

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL R. ALEXANDER and U.S. POSTAL SERVICE,
POST OFFICE, Lena, WI

*Docket No. 02-1723; Submitted on the Record;
Issued May 2, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant forfeited her entitlement to compensation from January 18 to March 8, 1997; (2) whether an overpayment of \$1,236.48 resulted from the forfeiture; and (3) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in creating the overpayment and, therefore, not entitled to waiver of recovery.

Appellant's claim, filed on January 26, 1996, was accepted for right carpal tunnel syndrome due to hand sorting mail. Appellant returned to limited duty and claimed intermittent wage-loss compensation. The Office accepted bilateral carpal tunnel syndrome on October 29, 1996 and appellant had release surgery on her right hand on January 17, 1997. Appellant returned to full duty on March 17, 1997.

On March 31, 1997 postal inspectors from the employing establishment interviewed appellant about completing claim forms for compensation in the preceding three months.

In an April 2, 1997 letter to the Office, appellant stated that she received wage-loss compensation from January 17 to March 17, 1997 and had not recorded outside income on her claim forms. She listed weekly amounts of income received during that period from a pharmacy for an average of 18 hours a week. On May 2, 1997 the Office asked appellant to submit further information regarding her wages.

The record contains an April 16, 1997 investigative memorandum from the employing establishment's postal inspectors detailing their findings. On January 16, February 12 and March 10, 1997, appellant completed CA-8 forms requesting wage-loss compensation. On all three forms appellant left blank the section, which requires a claimant to "complete this item if you worked anywhere during the period" for which you are claiming wage loss and show salaried employment, commission and self-employment as well as "all activities, whether or not income resulted from your efforts."

The memorandum stated that appellant received wage-loss benefits during this period and admitted that she had worked at the pharmacy since October 1996 on a part-time, as-needed basis. The memorandum noted the hours appellant had worked and the wages she had received: 17.5 hours and \$140.25 wages during January 4 through 17, 1997; 39.75 hours and \$200.17 wages during February 1 through 14, 1997; and 41.25 hours and \$210.37 wages during March 1 through 8, 1997.

Appellant admitted to the postal inspectors that she had worked during the periods she was receiving compensation and that she had failed to report this income on the three forms. She stated: "I did not realize I should have reported this, I screwed up.... I should have read the forms more carefully."

An Office memorandum dated December 10, 1997 stated that appellant had returned compensation checks for \$645.12 covering February 15 through 28, 1997 and \$376.32 covering March 1 through 8, 1997. In addition, she had submitted a money order for \$53.76 covering January 4 through 17, 1997 with a note that she had made "an error" on her claim form and should not have received any compensation.

On February 13, 2002 the Office determined that appellant had forfeited her entitlement to compensation between January 18 and March 8, 1997. The Office found that appellant had knowingly omitted earnings on each of the CA-8 compensation claim forms she submitted during the period and thus failed to furnish information that she should have known was material to her receipt of benefits.

On February 13, 2002 the Office also issued a preliminary finding that appellant had been overpaid \$1,236.48 in benefits for January 18 through March 8, 1997 due to the forfeiture. The Office also found that appellant was at fault in creating the overpayment because she had knowingly omitted earnings on her compensation claim forms.

The Office made its findings of overpayment and fault permanent on April 30, 2002 but appellant had requested a telephone conference on April 25, 2002 because she disagreed with the finding of fault. She also completed the overpayment recovery questionnaire. A telephone conference was held on June 12, 2002. On July 8, 2002 the Office issued a decision superceding the April 30, 2002 decision and found appellant at fault in creating the overpayment, which was not, therefore, subject to waiver.

The Board finds that appellant forfeited her compensation from January 18 to March 8, 1997.

Section 8106(b) of the Federal Employees Compensation Act¹ 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 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.”

While section 8106(b)(2) refers only to partially disabled employees, 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 during that period for loss of wage-earning capacity.²

To declare a forfeiture of compensation, the Office must establish that a claimant knowingly failed to report employment or earnings during the relevant period.³ Because forfeiture is a penalty, merely showing that there were unreported earnings from employment is insufficient.⁴ The Office procedure manual recognizes that forfeiture as a penalty provision must be narrowly construed.⁵

The inquiry is whether appellant knowingly failed to report his employment activities and earnings.⁶ The term knowingly defined within the implementing regulation “with knowledge,” “consciously,” “willfully,” or “intentionally.”⁷

In this case, appellant admitted to the postal inspectors that she had failed to report wages she earned in the periods during which she was receiving wage-loss compensation. Appellant

¹ 5 U.S.C. § 8101 *et seq*; 5 U.S.C. § 8106(b) (1974).

² *Joseph M. Popp*, 48 ECAB 624, 627 n. 12 (1997), citing *Ronald H. Ripple*, 24 ECAB 254, 260 (1973) (explaining that a totally disabled employee normally would not have any employment earnings and, therefore, a statutory provision about such earnings would be meaningless).

³ *Edwin C. Whitlock*, 50 ECAB 384, 390 (1999).

⁴ *Martin James Sullivan*, 50 ECAB 158, 160 (1998).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10. c.(c) (July 1997).

⁶ *John M. Walsh*, 48 ECAB 474, 479 (1997).

⁷ 20 C.F.R. § 10.5(5)(n).

also signed a statement that she had failed to complete the CA-8 claim forms accurately. Appellant stated during the telephone conference that she did not “have anyone to ask how to complete the forms correctly,” but the record contains no evidence that appellant was unable to read or comprehend the meaning of the instructions on these forms. Based on her own admission, the Board finds that appellant knowingly omitted earnings that she should have reported on her claim forms, pursuant to section 8106(b)(2).⁸

The Board also finds that the Office properly determined the amount of the overpayment created by appellant’s failure to report her earnings on her claim forms.

The basic rate of compensation under the Act is 66 2/3 percent of the injured employee’s monthly pay.⁹ When the employee has one or more dependents as defined by the Act, she is entitled to have her compensation augmented at eight and one-third percent.¹⁰

In this case, appellant claimed one dependent and her weekly pay rate was \$716.80. She received \$53.76 covering January 4 through 17, 1997; \$591.36 covering January 18 through 24, 1997; \$645.12 covering February 1 through 14, 1997; \$645.12 covering February 15 through 28, 1997; and \$376.32 covering March 1 through 8, 1997, for a total of \$2,311.68. Appellant returned two checks that were issued to her for \$376.32 and \$645.12 and sent a money order for \$53.76, totaling \$1,075.20. The difference between what appellant received in compensation and what she returned to the Office is \$1,236.48, the amount of the overpayment. Therefore, the Board finds that the Office properly calculated the total overpayment.

The Board also finds that appellant was at fault in the creation of the overpayment, which is not, therefore, subject to waiver.

Section 8129(a) of the Act 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.¹¹ The only exception to this requirement must meet the tests set forth 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.”¹² No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹³

⁸ 5 U.S.C. § 8106(b)(2).

⁹ 5 U.S.C. § 8105(a).

¹⁰ 5 U.S.C. § 8105(b).

¹¹ 5 U.S.C. § 8129(a).

¹² 5 U.S.C. § 8129(b).

¹³ *Anthony V. Knox*, 50 ECAB 402, 409 (1999).

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.433 of Title 20 of the Code of Federal Regulations provides in relevant part:

“(a) [The Office] may 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 that may affect entitlement to or the amount of the benefits. A recipient who had done any of the following will be found to be at fault with respect to 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 furnish 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.)

“(b) Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹⁴

In this case, appellant failed to furnish information, which she knew or should have known was material to her receipt of compensation. The CA-8 form, claim for continuing compensation on account of disability, has 15 sections covering personal information and employment data. These include the period of time during which a claimant lost pay due to the injury, two questions involving leave and section 9, which states: “Complete this item if you worked anywhere during the period shown in item 6. Attach a separate sheet if needed.”

The section has two parts, one for salaried employment, showing the dates and hours worked, the pay rate, the total amount earned, the type of work done and the name and address of the employer. Section 9B covers commission and self-employment, with similar inquiries regarding the time worked, the name and address of the business, the type of activity and the income derived.

On all three forms dated January 16, February 12 and March 10, 1997, appellant left section 9B blank, although she knew she had worked for the pharmacy during that time and in fact submitted to the Office a listing of her gross pay from the pharmacy for the weeks at issue. The pharmacy confirmed that appellant worked for wages during the period covered. Appellant

¹⁴ 20 C.F.R. § 10.433 (1999).

admitted to the postal inspectors that she did not read the forms carefully and that she “screwed up” in failing to complete them accurately.

While appellant stated that she “did not intentionally” omit answering the questions in section 9B, the Board finds that appellant failed to exercise the degree of customary care required in reporting information that could affect the amount of disability compensation, to which she was entitled. Therefore, appellant was at fault in creating the overpayment, which is not subject to waiver.¹⁵

The July 8 and February 13, 2002 decisions of the Office of Workers’ Compensation Programs are hereby affirmed.

Dated, Washington, DC
May 2, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹⁵ Appellant has paid the amount of \$1,236.48 to the Office. *See Beverly E. Labbe*, 50 ECAB 440, 443 (1999) (finding that the Board’s jurisdiction is limited to recovery of an overpayment from continuing compensation under the Act).