

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUCIUS E. PEARSON and U.S. POSTAL SERVICE,
POST OFFICE, Miami, FL

*Docket No. 97-832; Submitted on the Record;
Issued August 4, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited compensation in the amount of \$248,480.99 for the period April 1, 1979 through April 30, 1992; (2) whether the Office properly determined that appellant was at fault in the creation of the \$248,480.99 overpayment of compensation and therefore not subject to waiver; (3) whether the Office properly determined that there was an overpayment of compensation in the amount of \$10,179.41 for the period May 1, 1992 through February 5, 1994; and (4) whether appellant was at fault in the creation of the \$10,179.41 overpayment of compensation.

In the present case, the Office accepted appellant's claim for varicose veins. The record indicates that appellant's case was placed on the periodic compensation rolls April 1, 1979.

The record reveals that an investigation conducted in March 1993 by the U.S. Postal Inspector revealed that appellant was self-employed performing jobs of fixing lawn mowers, weed eaters, etc. at his home. The investigation further revealed that appellant admitted that he had been doing repair work at his home since approximately 1976.

By decision dated January 16, 1994, the Office reduced appellant's compensation on the basis that he was capable of earning wages as a small engine mechanic.

In a preliminary decision dated February 8, 1994, the Office found that appellant had forfeited his entitlement to compensation in the amount of \$248,480.99 for the period April 1, 1979 to April 30, 1992 by failing to report earnings for the stated period. The Office further found that appellant had been overpaid in the amount of \$10,179.41 for the period May 1, 1992 to February 5, 1994 as he had been receiving compensation based on temporary total disability while he was only entitled to compensation based on a wage-earning capacity. The Office informed appellant that he had the right to submit any evidence or arguments if he disagreed that the overpayment(s) occurred, disagreed with the amount of the overpayment(s), believed that the

overpayment occurred through no fault of his own or believed that recovery of the overpayment should be waived. The Office informed appellant that he had a right to a precoupment hearing before an Office hearing representative. The Office indicated that when a claimant is found to be without fault in the occurrence of an overpayment, the Federal Employees' Compensation Act provided that recovery of the overpayment may not be made if it could be shown that such recovery would defeat the purpose of the Act or would be against equity and good conscience. Appellant did not request a hearing on the forfeiture and overpayment decisions.

In a preliminary decision issued on June 27, 1994, the Office found that appellant was without fault in creating an overpayment of compensation in the amount of \$2,646.04 for the period February 6 through May 28, 1994 as the Office had entered the incorrect amount for appellant's wage-earning capacity.¹

By letter dated July 11, 1994, appellant requested a hearing.

Several hearings were scheduled on appellant's case, the most recent for January 24, 1996 in Washington, D.C. By letter dated January 22, 1996 and in a subsequent conversation, appellant's representative advised the Branch of Hearings and Review that appellant did not wish to pursue a hearing on the reduction of his compensation, but was primarily concerned about the forfeiture decision.

In an April 11, 1996 letter, an Office hearing representative noted that appellant had not requested a hearing on the forfeiture decision and, therefore, that issue could not be addressed at the hearing. The hearing representative noted that appellant's representative then advised that appellant wished to withdraw his request for a hearing on the reduction of his compensation benefits. Appellant's representative further indicated that appellant did not wish to have a hearing on the June 27, 1994 overpayment decision. The hearing representative advised that appellant's case would be returned to the District Office for a final determination on all overpayments.

By decision dated October 9, 1996, the Office formalized its determination that appellant received an overpayment in the amount of \$10,179.41 for the period May 1, 1992 through February 5, 1994. The Office noted that appellant received compensation for total disability during the stated period, but was self-employed at the time and therefore only entitled to receive compensation for the loss of his wage-earning capacity. The Office further found that by signing the Forms CA-1032, appellant should have been aware, or reasonably aware, that he was to report his earnings immediately to the Office.

By decision dated December 17, 1996, the Office formalized its determination that appellant received an overpayment in the amount of \$248,480.99 for the period April 1, 1979 through April 30, 1992. The Office found that appellant was at fault because he failed to report earnings for the stated period, while in receipt of compensation and that by signing the CA-1032

¹ By decision dated October 9, 1996, the Office waived recovery of the \$2,646.04 overpayment for the above stated period.

forms, he should have been aware or reasonably aware that he was to report such earnings to the Office.²

The Board finds that the Office properly determined that appellant forfeited \$248,480.99 compensation from the period April 1, 1979 through April 30, 1992 based on his failure to report earnings.

Section 8106(b) of the Act³ 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 --

- (1) fails to make an affidavit or report when required; or
- (2) knowingly omits or understates any part of his earnings;
- (3) 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, failed to establish that appellant should forfeit the compensation he received during the period. The Office must establish that he knowingly failed to report employment or earnings. As forfeiture is a penalty, it is not enough to establish that there were unreported earnings from employment. 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 was on the periodic roll from April 1, 1979 through April 30, 1992. During this time he was sent CA-1032 forms to complete information about his earnings during the twelve or fifteen months preceding the date he signed the forms. Appellant was specifically

² It is noted that after appellant filed an appeal to the Board, appellant plead guilty to defrauding the FECA program on July 8, 1997. Inasmuch as the information was not before the Office at the time the last merit decision was issued, the Board does not have jurisdiction to review this evidence.

³ 5 U.S.C. § 8106(b).

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.

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

informed by the CA-1032 forms to report any and all employment, including self-employment. The CA-1032 forms indicated that appellant was self-employed (such as farming, operating a store or business, etc.), he must report such employment and show as “rate of pay” what it would have cost him to have hired someone else to do the same work. Appellant submitted Office CA-1032 forms he signed April 1 and December 29, 1980, and June 10, 1981 certifying that he had not worked for the past 12 months and CA-1032 forms he signed December 18, 1986, June 7, 1988, February 1, 1989, February 16, 1990, April 8, 1991 and January 19, 1992 certifying that he had not worked for the past 15 months. The March 1993 investigation by the U.S. Postal Inspector revealed that appellant had been employed for the entire period, April 1, 1979 through April 30, 1992. Moreover, appellant admitted that he had been doing repair work at his home since approximately 1976. Appellant thus forfeits his entitlement to compensation during the 12 or the 15 months covered by each of these forms as he knowingly omitted to report his earnings.⁶

For the periods of forfeiture not covered by an Office Form CA-1032, namely the approximate period from July 1981 through September 1985, appellant is still required to report any earnings and is subject to the forfeiture provision of section 8106(b) of the Act for failure to report earnings.⁷ However, during such periods appellant forfeits his entitlement to compensation only for the time he was employed.⁸ The evidence indicates that appellant was employed during such period as he so admitted and the investigative report supports. Thus, appellant would be subject to the forfeiture provision of the Act for that period.

The Board further finds that appellant was at fault in the creation of the \$248,480.99 overpayment.

Section 8129(b) 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 adjustment of recovery would defeat the purpose of the Act or would be against equity and good conscience.”⁹ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

⁶ *Id.*

⁷ *Lorand Hegedus*, 37 ECAB 162 (1985).

⁸ *Catherine Adams*, 39 ECAB 829 (1988). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c)(2)(b) (July 1993) provides: “If a CA-1032 was *not* issued for the period during which the claimant worked, but the claimant had earnings while receiving compensation, the period of forfeiture is limited to the period that the claimant actually worked and did not report earnings.” (Emphasis in the original.)

⁹ 5 U.S.C. § 8129(b).

In determining whether an individual is with fault, section 10.32(b) of the Office's regulations provide 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.”¹⁰

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

The evidence of record demonstrates that appellant indicated on the CA-1032 forms that questions relating to employment, specifically self-employment, did not apply in his case. However, the evidence of record shows that appellant was self-employed for the stated period and did not report his self-employment earnings until the January 2, 1993 CA-1032 form. By signing the CA-1032 forms, appellant should have been aware, or reasonably aware, that he was to report his earnings immediately to the Office. Appellant, therefore, presented information on employment which he knew or should have known to be incorrect. Appellant, therefore, was at fault in the creation of the overpayment and is not entitled to waiver of the overpayment.

The Office properly determined that appellant was at fault in the creation of a \$10,179.41 overpayment of compensation for the period May 1, 1992 through February 5, 1994 and therefore the overpayment was not subject to waiver.

The Board finds that the Office properly found a \$10,179.41 overpayment of compensation was created for the period May 1, 1992 through February 5, 1994, based on the fact that appellant was self-employed at the time and only entitled to receive compensation for loss of his wage-earning capacity, not total disability.

The Board finds that the Office's calculations are correct as to the period and amount of overpayment. The record reflects that appellant's compensation was not corrected until February 6, 1994, thus an overpayment resulted for the period May 1, 1992 through February 5, 1994. Appellant does not contest the amount of the overpayment and there is no evidence that the period or amount of overpayment were improperly determined.

The Board finds that the Office properly determined that appellant was at fault in the creation of an overpayment of compensation from May 1, 1992 through February 5, 1994 as he knew or should have known that by signing the CA-1032 forms, he was not entitled to receive

¹⁰ 20 C.F.R. § 10.32(b).

total disability compensation during a period in which he was self-employed and only entitled to receive compensation for the loss of his wage-earning capacity.

The decisions of the Office of Workers' Compensation Programs dated December 17 and October 9, 1996 are hereby affirmed.

Dated, Washington, D.C.
August 4, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member