

**United States Department of Labor
Employees' Compensation Appeals Board**

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K.D., Appellant)	
)	Docket No. 09-824
and)	Issued: November 10, 2009
)	
U.S. POSTAL SERVICE, BERGER POST OFFICE, Jersey City, NJ, Employer)	
)	

Appearances:
Donald J. Millman, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 6, 2009 appellant, through his attorney, filed a timely appeal of the December 23, 2008 decision of an Office of Workers' Compensation Programs' hearing representative who found an overpayment of compensation for which he was not without fault. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant forfeited his compensation benefits for the period October 31, 2004 to May 15, 2006 as he had unreported income; (2) whether he received an overpayment in the amount of \$44,099.24 for this period; (3) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (4) whether the Office properly determined the repayment schedule.

FACTUAL HISTORY

On May 30, 2000 appellant, then a 49-year-old city carrier, filed a recurrence of disability claim alleging that on April 3, 2000 he sustained a recurrence of his October 2, 1995

employment injury of back pain. The Office accepted his claim for aggravation of degenerative disc disease on October 26, 2000. It accepted a recurrence of disability claim on November 6, 2000 and entered appellant on the periodic rolls as of June 4, 2001.

Appellant completed a Form EN1032 on March 24, 2003 and represented that he performed no work for an employer, no self-employment or business enterprise and that he was unemployed for the 15 months covered by the form. He completed a second EN1032 on January 28, 2006 and advised that he did not work for an employer, was not self-employed or involved in any business enterprise and that he did not perform any volunteer work for which any form of monetary or in-kind compensation was received. Appellant completed an EN1032 on May 7, 2006 in the same manner. The Form CA-1032's which accompanied these documents stated: "This statement covers the 15 months prior to the date you complete and sign the form. Your signature at the end of the statement certifies that you have supplied all information requested for that period of time."

On March 12, 2007 appellant completed an EN1032, again noting that he did not work for an employer during the past 15 months. He was self-employed or involved in a business enterprise from September 2005 through 2006 in that he helped do paperwork and books for a daycare center as a volunteer. Appellant shared supervision, helped open and close the center and was not paid. He stated that he did not perform volunteer work for which any form of monetary or in-kind compensation was received. Appellant volunteered at a daycare center from September 2005 through the present and that he worked four or five days. Appellant described his activities as "mostly hanging out" as well as "books, supervision, open up-close."

By letter dated June 6, 2007, the Office requested additional information from appellant regarding his self-employment as a volunteer in a daycare center. On June 12, 2007 appellant stated that the school was the Christina Nicole Academy and that he helped as a friend. He opened the school in the morning along with one teacher, watched the children play and provided them with cereal. Appellant helped with snack time and supervised outside playtime. He placed the mats for naptime and when nap ended again served snack. Appellant would linger about for the rest of the day and put out the garbage at closing. He collected fees from parents at the beginning of the month and registered these payments in the accounting books. Appellant listed his schedule as from seven o'clock a.m. until five or six o'clock p.m. five days a week. He stated that he did not receive wages as "I know I can't be paid." Appellant performed the activities as a favor to Gail Cartisano.

In a letter dated December 18, 2007, the employing establishment inspector general found that from September 2005 through April 2007 appellant was employed full time as the office manager for Christina Nicole Daycare and Pre-School Academy. Appellant was observed opening and closing the center, greeting parents, supervising children, sweeping, removing garbage and carrying children for 10 to 12 hours a day. Investigators telephoned the center and appellant identified himself as the office manager. On February 26, 2007 investigators interviewed appellant, who advised that his girlfriend, Ms. Cartisano, was the director of the center and that he was not paid for his work. Ms. Cartisano confirmed that appellant volunteered and was not paid for his work. However, she acknowledged that without his help she would have to hire and pay someone to perform his duties.

Appellant began officially working as an office manager at the daycare center on February 2, 2008.

By decision dated April 28, 2008, the Office found that appellant had forfeited his compensation benefits for the period October 31, 2004 through May 13, 2006. Although he denied any employment on the EN1032 forms completed on March 23, 2003, March 17, 2004, January 28 and April 3, 2006, he admitted working at the daycare facility from September 2005. The Office found that appellant omitted material information on the January 28 and May 7, 2006 EN1032s and forfeited the compensation received during the 15-month period covered by these forms, or \$44,099.24 from October 31, 2004 through May 13, 2006.

On April 28, 2008 the Office also made a preliminary determination that appellant received an overpayment of compensation in the amount of \$44,099.24 based on the forfeiture from October 31, 2004 through May 13, 2006. It found that appellant was at fault in the creation of the overpayment as he knowingly omitted reporting his involvement in a business enterprise. Appellant requested a prerecoupment hearing on May 20, 2008.

On October 7, 2008 appellant testified that he currently received \$1,500.00 in compensation benefits and \$900.00 in earnings a month. As to monthly expenses his mortgage was \$950.00, food was \$550.00 to \$600.00, clothing was \$75.00 a month and utilities were \$200.00. Appellant also listed \$900.00 in miscellaneous expenses. He had credit card debt and made monthly payments of \$300.00. Appellant had \$4,000.00 in checking and no savings account with \$20,000.00 in his retirement fund. He characterized his involvement with the daycare center as "Basically hanging out, helping with her books, because she was not too good in math." Appellant was not paid and he did not indicate he was volunteering because the form included volunteering and receiving money. He contended that he was doing a favor for a friend.

On November 6, 2008 appellant's attorney asserted that appellant disputed the amount of the overpayment specifically the date of October 2004. He argued that the EN1032 was misleading and vague. Appellant correctly answered no because he received no monetary or other compensation for volunteering. Counsel argued that appellant did not knowingly omit material information regarding his volunteer work. He asserted that appellant was without fault in the creation of the overpayment and requested waiver due to financial hardship.

By decision dated December 23, 2008, the hearing representative found that the activities performed by appellant, although on a volunteer basis, clearly merited notification to the Office. Ms. Cartisano advised that she would have had to hire someone to perform the duties appellant performed previously on a volunteer basis and that appellant was now currently employed with earnings performing those same duties. The hearing representative found appellant reasonably should have been aware of the reporting requirements and he knowingly failed to report his employment activities as required. He concluded that all compensation paid for the period October 31, 2004 through May 13, 2006 was forfeited. The hearing representative found that appellant was at fault in the creation of the overpayment such that it was not subject to waiver. Based on the financial information submitted, appellant had approximately \$2,400.00 in monthly income and \$3,125.00 in monthly expenses. The hearing representative noted that appellant had a monthly deficit of approximately \$725.00. He concluded, "No reasonable repayment plan can

be established and this reviewer has no alternative than to declare the entire amount of the overpayment of \$44,099.24 due and payable at this time.”

On appeal, appellant’s attorney contends that the hearing representative misquoted his letter, that the Form CA-1032 is vague and that appellant reasonably believed that his activities constituted volunteering rather than employment and that the Office erred in requiring repayment of the entire amount.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the Federal Employees’ Compensation Act 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 time 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.”¹

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he “knowingly” failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.² The term “knowingly” is defined in the regulations as “with knowledge, consciously, willfully or intentionally.”³

Section 10.5(g) of the Office’s regulations defines earnings from employment or self-employment as follows:

“(1) Gross earnings or wages before any deduction and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or

“(2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual’s

¹ 5 U.S.C. § 8106(b).

² *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

³ 20 C.F.R. § 10.5(n).

responsibility to report the estimated cost to have someone else perform his or her duties.”⁴

ANALYSIS -- ISSUE 1

The Office found that appellant forfeited his right to compensation because he knowingly failed to report his earnings and employment on EN1032 forms dated January 28 and May 7, 2006. Appellant completed the forms, representing that he was not employed and did not engage in self-employment. He denied performing volunteer work. Inspectors with the employing establishment, however, conducted surveillance of appellant on multiple occasions and observed him opening and closing the center, greeting parents, supervising children, sweeping, removing garbage and carrying children. The inspectors found that he worked from 10 to 12 hours a day. Investigators also telephoned the center and appellant identified himself as the office manager. The owner of the center, Ms. Cartisano, stated that appellant volunteered and was not paid for his work; however, she acknowledged that without his help she would have to hire and pay someone to perform his duties.

The Board finds that the evidence establishes that appellant failed to report earnings from employment. The Office’s regulation defines earnings to include a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither the lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual’s responsibility to report the estimated cost to have someone else perform his or her duties.⁵ Appellant clearly performed duties for the daycare center which the owner would have had to pay an individual to complete. He opened and closed the center, watched the children, helped with bookkeeping and took out the garbage.

Appellant can be subject to the forfeiture provision of section 8106(b) only if he knowingly failed to report a reasonable estimate of the cost to have someone else perform the duties he performed. The Office has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from employment.⁶ Appellant completed EN1032 forms which advised him to report all employment and all earnings from employment and self-employment. The EN1032 forms also required him to report all volunteer work. The EN1032 forms clearly stated that he could be subject to criminal prosecution for false or evasive answers or omissions. The factual circumstances of the record, including appellant’s signing of strongly worded certification clauses on the EN1032 forms, provide persuasive evidence that he knowingly understated his earnings and employment information.⁷ The Office properly found that appellant forfeited his entitlement to compensation for the period covered by the EN1032 forms which he signed on January 28 and May 7, 2006.

⁴ *Id.* at § 10.5(g).

⁵ *P.M.*, 60 ECAB ___ (Docket No. 07-2169, issued March 3, 2009).

⁶ 20 C.F.R. § 10.5(n).

⁷ *See Generally Robert C. Gilliam*, 50 ECAB 334 (1998).

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of the Office's implementing regulation provides as follows:

“(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

“(b) Where the right to compensation is forfeited, [the Office] shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”⁸

ANALYSIS -- ISSUE 2

The Office's regulations provide that it may declare an overpayment of compensation for the period of a given forfeiture of compensation. If a claimant has any earnings or employment activities during a period covered by the Form EN1032 which he knowingly fails to report, he 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.⁹

The Office found that appellant forfeited his right to compensation for the period October 31, 2004 to May 15, 2006 because he knowingly failed to report his earnings and employment activities on EN1032 forms covering this period. Appellant signed EN1032 forms on January 28 and May 7, 2006 covering the period October 28, 2004 through May 7, 2006. If a completed Form EN1032 omits earnings resulting in a finding of forfeiture, the Board has found that the period of forfeiture is the entire 15-month period covered by the form.¹⁰ As appellant signed a form on January 28, 2006, 15 months preceding this date is October 28, 2004. Appellant signed the last EN1032 denying that he had earnings on May 7, 2006 and the Office may not extend the forfeiture period to the end of the pay period for its own convenience in calculating the amount of the overpayment. Consequentially, the Office has not accurately calculated the amount of the overpayment and the case will be remanded for an appropriate calculation of the compensation paid for the period October 28, 2004 through May 7, 2006.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act¹¹ provides: 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

⁸ 20 C.F.R. § 10.529.

⁹ *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

¹⁰ *Ronald E. Ogden*, 56 ECAB 278, 285 (2005).

¹¹ 5 U.S.C. § 8129(b).

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

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 received 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 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 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).¹²

ANALYSIS -- ISSUE 3

The Office properly determined that appellant was at fault in the creation of the overpayment because he failed to provide information which he knew or should have known to be material on EN1032 forms covering the period October 28, 2004 through May 7, 2006. Appellant had earnings as defined by section 10.5(g) of the Office’s regulations from working in a daycare center during this period. He did not report employment and earnings on EN1032 forms covering October 28, 2004 through May 7, 2006 and did not report any volunteer work; thus, he failed to furnish material information to the Office. Appellant signed certification clauses on EN1032 forms which advised him in explicit language that he might be subject to civil, administrative or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. Consequently, by signing the form, he is deemed to have acknowledged his duty to fill out the form properly, including the duty to report any employment or self-employment activities and income. Appellant, therefore, failed to furnish information which he knew or should have known to be material to the Office. As he is not without fault in creating the overpayment, it is not subject to waiver.

LEGAL PRECEDENT -- ISSUE 4

The method by which the Office may recover overpayments is defined by regulation. The applicable regulations, 20 C.F.R. § 10.441(a) provides as follows:

“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 the 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.”

¹² 20 C.F.R. § 10.433(a).

ANALYSIS -- ISSUE 4

Appellant provided detailed information about his current financial circumstances. The hearing representative found that appellant had \$2,400.00 in monthly income and \$3,125.00 in monthly expenses. The hearing representative stated, "No reasonable repayment plan can be established and this reviewer has no alternative than to declare the entire amount of the overpayment of \$44,099.24 due and payable at this time."

The Board finds that the Office hearing representative did not attempt to decrease appellant's 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. On remand, the Office considered the applicable factors and determined an appropriate repayment plan for appellant to minimize financial hardship.

CONCLUSION

The Board finds that the Office properly determined that appellant forfeited his entitlement to compensation from October 28, 2004 through May 7, 2006 because he knowingly failed to report employment activities. The Board further finds that appellant received an overpayment during this period for which he was at fault and remands the case for the Office to properly calculate the amount of the overpayment. The Board also finds that the Office must determine an appropriate repayment plan considering the factors listed in 20 C.F.R. § 10.441(a).

ORDER

IT IS HEREBY ORDERED THAT the December 23 and April 28, 2008 are affirmed in part and set aside in part. The case is remanded for further action consistent with this decision of the Board.

Issued: November 10, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board