

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

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R.B., Appellant)	
)	
and)	Docket No. 11-1471
)	Issued: March 7, 2012
U.S. POSTAL SERVICE, POST OFFICE,)	
Oakland, CA, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On June 8, 2011 appellant filed a timely appeal from a January 12, 2011 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 her right to compensation from December 25, 2008 to March 25, 2010; (2) whether OWCP properly found that an overpayment in compensation in the amount of \$47,599.39 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, therefore, the overpayment was not subject to waiver.

¹ 5 U.S.C. §§ 8101-8193.

On appeal, appellant asserts that she made an understandable human error in failing to report earnings to OWCP.

FACTUAL HISTORY

On January 5, 2001 appellant, then a 31-year-old letter carrier, filed an occupational disease claim for a knee condition due to walking up a hill.² She stopped work on December 23, 2000 and returned to modified duty on January 2, 2001. OWCP accepted internal derangement of the right knee, a medial meniscus tear and aggravations of chondromalacia patella and patellofemoral arthritis of the right knee. On April 9, 2004 appellant received a schedule award for five percent impairment of the right leg. On October 28, 2004 she had right knee surgery and returned to modified duty for six hours a day on February 10, 2005. Appellant received wage-loss compensation for two hours a day. On May 12, 2006 she began working modified duty for eight hours daily. Appellant stopped work in June 2006 after falling in the shower when her right knee buckled, injuring her left knee. She was placed on the periodic compensation rolls. On December 7, 2006 appellant underwent a left medial collateral ligament repair. OWCP accepted consequential conditions of cervical strain, lumbar strain, right wrist strain, left knee strain, left knee bursitis, right knee contusion, complete tear of the left medial collateral ligament, right medial collateral ligament sprain, left anterior cruciate ligament strain, right foot contusion and right ankle sprain.

In a September 3, 2008 impartial evaluation,³ Dr. Jack H. Stehr, a Board-certified orthopedic surgeon, advised that appellant could return to work eight hours a day with permanent physical restrictions. Appellant returned to modified duty on August 26, 2008. She stopped work on December 2, 2008 and returned on March 14, 2009. On March 16, 2009 appellant stopped work to undergo nonemployment-related surgery. On May 4, 2009 she filed a recurrence claim, alleging knee pain when she fell on April 9, 2009.⁴ Appellant was paid wage-loss compensation beginning April 9, 2009 and was returned to the periodic compensation rolls.⁵

In November 2009, appellant was referred to vocational rehabilitation. On December 22, 2009 a rehabilitation plan for business education training was approved. Appellant began studies on March 8, 2010. On March 25, 2010 she completed an OWCP EN1032 form. Appellant reported that she worked as a dispatcher for the City of Oakland Fire Department (OFD), beginning in 2009 and that she received VA benefits for dental, hernia, abdominal surgery and knee conditions.

² Appellant also noted on the claim form that she was receiving Veterans Administration (VA) benefits for a knee condition. She has a separate claim, adjudicated under OWCP file number xxxxxx024, accepted for left Achilles tendinitis.

³ OWCP determined that a conflict had been created between appellant's treating physician Dr. Michael Hebrard and an OWCP referral physician, regarding whether she had residuals of the employment injury.

⁴ Appellant stated that she slipped when walking to her mother's front door because her knee gave out.

⁵ In a July 24, 2009 decision, OWCP denied appellant's claims for compensation for the periods September 30 to October 1, 2008 and October 29 to 31, 2008.

The employer's Office of the Inspector General (OIG) provided a May 20, 2010 investigation report that covered the period February 22 to May 12, 2010 together with supporting documentation.⁶ The report advised that, in addition to working for the OFD, appellant also earned income from Solano County in-home support services (IHSS) as a service provider. The report noted that subpoenaed records from IHSS showed that she had been hired on January 1, 2009 and first worked on January 4, 2009 and that she worked 29 to 30 hours every two weeks at an hourly rate of \$11.50. The OIG reported that, in a May 5, 2010 interview, appellant at first denied any outside employment, but that, upon requisitioning, she stated that the county paid her for helping her mother. In an attached sworn statement, appellant acknowledged that she was employed by IHSS assisting her mother but did not consider this a real job and it was an oversight on her part not to report it. The report attached forms signed by her, in which she reported the hours worked for IHSS from January through December 2009.⁷

By decision dated July 1, 2010, OWCP found that appellant forfeited her right to compensation from December 25, 2008 through March 25, 2010 because she knowingly omitted earnings with the Solano County IHSS on the EN1032 form signed by her on March 25, 2010.

On July 1, 2010 OWCP also made a preliminary determination that appellant received an overpayment of compensation in the amount of \$47,599.39 because she knowingly failed to report work activity for the period December 25, 2008 through March 25, 2010 and that she had received compensation totaling \$47,599.39 for this period. Appellant was found at fault in creating the overpayment because she knew or should have known to report her work activity with IHSS on the EN1032 form. The appeal actions she could take were explained to her and she was given 30 days to respond. Computer print-outs and an overpayment worksheet of record established that appellant received wage-loss compensation totaling \$47,599.39 for the period December 25, 2008 through March 25, 2010.

On July 23, 2010 appellant requested a preresoupment hearing regarding the overpayment, asserting that she accidentally failed to disclose IHSS income. She provided an overpayment questionnaire and documentation regarding her IHSS earnings. Appellant completed business training on July 30, 2010.

On October 26, 2010 OWCP proposed to terminate appellant's monetary compensation on the grounds that, as her employment with the OFD began on July 26, 2006, after the December 22, 2000 employment injury and because her earnings as a dispatcher with the OFD exceeded the current wages of the job held when injured, she did not have a loss of wage-earning capacity. Appellant resigned from the employing establishment on November 4, 2010.

⁶ The documentation included a May 5, 2010 memorandum of interview with appellant, who's sworn May 5, 2010 statement, an April 14, 2010 interview with a dispatch supervisor with the OFD, a May 12, 2010 memorandum of interview with an OWCP senior claims examiner, tax records, employments records from the City of Oakland and State of California, Solano County, including pay slips, EN1032 forms and other claim forms, a rehabilitation maintenance certificate and correspondence with OWCP.

⁷ The report noted that OFD records were also subpoenaed and that her description of the April 9, 2009 slip and fall injury on her recurrence claim form did not agree with her description on her sworn statement.

At the November 2, 2010 hearing, appellant testified that it was just an honest mistake on her part not to enter her earnings from IHHS. She asserted that she was not trying to deceive anyone, helping her mother and that the forfeiture amount was punitive. Appellant indicated that she earned approximately \$6,000.00 a month from the OFD, approximately \$600.00 a month in VA benefits and was still receiving FECA benefits.

By decision dated December 1, 2010, OWCP finalized the termination of appellant's monetary compensation.⁸

In a January 12, 2011 decision, an OWCP hearing representative affirmed the July 1, 2010 forfeiture decision and overpayment of compensation in the amount of \$47,599.39 for the period December 25, 2008 through March 25, 2010 based on the forfeiture. Appellant was found at fault in the creation of the overpayment.

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.”⁹

Section 10.5(g) of OWCP's regulations defines 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.”¹⁰

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

⁸ Appellant did not appeal the termination of monetary compensation with the Board.

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

¹⁰ 20 C.F.R. § 10.5(g).

knowingly omitted or understated his or her employment and earnings.¹¹ 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 earnings from employment for the periods covered by the EN1032 forms. The term “knowingly” as defined in OWCP’s implementing regulations and Board precedent means “with knowledge; consciously; intelligently; willfully; intentionally.”¹² The language on the EN1032 forms is clear and unambiguous in requiring a claimant to report earnings for the previous 15 months from any employer, self-employment or 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 her entitlement to compensation for the period December 25, 2008 to March 25, 2010. Appellant signed an EN1032 form on March 25, 2010 covering the period December 25, 2008 to March 25, 2010. She indicated on the EN1032 form that her only outside employment was with the OFD. The May 20, 2010 OIG report and accompanying documentation, however, showed that appellant was also employed by IHSS during this period. Appellant’s sworn statement and the findings of the OIG, which included documentation showing the hours she worked and claimed compensation with IHSS, support that she worked for IHSS during this time. Therefore, she clearly had unreported earnings for the period December 25, 2008 to March 25, 2010.

Appellant can be subject to the forfeiture provision of section 8106(b) only if she “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.¹³ In this case, appellant completed an EN1032 form on March 25, 2010 which advised her that she must report both all employment and all earnings from employment and self-employment. The form clearly stated that she 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 form, provide persuasive evidence that she “knowingly” understated her earnings and employment information.¹⁴ She was working at the IHSS for over a year receiving \$11.50 an hour 29 to 30 hours a week. This clearly fell within the definition of the earnings under the regulations. Thus, contrary to appellants argument on appeal that not reporting the IHSS income was an understandable human error, the Board finds that appellant knowingly under reported her earnings and she forfeited her compensation for the period December 25, 2008 to March 25, 2010.

¹¹ *Robert R. Holmes*, 49 ECAB 161 (1997); *id.* at § 10.5(n).

¹² *Christine C. Burgess*, 43 ECAB 449 (1992).

¹³ *Supra* note 11.

¹⁴ *See Harold F. Franklin*, 57 ECAB 387 (2006).

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.

“(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 statutes.”¹⁵

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 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 have had earnings during a portion of that period.¹⁶ OWCP paid appellant compensation in the amount of \$47,599.39 for the period December 25, 2008 to March 25, 2010. As it properly found that she forfeited her entitlement to compensation during this period because she failed to report earnings from employment on an EN1032 form, there exists an overpayment of compensation in the amount of \$47,599.39.

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.”¹⁷

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

¹⁵ 20 C.F.R. § 10.529.

¹⁶ *Louis P. McKenna, Jr.*, 46 ECAB 428 (1994).

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

an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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).”¹⁸

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.¹⁹

ANALYSIS -- ISSUE 3

OWCP properly determined that appellant was at fault in the creation of the overpayment because she failed to provide information which she knew or should have known to be material on an EN1032 form covering the period December 25, 2008 to March 25, 2010. As described above, the record establishes that appellant had unreported earnings from employment during this period and knowingly failed to furnish this material information to OWCP. She signed a certification clause on the EN1032 form, which advised her in explicit language that she might be subject to civil, administrative or criminal penalties if she knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing the form, appellant is deemed to have acknowledged her duty to fill out the form properly, including the duty to report any employment of self-employment activities and income. She failed to furnish information which she knew or should have known to be material to OWCP. As appellant is not without fault in creating the overpayment, it is not subject to waiver.²⁰

CONCLUSION

The Board finds that appellant forfeited her entitlement to compensation for the period December 15, 2008 to March 25, 2010. The Board further finds that she received an overpayment of compensation in the amount of \$47,599.39 and that she was at fault in the creation of the overpayment.

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

¹⁹ *Id.* at § 10.433(b); *Duane C. Rawlings*, 55 ECAB 366 (2004).

²⁰ *Harold F. Franklin*, *supra* note 14. Lastly, 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 OWCP’s recovery of the overpayment under the Debt Collection Act. *Albert Pineiro*, 51 ECAB 310 (2000).

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 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