United States Department of Labor
Employees' Compensation Appeals Board

M.P., Appellant	)	
	)	**Docket No. 09-1309**
and	)	**Issued: April 2, 2010**
	)	
U.S. POSTAL SERVICE, LAKEWOOD POST OFFICE, Dallas, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 22, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated July 21 and August 25, 2008 and March 3, 2009. 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 appellant forfeited his compensation for the periods November 15, 2003 through May 15, 2005 and June 14, 2006 through September 14, 2007; (2) whether appellant received an overpayment in the amount of $19,597.14 from June 14, 2006 through September 14, 2007 which was not subject to waiver; (3) whether the Office met its burden of proof to terminate appellant's wage-loss benefits effective July 21, 2008; and (4) whether appellant has met his burden of proof in establishing any continuing disability on or after July 21, 2008 causally related to his March 10, 2003 employment injury.

FACTUAL HISTORY

On March 12, 2003 appellant, then a 28-year-old mail carrier, filed a traumatic injury claim alleging that he injured his back and neck when his postal vehicle was struck in the rear on March 10, 2003. The Office accepted his claim for sprain/strain of the neck, lumbar and thoracic spine and sprain/strain of the shoulders and upper arms on April 8, 2003. Appellant returned to work as a modified clerk and on June 17, 2004, the Office informed him that the position fairly and reasonably represented his wage-earning capacity. On August 26, 2004 his attending physician, Dr. Harold C. Henderson, a physician Board-certified in pain management, found that appellant was totally disabled. The Office entered appellant on the periodic rolls effective on October 31, 2004.

Appellant completed an EN1032 form on February 14, 2005 which directed him to "Report all employment for which you received a salary, wages, income, sales commissions, piecework, or payment of any kind." He answered "no" to the question of whether he worked for any employer during the past 15 months. Appellant completed a similar EN1032 form on May 15, 2005.

In a report dated April 27, 2006, Dr. Henderson stated that appellant complained of shoulder and low back pain. On physical examination, he found spasm and tenderness in the lumbar spine, with decreased range of motion. Dr. Henderson diagnosed lumbar herniated disc, shoulder arthrosis and neuropathic pain. He submitted a note dated May 25, 2006 and repeated his findings and diagnoses.

The Office referred appellant for work hardening beginning February 28, 2007. Appellant underwent a lumbar magnetic resonance imaging (MRI) scan on February 27, 2007 which demonstrated mild sacralization of L5 and minimal diffuse disc bulge and facet hypertrophy at L5-S1 resulting in mild bilateral neural foraminal stenosis but no central canal stenosis.

In notes dated April 11, May 11, July 13, August 10 and October 11, 2007, Dr. Henderson reported that appellant's pain had decreased by 60 percent since undergoing work hardening. On examination he found extensive muscle spasm in the paracervical, trapezius, parascapular and lumbar region. Appellant underwent a functional capacity evaluation on October 2, 2007. The test revealed that he demonstrated consistent effort, had moderate progress and had increased range of motion, but did not reach his date-of-injury condition. In the report dated October 2, 2007, the evaluator found that appellant could work in a light medium level and was unable to safely return to regular duty as a mail carrier, a heavy physical demand job.

Appellant completed a Form EN1032 on September 14, 2007. This form directed him to report all employment for which he received a salary, wages, income, sales commissions, placework or payment of any kind. Appellant circled "no" indicating that he did not work for any employer during the past 15 months.

The Office referred appellant for a second opinion evaluation on November 13, 2007 with Dr. Robert E. Holladay, a Board-certified orthopedic surgeon.

The record indicates that appellant returned to part-time work as a telemarketer on January 30, 2007.

In a report dated November 29, 2007, Dr. Holladay noted appellant's history of injury and responded to the Office's questions. He found no tenderness on palpation, no muscle spasm and normal range of motion of the cervical, thoracic and lumbar spines. Dr. Holladay stated that appellant's shoulder strain had resolved and also opined that appellant's cervical, thoracic and lumbar strains had resolved. He stated that appellant had nonwork-related underlying psychosocial issues dealing with depression and anxiety which were preventing him from returning to work. Dr. Holladay reviewed the functional capacity evaluation and adopted those conclusions.

On January 7, 2008 the Office received a report from the employing establishment investigative unit stating that appellant fraudulently used a social security number other than his own to secure full-time employment as a telemarketing representative with Premier Pest Control of Dallas, Texas. The report included a payroll journal report dated January 1, 2007 through November 30, 2007 which indicated that appellant had earnings beginning on January 16, 2007 and that he received checks from Premier Pest Control through November 23, 2007. The report also stated that appellant earned $773.00 working for South West Public Relations in the third quarter of 2004 and that this information was reported by the Texas Workforce Commission. Appellant completed a sworn statement on April 18, 2007 and stated that he did not remember earning $773.00.

Dr. Henderson submitted a report dated January 14, 2008 noting appellant's history of injury and detailing his medical care through August 10, 2007. He found spasm and tenderness to palpation in the lumbar spine, diffuse tenderness and spasm in the thoracic spine and mild tension and pain in the cervical spine. Dr. Henderson diagnosed chronic pain syndrome of the lumbar spine.

The Office referred appellant for an impartial medical evaluation with Dr. Marco Ochoa, a Board-certified orthopedic surgeon, on January 22, 2008.

By decision dated February 13, 2008, the Office found that appellant had forfeited his compensation for the period June 14, 2006 through September 14, 2007 as he had unreported earnings while receiving compensation benefits. It reduced appellant's compensation benefits effective January 20, 2007 to reflect his actual earnings as a telemarketer in a separate letter dated February 13, 2008. The Office calculated that appellant was entitled to receive compensation in the amount of $672.00 every four weeks. It also made a preliminary determination that appellant had received an overpayment of compensation in the amount of $19,597.14 because he failed to report earnings on a Form CA-1032 dated September 14, 2007. The Office provided appellant with an overpayment recovery questionnaire and attached copies of the compensation payments he received from June 14, 2006 through September 14, 2007.

In a report dated March 26, 2008, Dr. Ochoa described appellant's history of injury and medical treatment. He found no muscle spasm in the spine and normal range of motion. Appellant's upper extremities demonstrated normal neurological findings. He diagnosed resolved neck sprain, lumbar sprain, thoracic sprain and shoulder sprains. Dr. Ochoa noted that

appellant's April 3, 2008 functional capacity evaluation did not support that he could return to his date-of-injury position as a mail carrier. He completed a work capacity evaluation and indicated that appellant could not perform his usual job, but could work eight hours a day with restrictions. Dr. Ochoa indicated that appellant could lift 25 pounds for four hours a day.

The Office proposed to terminate appellant's compensation benefits by letter dated April 29, 2008. It noted that Dr. Ochoa stated that appellant no longer had disability or restrictions from working as a result of his employment injury. The Office also found that Dr. Ochoa reported that appellant could not return to his date-of-injury position. It proposed to terminate appellant's medical and wage-loss benefits on the basis of Dr. Ochoa's report.

The record contains an e-mail from the employing establishment with an attachment from the Texas Workforce Commission establishing that appellant worked in 2004 as a telemarketer. The attachment confirmed that appellant worked for South West Public Relations and had earnings in the amount of $773.50 during the third quarter of 2004.

Dr. Henderson completed a note on May 6, 2008 which included appellant's history of injury and continued to note tenderness and spasm to palpation in the thoracic and lumbar spines. He submitted the results of a May 30, 2008 current perception threshold (CPT) of the lumbar spine. Dr. Henderson found a very severe hypoesthetic condition of L4, a mild hypoesthetic condition of L5 and a moderate hypoesthetic condition of S1. He also submitted the results of a diagnostic ultrasound of the cervical thoracic and lumbar spine dated May 30, 2008. This test revealed moderate to high inflammation throughout the entire spine with increased swelling in the thoracic and lumbar region. In a note dated May 30, 2008, Dr. Henderson repeated appellant's history, his findings and diagnoses of chronic pain syndrome.

By decision dated July 21, 2008, the Office found that appellant had forfeited his compensation benefits covered by the EN1032 forms dated February 14 and May 15, 2005 for the period November 15, 2003 through May 15, 2005 as he did not report earnings from private industry as established by the Texas Workforce Commission. It completed a memorandum to file and calculated the amount of the overpayment as $15,627.33.

In a separate decision dated July 21, 2008, the Office terminated appellant's wage-loss benefits effective July 21, 2008 relying on Dr. Ochoa's report.

Appellant submitted a report dated June 27, 2008 from Dr. Henderson which listed appellant's history of injury, findings of spasm and tenderness in the lumbar and thoracic spines and the diagnosis of chronic pain syndrome in the lumbar spine.

On August 1, 2008 appellant requested both a review of the written record and an oral hearing. In a letter dated August 25, 2008, the Office stated that it had received copies of appellant's request for hearings on the July 21, 2008 forfeiture and termination decisions.

The Office issued a decision dated August 25, 2008 finding that appellant received an overpayment in the amount of $19,597.14 as he failed to report earnings on his EN1032 dated September 14, 2007. It requested that appellant forward a check in the amount of $19,597.14.

Dr. Henderson submitted a report dated September 16, 2008 detailing appellant's continued cervical, thoracic and lumbar symptoms of tenderness and spasm. He examined appellant on October 7, 2008 due to ongoing chronic pain.

On August 1, 2008 appellant requested a review of the written record of the July 21, 2008 decision.

In a report dated January 29, 2009, appellant's new attending physician, Dr. Diane S. Litke, a Board-certified orthopedic surgeon, diagnosed lumbar strain, possible lumbar disc and shoulder strain. She noted that Dr. Henderson was no longer practicing medicine and described appellant's March 10, 2006 employment injury. Dr. Litke stated that appellant had chronic pain, but that she needed to review his medical records.

By decision dated March 3, 2009, the Branch of Hearings and Review affirmed the Office's July 21, 2008 termination decision finding that the weight of the medical opinion evidence established that appellant was no longer disabled due to his accepted employment injury.

LEGAL PRECEDENT -- ISSUE 1

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 the time 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 earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required."[1] (Emphasis added.)

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he "knowingly" failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.[2] The term "knowingly" is defined in the regulations as "with knowledge, consciously, willfully or intentionally."[3]

If a Form CA-1032 is improperly completed resulting in a finding of forfeiture, the board has found that the period of forfeiture is the entire 15-month period covered by the form in question.[4]

[1] 5 U.S.C. § 8106(b).

[2] *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

[3] 20 C.F.R. § 10.5(n).

[4] *Ronald E. Ogden*, 56 ECAB 278, 285 (2005).

ANALYSIS -- ISSUE 1

The evidence included in the record establishes that appellant was employed and had earnings from Premier Pest Control from January 17 through November 23, 2007. This evidence consists of a payroll journal detailing the wages appellant received from Premier Pest Control.[5]

Appellant completed an EN1032 form on September 14, 2007 on which he denied receiving any salary, wages or income and stated that he had not worked for any employer during the 15-month period covered by the form.

The Board finds that appellant knowingly omitted his employment with Premier Pest Control. Appellant took conscious, willful and intentional steps to conceal his work activities and earnings from the Office by denying his earnings and employment on the September 14, 2007 Form EN1032. The Board further finds that the Office met its burden of proof in establishing that appellant forfeited his compensation benefits for the entire 15-month period covered by the September 14, 2007 Form EN1032, from June 14, 2006 through September 14, 2007.

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of the Office's implementing regulations provides as follows:

> "(a) If an employee knowingly omits or understates any 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. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.
>
> "(b) Where the right to compensation is forfeited, [the Office] shall recover any compensation already paid for the period of the forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statues."[6]

Section 8129(b) of the Act[7] provides: Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act of would be against equity and good conscience."

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. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she

[5] The Branch of Hearings and Review did not address appellant's forfeiture for the period November 15, 2003 through May 15, 2005 issued on July 21, 2008. As appellant has timely requested a review of this decision by the Branch of Hearings and Review, the Board will not consider this issue on appeal. 20 C.F.R. § 501.2(c)(2).

[6] 20 C.F.R. § 10.529.

[7] 5 U.S.C. § 8129(b).

received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. 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; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).[8]

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.[9]

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault under the second standard, for failing to provide information on the Form EN1032. Appellant knew or should have known that this information was material. Each of the disclosure forms made clear that the Office would use the information requested to decide whether he was entitled to continue receiving benefits under the Act or whether his benefits should be adjusted. Warnings that severe penalties could be applied for failure to report all work activities thoroughly and completely underscored the importance of this information and appellant's responsibility to disclose it. The Board will therefore affirm the Office's August 25, 2008 decision finding that appellant was at fault in creating an overpayment in the amount of $19,597.14. Appellant's fault in the matter precludes any consideration of waiver. The Board notes that it does not have jurisdiction to review the Office's finding that the overpayment would be recovered in a lump sum. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.[10]

LEGAL PRECEDENT -- ISSUE 3

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[11] It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.[12] The Office's burden of proof in termination compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[13]

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[8] 20 C.F.R. § 10.433(a).

[9] *Id.* at § 10.433(b).

[10] *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

[11] *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

[12] *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

[13] *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001).

ANALYSIS -- ISSUE 3

The Office accepted appellant's claim for sprain/strain of the neck, lumbar and thoracic spine as well as sprain/strain of the shoulders and upper arms. Appellant's attending physician, Dr. Henderson, Board-certified in pain management, supported his continued employment-related conditions and resulting partial disability for work. The Office referred appellant for a second opinion evaluation with Dr. Holladay, a Board-certified orthopedic surgeon, who opined that appellant's employment-related conditions had resolved. It found a conflict of medical opinion evidence between Drs. Henderson and Holladay and referred appellant to Dr. Ochoa, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the issues.[14]

In a report dated March 26, 2008, Dr. Ochoa provided a history of injury and medical history. He listed his findings on physical examination and opined that appellant's employment-related conditions had resolved. Dr. Ochoa completed a work restriction evaluation and indicated that appellant could not return to his date-of-injury position. He found that appellant could work eight hours a day with restrictions.

Dr. Ochoa indicated that appellant's employment-related conditions had resolved, but clearly opined that appellant could not return to his date-of-injury position. In order to terminate appellant's compensation benefits, the Office must establish that either appellant's disability had ceased or that the disability was no longer due to his employment. Dr. Ochoa clearly found that appellant's disability had not ceased as he opined that appellant could not return to his date-of-injury position. He did not offer any opinion regarding the cause of appellant's current disability. Dr. Ochoa did not offer an opinion as to whether this disability was due to residuals of appellant's accepted employment injuries or to some other source. Without an opinion that appellant's employment-related disability had ceased, this report is not sufficient for the Office to terminate appellant's compensation benefits.

As the Office failed to meet its burden of proof to terminate appellant's compensation benefits, upon receipt of this decision of the Board, the Office shall reinstate appellant's compensation benefits effective July 21, 2008.[15]

CONCLUSION

The Board finds that appellant forfeited his compensation benefits for the period June 14, 2006 through September 14, 2007 in the amount of $19,597.14 and that he is at fault in the creation of this overpayment. The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective July 21, 2008 and that his compensation benefits should be reinstated to that date.

[14] The Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. 5 U.S.C. §§ 8101-8193, 8123; 20 C.F.R. § 10.321.

[15] Due to the disposition of this issue, it is not necessary for the Board to address whether appellant has established any continuing disability on or after July 21, 2008.

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2009 decision of the Office of Workers' Compensation Programs is reversed. The Board affirms the August 25, 2008 overpayment decision.

Issued: April 2, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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