

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

R.E., Appellant)
)
and)
)
DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Philadelphia, PA,)
Employer)
_____)

Docket No. 09-952
Issued: January 12, 2010

Appearances:
Ricardo A. Byron, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 25, 2009 appellant, through his attorney, filed a timely appeal of a November 21, 2008 merit decision of the Office of Workers' Compensation Programs finding an overpayment in the amount of \$16,069.34 for which he was at fault and directing recovery of the overpayment. 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 found that appellant received an overpayment of compensation in the amount of \$16,069.34 based on his forfeiture of compensation for the period February 25, 2005 to January 21, 2006; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, and therefore, ineligible for waiver of the recovery.

FACTUAL HISTORY

On January 10, 2005 appellant, then a 41-year-old transportation security screener, injured his left knee, left ankle and left side when a passenger struck him with heavy luggage. A subsequent passenger stepped on his ankle during screening. He stopped work on January 11, 2005. By letter dated February 17, 2005, the Office accepted appellant's claim for left knee sprain. It advised him that a person who knowingly makes any false statement, misrepresentation, concealment of fact, or any other act of fraud to obtain compensation, or who knowingly accepted compensation to which he or she is not entitled, was subject to felony criminal prosecution. The Office instructed appellant that he was required to notify it immediately if he returned to work or obtained new employment and to return immediately any compensation check including payment for a period he had worked, to prevent an overpayment of compensation.

On March 11 and April 2 and 17, 2005 appellant filed claims for wage-loss compensation (Form CA-7) for the period February 25 to April 17, 2005. Section 3 of the form asked whether appellant had any employment outside his federal employment for the periods claimed. The form specifically stated that employment included salaried, self-employment, commission and volunteer work. It also stated:

“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 [Federal Employees' Compensation Act], or who knowingly accepts compensation to which that person is not entitled is subject to civil or administrative remedies as well as felony criminal prosecution and may, under appropriate criminal provisions, be punished by fine or imprisonment, or both, in addition, a felony conviction will result in termination of all current and future FECA benefits.”

Appellant responded that he had not been employed.

By letter dated August 22, 2005, the Office advised appellant that he was being paid compensation for total disability from February 25 through April 16, 2005. Effective April 17, 2005, it placed him on the periodic rolls in receipt of total disability compensation every four weeks.

By decision dated February 2, 2006, the Office suspended appellant's compensation benefits effective January 22, 2006 because he failed to complete EN1032 forms sent to him on May 12 and December 19, 2005 for information regarding any earnings he received from employment while receiving total disability compensation. It advised him that his compensation benefits would be restored retroactively upon his submission of the completed EN1032 forms.

On May 14, 2006 appellant completed and signed an EN1032 form reporting that he had been self-employed as a part-time radio announcer at WDAS-FM, a Clear Channel Worldwide radio station, during the past 15 months. He reported initial earnings of \$218.00 per shift. From January 18, 2005 through January 30, 2006, appellant averaged two shifts per week. As of

February 1, 2006 he worked one shift per week, earning \$227.00 per shift. Appellant was paid a gross salary of \$1,927.50 in 2005.

In a December 6, 2006 letter, Clear Channel confirmed that in 2006 appellant worked as a part-time on-air announcer for WDAS-FM. He worked one weekend shift per week with a pay rate of \$236.33.

In a December 26, 2006 investigative report, the employing establishment's Office of the Inspector General, confirmed appellant's part-time employment. During a February 22, 2006 interview, appellant advised two special agents that he had worked as a part-time radio announcer at WDAS-FM radio station, nine hours per week, since 2000. He earned approximately \$19,000.00 in 2005. Appellant did not believe that he had to report his employment as it involved a nonphysical position and did not conflict with his federal employment. The Philadelphia District Attorney's office accepted appellant's case for prosecution of fraud for failing to disclose outside employment pursuant to the Federal Employees' Compensation Act.

By decision dated February 11, 2008, the Office found that appellant had forfeited his entitlement to compensation for the period February 25, 2005 through January 21, 2006 based on his failure to report earnings while receiving compensation for total disability.¹ I also made a preliminary determination that he received an overpayment of compensation in the amount of \$16,069.34 during the stated period. The Office found that appellant failed to provide information relative to his outside earnings on his March 11 and April 2 and 17, 2005 CA-7 forms covering the period February 25 through April 17, 2005. It found that he was at fault in the creation of the overpayment. The Office found that appellant knowingly failed to report his earnings as the CA-7 forms he signed certified that he was fully aware of his reporting requirements. It advised appellant that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents within 30 days.

On March 10, 2008 appellant's counsel requested an oral hearing regarding the February 11, 2008 forfeiture decision and a preredemption hearing before an Office hearing representative. Appellant reported monthly income of \$1,000.00 as a radio announcer. He had monthly expenses of \$4,200.00 and \$100.00 in a checking account. Appellant related that, at the time of his January 10, 2005 employment injury, he was working a second job at a radio station. He did not report his earnings on his CA-7 forms since the work was outside his federal employment work hours. Appellant contended that the earnings from his dissimilar job at the

¹ In the February 11, 2008 forfeiture decision, the Office noted that appellant's compensation had been reduced as of January 22, 2006 based on its determination that his actual earnings as a radio announcer represented his wage-earning capacity.

radio station could not be used to reduce his compensation to reflect his wage-earning capacity or to determine his compensation pay rate.²

At a June 18, 2008 hearing, appellant's attorney argued that appellant should not have been required to report his earnings from his radio announcer position. He stated that appellant's earnings should not have been taken into consideration in determining his loss of wage-earning capacity as the radio announcer position was not similar to his federal employment. Appellant testified that he began working as a radio announcer in November 1999. Initially, he was on call once every two months. Appellant currently worked once per week on a six-hour shift. At the time of his January 10, 2005 employment injury, he worked at the radio station, on a five-hour shift, one day per week. Appellant testified that he inadvertently stated that he was self-employed rather than employed by the radio station on his May 14, 2006 EN1032 form.

In a July 18, 2008 brief, appellant's attorney contended that appellant's earnings from employment as a radio announcer did not constitute earnings under 20 C.F.R. § 10.125 and the Board's dual employment doctrine. He further contended that appellant's failure to report such earnings was not a "knowing" omission since he was under no obligation to report dissimilar employment. By letter dated July 21, 2008, counsel submitted financial records.

In a November 21, 2008 decision, an Office hearing representative affirmed the February 11, 2008 forfeiture decision. She also finalized the February 11, 2008 preliminary determination of overpayment in the amount of \$16,069.34 and fault for the period February 25, 2005 to January 21, 2006. The hearing representative directed repayment in the amount of \$100.00 per month.

On appeal, appellant's attorney contended that the Office failed to establish that appellant knowingly failed to report his earnings from his radio announcer position. Counsel contended that appellant did not knowingly fail to report his earnings from his radio announcer position because they could not be used to determine his wage-earning capacity. He further contended that the decision of the Philadelphia District Attorney's office to not prosecute appellant on federal charges, established that he did not knowingly fail to report his earnings.

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

² By decision dated June 17, 2008, the Office terminated appellant's wage-loss compensation and medical benefits effective July 6, 2008 based on a January 10, 2008 medical opinion of Dr. Zohar Stark, an Office referral physician. He found that appellant no longer had any residuals or total disability causally related to his accepted January 10, 2005 employment-related injury. Dr. Stark advised that he could return to his regular work duties as a transportation security screener. As appellant is not appealing from this decision, the Board will not review it on the current appeal. *See* 20 C.F.R. § 501.3.

³ 20 C.F.R. § 10.525.

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

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

Section 8106(b) of the 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.⁷

It is not enough for the Office to merely establish that appellant had employment or earnings. A claimant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b)(2) if he knowingly failed to report employment or earnings.⁸ The term knowingly as defined in the Office's implementing regulations, means with knowledge, consciously, willfully or intentionally.⁹

The Office can meet this burden of proof in several ways, including by appellant's own admission to the Office that he failed to report employment or earnings which he knew he should report or by establishing that he has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form EN1032.¹⁰

ANALYSIS -- ISSUE 1

In order to determine whether an overpayment of compensation occurred in this case, the Board must initially determine whether appellant forfeited his right to monetary compensation from February 25, 2005 to January 21, 2006.

On March 11 and April 2 and 17, 2005 appellant signed CA-7 forms, attesting that he was unemployed, had not engaged in any self-employment activities and had no earnings from February 25 to April 17, 2005. The Office suspended his wage-loss compensation effective January 22, 2006 because he failed to complete EN1032 forms regarding his earnings from employment. On May 14, 2006 appellant signed an EN1032 form, advising that he had been self-employed as a part-time radio announcer at WDAS-FM beginning on January 18, 2005 for which he was paid \$1,927.50 in 2005.

On appeal, appellant argued that his earnings from his radio announcer position could not be used to determine his loss of wage-earning capacity or compensation pay rate as this position was dissimilar from his transportation security screener position. He contended that he did not

⁵ 20 C.F.R. § 10.529(a).

⁶ *Id.* at § 10.529(b).

⁷ 5 U.S.C. § 8106(b).

⁸ *Harold F. Franklin*, 57 ECAB 387 (2006).

⁹ 20 C.F.R. § 10.5(n); see *Donald L. Overstreet*, 54 ECAB 678 (2003).

¹⁰ See *Harold F. Franklin*, *supra* note 8.

knowingly fail to report his earnings from his radio announcer position because they could not be used to determine his wage-earning capacity.

Although the Board has held that earnings received from dissimilar private employment at the time of injury must be excluded by the Office when determining an injured employee's pay rate for compensation purposes, and subsequent earnings from that same employment cannot be considered in determining the employee's wage-earning capacity,¹¹ Office regulations provide that, if an employee knowingly omits or understates earnings or work activity in making a report, he shall forfeit the right to compensation with respect to any period for which the report was required.¹² The penalty provision under section 8106 is premised on the failure to report earnings from employment or self-employment as required. The Board held that section 8106(b)(2) makes no exception for reporting earnings in concurrent dissimilar employment.¹³

Appellant further contended that the Philadelphia District Attorney's decision not to prosecute him for fraud under the Act established that he did not knowingly fail to report his earnings. The Board has held that the failure of the government to prosecute appellant on criminal charges relating to failure to report earnings did not stay administrative proceedings under the Act.¹⁴ Appellant was aware that he was required to state that he was employed outside of his duties with the employing establishment because he had been so informed by the Office in its February 17, 2005 acceptance letter and the CA-7 form which clearly required him to report any outside employment. In addition, during a February 22, 2006 interview with employing establishment special agents, appellant admitted to working as a part-time radio announcer at WDAS-FM, nine hours per week since 2000. He stated that he earned approximately \$19,000.00 in 2005. Appellant testified at the preresoupment hearing that he had worked as a radio announcer at the time of his January 10, 2005 employment injury. Clear Channel confirmed that in 2006 he worked as a part time on-air announcer for WDAS-FM at the pay rate of \$236.33. The Board finds that the Office's February 17, 2007 acceptance letter and the CA-7 forms appellant signed on March 11 and April 2 and 17, 2005, establishes that he consciously and knowingly omitted material information concerning his employment activities and earnings from WDAS-FM radio station. Even though appellant performed work on a part-time basis during this period, he knew that he was required to report any employment and earnings produced from his work activities. Appellant signed the CA-7 forms certifying that all statements provided in response to the questions on the form were true, complete and correct to the best of his knowledge and belief. Appellant failed to report that he was engaged in outside salaried employment, despite the fact that the Office's investigation revealed that he was actively engaged in employment with earnings from WDAS-FM during the period in question.¹⁵

¹¹ *Irwin W. Goldman*, 23 ECAB 6 (1971), *petition for recon. denied*, 23 ECAB 46 (1971).

¹² 20 C.F.R. § 10.529(b); *Harold F. Franklin*, *supra* note 8.

¹³ *See Earl D. Long*, 50 ECAB 464 (1999).

¹⁴ *Anthony Derenzo*, 40 ECAB 504 (1989).

¹⁵ *See Carol Gianfrancisco*, 47 ECAB 205 (1995), in which Form CA-8 required that appellant report all salaried employment held during the period in question. The form advised of penalties for fraud. The Form CA-7's in the instant case contain the same requirements for employment reporting and penalty notice as in *Gianfrancisco*.

Accordingly, he forfeited his right to compensation during the period covered by the forms through the suspension of his compensation benefits, February 25, 2005 to January 21, 2006, which created an overpayment of compensation in the amount of \$16,069.34.

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of the Office's implementing regulations provide 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.¹⁶

“(b) 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 [recovery of overpayments] and other relevant statutes.”

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault under the second standard as he failed to provide information, which he knew or should have known to be material on CA-7 forms covering the period February 25, 2005 to January 21, 2006.¹⁷ As noted, he failed to report his employment and earnings on CA-7 forms covering the stated period. The Board finds, therefore, that appellant failed to furnish material information to the Office. Appellant signed certification clauses on the CA-7 forms which advised him in explicit language that he might be subject to civil, administrative or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. Consequently, by signing the form, appellant is deemed to have acknowledged his duty to fill out the form properly, including the duty to report any employment or self-employment activities and income. The Board finds, therefore, that he failed to furnish information which he knew or should have known to be material to the Office. As appellant is not without fault in creating the overpayment, it is not subject to waiver.

With respect to the recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.¹⁸ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.¹⁹

¹⁶ 20 C.F.R. § 10.529; see *Harold F. Franklin*, *supra* note 8.

¹⁷ See *Bob R. Gilley*, 51 ECAB 377 (2000).

¹⁸ *Terry A. Keister*, 56 ECAB 559 (2005); see also *Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁹ *Cheryl Thomas*, *id.*

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$16,069.34 based on his forfeiture of compensation for the period February 25, 2005 to January 21, 2006. The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment, and therefore, ineligible for waiver of the recovery.

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 12, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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