Office found that she failed to report earnings as required and that section 8106(b) states that an employee who knowingly omits or understates any part of her earnings, forfeits her right to compensation. The Office informed appellant that, if she disagreed with the preliminary determination, she could, within 30 days, submit evidence or argument to the Office, or request a precoupment hearing with the Branch of Hearings and Review.

By decision dated December 16, 2002, the Office found that appellant had forfeited her entitlement to compensation for the period June 23, 2001 through July 1, 2002 on the grounds that she failed to report earnings as required under section 8106(b) of the Act. The Office found that she was overpaid \$15,843.78. The Office noted that appellant knowingly omitted her outside earnings on all of her CA-7 forms from June 20, 2001 to July 2, 2002 and forfeited all compensation for that period.

On December 29, 2002 appellant requested a hearing before an Office representative on the issue of fault and eligibility for waiver of the overpayment.² Appellant completed an overpayment recovery questionnaire and provided a without fault statement. She alleged that she had worked two jobs since 1990, and had contacted the Department of Labor to see if she had to report her second income which she had since 1991. Appellant indicated that she was told that she only had to report a job change if her job changed or had income after her injury. She indicated that she had a second job and was advised that, if her physician did not have her off her second job, or she was not breaking her restrictions, she was okay.

At the hearing on September 25, 2003, appellant testified that she had worked for Dr. Hazlett's office since May 1990 and during the entire time of her postal employment, which began in 1996. She also indicated that she reported her outside employment on her postal application, and her supervisors were aware that she worked two jobs. Appellant worked at the doctor's office during the day and worked nights at the employing establishment. She testified

¹ 5 U.S.C. § 8106(b).

² The record reflects that, on January 28, 2003, the Office advised appellant that she was given the wrong appeal rights, and provided a copy of the proper appeal rights. Appellant filed a second request for hearing on February 22, 2003.

that she was able to work at the doctor's office after the employment injury because there were no physical demands. Appellant stated that she was unable to work at the employing establishment because her job required heavy lifting of 70 pounds and she was unaware that of a light-duty program. Further, appellant alleged that she did not report her outside employment on the Form CA-7 because she was informed by someone at the Department of Labor that she did not have to do so as long as she was not breaking her restrictions.

The Office received a second overpayment recovery questionnaire dated October 27, 2003 in which appellant itemized her income and expenses and reiterated the arguments that the employing establishment was aware that she had a daytime job that was physically less demanding than her postal job. She also indicated that her income was supplemental and did not replace her income. In addition, appellant repeated her claim that she had contacted a representative from the Department of Labor.

In a January 5, 2004 decision, the Office hearing representative determined that appellant forfeited her right to compensation for the period June 23, 2001 to July 1, 2002 because she knowingly made incorrect statements on the CA-7 forms for the period. The Office hearing representative also finalized the Office's findings that an overpayment of \$15,843.78, occurred because appellant failed to furnish information that was material to her case and that she was at fault in the matter and ineligible for waiver. In addition, the Office hearing representative found that appellant failed to report her availability for light duty from May 7 to August 29, 2001. The Office ordered appellant to repay the overpayment, and any applicable interest, by making payments in the amount of \$300.00 per month.

By decision dated March 30, 2004, the Office hearing representative modified the manner in which overpayment would be recovered to reflect that the recovery should be initiated at \$200.00 per month. The hearing representative reiterated that appellant did not qualify for waiver of the overpayment.

LEGAL PRECEDENT

Section 8106(b) of the 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.”³

³ 5 U.S.C. § 8106(b).

The Board has held that it is not enough merely to establish that there were unreported earnings or employment. Appellant can be subjected to the forfeiture provision of section 8106(b) only if she “knowingly” failed to report earnings from employment.⁴ The term “knowingly” as defined in the Office’s implementing regulation, means “with knowledge, consciously, willfully or intentionally.”⁵ The Board has held that forfeiture, being a penalty provision, must be narrowly construed.⁶

ANALYSIS

The Office found appellant forfeited her right to compensation for the period June 23, 2001 to July 1, 2002 pursuant to 8106(b)(2)⁷ on the basis that she knowingly failed to report her employment on Office CA-7 forms. The Office found that appellant made incorrect statements on her CA-7 forms because she either filled in “n/a” or did not provide any response.

However, the question presented to appellant on each of the CA-7 forms was phrased in the following manner: “[h]ave you worked outside your federal job during the period(s) claimed in [s]ection 2? (Include salaried, self-employed, commissioned, volunteer, etc.)” As noted above, appellant either filled in “n/a” or did not provide any response. The question presented to appellant did not inquire as to her “earnings.” As noted above, section 8106(b)(2) requires that there be a knowing omission or understatement of earnings. The Board has previously held that the language of some versions of the Form CA-7 is not specific enough to reasonably put an injured employee on notice that she had to report all earnings, no matter the source, for the period of claimed compensation.⁸ The Board finds that the language in the CA-7 forms of record is not specific to reasonably put appellant on notice that she had to report all earnings, no matter the source. The forms in question did not indicate that appellant had to report all earnings, but merely requested general employment information. Consequently, the Board finds that the forms of record were insufficient to put appellant reasonably on notice of her responsibility to report “earnings.” The Office did not meet its burden of proof to establish that she forfeited her right to compensation for the periods claimed. As appellant was not specifically requested to provide any earnings information, she cannot be found to have knowingly omitted or understated such information to require invoking the penalty provision of forfeiture under section 8106(b)(2).⁹ The Office improperly concluded that appellant forfeited her compensation for the period June 23, 2001 to July 1, 2002.

Because the Board finds that there was no forfeiture of compensation for the period June 23, 2001 to July 1, 2002, the Board also finds that the Office erred in determining that an

⁴ *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁵ 20 C.F.R. § 10.5(n).

⁶ *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

⁷ 5 U.S.C. § 8106(b)(2).

⁸ *See Carlos M. Gianfrancisco*, 47 ECAB 205, 210 (1995).

⁹ *See Christine P. Burgess*, *supra* note 6 (forfeiture, being a penalty provision, must be narrowly construed).

overpayment of compensation was created as a result of forfeiture. Consequently, it is not necessary for the Board to further address the overpayment issues.

CONCLUSION

In this case, the Board finds that the Office failed to meet its burden of proof to establish that appellant forfeited her right to compensation or that she received an overpayment resulting from any forfeited compensation.

ORDER

IT IS HEREBY ORDERED THAT the March 30 and January 5, 2004 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: December 16, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member