

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

E.L., Appellant)	
)	
and)	
)	Docket No. 11-1046
DEPARTMENT OF HOMELAND SECURITY,)	Issued: August 22, 2012
TRANSPORTATION SECURITY)	
ADMINISTRATION, PORTLAND)	
INTERNATIONAL AIRPORT, Portland, OR,)	
Employer)	
)	

<i>Appearances:</i>	Oral Argument April 11, 2012
<i>Appellant, pro se</i>	
<i>No appearance, for the Director</i>	

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 15, 2011 appellant filed a timely appeal from an October 22, 2010 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 the case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant forfeited his right to compensation for the period December 14, 2005 through April 27, 2009; (2) whether OWCP properly found that an overpayment in compensation in the amount of \$76,092.48 was 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 it was not subject to waiver.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 6, 2005 appellant, then a 28-year-old security screener, injured his low back while lifting a heavy bag to a search table while in the performance of duty. The claim was initially accepted for lumbar strain. Appellant stopped work on November 13, 2005 and was placed on the periodic compensation rolls. The claim was subsequently accepted for aggravation of degenerative disc disease at L5-S1 with annular disc bulge and spondylolisthesis.

Appellant submitted EN1032 forms signed on April 14, 2007 and May 7, 2008, on which he reported no earnings from employment, work activity, involvement in a business enterprise or volunteer work. On an EN1032 signed on April 27, 2009 he reported that he was a volunteer for his father's gunsmith business.

On April 15, 2009 the employer provided a report of investigation. During March 2008, a review of OWCP records raised an allegation of fraud by appellant in his claim. A suspected falsified document describing work restrictions was ultimately determined to be an incorrectly dated facsimile transmission reading. It was determined that the facsimile transmission header date was erroneously set. During a subsequent investigation, on November 13 and 14, 2008 appellant was the subject of surveillance; but no activity inconsistent with his physical limitations was observed and he was not seen performing any work activity. On January 30, 2009 a review of appellant's bank records showed possible income from a manufacturing and arms company owned by his father in addition to OWCP compensation payments and income as the executor of an estate. In a March 18, 2009 interview statement, appellant advised that his father owned a manufacturing and arms company that conducted firearms transactions.² Appellant related that, while a registered agent for the company, he received no salary. As a registered agent, he could complete documents required by the Bureau of Alcohol, Tobacco and Firearms (ATF) for transactions when his father was out of town. Appellant had performed similar services prior to his work at the employing establishment.³ He stated that he received no compensation from his father's company, and that checks written to him on the company account were for reimbursement of shared expenses related to the household.⁴ Further, appellant received no salary or compensation while acting as an executor for a friend, but received an electrical generator worth \$500.00 to \$600.00. The materials from the investigation were forwarded to the United States Attorney on March 20, 2009; but he declined to prosecute.

The record includes copies of withdrawal slips, deposit forms and cancelled checks, including payments to appellant from his brother.⁵ The record reflects payment to Comcast,

² The record reflects that appellant lives at the same residence from which his father conducted the manufacturing and arms business.

³ At oral argument, appellant related that there were three or four occasions when his father was in Afghanistan that he signed transfer documents for guns sold by his father to the ultimate purchasers.

⁴ At oral argument, appellant related that he and his wife personally owned over 100 firearms and the checks documented their purchase.

⁵ The canceled checks were from both appellant's personal account, dated April 12, 2007 to November 11, 2008; a company account dated September 22 to November 11, 2005; and a joint account, held with his father, dated October 27, 2005 to September 25, 2008, as well as checks regarding the estate of D.M.

local county animal services, Home Depot credit services, Safeway, Chase and miscellaneous cash.

On May 26, 2009 Dr. Michael A. Sandquist, a Board-certified neurosurgeon, performed a left L5-S1 discectomy. Appellant returned to work at four hours of modified duty on July 10, 2009 and to eight hours daily on July 27, 2009. He was released to full duty in October 2009.

By decision dated February 24, 2010, OWCP found that appellant forfeited his right to compensation for the period December 14, 2005 through April 27, 2009. It found that he had work activities as a registered agent for his father's manufacturing and arms company, that there was a joint bank account and that checks from the business account were made out to appellant. OWCP found that the investigation established appellant's significant participation in his father's company. As appellant failed to disclose his employment activities and earnings as required on the April 14, 2007 and April 27, 2009 EN1032 forms, his benefits were forfeited.

On February 24, 2010 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$76,092.48 because he knowingly failed to report his employment activity and earnings for the period December 14, 2005 through April 27, 2009 and received compensation in that amount. 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 the EN1032 forms. Computer print-outs contained in the record document that he received compensation of \$76,092.48 for the period December 14, 2005 through April 27, 2009.

On March 22, 2010 appellant, through his attorney, requested a hearing and submitted an overpayment questionnaire signed on March 18, 2010. Appellant noted that his father's business was attached to their shared residence. He denied any significant involvement in the company and noted he did not ever receive payment or compensation for any favors performed. Appellant's father submitted a March 28, 2010 statement advising that he shared a home with appellant and split the mortgage and utility expenses. When he was out of town, appellant would pay bills and ultimately be reimbursed out of the business account. On rare occasions when out of town, appellant signed transfer documents on completed transactions that had been pending approval by ATF. His father noted that his son was not paid any wages or salary.

At the June 14, 2010 hearing, appellant's father testified that he owned a gunsmith business for 20 years. He and appellant were registered agents as required by ATF to transfer firearms. With regard to their names on the business license, appellant's father testified that he lived with his son and ran his business as a hobby from their home. Appellant would pay utility bills or other shared expenses as a convenience when he travelled out of the country. At no time did he pay appellant a wage or salary. Appellant testified that RSR was a sporting goods wholesaler where guns could be purchased. He testified that he mainly repaired normal firearms but purchased specialized or rare small arms for his own use and ATF required he and his son be licensed. Appellant's father noted that the business was primarily a hobby and that his primary occupation was as a project manager subcontracting for a software company. He noted that the ATF license allowed for the purchase of all kinds of guns and that he and appellant took

advantage of that fact for their personal use. Appellant did not perform any repairs or make any deliveries.

Appellant testified as to his involvement with his father's company and that he obtained an ATF license in about 2000. Prior to that time, his father went out of town after selling a silencer to a friend. The ATF required that a form be completed before the transfer of the item could be made. Appellant completed the form but a subsequent random ATF audit determined that he was not on his father's license, which violated the law. Appellant was subsequently placed on the business license in order to complete transfers on occasion when his father was out of town. He stated that he was not paid and occasionally completed paperwork as a favor for his father. The checks written to him by his brother from the business account were for reimbursement of common household items as they shared the same residence. Appellant's checks to RSR were for his personal purchase of firearms and those of his girlfriend, now wife. Together, they owned more than 100 firearms while his father owned 200 to 300. Appellant testified that he did not report any business activity because he performed an occasional favor for his father. He signed occasional gun transfer documents but did not perform any repairs. Over the prior five years, the time spent assisting his father was approximately five minutes total.

In a July 6, 2010 pleading, appellant's attorney argued that appellant did not knowingly fail to report earnings on EN1032 forms because, as supported by his hearing testimony, his sole activity was to occasionally sign an ATF form to complete a gun transfer initiated by his father, when his father was unavailable. Appellant resubmitted the March 18, 2010 overpayment questionnaire, copies of bills, tax forms, and his earnings and leave statements and those of his wife.

By decision dated October 22, 2010, an OWCP hearing representative found that appellant forfeited compensation for the period December 24, 2005 through April 27, 2009, because he did not report his employment activities on the EN1032 forms as required. Further, the hearing representative finalized the overpayment of compensation in the amount of \$76,092.48 and found appellant at fault because he knowingly failed to report employment activities. The hearing representative set a repayment schedule of \$600.00 a month.

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.”⁶

⁶ 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

“(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.”⁷

In order to establish that a compensationner 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.⁸ 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 1032 forms. The term “knowingly” as defined in OWCP's implementing regulations and Board precedent means “with knowledge; consciously; intelligently; willfully; intentionally.”⁹ The language on the 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 penalties may be applied for failure to report all work activities thoroughly and completely.

ANALYSIS

The Board finds that OWCP failed to establish that appellant forfeited his right to monetary compensation for the period December 14, 2005 to April 27, 2009 because he knowingly failed to report employment activities as required.

In analyzing whether an employee in the receipt of FECA benefits has earnings or wages, in *Christine P. Burgess*, the Board noted that wages are defined as:

“Every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and reasonable value of board, rent, housing, lodging, payments in kind, tips and any other similar advantages received from the individual's employer or directly with respect to work for him.”¹⁰

⁷ 20 C.F.R. § 10.5(g).

⁸ *Robert R. Holmes*, 49 ECAB 161 (1997); 20 C.F.R. § 10.5(n).

⁹ *Christine C. Burgess*, 43 ECAB 449 (1992).

¹⁰ *Id.*

In *Burgess*, the employee received reimbursed expenses and “other advantages” as part of wages or remuneration in the form of free travel, lodging, food and transportation costs as a result of performing the duties of an escort for a travel service. Based on these reimbursements and payments in kind, the Board found that she had “earnings” as defined under section 8106(c) which she was required to report to OWCP. Similarly, in *Barbara L. Kanter*,¹¹ the employee received monetary remuneration from the sales of dogs from her self-employment as a dog breeder. The Board noted that appellant’s self-employment activities were not so *de minimus* that the earnings did not have to be reported to OWCP as required under FECA. In *James M. Steck*,¹² the employee had earnings from his self-employment as a youth minister in that he received free housing, living expenses and utilities as remuneration for his work.

OWCP found that appellant forfeited his right to compensation because he knowingly failed to report employment activities involving his father’s company on the EN1032 forms, as required. The Board finds that the evidence of record does not establish that appellant had earnings from his father’s company or other remuneration for any activities in the business.

The record contains two investigative reports. They document that a suspected falsified medical form describing work restrictions was ultimately determined to be a misdated facsimile transmission. The surveillance of appellant’s residence found no activity inconsistent with his physical limitations or other activity that could be characterized as work. While a review of the bank records showed possible income in addition to his compensation payments, the investigative report established that he received a generator for being the executor of a friend’s estate.

Appellant testified that he completed several paperwork transactions for his father’s company when his father was out of the country. He received no wages or remuneration. At oral argument before the Board, appellant stated that he completed approximately four gun transfer transactions by signing the required document during the periods his father was out of the country. The investigative report generally asserted that appellant received a benefit from his relationship with his father’s company. It provided copies of cancelled checks in support of this contention. The Board finds that the evidence does not substantiate that appellant had any earnings or salary from his father’s business or that he performed any substantial employment activities.

Appellant testified that he did not make gun purchases for his father. He stated that he was first placed on the business license as a registered agent in 2000 following an audit by the ATF that found he was not authorized to sign required transfer documents without a license. After being placed on the license, he purchased guns from his personal account and, with his wife, had collected over 100 firearms as represented by the checks to RSR. Appellant explained that other checks written from the business account by his brother were for reimbursement of shared household expenses when his father was absent. Appellant’s father presented similar testimony to OWCP’s hearing representative, noting that no salary or compensation was ever paid to appellant. The Board notes that the record does not contain any evidence from ATF as to

¹¹ 46 ECAB 165 (1994).

¹² 49 ECAB 134 (1997).

any forms signed by appellant or evidence to establish more than the approximately four transactions to which he testified.

This case is distinguishable from those instances where forfeiture has been based on a claimant's self-employment in a family-owned business or where a personal financial interest is otherwise established as accruing to the benefit of the employee.¹³ In *Daniel A. Mashe*,¹⁴ the Board found that OWCP did not establish that the employee had any earnings or other forms of remuneration from his activities at a liquor store. The employee received no wages, tips or other similar advantages such as discounts on merchandise or receipt of commodities in exchange for his services and, as such, inured no benefit. In *Antonio J. Giunta*,¹⁵ the Board found that OWCP failed to establish that appellant forfeited compensation as the record did not support that he had earnings or other forms of remuneration from his activities at a car liquidation center.

The Board finds that the evidence of record does not support that appellant was employed in his father's gunsmith business or that he had a personal financial interest in the company. Appellant performed minimal activities by completing several documents during the periods when his father was out of the country. The record does not establish any financial interest by him in the business or that any benefit based on his activities. The occasional signing of transfer documents as required by ATF was *de minimus* and provides insufficient basis for invoking the penalty provision of section 8106(b)(2).¹⁶ In this regard, the Board notes that the U.S. Attorney declined to prosecute appellant based on the investigator's reports.

In *Louis P. McKenna, Jr.*,¹⁷ the Board noted that OWCP may not base its application of the forfeiture provision strictly on conclusions drawn in an investigative report. Rather, the evidence of record must clearly document that the claimant has unreported earnings from employment or performed activities that were knowingly not reported. The evidence of record does not establish that appellant had earnings or failed to knowingly report employment activity. OWCP did not meet its burden of proof to establish that he forfeited his right to compensation. The October 22, 2010 overpayment decision, based on the forfeiture determination, is reversed. The disposition of the forfeiture issue renders the remaining issues moot.

CONCLUSION

The Board finds that OWCP did not establish that appellant forfeited his right to monetary compensation for the period December 14, 2005 to April 27, 2009.

¹³ Compare *Robert C. Gilliam*, 50 ECAB 334 (1999) (employee-owned and operated motor home rental companies); *Gary L. Allen*, 47 ECAB 409 (1996) (employee had earnings from lawn moving service); *Anthony Nobile*, 44 ECAB 268 (1992) (employee operated a family-owned liquor store).

¹⁴ 50 ECAB 419 (1999).

¹⁵ 53 ECAB 370 (2002).

¹⁶ See *S.G.*, Docket No. 11-942 (issued April 4, 2012).

¹⁷ 46 ECAB 328 (1994).

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 22, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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