United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 10-1690**
	)	**Issued: April 15, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Boone, NC, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 8, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 4, 2010 merit decision regarding forfeiture of compensation. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly found that appellant forfeited his right to compensation from March 3, 2007 through April 3, 2009 because he knowingly failed to report his earnings and employment activities.

FACTUAL HISTORY

On August 2, 2006 appellant, a 53-year-old customer service supervisor, filed a traumatic injury claim alleging that he experienced stress, sleeplessness, depression and injuries to his

[1] 5 U.S.C. § 8101 *et seq.*

head, neck and chest as a result of being required by the employing establishment to drive long distances for many hours between July 21 and August 12, 2006.[2] The Office accepted the claim for temporary aggravation of obstructive sleep apnea.[3] Appellant stopped working on March 3, 2007 and was placed on the periodic rolls.

This case was previously before the Board. In a decision dated September 23, 2010, the Board affirmed May 12 and September 24, 2009 decisions denying his request to expand his claim to include a consequential emotional condition.[4] In an order dated April 13, 2011, the Board set aside a December 30, 2009 decision terminating appellant's compensation benefits and remanded the case for further development.[5]

On April 3, 2008 and April 1, 2009 the Office directed appellant to complete EN1032 forms reflecting his employment activities and earnings from employment during the 15-month period preceding the date of the completion of the form. The forms requested that he report employment other than self-employment for which he received salary, wages, sales commissions, piecework or other payment. Appellant was to report all self-employment or involvement in business enterprises including, but not limited to, farming, sales work, operating a business, and providing services in exchange for money, goods or other services. He was required to report activities such as carpentry, mechanical work, painting, contracting, childcare, and odd jobs. Keeping books and records or managing and/or overseeing a business of any kind, including a family business and even part-time or intermittent activities, were to be reported. Appellant was to report work or any ownership interest in any business enterprise even if he was not paid, the work was for a family member or relative, the business lost money, or income was reinvested or paid to others. He was warned that a false answer might be grounds for suspension of compensation and civil or criminal liability.

On EN1032 forms, signed and dated April 7, 2008 and April 3, 2009, appellant informed the Office that he had no employment or self-employment during the 15 months prior to his completion of the forms. He did not report his involvement in any activities which were identified in the form as relevant to his employment.

An investigation was conducted by the Office of the Inspector General (OIG) of the employing establishment regarding appellant's employment activities and earnings. A September 15, 2009 report revealed that appellant was actively engaged in employment activities and had earnings during the 15-month periods covered by the EN1032 forms he signed on April 7, 2008 and April 3, 2009, namely, the period April 3, 2007 through April 3, 2009.[6]

[2] The Office properly developed the claim as an occupational disease claim, as the alleged injury occurred over a period greater than one day or shift.

[3] On April 7, 2009 appellant file a traumatic injury claim alleging that he sustained neck and head injuries as a result of an August 4, 2006 motor vehicle accident when he fell asleep while driving in the performance of duty. (File No.xxxxxx034). On December 7, 2010 the Office accepted the claim for cervical sprain.

[4] Docket No. 10-165 (issued September 23, 2010).

[5] Docket No, 10-1533 (issued April 13, 2011).

[6] The Board notes that appellant did not begin receiving compensation benefits until April 3, 2007.

Through interviews with appellant, center staff officials and other employees, Special Agent Joanne Yarbrough documented that appellant worked as a custodian at the Hayes Performing Arts Center during 2007 and 2008.

In a September 15, 2009 interview, appellant acknowledged that he helped his wife with "light cleaning" two to three times a week at the center, performing such duties as vacuuming, taking out the trash and cleaning bathrooms. He denied, however, that he was paid for his services. In other interviews, Tim Billman, technical director at Hayes, stated that appellant performed janitorial duties at the center two to four days per week from August 2006 to 2008. Rich Suyao, director of marketing, also reported that he performed janitorial duties at the center, sometimes with his wife, sometimes alone. Kim Kay, education director, stated that he witnessed appellant performing custodial duties and noted that his daughter took classes at the center at the employee discount rate. Kenneth Kay, producing artistic director, and Gary Smith, a technical assistant, also witnessed appellant conducting housecleaning and custodial duties at the center during the period in question.

In a September 14, 2009 interview, Angelo Nigro, owner of Angelo's Maintenance, stated that appellant performed work for him, and that he helped his wife clean at the performing arts center during calendar years 2007 and 2008. Mr. Nigro also indicated that he paid appellant for painting services he performed, although he wrote the check to appellant's wife. Robert Miller, who was in charge of the center's cleaning schedule, stated that appellant performed cleaning services for the center between late 2006 and mid-December 2008, noting that he usually arrived between 8:30 and 9:30 a.m. Mr. Miller indicated that he regularly provided appellant with the center's cleaning schedule during that time period. He also provided appellant and his family with employee complimentary tickets for performances at the center. Allison West, a part-time employee at the center, stated that she observed appellant and his wife performing custodial duties there.

The OIG provided financial documents reflecting that Angelo's Maintenance paid appellant directly for labor on various occasions, including the amounts of $635.00 on November 5, 2007 and $288.00 on March 13, 2007.

On September 16, 2009 the Office terminated appellant's compensation benefits effective September 27, 2009. By decision dated December 31, 2009, an Office hearing representative affirmed the September 16, 2009 decision. In an April 13, 2011 order, the Board set aside the December 31, 2009 decision and remanded the case to the Office for further development.[7]

By decision dated November 12, 2009, the Office found that appellant had forfeited his entitlement to compensation from March 3, 2007 to September 26, 2009 because he knowingly failed to report employment during that period.[8]

[7] *Supra* note 5.

[8] On November 17, 2009 the Office issued a preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of $106,411.83 for the period April 3, 2007 to September 26, 2009, as a result of the forfeiture. Appellant requested a prerecoupment hearing on May 17, 2010.

On November 16, 2009 appellant, through his representative, requested a telephonic hearing. At the February 10, 2010 hearing, appellant testified that he was not employed at the performing arts center and that he was never an employee of Angelo Maintenance. Although he was friends with Mr. Nigro, who owned Angelo Maintenance, appellant allegedly received no remuneration from him. Appellant stated that his wife worked part time at the center and that he helped her because he felt guilty staying at home, but that he was never paid. He acknowledged that Mr. Nigro made a few checks payable to him by mistake. Appellant explained that if Mr. Miller or other center employees saw him performing custodial duties, he was "just helping his wife." He stated that Mr. Kay probably thought he was cleaning alone because he and his wife worked on different floors. Appellant testified that "we picked up" the cleaning schedule, which Mr. Miller left in a drawer. Although only Angelo told them what to do, Mr. Kay might say, "You don't have to take my trash this time," or, "There is no tissue in the women's restroom, so make sure that it gets replaced." Appellant indicated that he accompanied his wife approximately 60 percent of the time. When asked whether he was paid for painting services, he stated that Mr. Nigro "loaned" him money and then he painted for him.

By decision dated May 4, 2010, the Office hearing representative affirmed the November 12, 2009 forfeiture decision, finding that the evidence established that appellant knowingly and willingly failed to report income for the periods covered by the EN1032 forms, signed and dated April 7, 2008 and April 3, 2009, namely for the period April 3, 2007 to April 3, 2009.[9]

LEGAL PRECEDENT

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.... An employee who --
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> (1) fails to make an affidavit or report when required; or
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> (2) knowingly omits or understates any part of his earnings;
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> "forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section."[10]

[9] The hearing representative remanded the case to the Office for recomputation of the overpayment amount for the period covered by the April 7, 2008 and April 3, 2009 CA-1032s.

[10] While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled, and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and therefore a statutory provision about such earnings would be meaningless. *Id*. at 260.

Before the Office can declare a forfeiture of compensation, it must establish that appellant has received earnings from his own employment, not from passive investment in business ventures.[11]

It is not enough merely to establish that there was unreported employment or earnings. Appellant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she knowingly failed to report employment or earnings.[12] The term "knowingly," as defined in the Office's implementing regulations, means with knowledge, consciously, willfully or intentionally.[13] To meet this burden, the Office is required to examine closely appellant's activities and statements. It may meet this burden without an admission by the claimant if the circumstances of the case establish that he failed to reveal fully and truthfully the full extent of his employment activities and earnings.[14]

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
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> (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."[15]

ANALYSIS

On April 7, 2008 and April 3, 2009 appellant signed CA-1032 forms asserting that he had no income or employment for the 15-month period preceding his signing of the respective documents. Appellant was advised of his responsibility to complete the forms accurately and provide relevant information concerning his employment status and earnings during the period covered by the forms. The record reveals, however, that appellant was employed and received actual earnings during the periods covered by the forms. The Board finds that appellant forfeited his entitlement to compensation benefits from April 3, 2007 to April 3, 2009 because he knowingly failed to report employment and earnings during these periods.

The September 15, 2009 OIG investigative report documented that appellant worked as a custodian at the Hayes Performing Arts Center during 2007 and 2008. Appellant acknowledged that he helped his wife with "light cleaning" two to three times a week at the center, performing

[11] *Anthony V. Knox*, 50 ECAB 402 (1999).

[12] *Barbara L. Kanter*, 46 ECAB 165 (1994).

[13] 20 C.F.R. § 10.5(n).

[14] *Terry A. Geer*, 51 ECAB 168 (1999).

[15] 20 C.F.R. § 10.5(g); *see Monroe E. Hartzog*, 40 ECAB 322, 329 (1988).

such duties as vacuuming, taking out the trash and cleaning bathrooms. He noted his involvement in retrieving the weekly cleaning schedule from Mr. Miller between late 2006 and mid-December 2008, as well as responding to instructions from Angelo and Mr. Kay, and stated that he accompanied his wife to work approximately 60 percent of the time. Center employees, including the technical director, director of marketing, education director, producing artistic director, and technical assistant, all stated that appellant had regularly performed janitorial duties at the center during the period in question. Appellant received complimentary employee tickets for performances at the center, as well as an employee discount for his daughter's classes. Angelo Nigro, owner of Angelo's Maintenance, stated that appellant performed work for him, and that he helped his wife clean at the performing arts center during calendar years 2007 and 2008. The Board finds that appellant's activities as a custodian constituted earnings as defined by 20 C.F.R. § 10.5(g).[16] Accordingly, even if he did not receive any compensation for the performance of these duties, as he alleges, he was required to report a reasonable estimate of the cost to have someone else perform the duties."[17] 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.[18]

The record also reflects that appellant received monetary compensation for his services during the relevant period. Angelo's Maintenance paid appellant directly for labor on various occasions, including the amounts of $635.00 on November 5, 2007 and $288.00 on March 13, 2007. Additionally, Mr. Nigro indicated that he paid appellant for painting services, although he wrote the check to appellant's wife. Thus, the record establishes that appellant had earnings from his employment during the period in question.

The Board further finds that appellant knowingly failed to report earnings and employment activities during the relevant period. On April 7, 2008 and April 3, 2009 appellant denied that he was engaged in any employment activity or that he had received any employment income for the 15-month periods preceding the signing of the forms. The evidence of record, however, establishes that he was, in fact, employed and did, in fact, receive employment income during that period. The forms signed by appellant explained the obligation for reporting all forms of employment, self-employment and earnings. The explicit language of the Form CA-1032 clearly advised him that the nature of his work as a custodian would require him to report such employment activities on the form. Therefore, appellant was duly on notice of his reporting obligation. Moreover, he acknowledged that he actually received checks payable to him from Mr. Nigro and that he performed painting services for Mr. Nigro in exchange for a "loan." Under these circumstances, the Board concludes that appellant knowingly omitted his earnings under section 8106(b)(2) of the Act by failing to report his employment activities and earnings on the applicable CA-1032 forms for the period April 3, 2007 to April 3, 2009.

The Board notes that in its November 12, 2009 decision, the Office declared a forfeiture for the period April 3, 2007 to September 26, 2009, the date of termination of appellant's

[16] *Id*.

[17] *See B.T.*, Docket No. 09-2190 (issued August 6, 2010).

[18] 20 C.F.R. § 10.5(g); *see also C.R.*, Docket No. 09-720 (issued October 15, 2009); *B.S.*, Docket No. 09-741 (issued May 14, 2010).

compensation benefits. The Board finds, however, that the Office hearing representative correctly determined that the period of forfeiture covered only the period encompassed by the CA-1032 forms. The forfeiture provision is a penalty provision and is thus narrowly construed.[19] There are no CA-1032 affidavits or other relevant evidence upon which to base a forfeiture of compensation payments subsequent to April 3, 2009.

On appeal, appellant's representative contends that 20 C.F.R. § 10.441 required the Office to provide him copies of the CA-1032 forms on which it based its decision and that, since the Office failed to send him the required notice, the May 4, 2010 decision should be vacated. The Board notes that counsel's reliance on 20 C.F.R. § 10.441 is misplaced, as this section is no longer in effect and has been replaced by 20 C.F.R. § 10.700(c). Current regulations provide that a properly appointed representative who is recognized by the Office may make a request or give direction to the Office regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on the facts or the law and obtaining information from the case file, to the same extent as the claimant.[20] Any notice requirement contained in the regulations or the Act is fully satisfied if served on the representative and has the same force and effect as if sent to the claimant.[21] The Board has held that decisions under the Act are not deemed to have been properly issued unless both appellant and the authorized representative have been sent copies of the decision.[22]

The applicable regulations grant a duly appointed representative certain privileges, as noted. It does not, however, require the Office to provide a representative with a copy of every document provided to a claimant, absent a specific request. A CA-1032 form is in the form of an affidavit and requires that the employee truthfully provide and certify certain information, which is within the knowledge of the employee. Appellant's counsel cannot substitute his answers for the employee's in completion of the Form CA-1032. He also argues that he should have received notice of appellant's receipt of the form because Form Ca-1032 is an administrative action requiring such notice, and that failure to provide notice deprived appellant of a property interest in not having his rights forfeited. Appellant was on notice from the time he began receiving compensation benefits of his duty to report employment. The Office's request for financial information, in keeping with his ongoing requirement to inform the Office of any employment activity or income, does not constitute an administrative action requiring notice.

Accordingly, the Board finds that the Office properly determined that appellant forfeited his right to compensation for the period April 3, 2007 to April 3, 2009.

[19] *Karen Spurling*, 56 ECAB 189 (2004).

[20] 20 C.F.R. § 10.700(c).

[21] *Id*. *See also Sara K. Pearce*, 51 ECAB 517, 518 (2000).

[22] *See Travis L. Chambers*, 55 ECAB 138 (2003).

CONCLUSION

The Board finds that the Office properly found that appellant forfeited his right to compensation for the period April 3, 2007 to April 3, 2009 because he knowingly failed to report his employment activities and income.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 4, 2010 decision is affirmed.

Issued: April 15, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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