



at fault in the creation of the overpayment as the eBay account and any resulting sales belong to her daughter.

### **FACTUAL HISTORY**

On June 3, 2002 appellant, then a 53-year-old distribution clerk, filed a traumatic injury claim alleging that on that date she injured her lower back, right hip and right leg while lifting a heavy box. The Office accepted the claim for low back strain and right-sided sciatica. Appellant stopped work on June 3, 2002. The Office authorized L4-5 hemilaminectomy surgery which was performed on November 26, 2002 and surgery for anterior fusion surgery for L4-S1, which was performed on October 6, 2003.

In a July 26, 2002 letter, the Office advised appellant that a person who knowingly makes any false statement, misrepresentation, concealment of fact or any other act of fraud to obtain compensation or who knowingly accepts compensation to which he or she is not entitled, is subject to felony criminal prosecution. The Office instructed her that she must notify it immediately if she returned to work or obtained new employment and to return immediately any compensation check including payment for any period she worked.

Appellant filed claims for compensation for the period July 18, 2002 to the present and noted that she was entitled to continuation of pay for the period June 4 to July 18, 2002. She received compensation for temporary total disability on the daily and periodic rolls beginning July 22, 2002.

Appellant submitted EN1032 forms signed September 2, 2002, August 27, 2003, September 2004 and November 7, 2005, certifying that she had not worked during the prior 15 months relevant to each form or received any earnings. These forms covered the period July 22, 2002 through November 7, 2005.

By investigative memoranda dated March 23 and 27, 2005, the employing establishment inspection service advised the Office regarding appellant's eBay sale activities. The information provided by eBay noted that appellant opened an account on March 15, 2000. The profile under the account noted that she describing her sales activity as a hobby. The Office noted that appellant also has a Stamps.com account which allows her to purchase postage to mail packages. Appellant was observed mailing packages to her eBay customers during the period January 19 to March 15, 2005.

In a letter dated May 15, 2007, appellant responded to the postal inspector investigative interview. She contended that her daughter took over her eBay business following her second surgery and that the seller name was changed on October 13, 2003 to sxxxxxx714. Appellant stated that she mailed the packages for her daughter as her daughter worked nights. She noted that the income made using eBay was not reported to the Internal Revenue Service. Appellant stated that she "left everything mostly in [her] name because" she already had accounts with eBay, paypal and stamps.com and had her credit card on file.

In a letter dated June 27, 2005, appellant disputed the employing establishment's allegation that she ran an eBay account following her June 3, 2002 employment injury. She

states that she started the account as a hobby in 2000, but that her daughter took the account over following acceptance of her claim. Appellant also contended that the seller name on the account was changed to her daughter's name.

In response to a September 12, 2005 request, by the Office for a copy of appellant's eBay transactions, the postal inspector submitted a copy of all of appellant's eBay transactions for the period March 15, 2000 to the present. The account name listed was sxxxxxx714 and a sales summary for June 2003 through May 2005 was provided.

By letter dated November 15, 2005, the Office requested appellant to provide additional information regarding her self-employment.

In response to the Office's letter, appellant submitted information regarding the eBay account, a copy of her daughter's student loan, her daughter's debt management program and copies of charges for clothing. She contended that her daughter took over the eBay and stamps.com accounts following her June 3, 2002 injury and that she did not receive any income from the eBay sales. Her daughter also sold some of appellant's clothes as well as clothes from other relatives. She submitted a copy of an email sent from Stamps.com, to buyers which listed sxxxxx112.com, as copied on the email. The subject line noted "Shanna's eBay has sent you a package." Appellant also submitted a November 17, 2005 member profile noting her email address and the payment address in Sharpsburg, GA.

In a January 31, 2006 letter, Cornell J. Cypress, Jr., a postal inspector, noted that on December 6, 2004 the profile listed on the eBay account web site contained information about appellant. When he checked the web site again on May 17, 2005 the profile information changed. The profile now contained information about appellant's daughter and noted that she had taken over the account from her mother. Based upon viewing these changes, Mr. Cypress stated:

"After noticing that the profile had changed, I immediately contacted the eBay [i]nvestigator that sent me the original CD ROM and he stated that there was no way that he could tell me when the profile had been changed. [The investigator] stated that eBay does not keep a record of when profiles are changed, nor would the program tell them who changed the profile. It just seems ironic that soon after [appellant] was made aware that she was under observation that her eBay account profile changed from describing her to describing her daughter."

On September 29, 2006 the Office advised appellant of its preliminary determination that an overpayment of compensation was created in the amount of \$106,712.20, because she failed to report earnings and employment activities for the period July 22, 2002 to November 7, 2005 and, thus, forfeited compensation during this period. The Office noted a surveillance tape showed that appellant "continued to perform the duties of mailing merchandise to customer (sic) as of March 14, 2005. A preliminary determination was made that she was at fault in the creation of the overpayment and that, consequently, it was not subject to waiver.

By decision dated September 29, 2006, the Office found that appellant forfeited her rights to compensation benefits for the period July 22, 2002 through November 7, 2005<sup>1</sup> on the grounds that she failed to report earnings from her sale of merchandise through the website eBay, for the periods covered by EN1032 forms signed on September 2, 2002, August 27, 2003, September 2, 2004 and November 7, 2005. The Office noted that appellant did not change the profile information until after she knew she was being investigated by the employing establishment and that her email address did not change. Based on the evidence, the Office found that she “knowingly omitted that you were selling merchandise through [e]Bay.”

By decision dated November 8 2006, the Office finalized the preliminary overpayment determination finding that a \$106,712.20, overpayment of compensation was created for the period July 22, 2002 to November 7, 2005, as appellant received total disability compensation while failing to report earnings from self-employment. The Office further found that appellant was at fault and, therefore, was not entitled to a waiver of recovery. The Office directed recovery of the overpayment at a rate of \$750.00 a month from December 24, 2006 to March 31, 2019.<sup>2</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8106(b) of the Federal Employees’ Compensation Act provides that an employee who fails to make an affidavit or report when required, or knowingly omits or understates any part of [her] earnings; forfeits [her] right to compensation with respect to any period for which the affidavit or report was required.<sup>3</sup>

The Board has held that it is not enough merely to establish that there was unreported employment or earnings. Appellant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she knowingly failed to report employment or earnings.<sup>4</sup> The term knowingly as defined in the Office’s implementing regulation, means with knowledge, consciously, willfully or intentionally.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Office determined that appellant forfeited her entitlement to compensation for the period July 22, 2002 to November 7, 2005. Appellant signed Forms EN1032 on September 2, 2002, August 27, 2003, September 2004 and November 7, 2005, attesting that she had not worked during the previous 15 months or received any earnings. On the EN1032 forms she indicated that she was not employed or self-employed. The postal inspector submitted records

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<sup>1</sup> In the issue statement, the Office noted the period as July 22, 2002 to March 14, 2005. However, in calculating the overpayment and in its conclusion, the Office used the period July 22, 2002 to November 7, 2005.

<sup>2</sup> On August 14, 2006 appellant informed the Office that she had applied for Social Security disability retirement.

<sup>3</sup> 5 U.S.C. § 8106(b).

<sup>4</sup> *Harold F. Franklin*, 57 ECAB \_\_\_ (Docket No. 05-1559, issued February 8, 2006).

<sup>5</sup> 20 C.F.R. § 10.5(n).

from eBay documenting sales for the account appellant started on March 15, 2000 for the period March 15, 2000 to September 2005. In addition the record establishes that the profile for the account was not changed until after the employing establishment's investigation began. A surveillance tape showed appellant delivering packages for the eBay customers, the email address for the account did not change and appellant acknowledged that the accounts for eBay, Stamps.com, the credit card and paypal remained in her name. Based upon this evidence the Board finds that appellant had undisclosed earnings from self-employment which she did not report to the Office during the period July 22, 2002 to November 7, 2005.

On appeal, appellant contends that she used her credit cards to pay the eBay fees for her daughter and that she did not lie on the forms. She also states that the total sales listed by eBay does not include the many fees and deductions charged by eBay and paypal. The Board finds appellant's arguments unpersuasive. The fact that the total sales listed by eBay does include fees and deductions is irrelevant to the issue at hand, which is whether appellant knowingly failed to disclose earnings from self-employment. Appellant's contention that her daughter took over her eBay account and was selling merchandise is not supported by the record as noted above. She acknowledged that her credit card paid the eBay fees and she kept the Stamps.com, paypal and eBay accounts in her name. The profile on the eBay account did not change until after appellant found out she was being investigated. Moreover, the email address for the eBay account remained the same even after the account was allegedly transferred to her daughter. The facts of the case do not support appellant's contention that her daughter took over the account from her.

Appellant can be subject to the forfeiture provision of section 8106(b), only if she knowingly failed to report earnings or employment. 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.<sup>6</sup> Appellant completed EN1032 forms which advised her that she must report both all employment and all earnings from employment and self-employment. The EN1032 forms clearly stated that she could be subject to criminal prosecution for false or evasive answers or omissions. The factual circumstances of record, including appellant's signing of strongly worded certification clauses on the EN1032 forms, provide persuasive evidence that she knowingly understated her earnings and employment information.<sup>7</sup> The Office, therefore, properly found that appellant forfeited her compensation for the period July 22, 2002 to November 7, 2005.

### **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.

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<sup>6</sup> 20 C.F.R. § 10.5(n).

<sup>7</sup> See generally *Robert C. Gilliam*, 50 ECAB 334 (1988).

“(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.”<sup>8</sup>

### **ANALYSIS -- ISSUE 2**

The implementing regulations provide that the Office may declare an overpayment of compensation for the period of a given forfeiture of compensation. If a claimant has any earnings during a period covered by a Form EN1032 which she knowingly fails to report, she 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.<sup>9</sup> The Office paid appellant compensation in the amount of \$106,712.20, for the period July 22, 2002 to November 7, 2005. For the period July 22, 2002 to November 7, 2005, the Office paid appellant compensation in the amount of \$106,712.20. The Office properly found that appellant forfeited her entitlement to compensation during this time because she failed to report earnings from self-employment on EN1032 forms. The Board finds that there exists an overpayment of compensation in the amount of \$106,712.20.

### **LEGAL PRECEDENT -- ISSUE 3**

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.<sup>10</sup> The only exception to this requirement is a situation, which meets the tests set forth as follows 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.”<sup>11</sup> No waiver of payment is possible if the claimant is not without fault in helping to create the overpayment.<sup>12</sup>

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<sup>8</sup> 20 C.F.R. § 10.529. See also *Harold F. Franklin*, *supra* note 4.

<sup>9</sup> *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

<sup>10</sup> 5 U.S.C. § 8129(a).

<sup>11</sup> 5 U.S.C. § 8129(b).

<sup>12</sup> *Tammy Craven*, 57 ECAB \_\_\_\_ (Docket No. 05-249, issued July 24, 2006).

In determining whether an individual is without fault, section 10.433(a) of the Office's federal regulations provide, in relevant part:

“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.)”<sup>13</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that appellant was at fault in the creation of the overpayment because she failed to provide information which she knew or should have known to be material on EN1032 forms covering the period July 22, 2002 to November 7, 2005. The record establishes that appellant had unreported earnings from self-employment during these periods and knowingly failed to furnish this material information to the Office. She signed a certification clause EN1032 forms which advised her in explicit language that she might be subject to civil, administrative or criminal penalties if she knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing the form, appellant is deemed to have acknowledged her duty to fill out the form properly, including the duty to report any employment or self-employment activities and income. She failed to furnish information which she knew or should have known to be material to the Office. As appellant is not without fault in creating the overpayment, it is not subject to waiver.<sup>14</sup>

### **LEGAL PRECEDENT -- ISSUE 4**

Section 10.441 of the Office's regulations provides that whenever 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 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 hardship.<sup>15</sup>

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<sup>13</sup> 20 C.F.R. § 10.320(b).

<sup>14</sup> 20 C.F.R. § 10.433(a). *See Tammy Craven, supra* note 12.

<sup>15</sup> 20 C.F.R. § 10.438(a). *See Ralph P. Beachum, 55 ECAB 442 (2004).*

#### **ANALYSIS -- ISSUE 4**

Appellant did not provide any information regarding her current financial circumstances. It is her responsibility to provide information about income, expenses and assets.<sup>16</sup> The Office ordered recovery in the amount of \$750.00 per month. There is no evidence that recovery of the overpayment from appellant's continuing compensation would cause her undue financial hardship. Thus, the Board finds that the Office properly imposed repayment from continuing compensation at the rate of \$750.00 every 28 days pursuant to its recovery procedures.<sup>17</sup>

#### **CONCLUSION**

The Board finds that appellant forfeited her entitlement to compensation for the period July 22, 2002 to November 7, 2005. Regarding the second issue, the Board finds that she received an overpayment of compensation in the amount of \$106,712.20, for the period July 22, 2002 to November 7, 2005, based on her forfeiture of compensation benefits. Regarding the third issue, the Board finds that appellant was at fault in the creation of the overpayment, such that it was not subject to waiver. Lastly, the Board finds that the Office did not abuse its discretion in setting the rate of recovery at \$750.00 every 28 days from continuing compensation.

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<sup>16</sup> 20 C.F.R. § 10.438(a).

<sup>17</sup> See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.8 (May 2004).



**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 8 and September 29, 2006 are affirmed.

Issued: July 10, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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