United States Department of Labor
Employees' Compensation Appeals Board

CARL B. LEGER, Appellant	)	
and	)	**Docket No. 04-1789**
	)	**Issued: February 7, 2006**
DEPARTMENT OF AGRICULTURE, FEDERAL GRAIN INSPECTION SERVICE, Crowley, LA, Employer	)	

Appearances:
Carl B. Leger, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 7, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated June 24, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant forfeited his compensation for the period May 20, 1985 to July 9, 2002; (2) whether an overpayment of $363,756.23 was created for the period May 20, 1985 to July 9, 2002; (3) whether the Office properly found appellant was at fault in creating the overpayment and therefore not entitled to waiver; (4) whether the Office properly determined that the overpayment should be recovered by deducting $400.00 from appellant's continuing compensation payments; and (5) whether the Office properly reduced appellant's compensation on the grounds that he had the capacity to earn wages in the position of small business owner.

FACTUAL HISTORY

On May 14, 1984 appellant, then a 47-year-old grain inspector, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries on that date when he slipped and fell in the performance of duty. The Office accepted the claim for left shoulder tendinitis and aggravation of preexisting cervical laminectomy. Appellant stopped working and began receiving compensation for temporary total disability.

The Office periodically sent appellant EN1032 forms to complete that included questions as to whether he was employed or self-employed for any period during the previous 15 months. With respect to self-employment, the form stated that appellant should report any enterprise in which he worked and received revenue, even if the business operated at a loss, and show as rate of pay what it would have cost him to hire someone to perform the work performed. On May 30 and August 20, 1986, July 31, 1987 and August 3, 1988 appellant reported no employment activity or earnings. The Board also notes that, in December 1987, appellant reimbursed the Office $50,131.10 based on a third-party recovery.

On October 18, 1988 a report from a Department of Labor inspector stated that appellant was working at a family-owned lawn mower business (Leger's Lawn Mower & Repair) in Kaplan, Louisiana. The report stated that appellant was advised that he should submit information to the Office regarding his employment activity.

In an EN1032 signed on June 13, 1989, appellant referred to an attached letter regarding his employment activity. Appellant advised the Office that his wife owned a lawnmower shop that was operated by his son. He reported that approximately 10 to 12 months earlier he had begun going to the shop to help out by working behind the desk, answering telephones, helping customers and doing paperwork. Appellant indicated that he worked 2 to 4 hours a day, up to 10 or 12 hours per week. According to appellant he did not receive a salary or income from his participation in the business.

Appellant also submitted an EN1032 on July 28, 1989 that referenced the statement regarding his employment activity. The Office continued to pay appellant compensation for temporary total disability. The record indicated that appellant completed and signed EN1032 forms on August 10, 1990, September 5, 1991, July 22, 1992, July 22, 1993 and July 26, 1994. These forms did not report any earnings or employment activity. The Board notes that the record contains an unsigned, undated EN1032 that was stamped as received by the Office on July 24, 1995. There is no indication that the Office requested additional information. The forms commencing at that time provided more detailed information as to the type of employment activity that must be disclosed, including that, if any duties were performed in any business enterprise for which he was not paid, the employee must show as rate of pay what it would have cost to hire someone to perform the work. Appellant continued to submit EN1032 forms on July 24, 1998, July 9 and 22, 1999, reporting no employment activity.

In an EN1032 dated July 13, 2000, appellant again enclosed an accompanying statement advising the Office that he was frequently working at his son's lawn mower shop. He noted that some days he spent the entire day at the shop, sometimes a portion of the day, and other days not

at all. In EN1032 forms signed July 17, 2001 and July 9, 2002, appellant noted his employment activity at the lawn mower business on the form itself.

In a report dated November 13, 2002, an investigator from the Department of Labor's Office of Inspector General (OIG) summarized the results of an investigation of appellant's employment activities. The report stated that surveillance was conducted from January to June 2000 on several occasions, and appellant was observed at the lawn mower business the majority of the time. According to the report, the business was opened September 1, 1985 and was incorporated in the name of appellant's wife in May 1992. The exhibits accompanying the report provide sales receipts signed by appellant on behalf of the company from 1998. A report of interview dated June 22, 2000 indicated that appellant stated that he was at the business 30 to 40 hours a week; some of the time was spent drinking coffee and playing computer games and some time helping his son operate the business by doing various tasks. Appellant stated that he did not receive a salary, and he did not think it was considered employment as he was not receiving a paycheck. He stated that his attorney had told him he should fill out the forms without declaring employment, and at some point completing the forms became repetitious and he did not pay attention to what the forms actually said. According to the interview report appellant "admits he made a mistake in that he continued to receive payments while working in the family business" and concluded the interview by "stating that he did not realize that what he was doing was wrong and that he did not know he had to report when he came into his son's business to help out."

An interview report dated June 22, 2000 of appellant's son reported that the father and son "have been in business for about 15 years." According to the report that son stated that he, along with his mother and father, had check signing authority and "he is sure his father and mother are being paid." No additional information was provided regarding payment to appellant.

In a decision dated January 15, 2003, the Office determined that appellant had forfeited his right to compensation for the period May 20, 1985 to July 9, 2002. The Office found that appellant had completed 17 EN1032 forms from August 20, 1986 to July 9, 2002 stating that he had no earnings, and "based on the information obtained in the investigative memorandum as well as the evidence of record it is determined that [the] claimant knowingly failed to report earnings from September 1, 1985 through July 9, 2002 and thereby forfeits his right to compensation for the period May 20, 1985 through July 9, 2002 in the amount of $363,756.23."

In a separate decision dated January 15, 2003, the Office stated that it was reducing appellant's compensation. The Office stated that a rehabilitation counselor assigned to the case had determined that a person running a small lawn mower business in Louisiana was capable of earning $482.00 per week. According to the Office, appellant had owned and operated a small business since 1985 and the position of Small Business Owner (lawn mower) represented his wage-earning capacity.

In a letter dated January 15, 2003, the Office made a preliminary determination that an overpayment of $363,765.23 was created for the period May 20, 1985 to July 9, 2002. The Office indicated that appellant had forfeited his compensation for that period, and that he was at fault in creating the overpayment. By decision dated February 18, 2003, the Office finalized its

determination that an overpayment of $363,765.23 was created and that appellant was not entitled to waiver as he was at fault in creating the overpayment.[1]

Appellant requested a hearing before an Office hearing representative, which was held on January 22, 2004. Appellant stated that he did not have earnings from his employment activity. He stated that the first time he completed the EN1032 form he was not sure what information to include and he called his attorney and filled out the form in a manner he thought was correct.

By decision dated April 5, 2004, the hearing representative found that appellant forfeited his compensation from May 20, 1985 to July 9, 2002; that an $363,756.23 overpayment of compensation was created and appellant was not entitled to waiver because he was at fault in creating the overpayment. The hearing representative found that the overpayment could be recovered by deducting $400.00 every 28 days from appellant's continuing compensation. In addition, the hearing representative affirmed the January 15, 2003 loss of wage-earning capacity determination.

Appellant requested reconsideration, and by decision dated June 24, 2004, the Office denied modification. The Office found that appellant did not submit evidence showing that $400.00 deductions would cause hardship.

LEGAL PRECEDENT

Section 8106(b) of the Federal Employees' Compensation Act 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 times the Secretary specifies … An employee who--
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> (1) fails to make an affidavit or report when required; or
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> (2) knowingly omits or understates any part of his earnings;
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> 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."[2]

ANALYSIS

The Office made a determination that appellant forfeited all of his compensation from May 20, 1985 to July 9, 2002, without discussing in detail the issues raised in this determination. The forfeiture determination is based on appellant's submission of EN1032 forms that failed to

[1] The record also contains a final decision dated February 18, 2003, finding that an overpayment of $5,618.00 was created from July 10 to December 28, 2002.

[2] 5 U.S.C. § 8106(b).

disclose his employment activity. The initial question presented is whether any failure to disclose employment activity in this case may constitute a violation of section 8106(b)(2). Appellant stated that he did not have earnings and did not receive a salary from the lawn mower business. Although there is a brief statement from appellant's son that he was "sure his father and mother are being paid," there is no documentation, either in the investigative report or elsewhere in the record, that appellant was receiving payment for his employment activities at the lawn mower business.

The Board held in *Antonio J. Giunta* that a lack of evidence regarding earnings or remuneration for employment activity may provide no basis for invoking the penalty provision of section 8106(b)(2).[3] The *Giunta* case, however, clearly distinguishes itself from situations involving a family-owned business "where a personal financial interest is otherwise established as accruing to the benefit of the employee, members of his or her family, or other associates."[4] Similarly, there is a family-owned business in this case. Therefore, even in the absence of evidence establishing actual payment for the employment activity, the Board finds that section 8106(b)(2) may be invoked.

Having established that appellant should have reported the activity, the next question is whether appellant did fail to report the activity for the entire forfeiture period. The Office makes a general reference to the EN1032 forms without discussing the individual forms that were submitted in this case. The forms signed June 13 and July 28, 1989 clearly reference a statement that notified the Office of employment activity. The forms signed July 13, 2000, July 17, 2001 and July 9, 2002 all included statements regarding employment activity. The Office did not explain why the 15-month period covered by these forms constitute a violation of 8106(b)(2). In addition, the Office did not acknowledge that the form received in July 1995 was not signed or dated, and there appears to be a gap in the periods covered by the forms as the next form of record is dated July 28, 1997.

The Board therefore finds that the Office has not established that the entire period from May 20, 1985 to July 9, 2002 is subject to forfeiture. With respect to specific EN1032 forms where appellant did not disclose employment activity, there remains the additional issue of whether the omission was "knowingly" and therefore properly found to be subject to forfeiture under section 8106(b)(2). The term "knowingly" is defined in the regulations governing administration of claims filed under the Act as "[w]ith knowledge, consciously, willfully, or intentionally."[5]

The Office made a finding that appellant had knowingly omitted employment activity without discussing any of the relevant facts in the case. Appellant stated that he did not know he was supposed to report the employment activity, contending he did not receive any earnings.

[3] 53 ECAB 370, 377 (2002). *See also Daniel A. Mashe*, 50 ECAB 419 (1999).

[4] *Id. See also Robert Ringo*, 53 ECAB 258 (2001); *Anthony A. Nobile* 44 ECAB 268 (1992). These cases involved employment activity in a family business with no evidence of actual earnings; it was not disputed that the activity must be reported, but the issue was whether the omission was "knowingly."

[5] 20 C.F.R. § 10.5(n).

The Office did not cite to any specific evidence with respect to the issue of "knowingly."[6] Moreover, the Office failed to acknowledge that appellant did notify it of his employment activity in 1989. The Office did not discuss the relevant facts or provide any proper basis for its determination that appellant had "knowingly" omitted his employment activity.

The Board finds that the Office has not established that appellant forfeited his compensation from May 20, 1985 to July 9, 2002. Since the overpayment issues were based on the forfeiture of compensation, the overpayment of compensation has not been established and the Board will not further address the overpayment issues.[7]

LEGAL PRECEDENT -- ISSUE 5

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[8]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[9]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age, and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[10] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[11]

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[6] *See, e.g., Robert Ringo*, *supra* note 4 (appellant pleaded guilty to fraud and making false statements); *Anthony A. Nobile*, *supra* note 4 (standard is not a "should have known" standard, and there must be evidence of "knowingly" to establish forfeiture)

[7] The Board notes that, with respect to the overpayment amount, the Office failed to consider whether appellant's reimbursement of compensation in 1987 affected the amount of an overpayment.

[8] *Carla Letcher*, 46 ECAB 452 (1995).

[9] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[10] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[11] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

ANALYSIS -- ISSUE 5

The Office made a determination that the constructed position of Small Business Owner (lawn mower) represented appellant's wage-earning capacity. The Office's procedures require that a prereduction of compensation notice be provided to appellant.[12] There is no indication that a prereduction notice was provided in this case. Additionally, although the Office refers in the January 15, 2003 decision to a rehabilitation counselor and evidence regarding an ability to earn $482.00 in the constructed position, the record transmitted to the Board does not contain any supporting evidence. The specific job number for the selected position in the Department of Labor, *Dictionary of Occupational Titles* was not identified, nor was any evidence provided regarding wage rate and availability in the labor market. The Board finds that the evidence of record is not sufficient to establish that the Office properly reduced appellant's compensation based on the ability to earn $482.00 per week in a constructed position.

CONCLUSION

The Board finds that the evidence does not establish that appellant forfeits his compensation from May 20, 1985 to July 9, 2002. The Board further finds that the January 15, 2003 wage-earning capacity determination is not supported by the evidence of record.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 24 and April 5, 2004 are reversed.

Issued: February 7, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8(e) (December 1995); *see also David W. Green*, 43 ECAB 883 (1992).