U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EHRMAN S. ELDRIDGE and U.S. POSTAL SERVICE,
POST OFFICE, St. Louis, Mo.

Docket No. 95-2777; Submitted on the Record;
Issued January 5, 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 determined that appellant forfeited compensation for the period of March 9 to October 24, 1993; and (2) whether the Office properly found that appellant was at fault in the creation of a $6,309.18 overpayment in compensation.

On September 21, 1992 appellant, then a 48-year-old letter carrier, sustained a broken ankle when he slipped on steps. The Office accepted his claim for a fracture of the right ankle and paid appellant compensation for partial and total disability. In order to claim compensation for his partial and total disability, appellant submitted periodic CA-8 forms covering the period of March to October 29, 1993. On each of these forms appellant indicated that he was not self-employed during the period of time covered by the form. Beginning with the form covering the time period from June 12 to 25, 1993, appellant did indicate that he was working four hours per day as a letter carrier.[1]

In an investigative memorandum dated May 18, 1994, an employing establishment postal inspector, J.A. Clay, reported that during the time period in question, appellant opened DEC Automotive and on June 1, 1993, he had one full-time employee. In an affidavit attached to the memorandum, appellant stated that he was unaware that he had to report this enterprise on his claim forms and that although he owned the business, he did not work there. He later indicated that he did perform minor mechanical work and indicated that mainly he wrote checks and kept the books. The exhibits attached to the memorandum indicate that appellant obtained a bank account on March 9, 1993, government permits for his business on March 1, 1993, engaged in

[1] In a decision dated January 31, 1994, the Office determined that appellant had no loss of wage-earning capacity after his return to work on October 27, 1993. On June 24, 1994 the Office issued appellant a schedule award for a 26 percent permanent impairment to the right lower extremity for the period from May 4, 1994 to October 10, 1995 for a total of 74.88 weeks of compensation.

other business start-up activities in April 1993 and began doing actual vehicle repair business in May 1993.

By decision dated June 29, 1994, the Office found that appellant had forfeited his entitlement to compensation for the period March 9 to October 24, 1993 due to his failure to report earnings and work activities in self-employment. By letter dated June 29, 1994, the Office advised appellant that it had made a preliminary determination that he had received and was at fault in the creation of a $6,309.18 overpayment of compensation because he failed to report information that he knew or should have known was material. The Office advised appellant to submit additional evidence or argument if he disagreed with the preliminary determination and requested him to complete an overpayment questionnaire.

Appellant requested a hearing and submitted evidence he believed supported his assertion that he had no intent to defraud the "postal service." At the hearing, appellant indicated that he was unaware that he had to advise the Office of the DEC Automotive business on his CA-8 forms and that he never tried to hide his business. He indicated that his business was managed and operated primarily by Darrell Sterling but that as owner, "sometimes" he took in the receipts and talked to customers. Appellant submitted an affidavit from Mr. Sterling which indicated that he was the manager of DEC Automotive, that he had been informed by appellant from the beginning that he would be unable to work due to his limited-duty status with the employing establishment and that the employing establishment would be checking on him from time to time.

By decision dated May 23, 1995, an Office hearing representative affirmed the Office's finding that appellant forfeited his entitlement to compensation for the period of March 9 to October 24, 1993. The Office hearing representative also finalized the Office's preliminary determination that appellant was at fault in the creation of a $6,309.18 overpayment of compensation and therefore the overpayment was not subject to waiver.

The Board finds that the Office properly found that appellant forfeited his right to compensation for the period of March 9 to October 24, 1993.[2]

Section 8106(b) of the Federal Employees' Compensation Act[3] states 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 times the Secretary specifies. … An employee who--
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> (1) fails to make an affidavit or report when required; or

[2] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on August 15, 1995, the only decisions before the Board is the Office's May 23, 1995 decision; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. § 8106(b)

(2) knowingly omits or understates any part of his earnings;

forfeits his right to compensation with respect to any period for which the affidavit of 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."[4]

The Office, however, to establish that appellant should forfeit the compensation he received during the period, must establish that he knowingly failed to report employment or earnings. As forfeiture is a penalty, it is not enough that there were unreported employment activities and earnings. The term knowingly is not defined within the Act or its implementing regulations. In common usage, the Board had recognized that the definition of "knowingly" includes such concepts as "with knowledge," "consciously," "willfully" or "intentionally."[5]

In this case, appellant completed and signed CA-8 forms covering the period of March 9 to October 24, 1993 in which he indicated that he was not self-employed by indicating that this section of the form was not applicable to him. While appellant has stated that he did not know he had to fill in his participation in his DEC Automotive business, the forms clearly indicate that appellant should have shown "all activities, whether income resulted from [his] efforts" from self-employment. The Office properly determined that appellant forfeited his right to compensation because he engaged in self-employment in connection with the opening and operation of DEC Automotive between March 9, 1993, the date he opened and deposited money in a back account for his business and October 24, 1993, the last date on his CA-8 forms on which he did not report such activities. Thus, the Office properly found that appellant forfeited his compensation from March 9 to October 24, 1993 as he knowingly failed to report his self-employment activities on the CA-8 forms covering the period in question.

The Board further finds that the Office properly found that appellant was at fault in the creation of a $6,309.18 overpayment in compensation and the overpayment therefore was not subject to waiver.

Section 8129(a) of the Act provides, "Adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when recovery would defeat the purpose of the Act or would be against equity and good conscience."[6] Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

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[4] 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. 24 ECAB at 260.

[5] *Charles Walker*, 44 ECAB 641 (1993); *Christine P. Burgess*, 43 ECAB 449 (1992).

[6] 5 U.S.C. § 8129(b).

In determining whether an individual is with fault section 10.320(b) of the Office's 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
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> (2) Failed to furnish information which the individual knew or should have known to be material; or
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> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[7]

In this case, the Office applied the second standard in determining that appellant was at fault in creating the overpayment.

In the instant case, appellant filled out and signed CA-8 forms covering the period of March 9 to October 24, 1993 on which he wrote "N/A," not applicable, in response to the question concerning self-employment activities whether or not he derived income from his efforts. In the signature block of these forms, it indicates that any knowing false statements, misrepresentations, concealment of fact or any other act of fraud are subject to felony criminal prosecution. Thus, the forms clearly provide severe consequences for failing to properly execute the document; and by signing the forms, appellant is deemed to have acknowledged his duty to fill the form out properly, including the duty to report any self-employment activities or income. On the forms on which the appellant wrote "N/A" he met the first standard for determining fault. As appellant made incorrect statements as to material facts which he knew or should have known to be incorrect, he is at fault in the creation of the overpayment and therefore is not entitled to waiver of the overpayment.

[7] 20 C.F.R. § 10.320(b)

The decision of the Office of Workers' Compensation Programs dated May 23, 1995 is hereby affirmed.

Dated, Washington, D.C.
January 5, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member