

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM CLEARY and U.S. POSTAL SERVICE,  
POST OFFICE, Gloucester, NJ

*Docket No. 02-2088; Submitted on the Record;  
Issued May 11, 2004*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether appellant forfeited his right to compensation for the period January 1, 1990 through December 31, 1992 because he knowingly failed to report earnings; (2) whether he received an overpayment in the amount of \$26,953.54 for the forfeited compensation; and (3) whether the Office of Workers' Compensation Programs properly found appellant at fault in creating the overpayment.

On June 14, 1976 appellant, then a 31-year-old part-time flexible letter carrier, filed a notice of occupational disease alleging that he experienced pain in his legs, feet and lower back as a result of long periods of standing and walking while in the performance of duty. The Office accepted the claim for bilateral aggravation of des valgo planus. Appellant received compensation for wage loss from April 19 to August 23, 1977, at which time he returned to work. He filed a claim for a recurrence of disability beginning December 13, 1977 and the Office also accepted that claim as causally related to the original work injury. Appellant's treating physician, Dr. Stanley David, a Board-certified podiatrist, approved appellant for sedentary work but, there was no appropriate job for him at the employing establishment. Appellant began receiving compensation on the periodic rolls based on his loss of wage-earning capacity. The Office calculated his compensation based on the current rate of pay for a part-time flexible clerk, which was \$13.84 per hour.

On an Office form signed by appellant on September 10, 1980, he advised that, on June 4, 1979, he began working in the private sector for a local newspaper. In a decision dated December 3, 1979, the Office reduced appellant's compensation based on his actual earnings of \$200.00 per week as a clerk/typist for the Gloucester City News. The loss of wage-earning capacity determination was effective on November 8, 1979. Appellant later resigned from the employing establishment on February 1, 1980.

Appellant periodically completed and signed Office CA-1032 financial information forms regarding his salary and income. Each form covered a period of 12 to 15 months and were dated August 12, 1985, November 4, 1986, November 4, 1987, June 30, 1998, October 25, 1988,

September 10, 1989, October 24, 1990, October 24, 1991, September 1, 1992, August 10, 1993 and August 19, 1994. On these forms, appellant reported his continued employment with the Gloucester City News in various positions ranging from clerk, writer and then reporter. The annual earnings, as reported by appellant, rose from \$10,400.00 to \$55,600.00 between 1980 and 1994.

In a letter and corresponding investigative report, both of which were dated May 23, 1994, the employing establishment alleged that appellant had underreported his earnings because the amounts reported by him on the CA-1032 forms did not match those reported to the Social Security Administration (SSA).

The record reveals the following discrepancies between the CA-1032 forms submitted by appellant and his earnings as reported by the SSA for the same period:

| Date of CA-1032   | Earnings Reported | Earnings reported by SSA |
|-------------------|-------------------|--------------------------|
| June 3, 1988      | \$22,000.00       | \$22,000.00              |
| October 25, 1988  | \$22,000.00       | \$23,855.00              |
| 1989              | None sent         | \$25,220.00              |
| October 24, 1990  | \$24,600.00       | \$42,529.00              |
| October 24, 1991  | \$31,500.00       | \$41,330.00              |
| September 1, 1992 | \$45,000.00       | \$55,690.00              |
| August 10, 1993   | \$50,000.00       | \$55,120.00              |
| August 19, 1994   | \$55,600.00       | No SSA report            |

On October 14, 1994 the Office issued a notice of proposed termination of compensation finding that appellant no longer had wage loss on the account of his accepted work injury. The Office noted that appellant's wages as an employee of the Gloucester City News exceeded the current rate of pay for the job that he held at the time of his injury. The salary for a part-time flexible carrier was listed as \$22,183.00 per year, while appellant was noted as having earned \$55,000.00, based on a Form CA-1032 dated August 19, 1994. Appellant was given 30 days to submit additional evidence if he disagreed with the proposed action.

In a December 9, 1994 decision, the Office terminated appellant's disability compensation effective December 11, 1994 on the grounds that he had rehabilitated himself and no longer had a wage loss. The Office also terminated his medical benefits.

In separate decision, also issued on December 9, 1994, the Office determined that appellant had forfeited his right to compensation for the period July 1, 1988 through December 10, 1994 under 5 U.S.C. § 8106(b) of the Federal Employees' Compensation Act on the grounds that he had knowingly underreported his earnings from his private employment to

the Office. The Office found that an overpayment occurred in the amount of \$58,639.66 and that appellant was at fault in the creation of the overpayment. He was advised of his right to a hearing and to submit evidence if he disagreed with the Office's preliminary finding of fault. The Office directed appellant to complete an overpayment questionnaire if he sought waiver of the overpayment.

On December 20, 1994 appellant requested a hearing, which was held on May 24, 1995.<sup>1</sup> In a decision dated December 6, 1995 and finalized on December 8, 1995, the Office hearing representative vacated both of the December 9, 1994 decisions. The Office hearing representative determined that appellant had not knowingly underreported his earnings and, therefore, the Office had erred in finding that he had forfeited his right to compensation. However, the Office hearing representative found that an overpayment occurred based on appellant's increased earnings during the period in question. Because the record contained conflicting information as to appellant's rate of pay, the case was remanded for modification of appellant's loss of wage-earning capacity and recalculation of the resulting overpayment.

On remand the Office recalculated appellant's loss of wage-earning capacity for each year from 1988 through 1994, based on information provided by the employing establishment as to appellant's rate of pay effective January 1, 1988, assuming that he had retained the date-of-injury job as a part-time flexible clerk.

On May 15, 1996 the Office issued a preliminary determination that appellant was at fault in the creation of an overpayment in the amount of \$54,899.07, which occurred when appellant accepted compensation after he no longer had an employment-related loss of wage-earning capacity.

Appellant requested a preresoupment hearing, which was held on December 11, 1996. In a February 20, 1997 decision, an Office hearing representative found that appellant was at fault in the creation of a \$54,899.07 overpayment as determined by the Office's May 15, 1996 preliminary notice. The Office hearing representative found that appellant knew or should have known that he had increased his annual salary by working at the Gloucester City News in excess of what he would have been paid at the employing establishment. The Office hearing representative calculated an overpayment and held that appellant was at fault in the creation of an overpayment. Because he was found to be at fault in the creation of the overpayment, waiver was precluded. The Office hearing representative set forth a recoupment schedule for appellant to repay the debt in a period of two years.

Appellant filed an appeal with the Board on May 12, 1997. In a memorandum dated April 22, 1999, the Board requested that the Director of the Office submit a pleading addressing the legal basis for its determination that appellant received an overpayment from July 1, 1988

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<sup>1</sup> Appellant explained at the hearing that the Gloucester City News was owned and operated by his father and was a family business. He testified, at the hearing, that after 1988 he essentially copied information from his original CA-1032 form and estimated earnings based on what he thought his salary was with the newspaper. SSA records were presented, which reported a combined income for both appellant and his wife from the paper for the period 1990 to 1992. Appellant alleged that he had never been told by the Office that he could only earn a "x number of dollars" He stated that he believed that he had a permanent injury award and that by reporting income he had put the Office on notice to make any necessary adjustments to his compensation.

through December 10, 1994. The Board assumed that, if a loss of wage-earning capacity determination had been in effect in appellant's case since 1977, the Office erred in calculating the amount of the overpayment pursuant to the Office Procedure Manual, Chapter 2.814.7(d) and 7(e).<sup>2</sup> The Board asked the Office to address whether appellant's overpayment should have been calculated in accordance with Chapter 2.814.11.<sup>3</sup> On May 25, 1999 the Director of the Office filed a motion to remand and a request for the Board to set aside the February 27, 1997 decision. The Board granted the motion and set aside the February 20, 1997 decision of the Office hearing representative.<sup>4</sup>

In a December 3, 1999 decision, the Office determined that appellant had forfeited his right to compensation for the periods July 1 to October 25, 1988 and August 23, 1989 to December 10, 1994 because he knowingly understated his earnings for those periods on signed CA-1032 forms. The Office determined that the forfeiture created an overpayment in the amount of \$51,516.47. The Office found that appellant was at fault in the creation of the overpayment and, therefore, was not entitled to waiver.

Appellant disagreed with the decision and requested a hearing, which was held on November 29, 2000. On December 8, 2000 appellant by counsel submitted the following documents: (1) appellant's personal statement dated December 5, 2000; (2) W-2 wage forms for appellant and his wife for the years 1988 to 1991; (3) an overpayment questionnaire completed on December 5, 2000; (4) copies of Office letters dated December 14, 1979 and May 14, 1985.

In a decision dated May 6, 2002, an Office hearing representative made credibility findings based on appellant's testimony.<sup>5</sup> The Office modified the Office's December 3, 1999 decision to reflect that appellant knowingly understated his earnings from January 1, 1990 through December 31, 1992 and, therefore, was subject to forfeiture of his entitlement to compensation for that period. The Office hearing representative modified the amount of the overpayment to \$26,953.54<sup>6</sup> and also found that appellant was at fault in the creation of the overpayment, which precluded any consideration of waiver. Appellant was directed to reimburse the debt in full.

The Board finds that the Office properly determined that appellant forfeited his right to compensation based on a determination that he knowingly understated his earnings for the period January 1, 1990 through December 31, 1992.

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<sup>2</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7d-e (May 1997).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (June 1996).

<sup>4</sup> *William E. Cleary*, Docket No. 97-1837 (Order Granting Remand issued July 12, 1999).

<sup>5</sup> The Office hearing representative found that appellant was of above average intelligence and had a highly developed business acumen and financial aptitude. He did not find appellant's testimony to be credible that he was unaware of the amount of his salary at the newspaper.

<sup>6</sup> The total amount of compensation received by appellant on the periodic rolls from January 1, 1990 through December 31, 1992 is \$26,953.54 (\$8,337.50 + \$9,142.90 + \$9,473.14 = \$26,953.54).

Section 8106(b) of the Act<sup>7</sup> 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.... An employee who

(1) fails to make an affidavit or report when required; or

(2) knowingly omits or understates any part of his or her 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 [s]ection 8129 of this title, unless recovery is waived under that section.”

The term “knowingly” is defined by the regulations and means “with knowledge, consciously, willfully or intentionally.”<sup>8</sup> The Office has the burden of proof of establishing that a claimant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from self employment. To meet this burden, the Office must closely examine the claimant’s activities and statements in reporting employment or earnings. The Office may meet its burden in several ways. One is by the claimant’s own subsequent admission that he or she failed to report employment or earnings which he or she knew to report. Similarly, the Office may meet this burden by establishing that the claimant has pled guilty to violating 18 U.S.C. § 1920 by falsely completing the affidavit section of the Form CA-1032. Furthermore, the Office may meet this standard without an admission by the claimant, if the claimant failed to fully and truthfully complete the Form CA-103 and the circumstances of the case establish that the claimant failed to fully and truthfully reveal the full extent of his or her employment activities and earnings. The Office may also meet this burden if it establishes through the totality of the factual circumstances that the claimant’s certification, that he or he was not employed or self-employed, was false.<sup>9</sup>

On a CA-1032 form dated October 24, 1990, appellant reported his earnings as \$24,600.00 but the SSA records establish that he actually earned \$42,529.00, underreporting his earning by over 40 percent. Appellant underreported his earnings on the October 24, 1991 CA-1032 form as \$31,500.00 when he actually earned \$41,330.00 underreporting earnings by 20 percent. He stated on September 1, 1992 that he earned \$45,000.00 when he actually earned \$55,690.00 again underreporting by 20 percent. Appellant further stated that, on August, 10 1993, his annual salary at the newspaper was \$50,000.00 when it was listed on SSA records as \$55,120.00.

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<sup>7</sup> 5 U.S.C. § 8106(b).

<sup>8</sup> *See also* 20 C.F.R. § 10.5(n) (1999).

<sup>9</sup> *Melvin E. Gibbs*, 54 ECAB \_\_\_\_ (Docket No. 01-2252, issued March 6, 2003); *Terryl A. Geer*, 51 ECAB 168 (1999).

The Board finds that appellant knowingly underreported his earnings for the years 1990, 1991 and 1992. The Board recognized in *Sharon J. McIntosh* that an Office hearing representative has discretion to weigh the evidence of record and render credibility determinations based on the witness testimony.<sup>10</sup> The Office's Federal (FECA) Procedure Manual states:

"The [claims examiner] is responsible for determining the facts in a case by weighing the evidence which has been developed and drawing conclusions based on that evidence. When the relevant information has been received and the parties to the claim have had a chance to refute any disputed evidence, the [claims examiner] is ready to evaluate the evidence for credibility and validity."<sup>11</sup>

In this case, the Board finds that the hearing representative exercised sound discretion and logic in drawing conclusions based on the factual information in the claim. The Office hearing representative reasonably rejected the testimony of appellant with respect to whether or not he knowingly underreported his income to the Office. Furthermore, given the amount of the discrepancy between appellant's stated earnings and his actual earnings for each of the years 1990, 1991 and 1992 is so substantial that the Board concludes that appellant had to have known that he was underreporting his income, and had to have known that he was receiving a larger salary at the newspaper than he would have received in his date of injury job. For these reasons, the Board finds that appellant "knowingly" omitted or understated his earnings for the years of 1990, 1991 and 1992; and, therefore, forfeited his right to compensation for that period.

The Board finds that appellant received an overpayment in the amount of \$26,953.54 from January 1, 1990 through December 31, 1992.

The Office noted that based on periodic roll payments appellant received \$8,337.50 in compensation for the period January 1 through December 31, 1990, \$9,142.90 for the period from January 1 through December 31, 1991 and \$9,473.14 from January 1, 1992 through December 31, 1991. The total amount of compensation received by appellant on the periodic rolls from January 1, 1990 through December 31, 1992 is \$26,953.54 (\$8,337.50 + \$9,142.90 + \$9,473.14 = \$26,953.54). Because appellant has forfeited his right to compensation for the period of January 1, 1990 through December 31, 1992, the Board finds that an overpayment occurred in the amount of \$26,953.54.

The Board also finds that the Office properly determined that appellant was at fault in creating the overpayment.

Office regulations provided that the Office may consider waiving an overpayment only if the individual to who it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper. The recipient must show good faith and

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<sup>10</sup> Sharon J. McIntosh, 47 ECAB 754 (1996)

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts, Weighing Factual Evidence and Drawing Conclusions*, Chapter 2-809.10(a) (June 1995).

exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.<sup>12</sup> Section 10.433(a) of the Office regulations specifically states:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect;
- (2) Failed to provide information which he or she knew or should have known to be material;
- (3) Accepted a payment which he or she knew or should have been expected to know was incorrect.”<sup>13</sup>

In the present case, the record establishes that appellant underreported his earnings on CA-1032 forms provided to him for financial disclosure to the Office. The CA-1032 form letter specifically notified appellant of his responsibility to complete the forms and provide relevant information concerning his employment status and earnings. Appellant, however, made incorrect statements as to material facts which he knew or should have known not be incorrect and failed to furnish information which he knew or should have known to be material. Therefore, the Office properly found that appellant was at fault in the creation of the \$26,953.54 overpayment. Because appellant was with fault in the creation of the overpayment, waiver is not a consideration.

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<sup>12</sup> 20 C.F.R. §10.432(a) (1999); *John L. Hoss*, 54 ECAB \_\_\_ (Docket No. 01-404, issued December 16, 2002).

<sup>13</sup> 20 C.F.R. § 10.433(a)(1)-(3) (1999).

The decision of the Office of Workers' Compensation Programs dated May 6, 2002 is hereby affirmed.

Dated, Washington, DC  
May 11, 2004

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member