

On appeal, counsel asserts that prescribed medications impaired appellant's awareness such that he did not realize he was receiving FECA benefits.

FACTUAL HISTORY

OWCP accepted that on November 14, 2000 appellant, then a 39-year-old truck driver, sustained lumbar sciatica when he drove over a pothole. Appellant stopped work that day and did not return.² He received total disability wage-loss compensation beginning on November 15, 2000. OWCP placed appellant's case on the periodic rolls on March 22, 2001.³ In 2003, it accepted consequential major depression, based on the opinion of Dr. Charles Ferris, an attending Board-certified psychiatrist, who submitted reports through December 26, 2005 finding appellant totally disabled for work. Dr. Michael K. Park, an attending Board-certified neurologist and psychiatrist, found appellant remained totally disabled from 2004 through April 28, 2010.

In EN1032 forms completed on July 20 and August 6, 2004, May 20, 2005, April 6, 2006, April 15, 2007, April 1, 2008, March 15, 2009 and March 15, 2010, appellant indicated that he had no employment, self-employment or earnings from employment activities during the 15-month period prior to completing the forms.

On May 18, 2010 the employing establishment's investigative unit submitted documents demonstrating that appellant applied for a California State business license in January 2002. Appellant worked as a pizza franchise manager beginning in January 2002, completed franchise development training on February 28, 2003, and continued to work as a franchise manager through June 2003. He purchased a pizza franchise on September 2, 2003 and began operating the business. The purchase contract required appellant to maintain a minimum 51 percent ownership in the business and to oversee its day-to-day operation. In October 2008, he sold the franchise. On February 5, 2009 appellant executed articles of incorporation and on March 1, 2009 purchased a new pizza franchise in Hawaii.

The employing establishment obtained March 2010 surveillance video showing appellant arriving at the Hawaii pizza franchise with his wife, unlocking the door, removing delivery motorcycles from the building, sweeping the sidewalk, removing a jack from the trunk of a car, working underneath the car, and driving a delivery vehicle and motor scooter. Appellant wore a franchise uniform shirt throughout the recorded activities.

Employing establishment investigative agents interviewed appellant on March 15, 2010. When shown the surveillance videos, appellant acknowledged working at the pizza franchise in Hawaii, including delivering pizzas. He acknowledged purchasing both the California and Hawaii businesses, attending management training from February 24 to 28, 2003 and passing the manager's examination. Investigators also interviewed K.G., who purchased appellant's

² Appellant was separated from the employing establishment on August 6, 2004. The Office of Personnel Management (OPM) approved his application for disability retirement on August 26, 2004.

³ From January 2002 through July 2007, OWCP obtained second opinion and impartial reports indicating that appellant was either totally disabled for work or could perform part-time limited duty.

California pizza franchise, on March 15, 2010. K.G. stated that he saw appellant taking orders, and making and delivering pizzas at the California franchise.

In a July 19, 2010 letter, OWCP referred appellant to Dr. Aubrey Swartz, a Board-certified orthopedic surgeon, for an August 9, 2010 second opinion examination. Appellant telephoned OWCP on August 16, 2010, stating that he did not attend the appointment as he had traveled out of state.⁴ He noted that a district attorney was filing criminal charges against him for compensation fraud. On August 26, 2010 appellant telephoned OWCP and asked to elect retirement benefits through the Office of Personnel Management (OPM). In an August 26, 2010 letter, OWCP provided appellant a form to elect OPM benefits. By August 17, 2010 notice finalized by September 1, 2010 decision, it suspended appellant's compensation as he failed to attend the scheduled second opinion examination.⁵

OWCP reviewed compensation payment logs and calculated that from September 2, 2003 to March 15, 2010, appellant received a total of \$225,656.06 in temporary total disability compensation.

By decision dated January 21, 2011, OWCP found that appellant forfeited his right to compensation for the period September 2, 2003 to March 15, 2010 as he knowingly failed to report work activities on EN1032 forms dated July 20 and August 6, 2004, May 20, 2005, April 6, 2006, April 15, 2007, April 1, 2008, March 15, 2009 and March 15, 2010.

In a January 21, 2011 notice, OWCP advised appellant of its preliminary determination that he was overpaid \$225,656.06 as his compensation was forfeited from September 2, 2003 to March 15, 2010 and that he was at fault in creating the overpayment because he knowingly failed to report employment activities and earnings from his pizza businesses. It found that on each of the EN1032 forms he knowingly failed to report his work activities.

In a February 18, 2011 letter, appellant, through counsel, requested an oral hearing regarding the forfeiture and a prerecoupment hearing regarding the overpayment determination. He asserted that there was no overpayment, that the overpayment was not correctly calculated, and that the overpayment should be waived as appellant was not at fault. Counsel submitted an overpayment recovery questionnaire (Form OWCP-20) listing appellant's assets of a \$260,000.00 primary residence and \$3,600.00 in bank accounts and cash.⁶

At the hearing, held June 29, 2011, counsel asserted that appellant did not understand the EN1032 forms. Appellant stated that he did not realize he received FECA benefits. His wife

⁴ Dr. Swartz examined appellant on August 15, 2011 and determined he could work full time with restrictions.

⁵ In a September 22, 2010 letter, OWCP provided information requested by the San Francisco District Attorney's Office, Insurance and Welfare Fraud Division. It advised that appellant received \$265,692.63 in compensation while he owned pizza franchises and performed business activities. The outcome of the District Attorney's investigation is not of record.

⁶ In a June 14, 2011 letter, counsel proposed a settlement in which appellant would repay \$132,384.06 in "restitution" without admitting fault in the creation of an overpayment. In a June 14, 2011 letter, OWCP advised counsel that there was no overpayment settlement provision under FECA.

acknowledged that, in 2008 and 2009, appellant participated in running the Hawaii pizza franchise.

In a July 24, 2011 statement, appellant acknowledged owning the California and Hawaii pizza franchises and attending management training. He stated that, in Hawaii, he helped in the pizza business “by making pizzas, making deliveries, etc.” Appellant listed \$6,800.00 in monthly expenses, including food, mortgage, insurance, debt repayment and medical expenses.

In a July 26, 2011 statement, Dr. Ferris asserted that, from 2003 to 2006, appellant had diminished alertness due to prescribed antidepressants and pain medications. He noted that, during this period, appellant was able to drive and attend appointments independently.

By decision dated September 22, 2011, an OWCP hearing representative affirmed OWCP’s January 21, 2011 forfeiture decision, finding that appellant knowingly failed to report his work activities from owning and working in two pizza franchises serially for the period September 3, 2003 to March 15, 2010. The hearing representative found that OWCP met its burden of proof by submitting extensive documentation of appellant’s business activities and appellant’s statements acknowledging those activities.

By decision dated September 22, 2011, an OWCP hearing representative finalized the January 21, 2011 notice, finding a \$225,656.06 overpayment of compensation for the period September 3, 2003 to March 15, 2010. The hearing representative found that appellant was at fault in the creation of the overpayment as he forfeited his compensation by failing to report his business activities on EN1032 forms dated July 20 and August 6, 2004, May 20, 2005, April 6, 2006, April 15, 2007, April 1, 2008, March 15, 2009 and March 15, 2010. Therefore, the overpayment was not subject to waiver.⁷

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA provides that an employee who “fails to make an affidavit or report when required, or 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.”⁸

The Board has held that it is not enough merely to establish that there was unreported employment or earnings. Appellant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she “knowingly” failed to report employment or earnings.⁹ The term “knowingly” as defined in OWCP’s implementing regulation, means with knowledge, consciously, willfully or intentionally.¹⁰ The Board has found that OWCP can meet this burden of proof in several ways, including by appellant’s own admission to OWCP that he failed to report employment or earnings which he knew he should report, or by establishing that appellant

⁷ OWCP did not address recovery of the overpayment.

⁸ 5 U.S.C. § 8106(b).

⁹ *Harold F. Franklin*, 57 ECAB 387 (2006).

¹⁰ 20 C.F.R. § 10.5(n).

has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form EN1032.¹¹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained lumbar sciatica with consequential major depression due to a November 14, 2000 work incident. He received total disability compensation beginning on November 15, 2000. On EN1032 forms signed on July 20 and August 6, 2004, May 20, 2005, April 6, 2006, April 15, 2007, April 1, 2008, March 15, 2009 and March 15, 2010, appellant indicated that he had no employment, self-employment or earnings from employment activities during the 15-month period prior to completing the forms. However, an employing establishment investigation demonstrated that, from January 2002 through March 2010, appellant worked at or owned and operated pizza franchises in California and Hawaii.

The evidence of record establishes that appellant “knowingly” concealed his employment activities from OWCP. In March 15, 2010 statement, appellant acknowledged owning and working at a pizza franchise in Hawaii in 2008 and 2009, including delivering pizzas. He admitted purchasing pizza franchises in California and Hawaii and attending management training from February 24 to 28, 2003. In a July 24, 2011 statement, appellant expanded his admission to include making pizzas at the Hawaii franchise. K.G., who purchased appellant’s California franchise, also observed appellant taking orders, making pizzas and delivering pizzas at the California franchise.

The Board finds that this evidence, including appellant’s statements, constitute persuasive evidence that he knowingly omitted his earnings and activities when he completed the affidavit on EN1032 forms on July 20 and August 6, 2004, May 20, 2005, April 6, 2006, April 15, 2007, April 1, 2008, March 15, 2009 and March 15, 2010 and that the provisions of 5 U.S.C. § 8106(b)(2) therefore apply to the periods covered by the affidavits. The Board therefore finds that appellant has forfeited his compensation benefits received during the period September 3, 2003 to March 15, 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.

¹¹ *Harold F. Franklin, supra* note 9.

(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 [recovery of overpayments] and other relevant statutes.”¹²

ANALYSIS -- ISSUE 2

As noted above, OWCP regulations provide that OWCP may declare an overpayment of compensation for the period of a given forfeiture of compensation. If a claimant has any earnings during a period covered by a Form EN1032 which he knowingly fails to report, he is not entitled to any compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.¹³ OWCP paid appellant compensation in the amount of \$225,656.06 for the period September 3, 2003 to March 15, 2010. It properly found that appellant forfeited his entitlement to compensation during this time because he failed to report employment activities and earnings related to his business ownership and activities on EN1032 forms. Therefore, there exists an overpayment of compensation, due to the forfeiture, in the amount of \$225,656.06.

On appeal, counsel asserts that prescription medications rendered appellant unable to understand that he received FECA benefits. Counsel obtained a July 26, 2011 statement from Dr. Ferris, an attending Board-certified psychiatrist, asserting that, from 2003 to 2006, appellant had diminished alertness due to prescribed medication. However, Dr. Ferris noted that appellant was able to drive and attend appointments independently. No physician of record opined that appellant was mentally incompetent for any period.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁴ The only exception to this requirement is a situation, which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹⁵ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

¹² 20 C.F.R. § 10.529. See also *Harold F. Franklin*, *supra* note 9.

¹³ *Robert Ringo*, 53 ECAB 258 (2001).

¹⁴ 5 U.S.C. § 8129(a).

¹⁵ *Id.* at § 8129(b).

In determining whether an individual is “without fault,” section 10.433(a) of OWCP’s federal regulations provide, in relevant part:

“A recipient who has done any of the following will be found at fault with respect to 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.)”¹⁶

ANALYSIS -- ISSUE 3

In this case, the Board finds that appellant was at fault under the second standard as he failed to provide information that he knew or should have known to be material. As noted, appellant had received and signed multiple EN1032 forms indicating that he had no employment or earnings from employment activities during the covered periods. He did not report employment and earnings on EN1032 forms covering the overpayment period. Appellant, therefore, failed to furnish information which he knew or should have known to be material to OWCP. Thus, he is at fault in creation of the \$225,656.06 overpayment, such that it was not subject to waiver.¹⁷

CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited his right to compensation for the period September 3, 2003 to March 15, 2010 as he knowingly failed to report his employment activities. The Board further finds that OWCP properly determined that appellant received a \$225,656.06 overpayment of compensation for the period September 3, 2003 to March 15, 2010 based on his forfeiture of compensation. The Board further finds that OWCP properly found appellant at fault in creating the \$225,656.06 overpayment, such that it was not subject to waiver.

¹⁶ 20 C.F.R. § 10.320(b).

¹⁷ See *M.D.*, Docket No. 11-1751 (issued May 7, 2012).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 22, 2011 are affirmed.

Issued: July 23, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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