

FACTUAL HISTORY

On December 27, 2005 appellant, then a 57-year-old mail carrier, filed an occupational disease claim alleging that he developed knee pain walking in the performance of duty. OWCP accepted this claim for right knee strain on February 15, 2006. Appellant underwent a right knee arthroscopic debridement and partial medial and lateral meniscectomy on March 21, 2006. He returned to light-duty work on May 5, 2006. Appellant accepted a second light-duty position on January 23, 2007. He also accepted a light-duty position on May 25, 2007.

Appellant underwent a total knee replacement on September 24, 2007. On September 28, 2007 OWCP authorized compensation from September 24 through October 10, 2007 and continuing. Appellant's physician released him to return to light-duty work on April 2, 2008. The employing establishment could not accommodate his work restrictions.

In a telephone memorandum dated April 30, 2008, OWCP received information that appellant was working in a laundromat owned by family members. On May 5, 2008 appellant completed a Form EN1032 which indicated that he worked for the employing establishment since March 26, 1988. He answered no to the question of whether he was self-employed or involved in any business enterprise in the past 15 months.

OWCP referred appellant for vocational rehabilitation counseling on May 27, 2008. It entered him on the periodic rolls on June 23, 2008.

Appellant completed a second Form EN1032 dated April 7, 2009 which indicated that he did not work for an employer during the past 15 months and was not self-employed or involved in any business enterprise in the past 15 months. He did not date the form.

Appellant underwent additional knee surgery on June 4, 2009.

The employing establishment Office of Inspector General completed a report of investigation on March 10, 2009. This report indicated that appellant was observed in May and September 2008 working at a cleaning business co-owned by his wife. The report stated that on April 30 and May 2, 3, 8, 9, 13 and 14, 2008 appellant "was apparently performing work activities at the Sundown Cleaners, a cleaning business owned in part by his spouse. Appellant was "observed driving a van apparently delivering finished products and was frequently seen behind the business counter assisting customers."

On April 30, 2008 investigators observed appellant driving a van and walking while carrying a bag. The investigators reported that on May 2, 2008 appellant entered the Sundown Cleaners holding a garment bag and turned the store sign to indicate that the business was open. Appellant was observed standing behind the counter helping a customer for several hours. The investigators reported that on May 3, 2008 he entered Sundown Cleaners and turned the store sign to indicate that the business was open. Appellant was seen in and around Sundown Cleaners at times behind the counter. According to investigators, he returned on May 8, 2008 entering the business and turning the sign to indicate that the cleaners was open. Appellant was observed behind the front counter working. On May 9, 2008 investigators reported that he

moved some vehicles and worked behind the counter at Sundown Cleaners. Appellant worked behind the counter at Sundown Cleaners on May 13 and 14, 2008.

In a letter dated February 4, 2010, OWCP proposed to reduce appellant's compensation benefits based on his capacity to earn wages in the constructed position of receptionist. By decision dated March 10, 2010, it reduced his compensation benefits effective March 14, 2010 based on his capacity to earn wages as a receptionist.

On April 15, 2010 appellant completed a Form EN1032 and indicated that he did not work for an employer and was not self-employed or involved in a business enterprise during the past 15 months. He received approval for disability retirement on March 26, 2010. In letters dated April 28 and July 21, 2010, OWCP informed appellant that he was entitled to continuing benefits at the rate of \$2,076.75 a month.

By decision dated July 27, 2010, OWCP declared appellant's compensation benefits from February 5, 2007 through April 8, 2009 as forfeited. It found that he failed to report that he was working for a business owned in part by his wife on EN1032 forms that he signed on May 5, 2008 and April 8, 2009. OWCP stated that the investigative report dated March 10, 2009 included video and still footage of appellant performing work activities at Sundown Cleaners from April 17, 2008 through March 10, 2009. These activities included driving a van to deliver finished products and working behind the business counter assisting customers. OWCP stated that the evidence established that appellant engaged in work activities on behalf of Sundown Cleaners and that he knowingly failed to report his work activities on the EN1032 forms.

In a letter dated July 28, 2010, OWCP made a preliminary determination that appellant had received an overpayment in the amount \$57,095.37 as he forfeited his compensation benefits for the period from September 24, 2007 through April 8, 2009. By decision dated September 22, 2010, it finalized the overpayment decision.

On July 28, 2010 appellant elected retirement benefits rather than FECA benefits effective August 1, 2010.

Appellant requested reconsideration of the forfeiture decision on February 3, 2011. Counsel argued that appellant did not "knowingly" fail to report earnings or purported earnings in this case. He stated that OWCP's finding was solely based on an investigative report, including video that showed appellant's actions of flipping a sign, moving a trash bin, walking on the sidewalk, driving his van and barely visible shots of the interior of Sunshine Cleaners, mostly showing claimant sitting and reading a newspaper; no confirming interviews or actions on the part of the investigators to confirm any work activities by claimant. Counsel concluded that there was no showing that the strict forfeiture provisions of 5 U.S.C. § 8106(b) were correctly applied.

Appellant submitted a statement drafted by counsel asserting that he spoke English as a second language and that his ability to read, write and comprehend written English was not adequate. He stated that if he had to read and understand documents, he usually used a translator. Appellant stated, "I may have been remiss in not understanding exactly what was asked of me in the 1032 forms I filled out." However, he denied working at the laundry as

alleged. In a second statement dated February 1, 2011, appellant stated that he and his wife decided that it would be safer for him to accompany her to work so he would not be home alone. He stated that he would walk around the neighborhood, mailing personal mail, banking, picking up coffee and moving his vehicle to avoid a ticket when the streets were cleaned. Appellant stated that he flipped the open sign, but that no one would be paid for this task. He stated that he moved empty garbage and recycling bins, watched as an employee unloaded water from the van and drove the van only as a favor to his wife. Appellant denied working and helping customers.

Appellant submitted a statement from E. Van Pham, an employee of the laundry, stating that appellant had been in and around the laundry since his job at the employing establishment ended. Mr. Pham stated that appellant had not worked at the laundry and that he performed the heavy lifting and carrying. Appellant's wife completed a similar statement dated February 1, 2011 and stated that she had two employees who pressed the clothes and covered the counter dealing with customers when she was not available. She stated that she worked at the counter and made alterations. Appellant's wife stated that appellant had never worked for the laundry and that he accompanied her to work to ensure that he was not home alone in case he fell or had problems relating to his heart condition. She stated, "When he was there he would do minor errands, including moving the van that we personally used and used in the business."

By decision dated May 26, 2011, OWCP reviewed the merits of appellant's claim and found that the investigative report supported that appellant drove the van and worked behind the counter. It stated that, while he may not have been paid for these actions, he was required to report what it would have cost his wife to hire someone to perform the work he did.

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 the time the Secretary specifies.... An employee who --

- (1) fails to make an affidavit or report when required; or
- (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."²

OWCP defines earnings from employment or self-employment as wages before any deductions or a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration.³ Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he "knowingly" failed to report employment or

² 5 U.S.C. § 8106(b).

³ 20 C.F.R. § 10.5(g).

earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty and, as a penalty provision, it must be narrowly construed.⁴ The term “knowingly” is defined as with knowledge, consciously, willfully; or intentionally.⁵

The EN1032 forms clearly indicate that if work was performed in furtherance of a relative’s business, the employee must show as the rate of pay what it would have cost the employer or organization to hire someone to perform the work performed. The Board has held that the test of what constitutes reportable earnings is not whether appellant received a salary but what it would have cost to have someone else to do the work.⁶

The Board has held that OWCP may not base its application of the forfeiture provision strictly on conclusions drawn in an investigation; rather, the evidence of record must establish that the claimant has had unreported earnings from employment which were knowingly not reported.⁷ In FECA Bulletin No. 83-7, OWCP noted that an investigative report showing that a claimant has had unreported earnings from employment must be used in conjunction with other evidence of record in order to properly find a forfeiture of compensation.⁸ The Board cited this Bulletin in *Claudia J. Thibault*,⁹ in finding that the evidence of record was insufficient to establish that the employee had earnings within the meaning of FECA. In declaring a forfeiture of compensation, the only document that OWCP presented in support of its position was a memorandum in which a special agent from the Office of Inspector General for the employees employing establishment memorialized a telephone interview with a witness who commented on her activities. The Board noted that the memorandum was written by the special agent rather than the person interviewed and found that the evidence was not sufficient to outweigh the claimant’s testimony that she did not have earnings.

ANALYSIS

OWCP determined that appellant forfeited compensation for the period February 5, 2007¹⁰ through April 8, 2009 as he knowingly failed to report his earnings in his wife’s business Sundown Cleaners. In a separate decision dated September 22, 2010, it found that he had

⁴ *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

⁵ 20 C.F.R. § 10.5(n).

⁶ *See Anthony Derenzo*, 40 ECAB 504 (1988); *see also Monroe E. Hartzog*, 40 ECAB 322 (1988).

⁷ *Antonia J. Giunta*, 53 ECAB 370, 377 (2002); *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

⁸ FECA Bulletin No. 83-7 (issued March 31, 1984).

⁹ 40 ECAB 836 (1989).

¹⁰ OWCP apparently used the date of February 5, 2007 as the earliest date covered by a form EN1032. However, the record indicates that appellant was not receiving compensation until his surgery on September 24, 2007 and that this therefore is the date any forfeiture would have begun.

received an overpayment of compensation in the amount \$57,095.37 as a result of the forfeiture.¹¹

On appeal, counsel argued that OWCP did not support its forfeiture determination because it did not present sufficient evidence to establish appellant's failure to report earnings and employment activities. He claimed that OWCP improperly based its report solely on the investigative report. The investigative report consists of a surveillance video and a narrative summary of this video. Upon review of these documents, the Board finds that OWCP did not present sufficient evidence to establish that appellant failed to report earnings or employment activities on the EN1032 forms he completed such that he should be subjected to the forfeiture provisions of FECA. The video does demonstrate that appellant was present at Sundown Cleaners on the dates in question and that he twice turned the sign from closed to open. Appellant left the shop and returned with a cup of coffee. On one occasion he moved garbage and recycling cans. He drove a minivan and on one occasion transported a woman and two black bags. The Board, however, is unable to discern from the video tape that appellant worked behind the counter or assisted customers due to the poor quality of the tape and the reflective nature of the shop windows. The quality of the recording makes it difficult to ascertain the activities and identities of the persons in Sundown Cleaners.

In finding that appellant forfeited compensation, OWCP relied solely on the video tape and summary submitted by the employing establishment's Inspector General. This evidence is not sufficiently clear or detailed to establish that appellant performed any work activities at Sundown Cleaners. On reconsideration, appellant submitted statements from his wife, an employee and himself denying that he performed any work at the cleaners. The investigative report does not provide any signed statements or evidence from witnesses such as customers regarding appellant's work activities. The Board has held that in the absence of actual signed statements or clear documentation of work activities, there is inadequate evidence to establish that appellant had earnings or was engaged in employment activities which were required to be reported on the EN1032 forms he submitted.¹²

As OWCP did not establish that appellant had earnings or employment activities that had to be reported on the EN1032 forms he completed. It did not meet its burden of proof to show that he forfeited his right to compensation for the period September 24, 2007 through April 8, 2009.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof in establishing that appellant knowingly failed to report earnings or work activities from September 24, 2007 through April 8, 2009 and that the May 26, 2011 decision finding forfeiture must be reversed.

¹¹ Appellant did not file a timely appeal from this decision, and the Board will not directly address this decision on appeal. 20 C.F.R. § 501.3(e).

¹² R. W., Docket No. 09-1607 (issued July 26, 2010).

ORDER

IT IS HEREBY ORDERED THAT the May 26, 2011 decision of Office of Workers' Compensation Programs is reversed.

Issued: July 24, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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