

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

LUCILLE A. PETTAWAY, Appellant

and

**U.S. POSTAL SERVICE, GRANVILLE ELDER
STATION, Houston, TX, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 03-1533
Issued: January 8, 2004**

Appearances:
Lucille A. Pettaway, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 6, 2003 appellant filed a timely appeal after receiving a May 9, 2003 decision from the Office of Workers' Compensation Programs, which found that she was at fault in the creation of a \$25,445.79, overpayment in compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision. The Board also has jurisdiction to review the Office's January 30, 2003 decision finding a forfeiture of compensation which led to the declared overpayment.

ISSUES

The issues are: (1) whether appellant forfeited her compensation for the period April 15, 2001 to July 16, 2002 on the grounds that she knowingly failed to report her imprisonment for a felony offense; (2) whether a resulting overpayment of \$25,445.79, in compensation occurred in appellant's case; (3) whether appellant was at fault in the matter of the overpayment, precluding waiver; and (4) whether the Office properly determined the rate of recovery from continuing compensation.

FACTUAL HISTORY

On July 8, 1996 appellant, then a 34-year-old letter carrier, sustained an injury in the performance of duty when she lost control of her postal vehicle. The Office accepted her claim for right medial meniscus tear and approved a right knee arthroscopy. The Office also accepted appellant's claim for lumbar strain. She received compensation for disability on the periodic rolls.

On July 16, 2002 appellant completed and signed a Form EN1032.¹ To the question "Have you been incarcerated for any period during the past 15 months for any felony offense?" She answered "No." The Office received information to the contrary. According to a December 27, 2002 investigative memorandum from the United States Postal Inspection Service:

"[Appellant] was arrested on July 8, 2001 by the Galena Park Police Department for possession of a controlled substance, (Exhibit 8). [She] served 45 days in jail, starting July 8, 2001 due to her inability to pay bond, (Exhibit 4). [Appellant] originally pleaded innocent to the charge of possession of a controlled substance, but subsequently changed her plea to guilty, (Exhibit 4). She entered her plea of guilty on March 8, 2002 and was sentenced to 7 months confinement, (Exhibit 9). [Appellant's] sentence began immediately and she was released from the Texas Department of Corrections on August 21, 2002."

The Texas Department of Corrections confirmed that appellant was incarcerated at the Texas State Plane State (sic) penitentiary from March 14 through August 21, 2002.

In a decision dated January 30, 2003, the Office found that appellant knowingly failed to report accurate information that was material to her case (her imprisonment) on the Form EN1032 she signed on July 16, 2002 and thereby forfeited her right to compensation for the period covered by that form, April 15, 2001 through July 16, 2002, in the amount of \$25,445.79.

Also on January 30, 2003 the Office made a preliminary finding that an overpayment of \$25,445.79 occurred in appellant's case because she failed to furnish information that was material to her case. The Office made a preliminary finding that she was at fault in the matter for three reasons: Appellant made an incorrect statement; she failed to furnish information that was material to her case; namely, she failed to report her imprisonment from March 14 to August 21, 2002 while in receipt of compensation for disability; and she continued to accept payment, which she knew or should have known to be incorrect.

In a decision dated May 9, 2003, the Office finalized its findings that an overpayment of \$25,445.79, occurred because appellant failed to furnish information that was material to her case and that she was at fault in the matter. The Office determined that recovery should be made

¹ The Form EN1032 serves as a report of earnings which the Office may require under 5 U.S.C. § 8106(b), when a claimant is receiving compensation. In addition to salaried employment, the claimant is required to report self-employment and unremunerated employment. A claimant is required to report what it would have cost him or her to hire someone to do the work performed. The fact that business expenses outweigh income does not excuse the claimant from making a report. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.9.a (July 1993).

by withholding \$93.20, from continuing compensation effective May 18, 2003. Appellant appealed to the Board.

LEGAL PRECEDENT

Section 8106(b) of the Federal Employees' Compensation Act provides as follows:

“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. The employee shall include in the affidavit or report the value of housing, board, lodging and other advantages which are part of his earnings in employment and self-employment and which can be estimated in money. 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 by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title [recovery of overpayments], unless recovery is waived under that section.”²

The Office periodically requires each employee who is receiving compensation benefits to complete an affidavit as to any work or activity indicating an ability to work, that the employee has performed for the prior 15 months.³ If an employee who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage loss is suspended until the Office receives the requested report.⁴ Further, section 10.529 of the implementing regulations provides as follows:

“(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

“(b) Where the right to compensation is forfeited, [the Office] shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”⁵

² 5 U.S.C. § 8106(b).

³ 20 C.F.R. § 10.528 (2003).

⁴ *Id.* § 10.528. At that time, the Office will reinstate compensation retroactively to the date of suspension if the employee remains entitled to compensation.

⁵ *Id.* § 10.529.

ANALYSIS

The Board notes that section 8106(b) of the Act is the penalty provision which relates to reports of earnings from employment or self-employment. This is in contrast with section 8148 of the Act, which was enacted by Congress on September 30, 1994 to provide for the termination of benefits payable to beneficiaries who have been convicted of defrauding the compensation program or imprisoned as the result of a felony conviction.⁶ The Office's procedure manual provides that in cases involving convictions for felonies unrelated to claims under the Act, but which result in imprisonment, the claims examiner is to suspend or adjust compensation benefits effective the date of imprisonment.⁷ The penalty for being incarcerated for a felony unrelated to claims under the Act, is found at section 10.18(a) of the implementing federal regulation, which provide: "Whenever a beneficiary is incarcerated in a State or Federal jail, prison, penal institution or other correctional facility due to a State or Federal felony conviction, he or she forfeits all rights to compensation benefits *for the period of his or her incarceration.*"⁸ (Emphasis added.) The Office did not base its January 30, 2003 decision on section 10.18(a) of the regulations. Rather, it applied the penalty provision of section 8106(b) of the Act, finding that appellant "knowingly failed to report" her imprisonment on the Form EN1032 she signed on July 16, 2002 and thereby forfeited her right to compensation with respect to the entire 15-month period for which the report was required. The Office claims examiner applied the penalty provision of section 8106(b) instead of following the appropriate procedures implemented under section 8148.

Not all of the information requested in the Form EN1032 subjects a claimant to forfeiture under section 8106(b) of the Act. The form requests information on dependents, for example, yet Office procedures provide: "Forfeiture may not be declared for failure to provide reports of dependents *since this penalty applies only to reports of earnings.*"⁹ (Emphasis added.) For the same reason, the Board finds that forfeiture under section 8106(b) may not be declared for failure, knowingly or otherwise, to report one's imprisonment for a felony. This penalty applies only to reports of earnings from employment or self-employment.

Because the Office erroneously found that appellant forfeited her compensation for the period April 15, 2001 to July 16, 2002, the record provides no factual basis for the Office's May 9, 2003 finding that an overpayment of \$25,445.79 occurred in appellant's case. The subsidiary issues of fault and recovery of overpayment are rendered moot.

⁶ 5 U.S.C. § 8148

⁷ Federal (FECA) procedure Manual, Part 2 -- Claims Disallowances, Chapter 2.1400.12e(2) (March 1997). See 5 U.S.C. § 8148(b).

⁸ *Id.* § 10.18(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10.c(1)(e) (July 1993).

CONCLUSION

The Board finds that appellant did not forfeit her compensation for the period April 15, 2001 to July 16, 2002 for failure to report her imprisonment on the Form EN1032. The Board also finds that no overpayment of compensation arose as a result of that failure.

ORDER

IT IS HEREBY ORDERED THAT the May 9 and January 30, 2003 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: January 8, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member