

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

M.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fife, WA, Employer**

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**Docket No. 11-1751
Issued: May 7, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 26, 2011 appellant filed a timely appeal from a June 1, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 compensation for the period January 10, 2006 to July 18, 2007 because he failed to report employment activity; (2) whether he received a \$54,454.82 overpayment of compensation for the period of the forfeiture; (3) whether appellant was at fault in creating the overpayment; (4) whether OWCP properly found that it would deduct \$500.00 from continuing compensation payments to repay the overpayment; and (5) whether the hearing representative properly denied appellant's request to issue subpoenas.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on October 10, 2001 appellant, then a 50-year-old city carrier, sustained a left shoulder dislocation, left shoulder strain, a consequential aggravation of a right shoulder dislocation and loose bodies in the left shoulder in the performance of duty.² Appellant stopped work on October 10, 2001 and did not return.

In a letter dated October 13, 2006, Dennis Warriner authorized appellant to manage a contract number DACA67-9-07-44 “to include cutting, removal and placing.”

In EN1032 forms signed April 10 and July 18, 2007, appellant indicated that he had not worked for any employer for the past 15 months and was not self-employed. The EN1032 forms advised that he must report all employment for which he received a salary, wages, income, sales commissions, piecework or any payment of any kind, that he must report self-employment and that he must report any such enterprise in which he worked and any volunteer work performed. OWCP advised appellant on the EN1032 forms that he was obligated to immediately report any employment to OWCP and that fraudulently concealing or failing to report income could subject him to criminal prosecution.

On April 24, 2007 a special agent interviewed Mr. Warriner. The agent related:

“Regarding wood and woodcutting, Warriner stated that his son, Alex, has, in the past, obtained some contracts at Fort Lewis to cut and remove trees. He stated that he would bid on stacked and limbed trees; that Alex and [appellant] would cut, stack, and haul the wood; that he (Warriner) would help Alex and [appellant] during his lunch breaks and after work at the end of the day. The last contracts were in August 2006 and October 2006. Warriner stated that [appellant] would not participate in any lifting or work more than 45 minutes at a time in years but would help where he could to include sharpening the chainsaw blades and manning the log splitter. When told that we had a videotape contrary to that statement; was shown a picture of him with [appellant] at the worksite; and asked if he was sure he wanted to make a flat statement, Warriner did not answer. He stated that he might have some of the contracts at home and would look for them. Overall, he stated that [appellant] received about 12 cords of wood from the cutting at Fort Lewis.”

In a May 9, 2007 memorandum of interview, a special agent with the employing establishment described his interview with appellant on April 24, 2007. Appellant denied working at Fort Lewis. He related that he went there to teach Alex Warriner tree clearing and that he owned the wood splitter used to clear the tree. Appellant denied having anything to do with the money paid by Fort Lewis for the tree clearing. The agent related:

“[Appellant] then stated the only reason his name was on any of the ‘paperwork,’ was because Warriner needed to leave the country and [appellant] had to turn in a tool to the base which they used at the job site. [Appellant] stated again that

² Appellant had a history of prior work-related injuries to his right and left shoulders and bilateral knees.

Warriner was teaching his son how to cut wood. He said Alex made approximately \$1,000 on the wood-cutting.”

Appellant indicated that the job at Fort Lewis in October took three and a half days to complete but that Mr. Warriner did all the work. The agent told him that he witnessed him cutting wood, starting the splitter, using a chainsaw and throwing wood. Appellant replied that he was taking medication. When the agent asked him why he had not told them about his activities at the beginning of the interview, he related that he did not want his benefits to stop and that he would lie to take care of his family. Appellant maintained that he received wood in exchange for the work “because they used my equipment.”

In a surveillance summary dated July 16, 2007, an investigator with the employing establishment witnessed appellant cutting wood on October 17, 2006 for three and a half hours and on October 19, 2006 for around five hours. During this time he started and used a chainsaw and a mechanical wood splitter.

In an August 21, 2007 report of investigation, the employing establishment maintained that appellant had misrepresented his condition to remain on workers’ compensation. It further asserted that he received compensation in kind for work at Fort Lewis.

By letter dated March 20, 2008, OWCP advised appellant of its preliminary determination that he received an overpayment of \$54,454.82 because he received unreported earnings in October 2006. It further advised him of its preliminary determination that he was at fault in the creation of the overpayment.

On April 7, 2008 appellant requested a prerecoupment hearing. He alleged that Mr. Warriner offered him a small amount of wood left over from the sale. Appellant did not believe taking the firewood constituted payment.

Following a preliminary review on August 28, 2008 a hearing representative vacated the preliminary overpayment determination after finding that OWCP had not issued a separate decision regarding the forfeiture.

By letter dated September 5, 2008, OWCP advised appellant that as it could not establish a monetary value from his October 2006 activities, it would not pursue a finding that he received an overpayment.³

By decision dated July 1, 2010, OWCP determined that appellant forfeited entitlement to compensation from January 10, 2006 to July 18, 2007 in the amount of \$54,454.82 as he failed to report employment activities. It found that in October 2006 investigators witnessed him cutting and loading firewood for eight hours and that Mr. Warriner authorized appellant to manage a contract to include the removal and placing of wood. OWCP determined that he knowingly failed to report employment activities on EN1032 forms.

³ In a statement dated October 14, 2008, Marjorie Pringle, one of appellant’s neighbors, asserted that she gave some wood to him for his stove a few years ago.

In another letter dated July 1, 2010, OWCP advised appellant of its preliminary determination that he received an overpayment of \$54,454.82 as he failed to report earnings on EN1032 forms signed April 10 and July 18, 2007. It further notified him of its preliminary finding that he was at fault in creating the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it informed him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On July 23, 2010 appellant requested a prerecoupment hearing and an oral hearing on the forfeiture decision. He further requested subpoena power. On August 17, 2010 appellant requested subpoenas for four individuals as well as a copy of all video and audio recordings and investigative records.⁴

By letter dated October 18, 2010, the hearing representative denied appellant's request to subpoena various individuals as he did not explain why it was the best method to obtain evidence or how the testimony was directly relevant to the issues. She informed him that he could ask the individuals to provide written testimony or to testify at the hearing. The hearing representative advised appellant that he could appeal the denial of his subpoena request after her decision, if it was not favorable.

In a statement dated November 21, 2010, Mr. Warriner related that he purchased wood from Fort Lewis following a public bid. He stated:

"Often the quantity of wood I purchased exceeds my immediate need and I offered some to [appellant] as a way of helping a friend, that burns wood to heat his house. At no time did I hire [him] nor did he enter into a contract with Fort Lewis. At no time did I charge him for the wood, nor did he capitalize in any way on the wood contract purchase. I did provide [appellant] with a copy of the contract and gave him permission to cut wood at the wood deck site in my absence. I provided his name and written permission to access the wood and cut the wood for his use so Fort Lewis Officials knew he had my authorization as the contract owner. At no time was [appellant] under any obligation to remove wood and he always used his own equipment."

In a telephone call dated December 10, 2010, appellant related that he was upset that the hearing would be by telephone rather than in person. At the telephone hearing, held on December 30, 2010, he asserted that Mr. Warriner used sealed bids to buy wood from Fort Lewis. Appellant denied having anything to do with the bids and denied working for Mr. Warriner who offered him leftover wood which he took to use as firewood. He indicated that he overmedicated to get the free firewood. Appellant did not consider getting free firewood work. He related that his name was on the paperwork so that he could get access to the wood. Appellant had no responsibilities for the project and considered it a chore akin to cutting grass. He denied any exchange of firewood for the use of his equipment. Appellant collected the wood

⁴ OWCP provided appellant with the investigative records and surveillance video.

over two half days. He got two truckloads of wood. Appellant did not make any money off the wood collection.

In a January 21, 2011 overpayment recovery questionnaire, appellant listed monthly income of \$5,831.00. He provided expenses of \$1,286.06 for housing, \$1,200.00 for food, \$300.00 for clothing, \$550.00 for utilities and \$600.00 in other expenses. Appellant also listed credit card payments of \$200.00, \$400.00, \$206.00 and \$58.00, for total expenses of \$4,800.06. He further noted that his wife had \$9,000.00 in a savings account.

By decision dated June 1, 2011, the hearing representative affirmed the July 1, 2010 forfeiture decision and finalized the finding that appellant received an overpayment of \$54,454.82 based on his forfeiture of compensation from January 10, 2006 to July 18, 2007. She further found that he was at fault in creating the overpayment and that OWCP should recover the overpayment by deducting \$500.00 from his continuing compensation payments. The hearing representative determined that based on his current OWCP compensation benefits, his monthly income was \$5,856.90 and his monthly expenses were \$4,800.06, and that his monthly income thus “exceeds his expenses by \$1,000.00.” She also noted that his wife had \$9,000.00 in savings.

On appeal appellant argues that he did not work for Mr. Warriner and was not self-employed. He asserted that he picked up wood worth less than \$200.00 which he did not sell but instead used himself. Appellant related that if an individual had offered him a washer or bed if he went and got it he would do that and not consider it employment or reportable to OWCP. Mr. Warriner kept the wood splitter on his property and could use it any time. Appellant noted that he asked for an oral hearing but only received a telephone hearing. He also maintained that he had the right to subpoena witnesses.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA provides that an employee who “fails to make an affidavit or report when required or 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.”⁵

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. Appellant can be subjected to the forfeiture provisions of 5 U.S.C. § 8106(b) only if he “knowingly” failed to report employment or earnings.⁶ The term “knowingly” as defined in OWCP’s implementing regulations, means “with knowledge, consciously, willfully or intentionally.”⁷

⁵ 5 U.S.C. § 8106(b).

⁶ *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁷ 20 C.F.R. § 10.5(n).

Section 10.5(g) of OWCP'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 responsibility to report the estimated cost to have someone else perform his or her duties.”⁸

ANALYSIS -- ISSUE 1

OWCP found that appellant forfeited his right to compensation from January 10, 2006 to July 18, 2007 because he knowingly failed to report employment activities on EN1032 forms covering this period. Appellant signed EN1032 forms on April 10 and July 18, 2007 covering the period January 10 through July 18, 2007. On the forms, he indicated that he was not employed and did not engage in self-employment. Appellant further denied performing volunteer work. Investigators with the employing establishment, however, conducted surveillance and witnessed appellant cutting wood for three and a half hours on October 17, 2006 and for approximately five hours on October 19, 2006. For part of this time he started and used a chainsaw and mechanical wood splitter. In an April 24, 2007 interview, Mr. Warriner related that his son Alex had a contract at Fort Lewis to cut and remove trees. Appellant helped him cut, stack and haul the wood and was authorized on the contract to access the wood. Mr. Warriner related that appellant “received about 12 cords of wood from the cutting at Fort Lewis.” In another April 24, 2007 interview, appellant indicated that he was teaching Alex Warriner tree clearing. He did not receive any money from Fort Lewis and was only on the paperwork so that he could get to the work site. Appellant stated that he obtained wood in exchange for the work “because they used my equipment.” He further related that he did not initially tell the investigators about the activity because he did not want it to affect his benefits.

The Board finds that appellant failed to report earnings from employment. OWCP's regulations define earnings to include 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 responsibility to report the estimated cost to have someone else perform his or her duties.⁹ Appellant clearly performed duties that Mr. Warriner would have had to pay an individual to perform when he helped his son cut and haul wood. Further, he received remuneration in the form of cords of wood. In a statement dated November 21, 2010, Mr. Warriner asserted that he offered the wood to appellant as a friend and that he had not hired or paid him. At the hearing appellant denied working for Mr. Warriner and indicated that he only took the leftover wood to use in his stove.

⁸ 20 C.F.R. § 10.5(g); *see also J.S.*, 58 ECAB 515 (2007).

⁹ *Id.*

However, the initial statement by Mr. Warriner to investigators that appellant took 12 cords of wood and appellant's initial statement that he received the wood in exchange for the use of his equipment is more credible as it was more contemporaneous and made to law enforcement personnel.¹⁰

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. OWCP has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.¹¹ Appellant completed EN1032 forms which advised him that he must report both 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 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.¹² OWCP, therefore, properly found that he forfeited his entitlement to compensation from January 10, 2006 to July 18, 2007.

On appeal appellant argues that Mr. Warriner gave him the wood as a friend and that he went to pick up the wood like he would go pick up an offered washer or bed. However, he was authorized by Mr. Warriner as a party on the contract to cut and haul wood and his actions in assisting Alex Warriner in starting the splitter and using a chainsaw go beyond picking up free wood and constitute employment activities.

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of OWCP's implementing regulations provide 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, [OWCP] 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.”¹³

¹⁰ See *P.M.*, Docket No. 07-2169 (issued March 2, 2009).

¹¹ 20 C.F.R. § 10.5(n).

¹² See generally *Robert C. Gilliam*, 50 ECAB 334 (1998).

¹³ 20 C.F.R. § 10.529.

ANALYSIS -- ISSUE 2

OWCP'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 during a period covered by an EN1032 form 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.¹⁴ OWCP paid appellant compensation in the amount of \$54,454.82 for the period January 10, 2006 to July 18, 2007. It properly found that appellant forfeited his entitlement to compensation during this time because he failed to report earnings from employment on EN1032 forms; consequently, there exists an overpayment of compensation in the amount of \$54,454.82

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of FECA¹⁵ 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 this subchapter or would be against equity and good conscience." Section 10.433 of OWCP's implementing regulations¹⁶ provides that in determining whether a claimant is at fault, it 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."

ANALYSIS -- ISSUE 3

OWCP 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 January 10, 2006 to July 18, 2007. He had earnings during this period as defined by section 10.5(g) of OWCP's regulations from work cutting and hauling wood and receiving cords of wood. Appellant did not report employment and earnings on EN1032 forms covering that period; thus, he failed to furnish material information to OWCP. He 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, appellant is deemed to have acknowledged his duty to fill out the form

¹⁴ *Louise P. McKenna, Jr.*, 46 ECAB 328 (1994).

¹⁵ 5 U.S.C. § 8129(b).

¹⁶ 20 C.F.R. § 10.433.

properly, including the duty to report any employment or self-employment activities and income.¹⁷ Appellant, therefore, failed to furnish information which he knew or should have known to be material to OWCP. As he is not without fault in creating the overpayment, it is not subject to waiver.

On appeal appellant asserts that he was entitled to an oral hearing rather than a telephone conference. As the discretion of the hearing representative, however, an oral hearing may be conducted by telephone or teleconference.¹⁸ The form of the hearing should be no impediment to any witness willing to give testimony.

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.¹⁹ Section 10.441(a) of the regulations provide:

“When an overpayment has been made to an individual who is 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. If no refund is made, [OWCP] 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.”²⁰

ANALYSIS -- ISSUE 4

On the overpayment recovery questionnaire, appellant provided monthly income of \$5,831.00 and monthly expenses of \$4,800.06. The hearing representative found that he could repay the overpayment at a rate of \$500.00 per month as his monthly income exceeded his expenses by \$1,000.00. Based on the evidence, OWCP gave due regard to the relevant factors noted above and did not abuse its discretion in setting the rate of recovery.²¹ The Board finds that it properly determined that the overpayment could be recovered by deducting \$500.00 from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 5

Section 8126 of FECA provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of

¹⁷ See *P.M.*, *supra* note 10.

¹⁸ *Id.* at §§ 10.439, 10.615.

¹⁹ *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

²⁰ 20 C.F.R. § 10.441(a).

²¹ See *Howard R. Nahikian*, 53 ECAB 406 (2002).

witnesses within a radius of 100 miles.²² The implementing regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.²³ In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.²⁴ Section 10.619(a)(1) of the implementing regulations provide that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.²⁵ OWCP's hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.²⁶ Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.²⁷

ANALYSIS -- ISSUE 5

On July 23, 2010 appellant requested OWCP issue subpoena to four individuals and a copy of all video and audio recordings and investigative records.²⁸ The hearing representative denied his request to subpoena the individuals on October 18, 2010 after finding that he did not show why that was the best method of obtaining evidence.

On appeal appellant argues that the hearing representative erred in denying his subpoena request. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.²⁹ It is not enough to show that the evidence could be

²² 5 U.S.C. § 8126(1).

²³ 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

²⁴ *Id.*

²⁵ 20 C.F.R. § 10.619(a)(1).

²⁶ See *Gregorio E. Conde*, *supra* note 23.

²⁷ *Claudio Vazquez*, 52 ECAB 496 (2001).

²⁸ As noted, OWCP provided a copy of the investigative report and video surveillance tape on September 7, 2010.

²⁹ See *Claudio Vazquez*, *supra* note 27.

construed so as to produce a contrary factual conclusion.³⁰ As appellant has not shown that the testimony from the individuals in question could not be obtained by other means, the Board finds no abuse of discretion in the hearing representative's denial of his request for subpoenas.³¹

CONCLUSION

The Board finds appellant forfeited compensation for the period January 10, 2006 to July 18, 2007 because he failed to report employment activity. The Board further finds that he received a \$54,454.82 overpayment of compensation for the period of the forfeiture and that he was at fault in creating the overpayment. The Board additionally finds that OWCP properly found that it would deduct \$500.00 from continuing compensation as repayment of the overpayment. The Board also finds that the hearing representative properly denied appellant's request to issue subpoenas.

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 7, 2012
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

³⁰ See *R.C.*, 58 ECAB 238 (2006); *Tina D. Francis*, 56 ECAB 180 (2004).

³¹ *Id.*