

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEADRAH V. BELLAMY and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Atlanta, Ga.

*Docket No. 95-2547; Submitted on the Record;
Issued March 11, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant forfeited her right to compensation for the period January 22, 1990 through January 24, 1992 when she failed to report earnings from two part-time jobs; and (2) whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of an overpayment of \$2,631.56, thus precluding waiver of recovery of the overpayment.

On December 1, 1989 appellant, then 28-year-old sorter machine operator, filed a notice of traumatic injury after she was hit in the mid-back by a mail cart being pushed by a coworker. Appellant returned to limited duty on January 14, 1990. The Office of Workers' Compensation Programs accepted a cervical strain and paid intermittent compensation from 1990 through 1992.¹

During this period appellant completed and filed five CA-8 forms dated June 13, October 26, and December 27, 1990, December 19, 1991, and February 10, 1992, as well as numerous other such forms, claiming compensation for various dates on which she was unable to work a full eight hours or was undergoing medical treatment.

On September 20, 1991 an employing establishment supervisor reported to the postal inspector's office that he had observed appellant working as a cashier at the Army and Air Force Exchange Services (AAFES) while on limited duty with the employing establishment. His information prompted an investigation, which revealed that appellant had been working part time for the U.S. Census Bureau and at the AAFES commissary but had failed to report this employment on the CA-8 forms.

¹ Appellant filed a second notice of traumatic injury on February 2, 1990 for an injury to her left arm, which put her on limited duty for a week and on January 31, 1992 for contusion to her knees, which was accepted by the Office.

On March 4, 1994 the Office determined that appellant had forfeited her right to compensation for the period from January 22, 1990 to January 24, 1992 and was not entitled to further disability benefits for her work-related injuries. The Office noted that appellant had worked a total of 82 times from March 17 to October 20, 1990 for the Census Bureau and 82 times from September 20, 1991 to March 2, 1992 at the commissary, but reported none of this employment on the 5 CA-8 forms. The Office also issued a notice of overpayment in the amount of \$2,631.56 and found appellant to be at fault because she had concealed her part-time earnings and employment.

Appellant requested an oral hearing, which was held on March 23, 1995. At the hearing, appellant testified that the CA-8 forms had changed from the ones she completed prior to 1990 for another work injury, that she didn't notice the change, and that she thought she did not need to answer the form's question about other employment because she did work for the employing establishment. Appellant added that she had asked the employing establishment's compensation specialist if she could work part time and was told she could, within her physical restrictions.

Appellant stated that she did not try to conceal her part-time employment because coworkers came into the commissary and saw her working, and she listed her Census Bureau employment on a subsequent job application for a different postal position in September 1993. Appellant concluded that she was able to work the Census Bureau job at home: "So it's not like I called into the post office and stayed at home and worked another job. I didn't do that."

In a decision dated May 30, 1995, the hearing representative found that appellant had forfeited compensation for the two-year period and was not entitled to waiver of recovery of the overpayment. The hearing representative noted that the fact that appellant asked whether she could work part time while receiving compensation indicated that she was aware of possible restrictions on such employment.

The Board finds that appellant forfeited her right to compensation for the period January 22, 1990 to January 24, 1992 because she knowingly failed to report earnings from her part-time employment as a census worker and a cashier.

Section 8106(b) of the Federal Employees' Compensation Act² provides that a partially disabled employee must report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times specified by the Secretary of Labor. The penalty for failing to make an affidavit or report when required or knowingly omitting or understating any part of an employee's earnings is forfeiture of his or her right to compensation during the period for which the affidavit or report was required.³

Because forfeiture is a penalty, the Office must establish that appellant knowingly failed to report employment or earnings.⁴ The term knowingly is not defined in the Act but the Board

² 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(b).

³ *Charles Walker*, 44 ECAB 641, 644 (1993).

⁴ *John M. Walsh*, 48 ECAB ____ (Docket No. 96-1801, issued April 25, 1997).

has recognized that the definition includes such concepts as “with knowledge,” “consciously,” “willfully,” “intelligently,” or “intentionally.”⁵ To meet its burden of proof, the Office must closely examine appellant’s activities and statements in reporting earnings; it is not enough merely to show that appellant received such earnings.⁶

In this case, appellant did not dispute her part-time employment in 1990 through 92 but claimed that she did not notice the change in the CA-8 form, which was revised in 1990, from a general statement in Item 9, “Complete this item if you worked during the period shown in item 6,” to the more specific direction, “Complete this item if you worked *for anyone* during the period shown in item 6.” Notwithstanding the additional phrase, “for anyone,” Item 9 on both the old and the revised forms lists “salaried employment” with spaces for dates and hours worked, pay rate, total amount earned, type of work performed, and name and address of the employer.

On four of the CA-8 forms at issue, appellant left Item 9 blank; on the fifth form she wrote “N/A.” Thus, despite appellant’s explanation that she did not notice the change in forms, the Board finds that she clearly was aware that Item 9 called for a response if she had salaried employment, which she admits that she had during the two-year-period in question. If she were not so aware, why did she mark “N/A” on one of the forms?

Further, appellant’s testimony that she thought the form was referring only to postal employment is not credible in light of Item 9’s space for the name and address of the employer under “salaried employment.” Since the CA-8 form itself requests compensation from the employing establishment, there would be no need for Item 9 on the form if appellant’s alleged supposition were accurate.

Finally, appellant admitted that she asked the employing establishment’s compensation specialist about part-time work. The Board finds that this inquiry indicated appellant’s awareness of restrictions on outside employment while in receipt of disability compensation. Regardless of the specialist’s response, appellant was not informed that she could collect disability benefits for claimed leave on the same days on which she worked part time after her work at the employing establishment. In light of the above analysis, the Board finds that the evidence establishes that appellant knowingly failed to report her two part-time salaried jobs and that she has forfeited her right to compensation during the period covered by the CA-8.⁷

The Board also finds that appellant was with fault in the creation of the resulting overpayment of \$2,631.56 and is, therefore, not entitled to a waiver of recovery of the overpayment.

⁵ *Glenn Robertson*, 48 ECAB ____ (Docket No. 95-639, issued February 20, 1997).

⁶ *Barbara Hughes*, 48 ECAB ____ (Docket No. 94-2533, issued March 13, 1997); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

⁷ *See James H. Hopkins*, 48 ECAB ____ (Docket No. 94-2351, issued January 7, 1997) (finding that the broad, inclusive language of the CA-8 forms clearly apprised appellant of his responsibility to report earnings from employment outside his regular job).

Section 8129 of the Act⁸ provides that an overpayment of compensation shall be recovered by the Office unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or be against equity and good conscience.⁹ Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.¹⁰

The implementing regulation¹¹ provides that a claimant is with fault in the creation of an overpayment when he: (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.

The Office has the burden of proof in establishing that appellant was with fault in helping to create the overpayment.¹² In determining whether a claimant is with fault, the Office will consider all pertinent circumstances including age, intelligence, education, and physical and mental condition.¹³ Factors to be weighed are the individual's understanding of reporting requirements and the obligation to return payments which were not due, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, and ability, efforts and opportunities to comply with reporting requirements.¹⁴

Thus, an individual will be found to be with fault in the creation of an overpayment if the evidence shows either a lack of good faith or a failure to exercise a high degree of care in reporting changes in circumstances which may affect entitlement to, or the amount of, benefits.¹⁵ It is axiomatic that no waiver is possible if the claimant is with fault in helping to create the overpayment.¹⁶

In this case, the Board finds that because appellant failed to furnish information that she knew or should have known to be material pursuant to sections 8106(b) and 10.320(b)(2), she is with fault in the matter of the overpayment resulting from her forfeiture of compensation. Thus, appellant has forfeited her right to compensation from January 22, 1990 to January 24, 1992, this

⁸ 5 U.S.C. § 8129(b).

⁹ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹⁰ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994); *see Harold W. Steele*, 38 ECAB 245, (1986) (no waiver is possible if the claimant is with fault in helping to create the overpayment).

¹¹ 20 C.F.R. § 10.320(b).

¹² *Danny L. Paul*, 46 ECAB 282 (1994).

¹³ *Stephen A. Hund*, 47 ECAB ____ (Docket No. 94-559, issued March 7, 1996).

¹⁴ *Henry P. Gilmore*, 46 ECAB 709 (1995).

¹⁵ *Id.*

¹⁶ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

forfeiture has resulted in an overpayment of compensation \$2,631.56, and appellant is with fault in the creation of this overpayment. Accordingly, no waiver of collection of the overpayment is possible under section 8129(b) of the Act.

The May 30, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 11, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member