

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMY E. TOLLIVER and U.S. POSTAL SERVICE,
POST OFFICE, Little Rock, Ark.

*Docket No. 98-36; Submitted on the Record;
Issued August 4, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his right to compensation for the period April 12, 1985 to April 20, 1995 because he knowingly failed to report his employment activities; (2) whether appellant received overpayments of compensation in the amounts of \$182,765.25 and \$11,151.00; (3) whether the Office properly determined that appellant was at fault in the creation of the overpayments and that, therefore, they were not subject to waiver; and (4) whether the Office properly reduced appellant's compensation effective December 21, 1995 based on his capacity to earn wages as a manager of an automotive specialty service.

The Board has given careful consideration to the issues involved, the contentions of appellant on appeal, and the entire case record. With respect to whether the Office properly found that appellant forfeited his right to compensation for the period April 12, 1985 to April 20, 1995, the Board finds that the decision of the hearing representative of the Office dated and finalized June 27, 1997 is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the Office hearing representative.¹

The Board further finds that the Office properly determined that appellant received overpayments of compensation in the amounts of \$182,765.25 and \$11,151.00.

The record contains evidence which indicates that appellant received \$182,765.25² in compensation for the period April 12, 1985 to April 20, 1995 but that he was not entitled to such compensation because he forfeited this amount for the reasons detailed in the June 27, 1997

¹ The Office hearing representative modified the Office's prior forfeiture decision by finding that appellant forfeited compensation for the period April 20, 1985 to April 20, 1995 rather than for intermittent periods between August 21, 1975 and April 20, 1995, as had previously been determined.

² The Office initially indicated that appellant forfeited \$219,497.53 in compensation. As noted above, the Office hearing representative determined that the actual amount of forfeiture was \$182,765.25.

decision of the Office hearing representative. The record also indicates that appellant received \$11,151.00 in compensation for the period April 21 to October 14, 1995 but was not entitled to such compensation because he retroactively elected to receive retirement benefits and hence received dual benefits for a period. For these reasons appellant received overpayments of compensation in the amounts of \$182,765.25 and \$11,151.00.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the \$182,765.25 overpayment and that, therefore, it was not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act³ provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.⁴ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 this subchapter or would be against equity and good conscience."⁵ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.320(b) of Title 20 of the Code of Federal Regulations provides in relevant part:

"An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."⁶

In this case, the Office applied the first and second standards in determining that appellant was at fault in creating the \$182,765.25 overpayment.

With respect to whether an individual is without fault, section 10.320(c) of the Office's regulations provides in relevant part:

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129(a).

⁵ 5 U.S.C. § 8129(b).

⁶ 20 C.F.R. § 10.320(b).

“Whether an individual is ‘without fault’ depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual’s understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which were not due, and ability to comply with any reporting requirements (e.g., age, comprehension, memory, physical and mental condition).”⁷

In the present case, appellant forfeited his right to \$182,765.25 in compensation for the period April 12, 1985 to April 20, 1995 because he knowingly failed to report his employment activities. As described in the June 27, 1997 decision of the Office hearing representative, appellant knowingly did not report, on various Forms EN-1032, the full extent of his employment activities at an automobile repair shop during the period April 12, 1985 to April 20, 1995. Therefore, he made an incorrect statement as to a material fact which he knew to be incorrect and failed to furnish information which he knew to be material. For these reasons, the Office properly determined that appellant was at fault in the creation of the \$182,765.25 overpayment and that, therefore, it was not subject to waiver.

The Board further finds that the case is not in posture for decision regarding whether the Office properly determined that appellant was at fault in the creation of the \$11,151.00 overpayment and that, therefore, it was not subject to waiver.

In its preliminary determination, the Office determined that appellant was not at fault in the creation of the \$11,151.00 overpayment relating to his receipt of dual benefits. In his June 27, 1997 decision, the Office hearing representative determined that the \$11,151.00 overpayment was not subject to waiver. He did not, however, provide any explanation for his finding that the overpayment was not subject to waiver and the Board is otherwise unable to determine the basis for this finding. A final decision denying a claim must include findings of fact and provide “a correct description of the basis for denial so that the parties of interest will have a clear understanding of the precise defect of the claim and the kind of evidence which would tend to overcome it.”⁸ These requirements are supported by Board precedent.⁹ Therefore, the case should be remanded to the Office in order make a reasoned determination, with proper reference to the relevant standards concerning overpayment waiver, regarding whether appellant is entitled to waiver of the \$11,151.00 overpayment.

The Board further finds that the Office improperly reduced appellant’s compensation effective December 21, 1995 based on his capacity to earn wages as a manager of an automotive specialty service and that appellant’s continuing compensation should be reinstated, effective December 21, 1995, to the amount he received prior to December 21, 1995.

⁷ 20 C.F.R. § 10.320(c).

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.9a (July 1993).

⁹ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹⁰ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹¹ Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.¹² Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹³ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.¹⁴

In his June 27, 1997 decision, the Office hearing representative properly noted that the Office failed to meet its burden of proof to modify appellant's compensation effective December 21, 1995 because it did not adequately consider the above-described factors in determining that appellant could perform the selected position of "manager, an automobile specialty service." The Office hearing representative did not, however, adequately explain why appellant's continuing compensation should not be reinstated, effective December 21, 1995, to the amount he received prior to December 21, 1995. As noted above, it is the Office's burden to terminate or modify compensation and the Office did not meet its burden in the present case with respect to determining appellant's wage-earning capacity effective December 21, 1995. Therefore, appellant's continuing compensation should be reinstated, effective December 21, 1995, to the amount he received prior to December 21, 1995.

¹⁰ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

¹¹ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹² *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

¹³ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

¹⁴ *Id.*

The decision of the Office of Workers' Compensation Programs dated and finalized June 27, 1997 is affirmed with respect to the forfeiture issue, affirmed with respect to the amount of the overpayments and the denial of waiver of the \$182,765.25 overpayment, set aside and remanded to the Office with respect to the denial of waiver of the \$11,151.00 overpayment, and affirmed as modified with respect to the wage-earning capacity issue.

Dated, Washington, D.C.
August 4, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member