

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

) CHERYL THOMAS, Appellant)
))
)) Docket No. 03-1848
) and) Issued: July 6, 2004
))
) U.S. POSTAL SERVICE, POST OFFICE,)
) Dallas, TX, Employer)
))

Appearances:
Cheryl Thomas, 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 July 15, 2003 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated April 29, 2003. 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 are: (1) whether the Office properly found that appellant forfeited her entitlement to compensation from June 13, 1999 through November 4, 2002 because she knowingly failed to report earnings from employment during this period; (2) whether appellant received an overpayment of compensation in the amount of \$35,316.14 during the period of forfeiture; and (3) whether the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver.

FACTUAL HISTORY

On May 9, 1989 appellant, then a 27-year-old clerk, filed a traumatic injury claim to her right hand and middle finger occurring on April 21, 1989. The Office accepted appellant's claim

for carpal tunnel syndrome. She stopped work on April 21, 1989 and returned to limited-duty employment on September 22, 1992. Appellant subsequently stopped work again and was placed on the periodic rolls effective September 17, 1995.¹

By decision dated September 16, 1997, the Office reduced appellant's compensation based on its findings that her actual earnings as a tax generalist effective July 15, 1997 represented her wage-earning capacity. In a decision dated November 3, 1997, the Office amended its September 16, 1997 wage-earning capacity to reflect a different rate of pay for appellant.²

On September 13, 2000 appellant completed and signed a Form CA-1032 covering the prior 15-month period which advised that she must report all employment from which she received wages or other income and must report what she was paid for any employment. In response to the question of whether she had worked for an employer during the previous 15 months, appellant responded "yes." She indicated that she worked as a receptionist from October 1998 to January 2000, earning \$10.00 per hour and from February 2000 onward as a receptionist with Office Team with a variable rate of pay. Appellant also indicated that she was self-employed as a realtor with Felder and Company Realtors from February 2000 to the present with a variable rate of pay and with Dis-N-Dat Business Services with a variable rate of pay. Appellant noted that she earned \$13.00 per hour at Dis-N-Dat Business Services. In a statement submitted with her September 13, 2000 Form CA-1032, appellant noted that she worked for Macy's Galleria from October 2000 to the present with a base pay of \$7.50 plus sales commission. Appellant referred the Office to pay stubs submitted prior to the conclusion of 1999 and noted that, regarding her real estate commissions, she was not always paid at the time of the sale of the properties.

Accompanying her September 13, 2000 Form CA-1032, appellant submitted copies of pay stubs from Premier Consulting from December 26, 1999 to January 15, 2000, showing that she received earnings in the amount of \$904.00. Appellant further submitted pay stubs from Office Team dated February 28 to September 11, 2000, showing that she received earnings in the amount of \$4,991.88 and pay stubs from Macy's Galleria showing year-to-date earnings as of October 1, 2000 of \$171.19. With regard to real estate commissions, appellant submitted copies of three checks from the sale of real estate together totaling \$4,212.50.

On October 1, 2001 appellant completed and signed a Form CA-1032 covering the prior 15-month period. Appellant did not respond to the question of whether she worked for an employer during the previous 15 months. She responded "yes" to the question of whether she was self-employed and noted that she assisted in real estate transactions for Pat Mays Realtors with earnings by "commission only."

¹ By decision dated March 1, 1993, the Office granted appellant a schedule award for a 22 percent permanent impairment of the right upper extremity and a 4 percent permanent impairment of the left upper extremity.

² By decision dated February 20, 1998, the Office denied modification of its November 3, 1997 wage-earning capacity decision. In a decision dated November 24, 1999, the Office denied appellant's claim for compensation from September 6 to 10 and 13 to 17, 1999 on the grounds that the medical evidence did not establish that she was disabled due to her accepted condition of right carpal tunnel syndrome.

Appellant completed and signed but did not date a Form CA-1032 received by the Office on November 4, 2002. Appellant listed Macy's Galleria as work for an employer during the previous 15-month period but did not provide dates of employment or salary information. She also indicated that she was self-employed as a realtor for Pat Mays Realtors by commission.

In an investigative memorandum dated February 20, 2003, a special agent with the Office of the Inspector General for the Department of Labor described appellant's employment from 1998 to 2001. She compiled a chart comparing appellant's employment information provided on the CA-1032 forms "with information obtained from the Texas Workforce commission and other sources." In the chart, the special agent found that, for the period June 13, 1999 to September 13, 2000, appellant had not reported earnings from Felder and Company Realtors, DSW Shoe Warehouse, Target and Taxes Plus. The special agent determined that appellant had not submitted a Form CA-1032 for 2001. She noted that appellant had worked at Texas Temp Limited Partnership, Federal Corporate Services, Accountemps and Macy's Galleria during 2000 and 2001. The special agent further indicated that appellant had not reported her actual earnings from her work at Felder and Company Realtors. For the undated Form CA-1032 received by the Office on November 4, 2002 the special agent noted that appellant had not reported her actual earnings at Macy's Galleria and Pat Mays Realtors. Attached to the special agent's report was financial information provided by appellant, including tax returns, copies of wage and tax statements (W-2s) dated 1999 to 2002 and Form 1099s reporting miscellaneous income from 1999 to 2002. The 2001 Form 1099 reveals that appellant had earnings from Pat Mays Realtors in the amount of \$19,074.98 and from Felder and Company Realtors in the amount of \$3,082.50. The 2002 Form 1099 showed that appellant had earnings from Pat Mays Realtors in the amount of \$38,106.00.

Social Security Administration earnings records for the period January 1, 1998 through December 31, 2000 show that in 2000 appellant earned \$1,890.65 working for Premier Consulting, \$5,881.38 working for Texas Temp Limited Partnership, \$5,395.96 working for Federated Corporate Services and \$4,054.00 in self-employment.

On March 27, 2003 the Office notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$35,316.14 because she underreported earnings for the years 2000 to 2002 on CA-1032 forms. The Office further informed appellant of its preliminary finding that she was at fault in the creation of the overpayment and, consequently, was not entitled to waiver.

In a letter dated March 28, 2003, the Office informed appellant that it proposed to modify its prior wage-earning capacity determination and reduce her compensation to zero because she had the capacity to earn wages as a real estate broker.

On March 28, 2003 the Office also notified appellant of its proposed decision that she forfeited entitlement to compensation for the period June 13, 1999 through November 4, 2002 because she failed to report or underreported earnings during the years 2000 to 2002. The Office found that, for the year 2000, appellant failed to report or underreported earnings in the amount of \$5,395.96 from her work at Macy's Galleria and earnings in the amount of \$3,200.00 from work at Taxes Plus. The Office further noted that appellant had reported working at Premier Consulting earning \$10.00 per hour and reported working at Office Team and Felder and

Company Realtors with a pay rate that varied but had not reported earnings in the amount of \$5,861.96 from Office Team and \$9,709.00 from Felder and Company Realtors. For the year 2001, the Office found that appellant failed to report her work at Macy's Galleria, where she earned \$2,988.45, Accountemps, where she earned \$1,855.88 and Felder and Company Realtors, where she earned \$3,082.50. The Office noted that she described working at Pat Mays Realtors on commission but did not include her earnings of \$19,074.98. For the year 2002, the Office found that appellant had actual earnings from Macy's Galleria of \$220.00 but had not shown the amount she earned and had earnings of \$38,326.00 from Pat Mays Realtors but had shown only that she received commissions.

In a response dated April 28, 2003, appellant related that she submitted pay stub copies until July 1999, when she obtained her real estate license and resigned from the employing establishment. Appellant stated that she resigned because she no longer wished to receive workers' compensation and did not want to continue to submit documentation of her earnings. Appellant stated that she completed the Office forms listing her employment but not the income. She related that she thought that the Office could obtain her salary information from her tax return and stated: "This was not an intentional act on my part."³

By decision dated April 29, 2003, the Office modified its prior wage-earning capacity determination and reduced appellant's compensation to zero effective April 29, 2003, based on its finding that she had the capacity to earn wages as a real estate broker.⁴

The Office finalized its finding that appellant forfeited compensation for the period June 13, 1999 through November 4, 2002, in the amount of \$35,316.14 because she knowingly omitted or underreported earnings on CA-1032 forms covering this period.

In another decision dated April 29, 2003, the Office finalized its finding that appellant received an overpayment of compensation in the amount of \$35,316.14 due to her underreporting of earnings from 2000 to 2002. The Office further finalized its determination that she was at fault in the creation of the overpayment because she omitted earnings for the years 2000 to 2002 and, thus, was not entitled to waiver.

LEGAL PRECEDENT

Section 8106(b) of the Federal Employees' Compensation Act provides that an employee who "fails to make an affidavit or report when required or 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."⁵

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

³ Appellant noted that she would soon file her 2001 and 2002 tax returns.

⁴ Appellant has not appealed this decision and therefore it is not before the Board at this time.

⁵ 5 U.S.C. § 8106(b).

8106(b) only if she “knowingly” failed to report employment or earnings.⁶ The term “knowingly” as defined in the Office’s implementing regulation, means “with knowledge, consciously, willfully or intentionally.”⁷

ANALYSIS

The Office found that appellant forfeited compensation from June 13, 1999 through November 4, 2002. Appellant signed a Form CA-1032 on September 13, 2000 covering the period June 13, 1999 through September 13, 2000. On that form appellant indicated that she worked as a receptionist from October 1998 to January 2000, earning \$10.00 per hour and as a receptionist from February 2000 onwards with Office Team. She also listed self-employment with Dis-N-Dat Business Services and Felder and Company Realtors with a variable rate of pay. Accompanying her September 13, 2000 Form CA-1032, appellant submitted pay stubs from Premier Consulting showing earnings of \$904.00, Office Team showing earnings of \$4,991.88 and Macy’s Galleria showing earnings of \$171.19 as of October 1, 2000. She further submitted copies of checks totaling \$4,212.50 showing commissions earned from the sale of real estate. Appellant signed a Form CA-1032 on October 1, 2001 covering the period July 1, 2000 through October 1, 2001. On the Form CA-1032 signed October 1, 2001, appellant did not report any earnings from employment but noted that she worked at Pat Mays Realtors on commission. She further signed but did not date a Form CA-1032, received by the Office on November 4, 2002 covering the period August 4, 2001 through November 4, 2002. On the November 4, 2002 Form CA-1032, appellant responded “yes” that she was self-employed as a realtor with Pat Mays Realtors with earnings consisting of commissions. She also listed employment but not earnings at Macy’s Galleria.

In a February 20, 2003 investigative memorandum, a special agent found that information from the Texas Workforce commission revealed that appellant had unreported earnings from DSW Shoe Warehouse, Target and Taxes Plus for the period covered by the September 13, 2000 Form CA-1032. The special agent further reported that appellant worked at Texas Temp Limited Partnership, Federal Corporate Services, Accountemps and Macy’s Galleria during 2000 and 2001. Records from the Social Security Administration show that in 2000, appellant received earnings of \$1,890.65 working for Premier Consulting, \$5,881.38 working for Texas Temp Limited Partnership, \$5,395.96 working for Federated Corporate Services and \$4,054.00 in self-employment. The record further shows that appellant had unreported earnings in 2001 of \$19,074.98 in commission from Pat Mays Realtors, \$3,082.50 from Felder and Company Realtors, \$1,855.88 from Accountemps and \$2,988.45 from Macy’s Galleria. Additionally, in 2002 appellant failed to report earnings of \$220.00 from Macy’s Galleria and over \$38,000.00 in commissions from Pat Mays Realtors.

In a letter dated April 28, 2003, appellant related that, after she resigned from the employing establishment in July 1999, she thought that she no longer needed to submit supporting documentation regarding her employment and earnings. Appellant stated that she

⁶ *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁷ 20 C.F.R. § 10.5(n).

completed the forms listing her employment but not the income and believed that the Office could obtain her salary information.

As noted above, the Office has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from employment. In this case, appellant signed CA-1032 forms which advised her that she must report both all employment and all earnings from employment; however, appellant omitted employment and earnings information from the CA-1032 forms covering the period September 13, 2000 to November 4, 2002. The Office forms clearly state that “a false or evasive answer to any questions or the omission of an answer, may be grounds for forfeiture of your compensation benefits and subject you to civil liability” and that a fraudulent answer “may result in criminal prosecution.” The factual circumstances of record, including appellant’s acknowledgement that she failed to submit the necessary information and her signing of strongly-worded certification clauses on the CA-1032 forms provide persuasive evidence that she “knowingly” understated her earnings and employment information.⁸ Her failure to list all her earnings and employment must be considered to have been made with knowledge of the reporting requirements. The Office, therefore, properly found that appellant forfeited her compensation from September 13, 2000 to November 4, 2002.

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of the Office’s implementing regulation 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.”⁹

ANALYSIS -- ISSUE 2

If a claimant has any earnings during a period covered by a Form CA-1032 which he or she knowingly fails to report, he or she is not entitled to any compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.¹⁰ The Office paid appellant compensation from September 13, 2000 to November 4, 2002, in the amount of \$35,316.14. As appellant forfeited compensation for this period because she underreported her income and employment on CA-1032 forms covering the

⁸ See generally *Robert C. Gilliam*, 50 ECAB 334 (1998).

⁹ 20 C.F.R. § 10.529.

¹⁰ *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

period September 13, 2000 to November 4, 2002, there exists an overpayment of compensation in the amount of \$35,316.14.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Federal Employees' Compensation Act¹¹ provides that “[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.” Section 10.433 of the Office’s implementing regulation¹² provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(2) Failed to provide information which he or she knew or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

ANALYSIS -- ISSUE 3

In this case, the Office found that appellant was at fault in the creation of the overpayment because she omitted earnings on CA-1032 forms for the years 2000 to 2002. The record establishes that appellant had unreported earnings from employment during the period of the forfeiture and knowingly failed to furnish this material information to the Office. Appellant signed certification clauses on the CA-1032 forms advising her that she might be subject to civil, administrative or criminal penalties if she knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. Thus, by signing the form, appellant is deemed to have acknowledged her duty to fill out the form properly, including the duty to report any employment or self-employment activities and income. The evidence of record, therefore, shows that appellant was aware or should have been aware of the materiality of the information that she had earnings which she had not listed on the relevant forms. As she failed to provide information to the Office regarding her employment during the period covered by the form, she is at fault in creating the overpayment and is not entitled to waiver of recovery of the amount of \$35,316.14.

On appeal, appellant contends that she did not intentionally conceal her wages and that she believed that the Office could obtain the information from her tax records. However, as

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.433.

discussed above, the Form CA-1032 clearly indicated that all employment and earnings must be reported.¹³

Regarding the repayment of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employees' Compensation Act. In this case, a claimant is no longer receiving wage-loss compensation, therefore, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.¹⁴

CONCLUSION

The Board finds that appellant forfeited her entitlement to compensation from June 13, 1999 through November 4, 2002 because she knowingly failed to report earnings from employment during this period. The Board further finds that appellant received an overpayment of compensation in the amount of \$35,316.14 during the period of forfeiture. The Board finds that the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 29, 2003 are affirmed.

Issued: July 6, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹³ Appellant also questions why her private employment earnings were not included in her pay rate when she began receiving disability compensation; however, this matter is not before the Board at the present time.

¹⁴ See *Robert S. Luciano*, 47 ECAB 793 (1996).