

FACTUAL HISTORY

On November 20, 2002 OWCP accepted that appellant, a 35-year-old part-time flexible mail processor, sustained sprains to the left hand, wrist, upper arm and shoulder on September 27, 2002 while sleeving mail and pulling trays. Appellant began light-duty work. She had arthroscopic repair of the left shoulder on April 6, 2005, and was off work through August 16, 2005. Appellant returned to light duty until June 8, 2006. She was thereafter placed on the periodic compensation rolls. Appellant returned to six hours of daily modified duty on February 8, 2007 and continued to receive wage-loss compensation for two hours a day.²

On August 15, 2008 appellant submitted an OWCP EN1032 form in which she reported no employment activity. On September 8, 2008 OWCP noted that the EN1032 form was not completed properly because the record indicated that she had been working for the employing establishment. It asked appellant to complete another form, which was attached. On September 11, 2008 appellant submitted a second EN1032 form. In answer to question one, on whether she had worked for any employer during the past 15 months, she reported that she had worked for the employing establishment since February 7, 2007; in answer to question two, on whether she had been self-employed or involved in any business enterprise in the past 15 months, she responded "no." The EN1032 form signed by appellant on September 11, 2008 covered the period June 11, 2007 through September 11, 2008. Appellant returned to eight hours of modified duty on October 20, 2008.

A December 18, 2008 postal service Office of Inspector General investigation report covered the period November 9, 2007 to December 18, 2008. The report indicated that appellant had been a full-time student in a practical nursing program while working limited duty at the employing establishment, and was also employed at Mediquip Rehabilitation Equipment and Supplies. The investigator reported observing appellant in April 2008, arriving at Mediquip dressed in a blue shirt with a Mediquip logo, and that in August 2008, the investigator entered Mediquip, posed as a customer, and appellant assisted her. The owner of Mediquip is appellant's cousin and was interviewed. She stated that appellant began working for her in September 2007, several hours a day, several days a week, working on paperwork and assisting customers. The owner related that she had paid appellant \$150.00 per week on a few occasions, and that when profits declined, compensated appellant by buying clothes and paying for meals and entertainment. When interviewed, appellant admitted that she was employed at Mediquip from November 2007 to the present, answering the telephone and completing paperwork. She denied receiving financial compensation for her work, stating that she was compensated with meals and clothing, but later admitted that she might have been paid \$150.00 on one occasion. Appellant stated that she did not report this position because she was volunteering her time. A DVD surveillance video of her activities from April 4 to June 12, 2008 is found in the case record.

By decision dated February 10, 2010, OWCP found that appellant had forfeited compensation for the period June 11, 2007 through September 11, 2008 because she knowingly

² In January 2004 appellant filed an emotional condition claim that was denied. On July 14 and 29, 2008 OWCP found that she received overpayments in compensation in the amounts of \$368.43 and \$4,429.71 that were deducted from her continuing compensation.

omitted and/or understated work activity and earnings on an EN1032 form.³ OWCP also made a preliminary determination that appellant was at fault in the creation of an overpayment in compensation in the amount of \$7,623.88 because she knowingly understated or omitted earnings for the period June 11, 2007 to September 11, 2008 and had received compensation in this amount. Computer print-outs and an OWCP overpayment worksheet indicate that appellant received \$7,624.88 in compensation for this period.

On March 4, 2010 appellant requested a decision on the record, stating that she disagreed that the overpayment occurred and requested waiver. She submitted an overpayment questionnaire and stated that she was financially unable to repay the funds as she had been terminated by the employing establishment and was currently employed by Mediquip, earning \$300.00 a week.

By decision dated April 20, 2010, OWCP finalized the preliminary determination that appellant was at fault in creating the \$7,623.88 overpayment because she failed to report a material fact and provided information that she knew or should have known was incorrect.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁴ A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period.⁵ OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work and continues to receive compensation.⁶

Section 8106(b) of FECA provides that 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. It provides that an employee who fails to make an affidavit or report when required or knowingly omits or understates any part of his or her earnings forfeits his or her right to compensation with respect to any period for which the affidavit or report was required.⁷

In order to establish that a compensation recipient should forfeit the compensation received for the periods covered by completed OWCP EN1032 forms, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.⁸ As forfeiture is a

³ Appellant did not file an appeal with the Board of the February 10, 2010 final decision regarding forfeiture.

⁴ 5 U.S.C. § 8102(a).

⁵ *Donna M. Rowan*, 54 ECAB 698 (2003).

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

⁷ 5 U.S.C. § 8106(b); *see F.C.*, 59 ECAB 190 (2007).

⁸ *Robert R. Holmes*, 49 ECAB 161 (1997).

penalty, it is not enough merely to establish that there were underreported earnings from employment. The inquiry is whether appellant knowingly omitted or understated his earnings from employment for the periods covered by the EN1032 forms. The term knowingly is not defined within FECA or its implementing federal regulations. In common usage, the Board has adopted the definition of “knowingly” as “with knowledge; consciously; intelligently; willfully; intentionally.”⁹ The language on OWCP EN1032 forms is clear and unambiguous in requiring a claimant to report earnings for the previous 15 months from any employer, self-employment or a business enterprise in which he or she worked. The forms further emphasize that severe penalties may be applied for failure to report all work activities thoroughly and completely.

Section 10.529 of OWCP’s regulations provide that, 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. Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture pursuant to section 8129 and other relevant statutes.¹⁰

ANALYSIS -- ISSUE 1

The evidence of record establishes that appellant knowingly failed to report her employment activities and earnings on an OWCP EN1032 form. The language on the form is clear and unambiguous in requiring that a claimant report all earnings or involvement in business enterprises, including odd jobs even if intermittent, and specifically notes that unpaid duties must also be reported and an appropriate rate of pay shown for the activity. Appellant performed work activities at Mediquip including completing paperwork and helping customers. Her signature on the EN1032 form dated September 11, 2008 certified 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.” Appellant only reported her part-time work at the employing establishment, but no other work, self-employment or volunteer work of any kind. The EN1032 form covered the 15-month period prior to the date of her signature on September 11, 2008. Thus, appellant knowingly forfeited her right to compensation for the period June 11, 2007 to September 11, 2008, and an overpayment in compensation was created. In calculating the amount of the overpayment, OWCP properly determined that she received wage-loss compensation totaling \$7,623.88 for the period in question. OWCP therefore properly found that an overpayment in compensation in the amount of \$7,623.88 had been created for the period June 11, 2007 to September 11, 2008.¹¹

⁹ *Harold F. Franklin*, 57 ECAB 387 (2006).

¹⁰ 20 C.F.R. § 10.529.

¹¹ *F.C.*, *supra* note 7.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “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.”¹²

Section 10.433(a) of OWCP’s regulations provide:

“OWCP 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 OWCP 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).”¹³

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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

ANALYSIS -- ISSUE 2

OWCP found appellant at fault in creating the overpayment in compensation because she knowingly failed to report employment activities. Appellant had an obligation to show good faith and to exercise a high degree of care in reporting events that could affect the amount of her compensation.¹⁵ On an OWCP EN1032 form dated September 11, 2008, she indicated that she had no earnings other than from her part-time postal employment, and was not performing other work activities. The EN1032 form advised appellant that a false or evasive answer to any question could be grounds for forfeiting compensation benefits and advised that severe penalties could be applied for failure to report all work activities thoroughly and completely. When appellant signed the forms, she certified that she understood that she must immediately report to OWCP any employment or work activities. She failed to inform OWCP of her work activities, information that she knew or should have known was material to the calculation of her wage-loss

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

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

¹⁴ *Id.* at § 10.433(b); *Duane C. Rawlings*, 55 ECAB 366 (2004).

¹⁵ *Sinclair L. Taylor*, *supra* note 13.

compensation.¹⁶ The Board finds that appellant was thus at fault in the creation of the overpayment in compensation.¹⁷ Because appellant is at fault in the creation of the overpayment, she is not entitled to waiver.¹⁸

CONCLUSION

The Board finds that appellant was at fault in the creation of an overpayment in compensation in the amount of \$7,623.88.

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 1, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

¹⁶ *Harold F. Franklin, supra* note 9.

¹⁷ *F.C., supra* note 7.

¹⁸ Lastly, the Board notes that its jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where, as here, a claimant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act. *Albert Pineiro*, 51 ECAB 310 (2000).