

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

LOUIS J. CAMMACK, Appellant

and

**DEPARTMENT OF THE ARMY,
Fort Polk, LA, Employer**

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**Docket No. 05-257
Issued: May 10, 2006**

Appearances:
Louis J. Cammack, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 4, 2004 appellant filed a timely appeal of the August 9, 2004 merit decision of the Office of Workers' Compensation Programs which found that he forfeited his compensation and received an overpayment of benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

ISSUES

The issues are: (1) whether appellant forfeited his right to compensation for the period June 20, 1998 through August 27, 2001, thereby, creating an overpayment of benefits; and (2) whether the Office properly determined that he was at fault in creating the overpayment of \$69,373.52.

FACTUAL HISTORY

Appellant, a 72-year-old retired heavy mobile equipment mechanic, sustained a traumatic back injury in the performance of duty on September 5, 1978. The Office initially accepted the claim for fractured vertebrae at T-10 and he returned to work in a light-duty capacity on

October 6, 1978. He stopped work on October 26, 1979 and filed a claim for additional compensation. The Office expanded appellant's claim to include aggravation of preexisting chronic cervical osteoarthritis. He underwent an anterior cervical fusion at C5-6 and C6-7 on December 6, 1979, which the Office authorized. Appellant received appropriate wage-loss compensation for total disability beginning October 26, 1979.

Appellant returned to full-time employment on August 30, 1995, working as a delivery driver with a private pharmaceutical company, PharMed. On December 22, 1995 the Office issued a formal loss of wage-earning capacity determination that reduced his compensation benefits based on his actual weekly earnings of \$220.00.

As a benefit recipient, the Office periodically required appellant to submit updated information (EN1032) regarding his employment, volunteer work, dependents, other federal benefits or payments received and any third-party settlements. The reports required that he provide information covering the 15-month period preceding the date of the request. On September 20, 1999 appellant submitted an EN1032 in which he reported that from July 1998 until September 1999 he worked part time as a drug store delivery person. He indicated that he worked 20 to 25 hours per week, earning an average biweekly pay of \$200.00.¹ Appellant filed another EN1032 on August 22, 2000, reporting monthly earnings of \$700.00 from September 8, 1997 to the present.² On August 27, 2001 he indicated that for the prior 15-month period he worked an average of 30 hours per week delivering drugs to nursing homes. Appellant reported an hourly pay rate of \$6.90 on the August 27, 2001 EN1032.

Social Security Administration (SSA) earnings records indicated that appellant received \$13,456.38, in wages from PharMed in calendar-year 1998. Similar SSA records for calendar years 1999, 2000 and 2001 revealed wages of \$9,322.19, \$14,215.69 and \$14,799.49, respectively. The Office also received a biweekly breakdown of appellant's gross earnings, including overtime for the period May 27, 1999 to October 10, 2002.

In a decision dated October 27, 2003, the Office found that appellant forfeited his compensation for the period June 20, 1998 through August 27, 2001 for failing to completely report earnings for the designated period. On October 29, 2003 the Office issued a preliminary finding of overpayment in the amount of \$69,373.52, for the period June 20, 1998 through August 27, 2001. The Office also made a preliminary finding that appellant was at fault in the matter for consistently underreporting his income which he knew or should have known to be improper.

Appellant requested a hearing, which was held on April 21, 2004. He testified that he was basically scheduled to work 20 to 25 hours a week delivering medicine. Appellant would report to work at 5:00 p.m. and his scheduled run would begin at 5:30 p.m. and last five hours. Occasionally, he would wait up to three hours for the pharmacy to get the medicine ready for

¹ For three months of the period, appellant received an hourly wage of \$5.50. For the remaining 12-month period, he earned \$6.00 an hour.

² Appellant indicated that he earned \$6.20 per hour.

delivery. Appellant further indicated that the hours of work he reported was based on his “scheduled hours.”

By decision dated August 9, 2004, the Office hearing representative found that appellant forfeited his wage-loss compensation for the period June 20, 1998 through August 27, 2001 which resulted in an overpayment of benefits in the amount of \$69,373.52. The hearing representative found that appellant was at fault in creating the overpayment. Accordingly, the Office hearing representative affirmed the October 27 and 29, 2003 decisions.

LEGAL PRECEDENT -- ISSUE 1

Pursuant to 20 C.F.R. § 10.525 an employee who is receiving compensation for partial or total disability will periodically be required to submit a report of earnings from employment or self-employment, either part time or full time.³ Failure to report income may result in forfeiture of all benefits paid during the reporting period.⁴ The regulations further provide that, if an employee knowingly omits or understates 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.⁵ 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. § 8129.⁶

ANALYSIS -- ISSUE 1

The record indicates that appellant underreported his earnings for the period June 20, 1998 through August 27, 2001. Although he questioned the accuracy of the information regarding the wages he actually received, he did not submit any documents that contradict the relevant SSA earnings records or the biweekly earnings information provided by his employer. However, a mere showing that there were unreported earnings is not enough to justify forfeiture of compensation. The issue to be resolved is whether appellant “knowingly” omitted or understated any part of his earnings for the period June 20, 1998 through August 27, 2001.⁷ The Office regulations define “knowingly” as “with knowledge, consciously, willfully or intentionally.”⁸ Absent an admission by appellant, a knowing omission or understatement of income can be established where circumstances indicate that appellant did not fully and truthfully complete Form EN1032 and thus, failed to reveal the full extent of his employment activities and earnings.⁹

³ 20 C.F.R. § 10.525 (1999).

⁴ 5 U.S.C. § 8106(b); 20 C.F.R. § 10.525(b) (1999).

⁵ 20 C.F.R. § 10.529(a) (1999).

⁶ 20 C.F.R. § 10.529(b) (1999).

⁷ 5 U.S.C. § 8106(b)(2).

⁸ 20 C.F.R. § 10.5(n) (1999).

⁹ *Melvin E. Gibbs*, 54 ECAB 473, 478 (2003); *Donald L. Overstreet*, 54 ECAB 678, 682 (2003).

The explanation appellant provided for the discrepancy in earnings was that he reported only his “scheduled hours.” The three EN1032 reports appellant submitted requested information for the preceding 15-month period. As the requested information related to past events, he should not have had to guess or speculate about his prior earnings. SSA records indicate that appellant earned \$13,456.38 in wages from PharMed in calendar-year 1998. His September 20, 1999 EN1032 covered the latter six months of 1998 and based on the information provided by him he would have earned a maximum of \$3,815.50 during that time frame. If appellant’s figures were accurate he would have had to work an average of 67 hours per week over the first 6 months of 1998 to earn the additional \$9,640.88 PharMed paid him in 1998. Appellant’s 1998 earnings, when spread evenly across the calendar year would indicate that he underreported his July through December 1998 earnings by 56 percent.

On August 22, 2000 appellant reported monthly earnings of \$700.00 over the preceding 15 months. His actual earnings between May 23, 1999 and August 26, 2000 equaled \$15,800.33, which averaged \$254.84 per week. Thus, appellant underreported his earnings by more than 30 percent on his August 22, 2000 EN1032. In the 15-month period from May 27, 2000 to August 27, 2001, he worked an average of 37.6 hours per week. However, on his August 27, 2001 EN1032 appellant reported working an average of 30 hours per week, which is 25 percent less than his actual hours worked. The amount of his unreported earnings over the period June 20, 1998 through August 27, 2001 ranged from 25 to 56 percent of his actual earnings and appellant has not provided any information that would militate against a finding that he knowingly understated his earnings. As such, the Board finds that appellant knowingly understated his earnings to the Office in EN1032 reports dated September 20, 1999, August 22, 2000 and August 27, 2001. Consequently, he forfeited his wage-loss compensation for the period June 20, 1998 through August 27, 2001.

During the forfeiture period of June 20, 1998 through August 27, 2001, appellant received wage-loss compensation in the amount of \$69,373.52. The regulations provide that compensation paid for the period of the forfeiture shall be recovered in accordance with the Federal Employees’ Compensation Act’s provisions concerning recovery of overpayments.¹⁰ Accordingly, the Office properly declared the forfeited compensation an overpayment of benefits in the amount of \$69,373.52.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.¹¹ Section 10.433 of the implementing regulations specifically provides that the Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹² A recipient will be found at fault in

¹⁰ 20 C.F.R. § 10.529(b) (1999).

¹¹ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (1999).

¹² 20 C.F.R. § 10.433(a) (1999).

creating an overpayment if he or she made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect.¹³ Fault will also be found where a recipient failed to provide information he or she knew or should have known to be material.¹⁴ Lastly, fault exists where the overpaid individual accepted a payment which he or she knew or should have known to be incorrect.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that appellant is at fault in creating the overpayment. As previously discussed, he knowingly understated his earnings to the Office. Accurate earnings information is material to the question of appellant's entitlement to continuing wage-loss compensation. Because he made incorrect statements as to material facts which he knew or should have known to be incorrect, appellant is at fault in creating the overpayment.¹⁶ Therefore, appellant is not entitled to waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant forfeited his compensation for the period June 20, 1998 through August 27, 2001, which resulted in an overpayment of benefits in the amount of \$69,373.52. The Board further finds that he was at fault in creating the overpayment.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the August 9, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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