

FACTUAL HISTORY

The case was before the Board on a prior appeal.² OWCP had issued a preliminary determination dated April 25, 2013 finding an overpayment of compensation. According to the record, appellant had failed to disclose employment activities on Form EN1032s dated November 23, 2007, November 28, 2008, November 21, 2009, and November 24, 2010. OWCP found in its April 25, 2013 preliminary determination that appellant had sold items at her farm and engaged in other employment activity, such as offering tours, while receiving FECA compensation. It found that an overpayment was created from August 23, 2006 (15 months prior to the November 23, 2007 EN1032) through November 24, 2010. According to the preliminary determination, appellant was overpaid for this period “because she did not report self-employment on EN1032 forms and knew or should have known she was creating an overpayment.” OWCP also made a preliminary finding that appellant was with fault in creating the overpayment, as she should have known her compensation was “subject to recovery” if she did not respond truthfully to the questions on the EN1032 forms.

OWCP issued a final overpayment decision dated May 29, 2013 finding that appellant at the time had chosen not to submit evidence either refuting the amount of the overpayment or the finding of fault. However, appellant had submitted additional evidence on May 29, 2013 that had not been reviewed by OWCP. The Board remanded the case for proper review of the evidence of record.³

In a letter dated November 8, 2013, OWCP reported that, in a telephone conference, appellant had been advised to provide sufficient proof of her monthly expenses. It provided her 15 days to submit the additional evidence. By letter dated November 13, 2013, appellant stated that she had previously explained that her insurance rates had increased and her social security payment had been reduced, but that OWCP had refused to listen. She submitted receipts, copies of invoices, and other financial documents.

By decision dated January 24, 2014, OWCP issued a final determination with respect to an overpayment of \$148,642.64 and finding of fault. As to fault, it found that appellant should have known her compensation was “subject to forfeiture.”

LEGAL PRECEDENT

Section 8106(b) of FECA 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 times the Secretary specifies.... An employee who --

- (1) fails to make an affidavit or report when required; or

² Docket No. 13-1840 (issued September 24, 2013).

³ *Id.*

(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 ... under section 8129 of this title, unless recovery is waived under that section.”⁴

As forfeiture is a penalty, it is not enough to establish that the claimant failed to report earnings from employment or self-employment. OWCP must show that the claimant knowingly omitted or understated any part of his earnings.

“Knowingly” means “with knowledge, consciously, willfully or intentionally.”⁵ OWCP thus has the burden of proof to establish that appellant did, either with knowledge, consciously, willfully, or intentionally, omit or understate any part of her earnings. To meet this burden, it is required to examine closely appellant’s activities and statements. This burden may be met without an admission by the claimant if the circumstances of the case establish that she failed to reveal fully and truthfully the full extent of her employment activities and earnings.⁶

Earnings from employment or self-employment means gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses, and any other goods or services received in kind as remuneration. It also means 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.⁷

The test of what constitutes reportable earnings is not whether the claimant received a salary, but what it would have cost to have someone else to do the work. Where a claimant takes an active role in the operation of a business, the claimant is obligated to report as earnings the amount that would have been paid to a person doing such work.⁸

OWCP regulations also 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.⁹ Its procedures note that the statutory provision for forfeiture of compensation is 5 U.S.C. § 8106(b).¹⁰ All claimants on the

⁴ *Supra* note 1 at § 8106(b).

⁵ 20 C.F.R. 10.5(n) (1999)

⁶ *Terryl A. Geer*, 51 ECAB 168 (1999).

⁷ *Supra* note 5 at § 10.5(g).

⁸ *Anthony A. Nobile*, 44 ECAB 268, 271 (1992) (the claimant worked at a liquor store owned by his family but contended that he received no salary for his work).

⁹ *Supra* note 5 at § 10.529.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.2 (May 2012).

periodic rolls must complete an EN1032 on a yearly basis. The form covers a 15-month period and provides specific instructions as to reporting employment activity, including self-employment.¹¹ A forfeiture decision applying section 8106(b) must make a determination that the claimant failed to report earnings, and that such failure was done knowingly.¹²

In determining whether OWCP has discharged its burden of proof, it is required by statute and regulations to make findings of fact.¹³ Its procedure further specifies that a final decision of OWCP must include findings of fact and provide clear reasoning which allows the claimant to understand the precise defect of the claim and the kind of evidence which would tend to overcome it.¹⁴ These requirements are supported by Board precedent.¹⁵ The forfeiture provision is a penalty provision and is thus narrowly construed.¹⁶

ANALYSIS

In the present case, OWCP made a finding that an overpayment occurred because appellant had not disclosed employment activity on periodic EN1032 forms. An employee may, as noted above, be subject to forfeiture for knowingly omitting or understating any part of her earnings on these forms.

In this case, OWCP failed to establish that appellant had knowingly omitted or understated her employment activities. It did not cite to 5 U.S.C. § 8106(b), nor any other authority for its finding that simply the failure to provide information on the EN1032 forms results in forfeiture of compensation. The EN1032 form requests information from the previous 15 months and advises a claimant that failure to report income “may result in the forfeiture of compensation.”

To find that appellant has, in fact, forfeited her right to compensation under FECA, there must first be a finding that appellant failed to truthfully report her earnings. In order to meet the standard under 5 U.S.C. § 8106(b), there must be a finding of intent.¹⁷

As 5 U.S.C. § 8106(b) is a penalty provision, it must be strictly construed. In this case, OWCP failed to adequately address the underlying basis for the declared overpayment of compensation. Its determinations in this case did not discuss the issue but rather referenced the “knew or should have known” standard with respect to the overpayment.

¹¹ *Id.* at Chapter 2.1402.4 (May 2012).

¹² *Id.* at Chapter 2.1402.5 (May 2012).

¹³ 5 U.S.C. § 8124 provides that OWCP shall determine and make findings of fact with respect to an award for or against payment of compensation. *Supra* note 5 at § 10.126 states that a decision shall contain findings of fact and a statement of reasons.

¹⁴ *Supra* note 10 at Chapter 2.1400.5 (February 2013).

¹⁵ *See James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

¹⁶ *M.C.*, Docket No. 10-881 (issued February 7, 2011); *Karen Spurling*, 56 ECAB 189, 194 n.9 (2004).

¹⁷ *Supra* note 4.

In *J.A.*, OWCP had issued a preliminary determination of an overpayment based on forfeiture, but an OWCP hearing representative set aside the preliminary determination.¹⁸ A second preliminary determination, as well as an OWCP hearing representative's decision, failed to address the forfeiture issue or to explain the basis of the overpayment. The Board remanded the case, finding that it was premature to address fact of overpayment when the presumed basis for the overpayment (forfeiture) had not been adequately addressed by OWCP. As previously stated, OWCP's decision "does not contain detailed facts and findings regarding the forfeiture matter. In the absence of such facts and findings, it is premature to consider whether OWCP properly found an overpayment of compensation and whether appellant was at fault in the creation of such an overpayment because the presumed basis for this overpayment (*i.e.*, the forfeiture of compensation for various periods) has not been adequately addressed by OWCP."¹⁹

It is well established, as noted above, that a claimant is entitled to a decision that adequately provides a statement of reasons and findings of fact.²⁰ OWCP has not established an overpayment of compensation in this case. It must properly identify and discuss the relevant authority that serves as the foundation for the creation of an overpayment. The case will be remanded for proper findings with respect to the overpayment issues. In view of the Board's holding, the issue of fault and waiver will not be addressed.

CONCLUSION

The Board finds that the case is not in posture for decision with respect to an overpayment of compensation.

¹⁸ Docket No. 12-1793 (issued May 7, 2013).

¹⁹ *Id.*

²⁰ *Supra* note 5 at § 10.126.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 24, 2014 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: June 10, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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