

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY TOWNS and U.S. POSTAL SERVICE,
POST OFFICE, Alameda, CA

*Docket No. 02-1059; Submitted on the Record;
Issued July 29, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his compensation for the period October 12, 1996 through December 19, 1998; and (2) whether the Office properly found that appellant was at fault in the creation of an overpayment of compensation in the amount of \$46,629.86 and, therefore, the overpayment was not subject to waiver.

On March 24, 1989 appellant, then a 39-year-old distribution clerk, filed an occupational disease claim alleging that factors of employment caused his right shoulder pain. The Office accepted that he sustained right rotator cuff tendinitis and right shoulder impingement syndrome. Appellant resigned on July 19, 1989. By letter dated December 19, 1994, the Office notified him that it proposed to reduce his compensation, because he was no longer totally disabled due to residuals of the employment injury and could perform the duties of the selected position, travel agent. Appellant continued to receive compensation at the reduced rate and submitted Office forms EN1032 dated January 12 and December 12, 1998, November 10, 1999 and January 7 and July 7, 2000, in which he indicated employment.

In an investigative report dated September 29, 2000, which includes supporting documentation, the employing establishment informed the Office that appellant had underreported his income for the period October 12, 1996 through December 19, 1998.

By letter dated December 19, 2000, the Office informed appellant that it proposed to reduce his compensation based on his actual earnings as an Educational Aide II with Harris County, Texas. This decision was finalized in a decision dated January 24, 2001.

In a decision also dated January 24, 2001, the Office found that appellant forfeited compensation for the period October 12, 1996 through December 19, 1998 because he failed to report total income from employment as required by section 8106(b) of the Federal Employees'

Compensation Act.¹ In a letter that same date, the Office informed him that it had made a preliminary determination that he had received an overpayment in compensation in the amount of \$46,629.86 for that period. The Office stated that it found appellant at fault in the creation of the overpayment because he had made an incorrect statement as to a material fact, which he knew or should have known was incorrect and that he failed to furnish information, which he knew or should have known was material. The Office informed appellant of his rights regarding the overpayment, instructing him to submit the financial information requested on an accompanying overpayment questionnaire and provided an Office form, on which appellant could request a telephone conference, hearing or a decision on the record.

On February 12, 2001 appellant submitted the Office form, requesting a hearing regarding the overpayment. On February 23, 2001 he requested a hearing regarding both the overpayment in compensation and the reduction in compensation. A hearing was held on September 26, 2001. The Office hearing representative, however, identified the issues as whether appellant forfeited his entitlement to compensation for the period October 12, 1996 through December 19, 1998, whether such forfeiture resulted in an overpayment of \$46,629.86 and whether he was at fault in the creation of the overpayment. At the hearing, appellant testified regarding his employment. He also submitted financial documentation, including the overpayment questionnaire.

By decision dated December 19, 2001, the Office hearing representative found that appellant forfeited wage-loss compensation for the period October 12, 1996 through December 19, 1998 because he underreported his income for that period. The hearing representative further found that an overpayment in compensation had been created for this period in the amount of \$46,629.86, the amount of compensation paid to him during this period and that he was at fault in the creation of the overpayment and was, therefore, not entitled to waiver. Lastly, the hearing representative determined that recovery of the overpayment would be made from appellant's continuing compensation at a rate of \$300.00 every 28 days and compromised the debt principal to reflect a new balance of \$41,910.06. The instant appeal follows.

The Board finds that the Office properly found that appellant forfeited his compensation for the period October 12, 1996 through December 19, 1998 because he knowingly failed to fully and truthfully complete Office EN1032 forms and because his certification on the EN1032 forms was false.²

¹ 5 U.S.C. §§ 8101-8193.

² *Linda K. Richardson*, 47 ECAB 171 (1995).

Section 8106(b) of the Act³ 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--

- (1) fails to make an affidavit or report when required; or
- (2) knowingly omits or understates any part of his earnings;

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.”⁴

Section 10.5(g) of the implementing regulations defines “earnings” to include “a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration.”⁵ Section 10.529 provides that an employee who knowingly omits or understates any earnings or work activity in making a report shall forfeit the right to compensation with respect to any period for which the report was required.

An employee can only be subjected to the forfeiture provision of section 8106 of the Act if he or she “knowingly” omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. The Office procedure manual recognizes that forfeiture is a penalty⁶ and, as a penalty provision, it must be narrowly construed.⁷ The term “knowingly” is not defined within the Act or its regulations. In common usage, “knowingly” is defined as: “[w]ith knowledge; consciously; intelligently; willfully; and intentionally.”⁸

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. *Id.*

⁵ 20 C.F.R. § 10.5(g) (1999).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

⁷ See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

⁸ *Black's Law Dictionary* (5th ed. 1979); see *Glenn Robertson*, 48 ECAB 344 (1997).

Office EN1032 forms provide that “severe penalties may be applied for failure to report all work activities thoroughly and completely.” In Part G of the form, a compensation claimant acknowledges that he or she “know[s] that anyone who fraudulently conceals or fails to report income or other information, which would have an effect on benefits or who makes a false statement or misrepresentation of a material fact in claiming a payment or benefit under the Act may be subject to criminal prosecution, from which a fine or imprisonment or both, may result.” Part G concludes with the certification that “all the statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief.”

In the instant case, the Office determined that appellant forfeited his right to compensation for the period October 12, 1996 through December 19, 1998 because he understated his employment on Office Forms EN1032. The record includes a Form EN1032, signed by appellant on January 12, 1998, in which he reported that he had been employed at Westec Security for the period March 1 through August 30, 1997. Appellant also submitted a Form EN1032, which he signed on December 19, 1998 and reported that he had been employed by the Harris County Department of Education for the period May 1 through December 18, 1998. An investigative report dated September 29, 2000, which includes tax forms and earnings reports demonstrates that appellant also worked for Baker Safe & Lock Co., Inc. in 1998. Administaff from August 18 to October 10, 1997 and ADT from February 28, 1996 to March 21, 1997 during the period covered by the above EN1032 forms. He, therefore, underreported his income for the 15 months prior to January 12 and December 18, 1998, the date he signed the above-mentioned EN1032 forms.

Appellant also submitted an EN1032 form, signed by him on November 10, 1999, in which he reported that he had been employed by Harris County from January 5, 1999 to “present.” The record, however, demonstrates that he also worked at Baker Safe & Lock Co., Inc. in 1998.

In analyzing whether a claimant has earnings or wages, wages have been defined as every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and reasonable value of board, rent, housing, lodging, payment in kind, tips and any other similar advantage received from the individual’s employer or directly with respect to work for him.⁹

The Office has the burden of proof of establishing that a claimant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from self-employment. To meet this burden, the Office must closely examine the claimant’s activities and statements in reporting employment or earnings. The Office may meet its burden in several ways. One is by the claimant’s own subsequent admission that he or she failed to report employment or earnings which he or she knew to report. Similarly, the Office may meet this burden by establishing that the claimant pled guilty or was convicted of violating 18 U.S.C. § 1920 by falsely completing the affidavit section of an EN1032 form. The Office may meet this standard without an admission by a claimant, if the claimant failed to fully and truthfully complete the form and the circumstances establish that the claimant failed to fully and truthfully reveal the full extent of his

⁹ *Barbara L. Kanter*, 46 ECAB 165 (1994).

employment activities and earnings. The Office may also meet its burden if it establishes through the totality of the factual circumstances that the claimant's certification, that he or she was not employed or self-employed, was false.¹⁰

As stated above, the record in the instant case demonstrates through tax forms and earnings report found in an investigative record that appellant had earnings from Baker Safe & Lock Co., Inc., Administaff and ADT and that he did not report these earnings on the above-mentioned EN1032 forms, which he signed. The Office forms clearly state that "a false or evasive answer to any questions or the omission of an answer, may be grounds for forfeiture of your compensation benefits and subject you to civil liability or, if fraudulent, may result in criminal prosecution." By signing these forms, the Board deems that appellant acknowledged his duty to properly complete the EN1032 forms. As he failed to fully and truthfully reveal the full extent of his employment activities and earnings, the Board finds that he knowingly omitted to report said earnings and the Office properly determined that appellant forfeited his right to compensation for the period October 12, 1996 through December 19, 1998 because he did not fully report his income.¹¹

The Board further finds that an overpayment in compensation in the amount of \$46,629.86 was created.

The record in this case shows that the Office paid appellant compensation totaling \$46,629.86 for the period October 12, 1996 through December 19, 1998.

If a claimant has any earnings during a period covered by a report, which he or she knowingly fails to report, appellant is not entitled to any compensation for any portion of the period covered by the report even though he or she may not have had earnings during a portion of that period.¹² As appellant underreported his income for the period October 12, 1996 through December 19, 1998, an overpayment in compensation in the amount of \$46,629.86 was created.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment in compensation and, therefore, the overpayment is not subject to waiver.

Section 8129 of the Act provides that an overpayment in 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 would be against equity and good conscience."¹³

¹⁰ See *Melvin E. Gibbs*, 54 ECAB ___ (Docket No. 01-2252, issued March 6, 2003).

¹¹ *Id.*

¹² *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

¹³ 5 U.S.C. § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

Section 10.433(a) of the Office's regulations provides that the Office:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (1) Made an incorrect statement as to a material fact, which he or she knew or should have known to be incorrect; or (2) Failed to provide information, which he or she knew or should have known to be material; or (3) Accepted a payment, which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”¹⁴

In this case, the Office found that appellant was at fault in creating the overpayment because he failed to report employment and earnings on Office EN1032 forms. The Office has the burden of proof in establishing that appellant was at fault in helping to create the overpayment.¹⁵ In determining whether a claimant is at fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition.¹⁶ 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.¹⁷ Thus, an individual will be found to be at 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.¹⁸ The Board has found that, even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment, which he or she knew or should have expected to know he or she was not entitled.¹⁹

As stated above, appellant forfeited compensation because he failed to fully report earnings on Office form reports. The Board, therefore, finds that he was at fault in creating the overpayment in compensation because he made an incorrect statement that he knew or should have known to be incorrect by underreporting his employment on the Office forms. Appellant was also at fault because he failed to furnish information about his earnings that he knew or should have known to be material. The Office form reports clearly advised him of the

¹⁴ 20 C.F.R. § 10.433 (1999); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

¹⁵ *Danny L. Paul*, 46 ECAB 282 (1994).

¹⁶ *Stephen A. Hund*, 47 ECAB 432 (1996).

¹⁷ *Henry P. Gilmore*, 46 ECAB 709 (1995).

¹⁸ *Id.*

¹⁹ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

requirement to accurately report his employment activities and earnings and informed him of the consequences of failing to do so.²⁰ As appellant was at fault in the creation of the overpayment in compensation, he was not entitled to waiver.

The Board, however, finds that the Office abused its discretion by requiring repayment by withholding \$300.00 each payment period from appellant's continuing compensation.

Compensation forfeited under section 8106(b), if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129, unless recovery is waived under that section.²¹ The amount of adjustment of continuing compensation to recover an overpayment lies within the Office's discretion. Section 10.441(a) of Office regulations provides:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”²²

In the instant case, the Office hearing representative properly stated that appellant's expenses were in excess to his monthly income,²³ yet she still determined that repayment should be deducted from appellant's continuing compensation benefits at the rate of \$300.00 each 28-day compensation period.

In establishing the initial collection strategy, the Office must weigh the individual's income, ordinary and necessary expenses and assets in a manner similar to the waiver considerations.²⁴ Waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.²⁵ These statutory guidelines are found in section 8129(b) of the Act which states:

“Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual, which is without

²⁰ *Barbara L. Kanter, supra* note 9.

²¹ *Linda L. Coggins*, 51 ECAB 300 (2000).

²² 20 C.F.R. § 10.441(a) (1999).

²³ The record indicates that appellant's monthly expenses exceeded his income by approximately \$560.00 a month.

²⁴ *See Frederick Arters*, 53 ECAB __ (Docket No. 01-1237, issued February 27, 2002).

²⁵ *See Robert Atchison*, 41 ECAB 83 (1989).

fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience.”²⁶

Section 10.436 of the implementing regulations provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary’s assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics.²⁷ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.²⁸

In the instant case, the Office hearing representative did not follow this analysis when she determined that repayment should be deducted from appellant’s continuing benefits at the rate of \$300.00 each 28-day compensation period. The Board, therefore, finds that the Office abused its discretion under the standard noted above and the case must be remanded to the Office for further analysis regarding recoupment of the overpayment in compensation, to be followed by a *de novo* decision, which addresses this issue.

Finally, the Board finds that the Office did not abuse its discretion in compromising the principal amount of the overpayment to \$41,910.06. Under Office procedures, compromise of the principal of the overpayment can be considered if application of the interest charges would extend the period of repayment by more than 35 percent. Such a determination is made at the time the repayment schedule is established.²⁹ Office procedures provide, in relevant part:

“If charges cannot be waived and a repayment schedule (either initial or renegotiated) is being established and the [Office] has determined, by review of detailed financial information, the maximum amount per installment that the debtor can afford and the period required for repayment of the debt at this rate is extended by more than 35 percent due to the application of the charges, then the amount of the principal must be compromised so that the period required for repayment of the debt is not extended by more than 35 percent....”³⁰

The Board finds that, in a proper exercise of her discretion in this case, the Office hearing representative followed Office procedures and compromised the amount of the overpayment in compensation from \$46,629.86 to \$41,910.06.

²⁶ 5 U.S.C. § 8129(b).

²⁷ 20 C.F.R. § 10.436 (1999).

²⁸ See *Frederick Arters*, *supra* note 23.

²⁹ See *Jorge O. Diaz*, 53 ECAB ____ (Docket No. 00-1368, issued March 4, 2002).

³⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.5 (September 1994).

The decision of the Office of Workers' Compensation Programs dated December 19, 2001 is hereby affirmed in part and vacated in part and the case is remanded to the Office for findings consistent with this opinion of the Board.

Dated, Washington, DC
July 29, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member