

FACTUAL HISTORY

On March 6, 2010 appellant, then a 36-year-old rural carrier associate, sustained a traumatic back injury in the performance of duty when she lifted a tray of mail. OWCP accepted her claim for lumbar sprain. Appellant returned to work at reduced hours and received compensation for intermittent wage loss.

Appellant completed numerous Forms CA-7 to claim compensation. Each form asked her to respond to the following:

“You must report all earnings from employment (**outside** your federal job); include any employment for which you received a salary, wages, income, sales commissions, piecework, or payment of **any** kind during the period(s) claimed in Section 2. Include self-employment, involvement in business enterprises, as well as service with the military forces. Fraudulent concealment of employment or failure to report income may result in forfeiture of compensation benefits and/or criminal prosecution. *Have you worked outside your federal job for the period(s) claimed in Section 2?*” (Emphasis in the original.)

If she had worked outside her federal job, the form asked appellant to provide the name and address of the business, the dates worked and the type of work performed. On each form she answered “No.”

Appellant informed the U.S. Postal Service, Office of the Inspector General (OIG) that after her injury she shopped at discount stores for merchandise to sell on eBay™ to supplement her income. The OIG found that she conducted business transactions, which included purchasing a fine fabric tagging gun and a postal scale, making website payments to a firm and routinely purchasing PayPal™ shipping labels. The records showed that appellant frequently purchased and shipped items since May 2010.

In an August 8, 2011 decision, OWCP found that appellant forfeited all wage-loss compensation paid from May 25, 2010 through April 15, 2011. It noted that she had bought and sold items online to supplement her income, that she had received commissions from online sales, yet she claimed on her CA-7 forms that she did not work outside her federal job during the periods claimed and did not have any other earnings. OWCP found that appellant knowingly omitted or understated earnings under 5 U.S.C. § 8106(b).

As a result of the forfeiture, OWCP found that appellant received an overpayment of \$9,522.91 during the same period. It also found that she was at fault in the creation of the overpayment because she knowingly accepted compensation to which she was not entitled.

Appellant explained: “I honestly did not know that the \$50.00 - \$150.00 a month money my hobby provided was supposed to be on the CA-7.”³ She stated that she had no idea that she was withholding any information. “I would’ve reported every penny if I thought for one second I was doing something wrong.”

³ It appears appellant earned \$520.00 over the last six months of 2010.

In an October 26, 2011 decision, OWCP found appellant at fault in creating the overpayment on the grounds that she knowingly accepted wage-loss compensation to which she was not entitled. It asked her to forward a check for the full amount.

On appeal, appellant states that she truly did not know that she had to disclose her hobby. She explains that she enjoyed doing it as a hobby, not as any means to make a living. Appellant was used to being very busy working two jobs and when she hurt her back she became bored. “I by no means tried to be deceitful in this.”

LEGAL PRECEDENT -- ISSUE 1

The Secretary of Labor may require a partially disabled employee to report her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the time the Secretary specifies. An employee who 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.⁴

The employee, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if she knowingly failed to report employment or earnings. It is not enough merely to establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty and thus must be narrowly construed.⁵ The term “knowingly” is defined by regulations as “with knowledge, consciously, willfully or intentionally.”⁶

ANALYSIS -- ISSUE 1

The Board finds that the plain language of Form CA-7, section 3, was sufficient to put appellant on notice that she was required to report all earnings outside her federal job.⁷ Appellant was, of course, fully aware that she had earnings from reselling merchandise online. But she answered “No” to section 3 because she believed that she had good reason not to report those earnings: It was only a hobby, an enjoyable activity to help break the boredom brought on by her disabling injury.

The Board believes that appellant has been genuine and forthright about her reasons for answering “No” to section 3. The Board does not wish to imply or leave the impression that she attempted to be deceitful. But appellant’s claim that she had no idea that she was withholding any information appears factually incorrect. Clearly, she did not provide OWCP with information about her earnings. Appellant had earnings, but she did not report them because she

⁴ 5 U.S.C. § 8106(b)(2).

⁵ *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

⁶ 20 C.F.R. § 10.5(n).

⁷ *Cf. Kenneth T. Truhlar*, Docket No. 05-1500 (issued January 12, 2006) (“Have you worked outside your federal job during the period(s) claimed in [s]ection 2?”) (Include salaried, self-employed, commissioned, volunteer, etc.”); *Karen Spurling*, 56 ECAB 189 (2004); *Billy J. McCamey*, Docket No. 00-2725 (issued June 11, 2002) (finding that the Form CA-8s that the claimant completed were insufficient to support a forfeiture of compensation).

thought she did not have to under the circumstances. She did not think she was doing anything wrong. Appellant felt she answered the question properly.

But the language of section 3 did not instruct appellant to report all earnings outside her federal job unless the earnings were insufficient to earn a living or unless they derived from what might be considered a hobby. Those were qualifications that she herself supplied. The actual language was far more inclusive: all earnings, whether from employment or self-employment or involvement in a business enterprise and not just salary or wages, but income, sales commissions, piecework or “payment of **any** kind.” (Emphasis in the original.) The purpose was one of full disclosure so that OWCP could determine whether the earnings, under the circumstances, made any difference to the amount of compensation appellant should receive. It might be that the earnings would have no effect on compensation. OWCP cannot leave that determination to the claimant who is receiving compensation. Claimants must report all earnings outside their federal jobs, no matter the source.

The forfeiture standard requires that the employee knowingly omit or understate any part of her earnings. Appellant did not report her earnings and she knowingly did not report them. That she was mistaken in her assumptions is immaterial. Accordingly, the Board finds that appellant knowingly omitted her earnings from reselling merchandise and thereby forfeited her entitlement to compensation for the period in question.

LEGAL PRECEDENT -- ISSUE 2

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 she received 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 with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which she knew or should have known to be incorrect; (2) Failed to provide information which she knew or should have known to be material; or (3) Accepted a payment which she knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁸

Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances of the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that she is being overpaid.⁹

ANALYSIS -- ISSUE 2

Fact and amount of overpayment are not in dispute. The forfeiture of compensation from May 25, 2010 through April 15, 2011 created an overpayment of all wage-loss compensation

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.* § 10.433(b).

appellant received for that period. The Board will therefore affirm OWCP's October 26, 2011 decision on the issues of fact and amount of overpayment.

OWCP found that appellant was at fault in the creation of this overpayment because she knowingly accepted wage-loss compensation to which she was not entitled. To be precise, the standard is whether appellant accepted a payment which she knew or should have known to be incorrect.

The record shows that appellant received direct payments of compensation for wage loss throughout the period. The question that remains under the fault standard is whether, at the time she accepted each of the compensation payments in question, she knew or should have known they were incorrect.¹⁰

The Board has carefully reviewed OWCP's overpayment decision, both preliminary and final and can find no convincing argument that appellant should have known that she was being overpaid at the time she accepted the checks. It appears that OWCP found appellant at fault because she knowingly omitted earnings. But that is the standard for forfeiture under section 8106(b)(2) of FECA, not the standard for fault under section 10.433(a) of the regulations.

As noted earlier, whether an individual was at fault with respect to the creation of an overpayment depends on the circumstances of the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that she is being overpaid. The circumstances here do not support OWCP's fault finding. The finding presupposes that insubstantial earnings from a hobby would necessarily reduce appellant's entitlement to compensation and that she should have known this or that failure to report such earnings would necessarily result in forfeiture and that she should have known this. In fact, the language of CA-7 form, section 3, advised that fraudulent concealment of employment or failure to report income "may result in forfeiture" of compensation benefits, not that it would. It admitted only to the possibility.

Appellant should have known that she was required to report all earnings outside her federal job, but OWCP has not made the case that, when she received compensation checks after May 25, 2010, she should have realized that she was not entitled to them. Accordingly, the Board finds that OWCP has failed to establish fault in the creation of the overpayment. The Board will set aside OWCP's October 26, 2011 decision on the issue of fault and will remand the case for consideration of waiver. After such further development as may be necessary, OWCP shall issue an appropriate final decision on whether appellant is entitled to waiver of the overpayment.

CONCLUSION

The Board finds that appellant forfeited her entitlement to compensation from May 25, 2010 to April 15, 2011. The Board also finds that OWCP has failed to establish that she was at fault in creating the resulting overpayment of compensation.

¹⁰ *T.C.*, Docket No. 05-249 (issued July 24, 2006) (the regulations define fault by what the claimant knew or should have known at the time of acceptance, not by what she later learned).

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2011 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action.

Issued: August 27, 2012
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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