

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

R.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Detroit, MI, Employer**

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**Docket No. 07-902
Issued: June 9, 2008**

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 14, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs hearing representative decision dated November 13, 2006. Under 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 received an overpayment in the amount of \$44,005.64 for the period July 14, 2002 through December 27, 2003; and (2) whether the Office properly found that appellant was at fault in creating the overpayment.

FACTUAL HISTORY

Appellant, a 40-year-old letter carrier, sustained an injury to his left wrist, right knee, left ankle, head, back and neck on March 16, 1999 when his mail truck was involved in a vehicular accident. He filed a claim for benefits, which the Office accepted for neck sprain, lumbar sprain,

osteoarthritis of the left shoulder and contusion of the left forearm. The March 26, 1999 letter informing appellant that his claim had been accepted contained the following statement:

“PENALTY. Any person who knowingly makes any false statement, misrepresentation, concealment of fact, or any other act of fraud to obtain compensation as provided by the FECA [the Federal Employees’ Compensation Act] or who knowingly accepts compensation to which he or she is not entitled is subject to felony criminal prosecution and may, under appropriate U.S. Criminal Code provisions, be punished by a fine of not more than \$10,000.00 or imprisonment for not more than five years or both.”

The Office paid appropriate compensation for temporary total disability.

In an investigative report dated April 4, 2003, the employing establishment indicated that an investigation of appellant commenced for suspected compensation fraud. Appellant was subsequently interviewed on May 28, 2003 by a Department of Labor special agent regarding his continued receipt of compensation. During this interview, he stated to the agent that his condition had not improved and that he had severe limitations impairing his ability to lift, bend, walk, drive and exercise. The Office found on December 27, 2003 that this statement was in direct contradiction to his observed activity level and that he willfully and knowingly made this statement with the intent to facilitate his continued collection of total disability compensation.¹

On August 29, 2004 appellant signed a plea agreement pleading guilty in U.S. District Court to violation of Title 18 U.S.C. § 1920 of the Act for making false statements to obtain compensation benefits. The agreement, to which both parties stipulated, indicated that he had received more than \$30,000.00 in disability benefits after his condition had improved to the extent that he should have reported that improvement. The court ordered appellant to pay the amount of \$44,005.64 in restitution to the Department of Labor.

By decision dated October 20, 2004, the Office terminated appellant’s compensation benefits effective September 4, 2004 on the grounds that he was convicted of violating Title 18 U.S.C. § 1920 of the Act for making false statements to obtain compensation benefits. The Office found that this conviction precluded appellant from entitlement to further benefits under the Act.

On August 23, 2005 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$44,005.64 for the period July 14, 2002 through December 27, 2003 because appellant had been receiving compensation to which he was not entitled. The Office relied on the amount stipulated in the August 29, 2004 plea agreement, \$44,005.64, in determining the total amount of overpayment.

The Office found that appellant was at fault in the matter because he admitted in U.S. District Court that he was guilty of violating Title 18 U.S.C. § 1920 of the Act for making false statements to obtain compensation benefits.

¹ These findings by the Office were stipulated to by appellant and the U.S Attorney in the plea agreement he and his attorney signed on August 29, 2004.

On September 22, 2005 appellant requested a hearing, which was held on August 24, 2006. At the hearing, he admitted engaging in the activities at which he was videotaped; *i.e.*, putting things in his truck, carrying a duffle bag and moving clothes. Appellant stated, however, that the video was misleading because he only engaged in these activities for a few minutes, on different days and was therefore not engaged in continuous heavy labor as was alleged. He asserted that the only reason he pleaded guilty at federal court to violating Title 18 U.S.C. § 1920 was because he feared having to serve a prison term.

In a decision dated November 13, 2006, an Office hearing representative affirmed and finalized the preliminary determination regarding the overpayment of \$44,005.64. The hearing representative found that as a result of appellant's conviction for violation of Title 18 U.S.C. § 1920 of the Act he was not entitled to benefits as of July 14, 2002, the date he was determined to be engaging in activity he claimed he was unable to perform, through December 27, 2003, the date the Office found that he willfully and knowingly made false statements to the Department of Labor in order to continue receiving compensation for total disability. The hearing representative further found that appellant was at fault in the creation of the overpayment. The hearing representative stated that appellant's admission of guilt constituted an acknowledgement that he made false statements which he knew or should have known to be incorrect.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the 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 the times the Secretary specifies. The employee shall include in the affidavit or report the value of housing, board, lodging and other advantages which are part of his earnings in employment or self-employment and which can be estimated in money. 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.”²

This section of the Act is further defined by regulations which provides:

“Affidavit or report by employee of employment and earnings.

“(c) Earnings from employment referred to in this section or elsewhere in this part means gross earnings or wages before any deductions and includes the value of

² 5 U.S.C. § 8106(b).

subsistence, quarters, reimbursed expenses or any other advantages received in kind as part of the wages or remuneration.”³

In analyzing whether an employee in receipt of compensation has earnings or wages the Board, in *Christine P. Burgess*,⁴ noted wages are defined as:

“Every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and reasonable value of board, rent, housing, lodging, payments in kind, tips and any other similar advantage received from the individual’s employer or directly with respect to work for him.”⁵

ANALYSIS -- ISSUE 1

To determine that the overpayment of compensation occurred in this case, the Office appears to have somehow found that appellant forfeited his right to monetary compensation from July 14, 2002 through December 27, 2003 pursuant to 5 U.S.C. § 8106(b)(2).⁶ If that is the case, the Office should have based its finding of forfeiture on a determination that he knowingly failed to report “earnings” on Office CA-1032 forms. However, the Office found that appellant was not entitled to compensation for that period solely on the basis of the U.S. District Court’s finding that he violated Title 18 U.S.C. § 1920 and was liable in the amount of \$44,005.64. The Office provided no other reason for its finding. The Office found that appellant’s continuing receipt of compensation for wage loss from July 14, 2002 through December 27, 2003 was fraudulent in light of medical evidence indicating that he was not actually disabled during that period. While it may be true that appellant was fraudulent in obtaining compensation, section 8106(b) of the Act requires that the fraud be in terms of earnings, not simply reporting the physical condition. The decision of the Office provides on further legal basis for its decision which the Board can evaluate.

The Board has previously held that to sustain a finding of forfeiture the Office has the burden of proof to establish that appellant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from employment or self-employment. To meet this burden of proof, the Office is required to closely examine appellant’s activities and statements in reporting employment earnings.⁷ The Office may meet this burden by appellant’s own subsequent admission to the Office that he failed to report employment or earnings which he new he should report. The Office may also meet this standard without an admission by appellant, if he failed to fully and truthfully complete the EN1032 forms and the circumstances of the case establish that he failed to fully and truthfully reveal the full extent of his employment activities

³ 20 C.F.R. § 10.125(c).

⁴ 43 ECAB 449 (1992).

⁵ *Id.* at 457, citing *Black’s Law Dictionary*, (Special Deluxe, 5th ed. 1979).

⁶ *See Samuel J. Rosso*, 28 ECAB 43, 46 (1976).

⁷ *See Michael D. Mathews*, 51 ECAB 247 (1999).

and earnings. The Office may also meet this burden as it establishes though the totality of the factual circumstances that appellant's certification in the EN1032 form that he was not employed or self-employed, was false.⁸

While the Board has defined "earnings" broadly to include receipt of "other advantages" such as free travel, lodging or food, pursuant to the Act, the Board has consistently held that the Office must establish "earnings" before proceeding with the forfeiture penalty.⁹ The evidence in this case, unlike that presented in *Burgess*, does not establish that appellant received any wages, tips or other similar advantage from any employment activities, *i.e.*, earnings, during the period from July 14, 2002 through December 27, 2003. With no evidence of the receipt of earnings or other remuneration from his efforts, the record provided no basis for invoking the penalty provision of section 8106(b)(2).¹⁰

The Board finds that the Office improperly determined that appellant effectively forfeited his right to compensation for the period July 14, 2002 through December 27, 2003. In the instant case, the Office found that appellant had forfeited past earnings in the amount of \$44,005.64 for the period July 14, 2002 through December 27, 2003 despite the fact that there was no evidence in the record that he had accumulated earnings in that amount. The Office has not established, as required by section 8106(b), that appellant had "earnings" or other forms of remuneration from his activities.

As the record fails to establish that appellant had any earnings or other form of remuneration from his employment activities from July 14, 2002 through December 27, 2003, the Board finds that the Office did not properly invoke the penalty provision under section 8106(b)(2). For this reason, the overpayment of compensation based on the application of the forfeiture provision in this case must be set aside.

The November 13, 2006 decision of the Office is hereby reversed.

⁸ *Terryl A. Geer*, 51 ECAB 168 (1999).

⁹ In *Burgess*, the Board found that the record established that the employee received reimbursed expenses and "other advantages" as part of wages or remuneration in the form of free travel, lodging, food and transportation costs as a result of performing the duties of an escort for a travel service. Based on these reimbursed expenses and payments in kind, the Board found that appellant had "earnings" as defined under section 8106(c) which she was required to report to the Office.

¹⁰ See *Cecil S. Ortagus*, 38 ECAB 141 (1986) (setting aside a period of forfeiture as there was no evidence that there were earnings); *Jack Langley*, 34 ECAB 1077 (1983) (noting the Office's application of the forfeiture provision of the Act is not proper where an employee has no outside earnings).

CONCLUSION

The Board reverses the November 13, 2006 Office determination that appellant received an overpayment of compensation in the amount of \$44,005.64 for the period July 14, 2002 to December 27, 2003.¹¹

ORDER

IT IS HEREBY ORDERED THAT the November 13, 2006 decision of the Office of Workers' Compensation Programs' hearing representative is reversed.

Issued: June 9, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹¹ This decision is limited to the current record to the extent that section 8106(b) may have been the basis of the Office's determination. In the absence of any more specific explanation in the Office decision, this decision of the Board provides no opinion on whether appellant may have to reimburse compensation paid for the period July 14, 2002 to December 27, 2003 pursuant to the U.S. District Court's order.