

FACTUAL HISTORY

OWCP accepted that on March 6, 1995 appellant, then a 50-year-old food inspector, sustained a work-related herniated disc at L3-L4. He stopped work on the date of injury. Appellant retired on disability from the employing establishment and received a retirement annuity from the Office of Personnel Management effective November 26, 1996.²

OWCP required appellant to complete EN1032 forms which directed him to report any earnings from employment or self-employment while in receipt of OWCP compensation benefits during the past 15 months. In an EN1032 form completed and signed by appellant on April 3, 2000, he indicated that he worked as a part-time newspaper delivery man and carrier trainer for the San Angelo Standard Times from January 1 through May 31, 1999. He listed actual earnings of \$1,684.63. The job involved substituting for short carriers and training new carriers on vacant routes on an as-needed basis. On March 28, 2001 and April 12, 2002 appellant completed an EN1032 form and indicated that he did not work during the prior 15 months.

In a November 16, 2005 investigative memorandum, the Inspector General for OWCP presented evidence which showed that appellant worked for Carter Construction Company from September 2000 to 2003 as a carpenter and San Angelo Standard Times as a contract carrier from 2000 to 2004 for which he received pay. Appellant acknowledged that he received earnings during his employment with these companies.

On March 13, 2007 OWCP issued a notice proposing to reduce appellant's compensation on the grounds that his actual earnings as a newspaper deliverer fairly and reasonably represented his wage-earning capacity. Also, it issued a notice proposing to initiate a forfeiture of his right to compensation in the amount of \$77,312.00 for the period January 3, 1999 through March 30, 2006 because he knowingly failed to report his earnings for 2000 through 2006 on EN1032 forms for the stated periods. Additionally, OWCP issued a preliminary notice advising appellant that he received an overpayment in compensation of \$206,766.05 for the period January 3, 1999 through March 30, 2006. Appellant failed to report his earnings from Carter Construction Company and the San Angelo Standard Times on EN1032 forms for 2000 through 2006. OWCP found that he was at fault in the creation of the overpayment as he failed to report his earnings on the stated EN1032 forms.

In an April 12, 2007 letter, appellant's attorney contended that the estimated figures for appellant's earnings from the San Angelo Standard Times failed to take into account the fair amount of "nonpayments" by customers which were debited from his earnings. The estimated profits per customer assumed a particular customer pays the invoice for the service. There were additional expenses which were not credited to appellant's estimated earnings. Counsel contended that he actually earned less than \$3,000.00 a year from his part-time work. The estimated figure did not take into account appellant's split-duty arrangement during some periods. Counsel contended that the estimated earnings for his construction work had been

² In an October 9, 1998 decision, OWCP accepted that appellant sustained a recurrence of disability commencing November 17, 1995 causally related to his March 6, 1995 employment injury. It paid compensation for total disability commencing October 19, 1998 after he made an election to receive compensation benefits under FECA instead of a retirement annuity.

overstated. Appellant worked on less than 10 locations during the period in question resulting in approximately \$6,000.00 in earnings over the entire period of years in question.

In an April 18, 2007 decision, OWCP finalized the forfeiture of appellant's compensation for the period January 3, 1999 through March 30, 2006. It also issued a decision finalizing the reduction of his compensation on the grounds that his actual earnings as a newspaper deliverer fairly and reasonably represented his wage-earning capacity. Additionally, OWCP issued a decision which finalized its finding of a \$206,766.05 overpayment and fault in creating the overpayment for the period January 3, 1999 to March 30, 2006. It directed recovery at the rate of \$815.64 from appellant's continuing compensation payments effective May 12, 2007.

In a December 21, 2007 decision, OWCP's hearing representative set aside the April 18, 2007 wage-earning capacity and forfeiture decisions. She remanded the case to OWCP for further development of the factual evidence to determine appellant's actual earnings and the period in which they were earned.

Appellant submitted his tax return forms for 2002 to 2006 which showed that he had actual earnings of \$10,707.00. By letter dated January 8, 2009, OWCP advised him that it had received his tax return forms for 2002 to 2006. It requested that appellant submit tax return forms for 2007 and 2008. OWCP also requested additional factual information regarding his dependent status. On February 11, 2009 appellant submitted the requested tax returns.³

On June 22, 2009 OWCP issued a notice proposing to reduce appellant's compensation on the grounds that the selected position of newspaper deliverer/carrier represented his wage-earning capacity.⁴ It issued a decision, finding that he forfeited his compensation in the amount of \$87,493.99 for the period January 3, 1999 through April 12, 2002 because he knowingly failed to report his earnings from sporadic employment as a carpenter at Carter Construction Company on EN1032 forms he completed on April 3, 2000, March 28, 2001 and April 12, 2002. The inspector general's investigation revealed that appellant received approximately \$3,720.00 in earnings from his construction position. OWCP issued a preliminary notice, finding that he received an \$87,493.99 overpayment of compensation as he had forfeited his compensation for the period January 3, 1999 to April 12, 2002. Appellant was found to be at fault in creating the overpayment because he failed to report all his earnings regarding his construction position. He was advised that he could request a telephone conference, a final decision based on the written evidence only or a prerecoupment hearing within 30 days if he disagreed that the overpayment occurred with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. OWCP requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents.

³ Appellant claimed a dependent son.

⁴ OWCP determined that appellant's actual earnings as a newspaper deliverer/carrier did not represent his wage-earning capacity. The medical evidence established that he was partially disabled and capable of working four hours per day with restrictions. The selected position was found to be medically and vocationally suitable and reasonably available in appellant's commuting area.

On July 22, 2009 appellant, through his attorney, requested a hearing regarding the June 22, 2009 proposed notices and decision. He contested the amount of the overpayment and finding of fault. Appellant noted his monthly expenses and income related to his newspaper carrier position. He contended that he did not intentionally fail to report his income from Carter Construction. Appellant was unsure as to how to report his earnings from his construction position because his work was limited. He made clerical errors on the EN1032 forms he submitted to OWCP. Appellant was confused about reporting monthly figures versus totals for a 15-month period.

Appellant completed the Form OWCP-20 on July 22, 2009 and indicated that he had monthly income of \$2,050.00 and expenses of \$1,923.00. He had assets in the amount of \$1,200.00.

In a February 1, 2010 decision, OWCP's hearing representative affirmed the June 22, 2009 forfeiture decision. She also finalized the overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$87,493.99 because he forfeited his right to compensation for the period January 3, 1999 through April 12, 2002 and that he was at fault in creation of the overpayment, thereby precluding waiver of recovery of the overpayment. The hearing representative noted that he reported his income from his newspaper route and offered no explanation as to why he did not report his income from working as a carpenter. She ordered repayment of the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA⁵ 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.⁶

⁵ 5 U.S.C. § 8106(b).

⁶ 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.* at 260.

ANALYSIS -- ISSUE 1

The record establishes that appellant omitted earnings on EN1032 forms covering the period January 3, 1999 to April 12, 2002. In these forms, OWCP notified him of his responsibility to complete the forms and provide relevant information concerning his employment status and earnings during the period covered by the forms. The record reveals, however, that appellant had unreported employment and earnings during the period covered by the EN1032 forms completed on April 3, 2000, March 28, 2001 and April 12, 2002. Appellant acknowledged to investigators that he was employed as a carpenter by Carter Construction from September 2000 to 2003. He earned approximately \$3,720.00 as a carpenter. The Board notes that OWCP's hearing representative properly determined that appellant reported his employment activities and earnings while employed by San Angelo Times from January 1 to May 31, 1999.

Appellant, however, can only be subjected to the forfeiture provision of section 8106 of FECA if he knowingly omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. OWCP's procedure manual recognizes that forfeiture is a penalty⁷ and, as a penalty provision, it must be narrowly construed.⁸ The term knowingly is not defined within FECA or its regulations. In common usage knowingly is defined as: "[w]ith knowledge consciously; intelligently; willfully; intentionally."⁹

The present case, does not involve any question as to the definition of earnings that must be reported. There is no question that appellant was paid wages for his work as a carpenter. The EN1032 forms signed by appellant used such terms as business, enterprise and service to explain the obligation for reporting all forms of employment, self-employment and earnings. The explicit language of the forms clearly advised him that the nature of his work as a carpenter would require him to report such employment activities on the forms. Appellant's signing of the strongly-worded certification clause on the EN1032 form shows that he was aware of the materiality of his failure to report his employment. Moreover, the Board finds the fact that he reported his employment activities and earnings with the San Angelo Standard Times company from 2000 to 2004 showed that he understood the importance of reporting employment and earnings.

Under these circumstances, the Board finds that appellant knowingly omitted his earnings under section 8106(b)(2) of FECA by failing to report all of his employment activities and earnings on the EN1032 forms covering the period January 3, 1999 to April 12, 2002. Accordingly, the Board finds that OWCP properly determined that he forfeited his right to compensation for the period January 3, 1999 to April 2, 2002.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10c (July 1993).

⁸ See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

⁹ Black's Law Dictionary (5th ed. 1979); see *Anthony A. Nobile*, 44 ECAB 268, 271-73 (1992).

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.¹⁰ Section 8129(a) of FECA provides, in pertinent part, “When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”¹¹

ANALYSIS -- ISSUE 2

Appellant forfeited his right to compensation for the period January 3, 1999 to April 12, 2002 because he knowingly failed to report earnings and employment on EN1032 forms covering that period. The record contains payment records showing that he received at least \$3,720.00 in earnings from employment as a carpenter from September 2000 to 2003. Because appellant forfeited compensation from January 3, 1999 to April 12, 2002 he is not entitled to the compensation he received for this period. The Board finds that OWCP properly found that he received an \$87,493.99 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of FECA¹² provides that “[a]djustment 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 [FECA] or would be against equity and good conscience.” Section 10.433 of OWCP’s implementing regulations¹³ provide that, in determining whether a claimant is at fault, OWCP will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(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.”

Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The

¹⁰ 5 U.S.C. § 8102(a).

¹¹ *Id.* at § 8129(a).

¹² *Id.* at § 8129(b).

¹³ 20 C.F.R. § 10.433.

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

ANALYSIS -- ISSUE 3

The Board finds that appellant was at fault in the creation of the overpayment because he failed to provide information about his employment, which he knew or should have known was material. The EN1032 forms completed by him on April 3, 2000, March 28, 2001 and April 12, 2002 specifically advised him to report any employment activity or earnings, including self-employment, even if the business ran at a loss. Appellant was reasonably aware that his employment as a carpenter was material information that should be furnished to OWCP. His failure to furnish this information created the forfeiture of compensation for the period January 3, 1999 to April 12, 2002 and the resulting overpayment of compensation. OWCP properly determined fault under the second standard for failing to provide information appellant knew to be material to his receipt of compensation benefits. Appellant, therefore, was at fault in the creation of the \$87,493.99 overpayment and recovery of the overpayment is not subject to waiver.¹⁵

LEGAL PRECEDENT -- ISSUE 4

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. Section 10.441(b) of the regulations provide:

“When an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to [OWCP] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. The overpayment is subject to the provisions of the Federal Claims Collection Act of 1966 (as amended) and may be reported to the Internal Revenue Service as income.”¹⁶

ANALYSIS -- ISSUE 4

The Board finds that the case is not in posture for decision regarding repayment of the overpayment in full to recover the \$87,493.99 overpayment. On June 22, 2009 OWCP issued a notice proposing to reduce appellant's compensation based on its determination that the selected newspaper deliverer/carrier position represented his wage-earning capacity. However, the record

¹⁴ *Id.* at § 10.433(b).

¹⁵ *See supra* note 13. With respect to recovery of the overpayment, the Board's jurisdiction is limited to review of those cases where OWCP seeks recovery from continuing compensation benefits under FECA. *See Terry A. Keister*, 56 ECAB 559 (2005); *Albert Pineiro*, 51 ECAB 310 (2000). As OWCP instructed appellant to submit a payment for the entire amount to repay the overpayment, the Board lacks jurisdiction to review the recovery of the overpayment.

¹⁶ 20 C.F.R. § 10.441(b).

does not contain a decision issued by OWCP which finalized its proposed action. Thus, it is unclear from the record as to whether appellant is in receipt of continuing compensation.

The Board will remand the case for further development on the issue of recovery. Pending further development of appellant's wage-earning capacity and OWCP's consideration of relevant factors so as to minimize any hardship in setting the rate of recovery, OWCP should suspend its collection of the overpayment. After further development, OWCP shall issue a final decision on an appropriate rate of recovery.

CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited his right compensation for the period January 3, 1999 to April 12, 2002 and properly determined that he received an \$87,493.99 overpayment of compensation. The Board further finds that OWCP properly determined that appellant was at fault in creating the overpayment of compensation and, therefore, the overpayment was not subject to waiver. The Board finds, however, that the case is not in posture as to whether OWCP properly required repayment of the overpayment in full.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed with regard to forfeiture, fact of overpayment and fault. OWCP's decision is set aside with regard to recovery of the overpayment and remanded for further action consistent with this decision of the Board.

Issued: August 2, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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