United States Department of Labor
Employees' Compensation Appeals Board

TRESIA K. THOMPSON, Appellant	)	
and	)	**Docket No. 03-1988**
	)	**Issued: January 28, 2004**
DEPARTMENT OF THE NAVY, MIRAMAR NAVAL AIR STATION, San Diego, CA, Employer	)	

Appearances:
Tresia K. Thompson, 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
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 8, 2003 appellant filed a timely appeal from the June 3, 2003 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the overpayment decision. Because more than one year has elapsed, however, between the Office's June 23, 2000 decision suspending compensation for wage loss and the filing of this appeal on August 8, 2003, the Board lacks jurisdiction to review the suspension.

ISSUES

The issues are: (1) whether an overpayment of $86,125.10 in compensation occurred in appellant's case from January 1993 through June 17, 2000 as a result of forfeiture under 5 U.S.C. § 8106(b)(2); and if so, (2) whether appellant was at fault in the creation of the overpayment, thereby precluding waiver.

FACTUAL HISTORY

On November 18, 1986 appellant, then a 29-year-old sales store checker, sustained an injury in the performance of duty while scanning a mop in the checkout line at the commissary. The Office accepted her claim for left trapezius strain with radiculopathy and paid compensation for temporary total disability on the periodic rolls.

On January 25, 1993 appellant completed a Form CA-1032 affidavit indicating that she had no employment during the previous 15 months. The Office asked appellant to complete other such forms dated January 11, 1994, January 17, 1995, February 20 and March 29, 1996, February 6, 1997, February 12 and April 3, 1998, February 16, May 18 and December 3, 1999 and March 28 and June 23, 2000.[1] The forms required appellant to report all employment and self-employment during the periods covered, including dates of employment, a description of the work done, the rate of pay and actual earnings received. The forms warned appellant as follows:

> "A FALSE OR EVASIVE ANSWER TO ANY QUESTION, OR THE OMISSION OF AN ANSWER, MAY BE GROUNDS FOR FORFEITING YOUR COMPENSATION BENEFITS AND SUBJECT YOU TO CIVIL LIABILITY. A FRAUDULENT ANSWER MAY RESULT IN CRIMINAL PROSECUTION. ALL STATEMENTS ARE SUBJECT TO INVESTIGATION FOR VERIFICATION."

Appellant completed affidavits on February 30, [sic] 1995, April 5, 1996 and May 17, 1999. These affidavits covered the periods from about November 30, 1993 through April 5, 1996 and from February 17, 1997 through May 17, 1999. On these forms appellant certified that she did some volunteer work from December 1994 to January 1995, about eight hours per month.[2] She was then self-employed from October to November 1995 placing people together for dinner at restaurants, but she earned nothing and went out of business after a month because her body could not handle the hours of sitting while she worked on the telephone. Finally, appellant worked as a waitress from August to December 1998 earning $50.00 to $200.00 a week, depending on the number of hours worked. She worked only a few hours the last few months because her body could not take the stress. Appellant certified that all these statements were true, complete and correct to the best of her knowledge and belief.

On June 25, 1999 the Office advised appellant that it was seeking additional information concerning her employment as a waitress from August to December 1998. The Office asked appellant to submit an enclosed form to her employer for completion and return. The form -- a June 25, 1999 letter to the employer -- requested appellant's job title and a brief description of the duties performed, the number of hours worked per week, inclusive dates of employment,

[1] The March 28 and June 23, 2000 questionnaires covered the entire period since March 1, 1995.

[2] On May 30, 1995 appellant explained that she volunteered at Tidewater Humane, working about four hours every other week. She did not get paid for her service. She walked around and sold paper bingo cards to people playing bingo. She could sit, stand or walk when she felt like it. Appellant provided the Office with Tidewater's telephone number.

weekly rate of pay exclusive of overtime and an explanation of why appellant left the employment.

On August 12, 1999 the Office received a July 20, 1999 response from Lance Reas, appellant's former supervisor at the International House of Pancakes (IHOP). Mr. Reas stated as follows:

> "To the best of my knowledge [appellant] started to work at IHOP at 641 [B]attlefield Blvd. In Aug[ust] of 1996. She quit in Nov[ember] of 1996 and started working again in late Dec[ember] 1996. She worked full time on and off at least 30 hours a week until Feb[ruary] or March of 1998. She then took off 2 or 3 months for health reasons and came back to work part time working 10 to 20 hours per week. She quit at IHOP in late Nov[ember] or early Dec[ember] 1998."

Effective June 18, 2000 the Office suspended appellant's compensation for failing to reply to the CA-1032 forms dated December 3, 1999 and March 28, 2000.

In an investigative report dated August 28, 2002, a special agent for the Office of the Inspector General (OIG) stated that subpoenaed records showed that appellant worked as a waitress from December 27, 1996 until December 21, 1998 with a break in time and attendance. Payroll records showed that she grossed earnings of $5,802.66 for the combined years of 1997 and 1998. There was no record of the amount of tips received.

On December 4, 2002 the Office made a preliminary finding that appellant received an overpayment of $86,125.10 because she "failed to report or underreported earnings for the period January 1993 through June 17, 2000 on your CA-1032 yearly [c]ertification forms." The Office made a preliminary determination that appellant was at fault in the matter because she knew or should have known that she was not entitled to total disability benefits while working and she knowingly failed to report or underreported her earnings.

The Office did not issue a separate decision with appeal rights on the issue of forfeiture. Instead, in a December 4, 2002 memorandum, the Office found that appellant knowingly failed to report or underreported her earnings for the period January 1993 through June 17, 2000 and therefore forfeited all compensation received during that entire period. The Office noted that appellant failed to submit forms in 1994, 1997, 1998 and 2000. Further, on the form dated May 17, 1999, she stated that she worked as a waitress from August to December 1998, when in fact she worked from August 1996 to December 1998, with a break in between. Appellant, the Office found, underreported her earnings on that form.[3]

The Office subsequently received additional information to support that appellant underreported her employment as a waitress. Records from IHOP showed that she received

[3] In a decision also dated December 4, 2002, the Office determined that appellant's loss of wage-earning capacity was zero, effective April 11, 2000, because her actual earnings as a full-time service representative beginning April 11, 2000 fairly and reasonably represented her capacity to earn wages. Appellant did not appeal this decision to the Board.

earnings as early as December 27, 1996. Also, appellant reported on her résumé that she worked as a manager/waitress from 1997 to 1998.

During a conference call on March 21, 2003, appellant advised the Office that she thought she had kept the Office informed of her work through telephone calls and employment affidavits. She stated that she worked as a waitress intermittently. She notified the Office by way of the affidavits and contacted the Office by letter to indicate when she stopped working as a waitress. Appellant stated that she did not hide any of her employment. Appellant provided the Office with information on monthly income and expenses and assets.

In a decision dated June 3, 2003, the Office finalized its preliminary findings on the overpayment. Because of the large amount of the overpayment and the monthly payment established, the Office noted that the overpayment would never be paid in its entirety. Therefore, the Office compromised the principal and accrued charges to $62,930.66.

LEGAL PRECEDENT -- ISSUE 1

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

"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, unless recovery is waived under that section."[4]

Effective June 1, 1987 the regulations implementing this provision of the Act provided as follows:

"While in receipt of compensation for partial or total disability, and unless found by the Office to be unnecessary or inappropriate, an employee shall periodically be required to submit an affidavit or other report of earnings from employment or self-employment on either a part-time or full-time basis. If an employee when required, fails within 30 days of the date of the request to submit such an affidavit or report, the employee's right to compensation for wage loss under section 8105 or 8106 is suspended until such time as the requested affidavit or report is received by the Office, at which time compensation will be reinstated retroactive to the date of suspension. If, in making an affidavit or report, an employee knowingly omits or understates any earnings or remuneration, the employee shall

[4] 5 U.S.C. § 8106(b).

> forfeit the right to compensation with respect to any period for which the affidavit or report was required. A false or evasive statement, omission, concealment, or misrepresentation with respect to employment or earnings in a required affidavit or report may, in addition to forfeiture, subject the employee to criminal prosecution."[5]

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[6]

It is not enough for the Office to establish that a claimant understated earnings. The forfeiture provision of 5 U.S.C. § 8106(b)(2) applies only if the claimant "knowingly" omitted or understated any part of earnings for the period in question. The Board has held that forfeiture, being a penalty provision, must be narrowly construed.[7]

ANALYSIS

On December 4, 2002 the Office found that appellant knowingly failed to report or underreported her earnings for the period January 1993 through June 17, 2000 and therefore forfeited all compensation received during that entire period. This finding is flawed on its face because it makes no distinction between section 8106(b)(1) and section 8106(b)(2) of the Act, between the failure to make an affidavit or report when required, which by regulation warrants only a suspension of compensation for wage loss and knowingly omitting or understating of any part of earnings, which carries the irrevocable and therefore harsher penalty of forfeiture. The Office invoked the harsher penalty for the entire period, as though appellant had made an affidavit or report in every year and knowingly omitted or understated a part of her earnings on each of those forms. This is inconsistent with the established facts of the case.

As the record shows, although the Office required an affidavit every year from 1993 to 2000, appellant submitted only three, dated February 30, [sic] 1995, April 5, 1996 and May 17, 1999. The law limits the application of forfeiture to the periods covered by these three affidavits, so long as the conditions for forfeiture are met in each case. The Board will address the affidavits separately to determine whether the Office has met its burden to establish a forfeiture of compensation and resulting overpayment.

With respect to the February 30, [sic] 1995 affidavit, the Office noted that appellant indicated only volunteer work from December 1994 to January 1995, while the Social Security Administration database showed earnings of $306.15 in 1993, according to the OIG investigation. This information alone does not establish forfeiture. As the regulations provide, forfeiture applies only to the period covered by the affidavit or report. Appellant's February 30,

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[5] 20 C.F.R. § 10.125(a) (1987). Effective January 4, 1999 the regulations were reorganized, with the provisions of section 10.125(a) broadened to include a requirement to report any work or "activity indicating an ability to work" or "work activity." *See id*. at §§ 10.528, 10.529 (1999).

[6] *Harold S. McGough*, 36 ECAB 332 (1984).

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

[sic] 1995 affidavit covers the period beginning on or about November 30, 1993. Therefore, to support forfeiture for the period covered by the affidavit, the evidence must establish that she earned at least a part of the $306.15 after about November 30, 1993. Because the evidence is not detailed enough to establish this as a fact, the Office has not shown that appellant was required to report these earnings on her affidavit. Moreover, the Office made no attempt to explain how it determined that appellant omitted these earnings "knowingly." The evidence does not establish that appellant forfeited her compensation based on the February 30, [sic] 1995 affidavit.

With respect to the April 5, 1996 affidavit, the Office made no finding in its December 4, 2002 memorandum that appellant had earnings from January 5, 1995 to April 5, 1996 and knowingly omitted or understated them. The evidence does not establish that appellant forfeited her compensation based on this affidavit.

The only other affidavit to which forfeiture may apply is the affidavit dated May 17, 1999. This is the only affidavit on which the Office made a specific finding. In its December 4, 2002 memorandum, the Office noted that appellant reported her work as a waitress from August to December 1998, when in fact she worked from August 1996 to December 1998, with a break in between. The Office found that appellant underreported her earnings on this form.

The record supports the Office's finding. Appellant's supervisor at IHOP reported that to the best of his knowledge appellant started working in August 1996, not August 1998. Records from IHOP showed that appellant received earnings as early as December 27, 1996, and appellant reported on her résumé that she worked as a manager/waitress from 1997 to 1998. Though she advised the Office of her weekly earnings, she underreported the length of her employment as a waitress and thereby understated the extent of her earnings in that position.

But, the Office must do more than find that appellant understated her earnings on this form. The forfeiture provision of 5 U.S.C. § 8106(b)(2) applies only if the claimant "knowingly" omitted or understated any part of earnings for the period in question. In this case, the Office made no effort to examine closely appellant's statements or activities or other circumstances of the case in order to determine whether the evidence established the requisite intent.[8] The Office simply made an overly broad finding that appellant "knowingly failed to report or underreported her earnings for the period January 1993 through June 17, 2000." The Office presented no analysis of the evidence to demonstrate that she understated her earnings as a waitress "with knowledge, consciously, intelligently, willfully or intentionally."[9] During the conference call on March 21, 2003, appellant stated that she thought she had kept the Office informed of her work through telephone calls and employment affidavits. The record before the Board does not bear this out, but neither is there sufficient probative evidence to rebut her assertion that she did not "hide" any of her employment from the Office. The fact that she correctly reported the month that she began working as a waitress (August, according to the supervisor at IHOP) raises the possibility that she meant to write August 1996 but inadvertently wrote August 1998 instead.

[8] *John Louis Ryan*, Docket No. 92-1261 (issued December 9, 1993) and cases cited therein.

[9] *Burgess*, citing BLACK'S LAW DICTIONARY 784 (5th ed. 1979); *see* 20 C.F.R. § 10.5(n) (1999) (defining "knowingly" to mean with knowledge, consciously, willfully or intentionally).

Appellant did not misrepresent the nature of her work activity or the nature of her earnings. She earned $50.00 to $200.00 a week, she reported, depending on the number of hours worked, but she worked only a few hours those "last few months" because her body could not take the stress. It appears that she faithfully passed along the Office's June 25, 1999 request for additional information to her former employer so that the Office could further develop the factual evidence. All things considered, the Board finds no proof of deceit or fraud or intent to conceal the extent of her earnings by misrepresenting the length of her employment as a waitress at IHOP. It is the Office that bears the burden in this matter, and the Office presented no case that appellant "knowingly" understated her earnings. For this reason, the Board finds that the Office has failed to establish that appellant forfeited her compensation based on the May 17, 1999 affidavit.

Because forfeiture is not established for any period covered by the three affidavits submitted in this case, no basis exists for the Office's June 3, 2003 decision that an overpayment of $86,125.10 in compensation occurred from January 1993 through June 17, 2000. The second issue on appeal, whether appellant was at fault in the creation of such an overpayment, is moot and need not be addressed.

CONCLUSION

The Office did not meet its burden to establish that an overpayment of $86,125.10 in compensation occurred in appellant's case from January 1993 through June 17, 2000 as a result of forfeiture under 5 U.S.C. § 8106(b)(2).

ORDER

The June 3, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 28, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member