United States Department of Labor
Employees' Compensation Appeals Board

A.C., Appellant	)	
and	)	**Docket No. 11-1760**
	)	**Issued: April 13, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Garfield, NJ, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 26, 2011 appellant, through his attorney, filed a timely appeal from a June 22, 2011 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant forfeited his right to compensation for the period May 7, 2009 through October 7, 2010; (2) whether OWCP properly found that an overpayment in compensation in the amount of $43,312.87 had been created because appellant did not report work activity; and (3) whether OWCP properly found that appellant was at fault in the creation of the overpayment and, therefore, it was not subject to waiver.

On appeal his attorney asserts that the decision is contrary to fact and law.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On December 2, 2008 appellant, then a 26-year-old part-time flexible city carrier, filed a traumatic injury claim alleging that he injured his lower back that day lifting a tub of mail. He began modified duty. OWCP accepted the claim for lumbar sprain. Magnetic resonance imaging (MRI) scan studies of the lumbar spine on January 3 and February 3, 2009 demonstrated disc herniations at L4-5 and L5-S1. Appellant had a recurrence of disability on April 15, 2009 and was placed on the periodic compensation rolls.[2] On August 4, 2009 the additional conditions of herniated discs at L4-5 and L5-S1 were accepted as employment related.

In reports dated April 15 to July 22, 2009, Dr. Mark J. Ruoff, an attending Board-certified orthopedic surgeon, provided findings on examination and advised that appellant could not work. On August 19, 2009 he stated that appellant could return to sedentary duty for four hours a day. OWCP referred appellant to Dr. David Rubinfeld, a Board-certified orthopedic surgeon, for a second opinion evaluation.[3] In a September 21, 2009 report, Dr. Rubinfeld noted appellant's complaints of constant back pain. He provided physical examination findings and diagnosed lumbosacral sprain with possible radiculopathy, caused by the December 2, 2008 employment injury. Dr. Rubinfeld advised that appellant could not return to his carrier position but could perform modified duty for eight hours a day. OWCP determined that a conflict in medical opinion arose between Dr. Ruoff and Dr. Rubinfeld as to whether appellant had continuing work-related disability, and referred him to Dr. Arash Emami, Board-certified in orthopedic surgery, for an impartial evaluation. In reports dated September 9 and October 21, 2010, Dr. Ruoff advised that appellant could work eight hours of sedentary duty each day.

Appellant submitted an OWCP EN1032 form, which he signed on October 7, 2010. He stated that he worked for the employing establishment until April 2009. Appellant certified that he was not self-employed or involved in any business enterprise for the previous 15 months and that he performed no volunteer work.

The Office of Inspector General (OIG) of the employing establishment conducted an investigation. In a report dated October 28, 2010, the OIG noted that surveillance of appellant had been conducted on numerous occasions from July 12 to September 2, 2010 which disclosed that he was active and did not appear to be totally disabled. Appellant was observed and videotaped repeatedly carrying bags to a vehicle and driving to Club Zone Radio, an online radio station, located in an office building, where appellant worked as a disc jockey (DJ). The OIG report noted that appellant did not report his outside employment while receiving FECA benefits, but that he was self-employed and operated an online radio station business. The report noted that appellant posted information about his work on his Facebook page, announcing that he worked as a DJ from 8:00 a.m. to 12:00 p.m. daily, and that the activities observed during surveillance appeared to conflict with his claimed medical restrictions. The OIG furnished supporting documentation including copies of numerous claim forms and the EN1032 form, signed by appellant on October 7, 2010 in which he stated that he had not been self-employed or involved in any business enterprise in the past 15 months. The report included photographs

[2] A copy of the letter informing appellant that he was placed on the periodic rolls is not found in the case record.

[3] A copy of the referral letter is not in the case record.

documenting appellant's activities. Two OIG agents interviewed Dr. Ruoff on October 13, 2010. After watching a video provided by the agents, the physician advised that appellant could have returned to work on July 12, 2010, the first date of activity on the video, and provided a written statement supporting this conclusion. The OIG furnished a digital video disc with captured video of appellant's physical activities and work activities as an online DJ.

On November 8, 2010 appellant underwent a functional capacity evaluation. The examiners reported that he demonstrated submaximal effort compatible with symptom magnification and concluded that, nonetheless, he demonstrated the ability for medium category work compatible with the essential job duties of a mail carrier.

On November 19, 2010 the employing establishment offered appellant a modified-duty position, casing and delivering mail. On November 30, 2010 Dr. Emami's office reported that appellant did not attend the scheduled impartial evaluation. In a November 30, 2010 report, Dr. Ruoff advised that appellant could work an eight-hour day, casing mail for up to four hours each day, with occasional lifting of up to 25 pounds. On December 2, 2010 the employing establishment informed appellant that the offered position remained available.

By decision dated December 3, 2010, OWCP found that appellant forfeited his right to compensation for the period May 7, 2009 through October 7, 2010 because he knowingly failed to report his employment activity on OWCP EN1032 forms. On December 3, 2010 it also made a preliminary determination that he received an overpayment of compensation in the amount of $43,312.87 because he knowingly failed to report employment activity for the period May 7, 2009 through October 7, 2010 and that he had received compensation totaling $43,312.87 for this period. Appellant was found at fault in creating the overpayment because he made an incorrect statement as to a material fact which he knew or should have known was incorrect, failed to provide information which he knew or should have known was material and accepted a payment which he knew or should have known was incorrect, based on his failure to report self-employment and outside employment activity on OWCP EN1032 and claim forms. Computer printouts contained in the record document that appellant received compensation of $43,312.87 for the period May 7, 2009 through October 7, 2010.

Also on December 3, 2010 OWCP advised appellant by letter that the offered position was suitable. Appellant was notified that, if he failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, his right to compensation for wage loss or a schedule award would be terminated. He was given 30 days to respond.

On December 22, 2010 appellant, through his attorney, requested a hearing regarding the December 3, 2010 forfeiture decision. On January 4, 2010 the employing establishment informed OWCP that the offered position was still available.

By decision dated January 6, 2011, OWCP terminated appellant's compensation benefits, effective January 4, 2011, on the grounds that he refused to accept an offer of suitable work.

On January 11, 2011 appellant, through his attorney, requested a hearing regarding the January 6, 2011 decision.

A telephonic hearing was held on April 5, 2011 regarding the December 3, 2011 forfeiture decision. Appellant testified that he operated an online radio station with his cousin, including during the period May 26 to September 2, 2010. He stated that it was a hobby and maintained that he did not fraudulently conceal the activity because he did not believe it was work. Appellant paid to host the website, did not sell advertising, and acted as a DJ. His cousin handled the business end, and they paid music royalties with website hot links to clubs. Appellant described his employment injury and testified that he did not carry heavy equipment. Upon questioning by the hearing representative, appellant stated that his DJ job was one people could get paid for. In a second April 5, 2011 hearing, regarding the overpayment of compensation, he reiterated that he did not think that running an internet radio station was a job, but rather, just a hobby. Appellant stated that the station was called Club Zone, and that he and his cousin were co-CEOs. He testified that he would only sit briefly while working as a DJ.

On May 23, 2011 appellant submitted an overpayment questionnaire. He provided no information regarding income or assets, and described expenses totaling $1,270.00 a month.[4] Appellant explained that he was not at fault because he had not collected extra income, and that he did not remember the conditions under which he could receive compensation.

By decision dated June 22, 2011, an OWCP hearing representative found that appellant forfeited compensation for the period May 7, 2009 through October 7, 2010 because he was involved in a business enterprise which he did not report on an OWCP EN1032 form. The December 3, 2010 decision was affirmed. The hearing representative also finalized the preliminary overpayment determination, finding appellant at fault because he knowingly failed to report employment activities. The hearing representative found that, as appellant submitted insufficient financial information, the full amount of the overpayment of compensation, $43,312.87, was due and payable.

LEGAL PRECEDENT -- ISSUE 1

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 states that an employee who:

> "(1) fails to make an affidavit or report when required; or
>
> "(2) 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."[5]

[4] These included utilities totaling $225.00, a car payment of $360.00, child support of $260.00, insurance of $175.00 and a credit card payment of $250.00, for a total of $1,270.00.

[5] 5 U.S.C. § 8106(b); *see F.C.*, 59 ECAB 666 (2007).

Section 10.5(g) of OWCP's regulations define 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
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> "(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."[6]

In order to establish that a compensationer should forfeit the compensation received for the periods covered by completed EN1032 forms, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.[7] As forfeiture is a 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" as defined in OWCP's implementing regulation and Board precedent means "with knowledge; consciously; intelligently; willfully; intentionally."[8] The language on 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.

ANALYSIS -- ISSUE 1

OWCP determined that appellant forfeited his entitlement to compensation for the period May 7, 2009 through October 7, 2010. He signed an EN1032 form on October 7, 2010 covering the period May 7, 2009 through October 7, 2010. Appellant stated on the form that, other than employment with the employing establishment through April 15, 2009, he had no additional employment, self-employment, or involvement in a business, or perform volunteer work. The October 28, 2010 OIG report and accompanying documentation, however, establishes that appellant worked as an online DJ for Club Zone Radio during this period. His hearing testimony and the finding of the OIG which included photographs of him going to the office building where Club Zone Radio was located, is substantial evidence that he was involved in a business enterprise while receiving wage-loss compensation under FECA. While he asserted that acting as a DJ was merely a hobby, the Board finds his activities were too extensive to be considered as such. The OIG investigation demonstrated that Club Zone Radio was operated at an office building. Appellant testified at the hearing that he performed the duties of a DJ for four hours

[6] 20 C.F.R. § 10.5(g).

[7] *Robert R. Holmes*, 49 ECAB 161 (1997); 20 C.F.R. § 10.5(n).

[8] *Christine C. Burgess*, 43 ECAB 449 (1992).

daily and that he was a co-CEO of Club Zone Radio but that his cousin handled the business end of the enterprise. Neither lack of profits, nor the characterization of the activities as a hobby, removes the duty of a recipient of compensation to report the estimated cost to have someone else perform his duties.[9]

Appellant can be subject to the forfeiture provision of section 8106(b) only if he "knowingly" failed to report earnings or employment. OWCP has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, failed to report earnings from employment.[10] In this case, appellant completed an EN1032 form on October 7, 2010 which advised him that he must report all employment and all earnings from employment, self-employment, and involvement in a business enterprise. The EN1032 form 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 a strongly worded certification clause on the EN1032 form, provide persuasive evidence that he "knowingly" understated employment information regarding his involvement in the business enterprise Club Zone radio.[11] The Board therefore finds that OWCP, properly found that he forfeited her compensation for the period May 7, 2009 through October 7, 2010.

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.
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> "(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 and other relevant statues."[12]

ANALYSIS -- ISSUE 2

As noted, OWCP regulations provide that it may declare an overpayment of compensation for the period of a given forfeiture of compensation. If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by an EN1032 form which he or she fails to report, the claimant is not entitled to any compensation for any portion of the period covered by the report, even though he or she may not

[9] *J.S.*, 58 ECAB 515 (2007).

[10] *Supra* note 7.

[11] *See Harold F. Franklin*, 57 ECAB 387 (2006).

[12] 20 C.F.R. § 10.529.

have had earnings during a portion of that period.[13] OWCP paid appellant compensation in the amount of $43,312.87 for the period May 7, 2009 through October 7, 2010. As OWCP properly found that appellant forfeited his entitlement to compensation during this period because he failed to report earnings from employment on an EN1032 form, there exists an overpayment of compensation in the amount of $43,312.87.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 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."[14]

Section 10.433(a) of OWCP's regulations provide that OWCP:

> "[M]ay 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)."[15]

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.[16]

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 an OWCP 1032 form covering the period May 7, 2009 through October 7, 2010. As described above, the record establishes that appellant had unreported employment activity during this period and knowingly failed to furnish this material information to OWCP. Appellant signed a

[13] *Louis P. McKenna, Jr.*, 46 ECAB 428 (1994).

[14] 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

[15] 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

[16] 20 C.F.R. § 10.433(b); *Duane C. Rawlings*, 55 ECAB 366 (2004).

certification clause on the EN1032 form 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. By signing the form, appellant is deemed to have acknowledged his duty to fill out the form properly, including the duty to report any employment, self-employment, or involvement in a business enterprise. He 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.[17]

CONCLUSION

The Board finds that appellant forfeited his entitlement to compensation for the period May 7, 2009 through October 7, 2010. The Board further finds that he received an overpayment of compensation in the amount of $43,312.87 and that he was at fault in the creation of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 13, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[17] *Harold F. Franklin, supra* note 11. The Board notes that its jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. Where, as here, a claimant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act. *Albert Pineiro*, 51 ECAB 310 (2000).