

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

C.R., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
CONNELLSVILLE, PA, Employer)

**Docket No. 09-720
Issued: October 15, 2009**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 22, 2009 appellant filed a timely appeal from a January 7, 2009 decision of the Office of Workers' Compensation Programs regarding an overpayment and affirming an April 3, 2008 forfeiture determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly determined that appellant forfeited his right to compensation benefits for the period December 19, 2005 through March 19, 2007; (2) whether the Office properly found that appellant received a \$37,862.30 overpayment of compensation during the period of the 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.

On appeal, appellant, through his attorney, asserted that government agents entrapped him into selling artwork on August 30, 2006, that he promptly notified the Office of the sale, and that he did not operate an art business.

FACTUAL HISTORY

The Office accepted that on August 9, 2004 appellant, then a 35-year-old part-time flexible letter carrier, sustained a lumbar strain, bilateral knee sprains and a partial tear of the right anterior cruciate ligament when he fell off a loading dock. He stopped work that day and did not return. Appellant received compensation on the daily rolls beginning on September 24, 2004. On December 1, 2004 he underwent an arthroscopic reconstruction of the right anterior cruciate ligament and a partial lateral meniscectomy. Appellant then received compensation on the periodic rolls. The Office later expanded the claim to accept an aggravation of preexisting bipolar disorder.

Appellant's physicians released him to full-time light-duty work as of January 11, 2005. Beginning in February 2005, appellant participated in vocational rehabilitation.¹ He began an approved associate's degree program in computer security in late 2006. Appellant withdrew from school at the Office's request as he failed two introductory computer and internet classes and had unspecified medical issues. The vocational rehabilitation counselor commented that appellant had extremely poor computer skills that did not improve with tutoring and related administrative supports.²

In a September 5, 2006 telephone memorandum, the Office noted that appellant called that day "to report that he sold a piece of furniture out of his home for \$600.00. [It] told [appellant] that was fine, and it will not interfere with his [compensation] benefits. Therefore no return calls necessary."

On March 19, 2007 appellant signed an affidavit of earnings and employment (Form CA-1032) in which he stated he was not employed or self-employed during the prior 15 months. This form advised him that a "false or evasive answer to any question, or the omission of an answer, may be grounds for forfeiting your compensation benefits" and subject him to civil or criminal penalties.

In a February 5, 2008 memorandum, the Department of Labor's Office of the Inspector General described its investigation of appellant's activities as an artist. On February 9, 2006 agents found two internet sites on which appellant posted approximately 25 images of his artwork, with three listed for sale. An undercover agent posing as an art collector telephoned appellant's home on August 29, 2006 and expressed interest in purchasing artwork. Appellant agreed to meet the agent at his house the following day. On August 30, 2006 the agent came to appellant's residence. Appellant displayed a variety of drawings and carved canes then left the room. The agent asked appellant's wife to price the artwork. Appellant's wife "suggested \$25.00 each" for three drawings. The agent then offered \$600.00 in cash for the three pieces.

¹ On July 22, 2005 the Office obtained a second opinion from Dr. Charles S. Stone, a Board-certified orthopedic surgeon, who found appellant capable of sedentary work.

² By notice dated November 9, 2007, the Office proposed to reduce appellant's compensation under 5 U.S.C. § 8106 and § 8115, based on his ability to perform the selected position of Dispatcher -- Maintenance Services. There is no final wage-earning capacity determination of record.

Appellant's wife accepted the money and provided a receipt.³ The agent asked appellant to carve a custom wood cane for her mother. Appellant agreed, stating he would charge \$1.00 an hour for labor. The agent returned to purchase the finished cane on November 6, 2006 for \$150.00. Appellant told the agent that, since she purchased his drawings in August, he earned \$50.00 a month selling his art but provided no receipts or other proof of sales. On September 7, 2007 the agent and a colleague went to appellant's home, revealed that they were agents and disclosed the investigation. Appellant contended that he reported the \$600.00 sale of art shortly after August 30, 2006 and was told he did not have to report the income on his compensation forms.

By decision dated April 3, 2008, the Office found that under 5 U.S.C. § 8106, the compensation paid to appellant from December 19, 2005 to March 19, 2007 was "declared forfeit due to lack of reporting/underreporting earnings on [his] Form(s) 1032 from the selling of [his] artwork and custom canes." The Office found that appellant did not disclose the sale of \$600.00 of artwork on August 30, 2006 on the Form CA-1032 signed on March 19, 2007. Therefore, the compensation paid for the 15-month period prior to the March 19, 2007 form was forfeit.

By notice dated April 3, 2008, the Office advised appellant of its preliminary determination that an overpayment of \$37,862.30 was created in his case as he was "self-employed and earning money" as an artist while receiving compensation for total disability. The Office made the preliminary finding that appellant was at fault in creation of the overpayment because he made deliberate factual misrepresentations and omissions by failing to report the August 30, 2006 sale of art. The Office afforded appellant 30 days to provide financial information and request a hearing.

Appellant requested a telephonic hearing, held September 23, 2008. At the hearing, appellant's attorney contended that appellant sold no art other than to the undercover agent and that the agent's conduct constituted entrapment. Also, appellant and his wife stated that they called the Office on September 5, 2006 and reported the \$600.00 August 30, 2006 transaction. They were told that the sale of appellant's art did not need to be reported to the Office. The attorney noted that the September 5, 2006 telephone memorandum noted a sale of furniture rather than artwork, but this could be explained as clerical error or misunderstanding. Appellant asserted that any internet prices for his artwork appeared in error as he was unfamiliar with computers and the internet and the art sites filled in prices automatically.

After the hearing the employing establishment submitted printouts from two websites where appellant offered a total of three artworks for sale among approximately 30 pieces. The employing establishment also submitted an October 30, 2006 e-mail in which he stated he would charge the agent \$150.00 for the cane. The employing establishment also submitted an October 16, 2008 letter noting that, on October 9, 2008, the investigating agents interviewed the Office employee who spoke with him on September 5, 2006 and wrote the telephone memorandum. The employee initially did not recall the conversation as it happened more than two years previously. She later remembered that she thought it unusual at the time that a

³ Exhibit 11 of the investigative memorandum is a handwritten receipt for the "purchase of 3 art pieces: "pulling in all directions," "heart of tired," and "trapped" for the amount of \$600.00 cash. Artwork by [appellant]. Sold by [appellant's wife]" with the notation "received by [appellant's wife] August 30, 2006."

claimant would inquire about selling furniture and that she sought out a supervisor to help her answer the question. When asked, the employee did not recall if appellant mentioned being an artist or selling artwork.

In an October 20, 2008 letter, appellant's attorney contended that the investigative memoranda were hearsay and should not be given greater weight than appellant's sworn testimony. Also, appellant was not given the opportunity to question the Office employee who wrote the September 5, 2006 telephone memorandum.

By decision dated and finalized January 7, 2009, an Office hearing representative finalized the preliminary overpayment determination and affirmed the April 3, 2008 forfeiture decision. He found that appellant "was involved in a business, creating and selling artwork." The representative found appellant's arguments that he listed prices for his art in error unconvincing. He also found that the September 5, 2006 telephone memorandum regarding the sale of furniture did not establish that appellant reported a sale of artwork. The hearing representative further found that appellant was at fault in creation of the overpayment because he willingly omitted information that he should have known to be material. Therefore, the overpayment was not subject to waiver. As appellant failed to "provide financial information to establish a repayment schedule," the hearing representative directed the Office to "demand repayment of the debt in full."

LEGAL PRECEDENT -- ISSUE 1

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.⁴

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. A claimant can be subjected to the forfeiture provisions of 5 U.S.C. § 8106(b) only if he knowingly failed to report employment or earnings.⁵ The term "knowingly" "as defined in the Office's implementing regulations, means with knowledge, consciously, willfully or intentionally."⁶ In determining whether a claimant knowingly failed to report earnings, Office procedures provide that the circumstances of the case should be carefully evaluated with respect to the nature of the employment/earnings involved and any other relevant factors.⁷

⁴ 5 U.S.C. § 8106(b).

⁵ *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁶ 20 C.F.R. § 10.5(n).

⁷ *Harold F. Franklin*, 57 ECAB 387 (2006).

Section 10.5(g) of the Office's regulations defines earnings from employment or self-employment as follows:

“(1) Gross earnings or wages before any deduction and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or

“(2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his or her duties.”⁸

ANALYSIS -- ISSUE 1

The Office found that appellant forfeited his right to compensation for the period December 19, 2005 through March 19, 2007 because he knowingly failed to report the August 30, 2006 sale of \$600.00 in artwork on a Form EN1032 covering this period. Appellant signed the EN1032 form on March 19, 2007. On the form, he indicated that he was not employed and did not engage in self-employment. Investigative agents from the Department of Labor's Office of the Inspector General found that appellant listed three of his artworks for sale on the internet. An undercover agent then purchased three of appellant's drawings from appellant's wife. Although appellant's wife asked for \$25.00 each, the agent offered \$600.00 in cash. Appellant's wife accepted this amount and issued a receipt.

Appellant can be subject to the forfeiture provision of section 8106(b) only if he knowingly failed to report the sale of his artwork. 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.⁹ It predicated the April 3, 2008 forfeiture determination on appellant's failure to report the \$600.00 sale of artwork on the Form EN1032 he signed on March 19, 2007. There is evidence; however, that appellant did report the sale to the Office.

The record contains a September 5, 2006 Office telephone memorandum, noting that appellant called that day “to report that he sold a piece of furniture out of his home for \$600.00.” Although the memorandum says “furniture” and not drawings or artwork, the memorandum does report the sale of items from appellant's home for \$600.00. The August 30, 2006 sale of artwork occurred in appellant's home and was in the amount of \$600.00. The memorandum thus corroborates the amount and location of the art transaction. Also, it was written less than a week after the August 30, 2006 sale.

⁸ 20 C.F.R. § 10.5(g); *P.M.*, 60 ECAB ____ (Docket No. 07-2169, issued March 3, 2009).

⁹ 20 C.F.R. § 10.5(n).

Critical to the forfeiture issue is the Office's finding that appellant knowingly failed to report the August 30, 2006 sale to the Office, but in the September 5, 2006 memorandum, the Office told appellant that the \$600.00 sale "was fine, and it will not interfere with his [compensation] benefits." Appellant later asserted that he did not list the sale of his art on EN1032 forms as the Office told him not to. The investigative agents noted that, when they revealed the investigation on September 7, 2007, appellant contended that he reported the \$600.00 sale and was told he did not have to include it on his compensation forms. The telephone memorandum corroborates that appellant reported a \$600.00 sale shortly after August 30, 2006 and that he was told it would not affect his compensation benefits. This indicates that appellant did not knowingly omit the sale from the March 19, 2007 Form EN1032. Rather, the Office instructed appellant that the sale of his artwork did not affect his compensation benefits.

In an October 16, 2008 letter, the employing establishment noted that, on October 9, 2008, the investigating agents interviewed the Office employee who spoke to appellant on September 5, 2006. The employee first stated that she did not remember appellant's call. Upon further questioning, she recalled that appellant asked about selling furniture but could not remember if he also asked about making or selling artwork. There is no direct statement of record from the Office employee. The Board notes that the interviewing agents investigated appellant for two years and had a significant interest in his prosecution. Considering the incomplete nature of the employee's recollections and the possibility of bias by the investigative agents, the Board finds that the October 16, 2008 letter does not establish that appellant did not ask about selling artwork on September 5, 2006. The letter indicates only that the employee did not remember whether appellant asked about artwork or not. The Board finds that, under the circumstances of this case, the September 5, 2006 telephone memorandum is sufficient to establish that appellant notified the Office about the August 30, 2006 sale of artwork for \$600.00 and that he was advised that the sale would not affect his compensation benefits. Therefore, the Office's finding that appellant failed to report these earnings was in error.

The Office hearing representative further found that appellant forfeited his right to compensation for the period December 19, 2005 to March 19, 2007 as he failed to report his participation in a business. The business was defined as appellant's listing three of his artworks for sale on the internet as of February 9, 2006. No internet sales were asserted or proven. The hearing representative found appellant's argument that he listed prices in error as he was unfamiliar with computers was not persuasive. However, there is significant evidence of record that appellant had limited computer skills. As part of vocational rehabilitation in late 2006, after the February 2006 internet postings, appellant took community college classes in introductory computer security and internet skills. He failed both courses despite tutoring and other interventions. This tends to support appellant's assertion that the price listings were mistakes due to his unfamiliarity with computers. The Board therefore finds that the price entries appearing on the two internet sites on February 9, 2006 do not, in and of themselves, establish

that appellant participated in a business.¹⁰ While appellant allegedly told the investigative agent on November 6, 2006 that he earned \$50.00 a month selling his art since August 30, 2006, there is no proof of record of such sales and the forfeiture determination was not predicated on such transactions. Also, these sales would have occurred after the Office advised appellant on September 5, 2006 that sales of his artwork would not affect his compensation. As the Office did not establish that appellant participated in a business, it cannot penalize appellant for failing to disclose business activities.

On appeal, appellant, through his attorney, contends that the Office's finding of forfeiture was in error as appellant notified the Office that he sold artwork on August 30, 2006 and did not otherwise participate in an art business. As set forth above, the Office failed to meet its burden of proof to establish that appellant forfeited his right to compensation for the period December 19, 2005 to March 19, 2007. The record does not establish that appellant participated in a business or that he failed to report selling \$600.00 of artwork on August 30, 2006.

ANALYSIS -- ISSUES 2 and 3

As the Office failed to establish forfeiture, the second and third issues regarding an overpayment of compensation predicated on the forfeiture are moot.

CONCLUSION

The Board finds that the Office has not established that appellant forfeited his right to compensation benefits for the period December 19, 2005 through March 19, 2007. Therefore, the Office has not established an overpayment of compensation.

¹⁰ Cf. *C.O.*, Docket No. 07-136 (issued September 6, 2007) (the Board affirmed the Office's forfeiture determination where the claimant, while receiving compensation for temporary total disability, operated an ongoing business enterprise making large quantities of wood crafts, maintaining booths at several monthly craft fairs and taking custom orders. The claimant admitted that he deliberately failed to report this business or his earnings on Forms CA-1032); *Joan Ross*, 57 ECAB 694 (2006) (While receiving compensation for temporary total disability, the claimant regularly sold personal grooming implements at trade shows, took orders, demonstrated products and participated in the financial management of the business. The claimant failed to report her earnings and activities on Forms CA-1032. The Board upheld the Office's finding of forfeiture); *Jane A. Pastva*, 54 ECAB 230 (2002) (while receiving compensation for temporary total disability, the claimant manufactured and sold wooden lawn decorations, offered a catalog of available items, filled custom orders, and advertised by posting signs and distributing business cards. The claimant also hired and paid others to paint items for sale. She failed to report her earnings and income on Forms CA-1032. The Board upheld the Office's finding of forfeiture.)

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 7, 2009 and April 3, 2008 are reversed.

Issued: October 15, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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