

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

L.M., Appellant)	
)	
and)	Docket No. 12-405
)	Issued: October 1, 2012
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Lompoc, CA, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On December 19, 2011 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs (OWCP) dated August 26 and 31, and October 20 and 21, 2011. 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 this case.

ISSUES

The issues are: (1) whether appellant's actual earnings in telephone sales and manicuring fairly and reasonably represented her wage-earning capacity; (2) whether OWCP properly determined that appellant forfeited her right to compensation for the period April 9, 2000 to April 5, 2009 because she failed to report work activity; (3) whether OWCP properly found that an overpayment in compensation in the amount of \$137,183.05 had been created for this period; (4) whether OWCP properly found that an overpayment in compensation in the amount of \$20,047.75 was created for the period April 5, 2009 through July 2, 2011 because appellant understated her earnings; (5) whether OWCP properly found that appellant was at fault in the creation of the overpayments and they were not subject to waiver; and (6) whether OWCP

¹ 5 U.S.C. §§ 8101-8193.

properly required repayment of the \$137,183.05 overpayment by deducting \$221.00 each period from appellant's continuing compensation and whether OWCP properly required repayment at the rate of \$240.00 each month for the \$20,047.65 overpayment.

On appeal appellant generally asserts that it would be a financial burden to repay the overpayments.

FACTUAL HISTORY

On April 21, 1997 appellant, then a 30-year-old accounting technician, injured her left wrist, thumb and arm when she fell at work. OWCP accepted the claim for left wrist strain. Appellant resigned from the employing establishment for personal reasons in August 1997. She briefly worked as a purchasing agent, and was self-employed as a manicurist until February 16, 2000 when she underwent surgical stabilization of the left thumb. Appellant received compensation and was placed on the periodic compensation rolls. On November 1, 2000 she underwent left lateral epicondylectomy. The accepted conditions include left carpal tunnel syndrome, rupture of ligament supporting the carpometacarpal joint of the left thumb and left lateral epicondylitis.

Appellant received wage-loss compensation and submitted signed CA-1032 forms, on July 9, 2001, June 17, 2002, November 7, 2003, July 20, 2004, June 22, 2005, August 7, 2006, August 1, 2007, June 30, 2008, July 31 and October 6, 2009. On each of these forms, which require a claimant to report earnings for the previous 15 months, appellant stated that she was not employed, self-employed and had not performed volunteer work.

In July 2006 OWCP was informed that appellant was working at a tanning and hair salon while in receipt of FECA wage-loss benefits. In March and April 2008, undercover agents observed appellant working as a manicurist. On March 17, 2010 appellant was interviewed by Steve Bolz, a fraud investigator for the Department of Labor (DOL) and Victor J. Bello, a special agent with the Department of Justice (DOJ). The agents met her at her place of employment and at her nearby home. Appellant described the April 1997 work injury and noted that she resigned for personal reasons in August 1997. She stated that she did not report her earnings on CA-1032 forms because they were not significant enough, and that she began part-time work at a car dealership three weeks prior. Appellant reported that she separated from her husband and that their children lived with him. She signed an affidavit on March 18, 2010, acknowledging that she had been in receipt of FECA benefits since 2000 and that she did not report self-employment on DOL forms dated 2005 through 2009.

In June 2010 appellant was indicted on four counts of fraud in the receipt of compensation benefits under FECA in U.S. District Court for the Central District of California. The counts covered CA-1032 forms signed on August 7, 2006, August 1, 2007, June 30, 2008 and July 31, 2009. In a November 17, 2010 memorandum, an OWCP claims examiner discussed the investigation and indictment. Appellant had net earnings of \$55,423.60 for the period June 1, 2005 through July 31, 2009, or \$255.11 per week. She had been paid wage-loss compensation at an incorrect pay rate, as payments were based on a weekly pay rate of \$336.33 while compensation should have been based on a weekly pay rate of \$659.60. The claims examiner

indicated that, even if appellant's self-employment income for the period June 1, 2005 through July 31, 2009 and the *Shadrick* formula were applied, she would still be underpaid \$28,231.90.²

On a CA-1032 form signed July 5, 2010, appellant indicated that she began employment on February 14, 2010 in telephone sales, earning \$10.00 an hour, with actual earnings of \$6,004.00. From January 1, 2009 and continuing she was self-employed as a manicurist, at varying rates of pay, with actual earnings of \$8,325.00.

In January 2011 DOJ noted that appellant would not be prosecuted for FECA fraud but would be referred for pretrial diversion. Appellant signed an agreement for pretrial diversion on March 7, 2011. She admitted to making false statements on CA-1032 forms dated August 7, 2006, August 1, 2007, June 30, 2008 and July 31, 2009, periods in which she was self-employed as a manicurist.

In a June 30, 2011 investigative memorandum, DOL Special Agent Bolz discussed the April 20, 1997 work injury, noted that appellant resigned for personal reasons on August 3, 1997, and advised that she received FECA benefits continuously since February 16, 2000. Agent Bolz acknowledged that OWCP relied on an incorrect pay rate in computing her compensation. He listed the CA-1032 forms that covered the period April 9, 2000 through October 5, 2009 in which appellant reported no employment or self-employment. Agent Bolz described the evidence gathered, including surveillance, undercover visits to the salon, an analysis of appellant's appointment books, her signed statements and admissions she made in the pretrial diversion agreement. During the March 17, 2010 interview, appellant's estimate of yearly earnings seemed far too low when compared with a review of her appointment books. Agent Bolz concluded that, while appellant did limited manicurist work before the April 1997 work injury, she expanded the volume of work after resigning from the government. Appellant averaged over 1,000 appointments a year, and that, at an average of \$20.00 per appointment, she earned at least \$20,000.00 a year as a manicurist. He attached a Notification of Personnel Action, effective August 1997, appellant's claim forms, CA-1032, dated July 9, 2001 to July 5, 2010, investigative memoranda, charts showing her appointments and price list as a manicurist and interview reports.

On a 1032 form signed June 21, 2011, appellant noted that she began employment on February 15, 2010 in internet/telephone sales, with a \$12.00 an hour rate of pay and actual earnings of \$31,753.00. She indicated that she was also self-employed as a manicurist from January 2010 to March 31, 2011, at varying rates of pay, with actual earnings of \$10,546.00. On July 2, 2011 OWCP paid appellant compensation in the amount of \$1,379.00 for the period June 5 through July 2, 2011.

By decision dated August 26, 2011, OWCP found that appellant forfeited her right to compensation for the period April 9, 2000 to April 5, 2009 because she knowingly omitted reported earnings from self-employment on nine CA-1032 forms signed by her on July 9, 2001,

² The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision, *Albert C. Shadrick*, 5 ECAB 376 (1953), has been codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job. *See J.C.*, 58 ECAB 700 (2007).

June 17, 2002, November 7, 2003, July 20, 2004, June 22, 2005, August 7, 2006, August 1, 2007, June 30, 2008 and July 31, 2009.

On August 26, 2011 OWCP also made a preliminary determination that appellant received a \$137,183.05 overpayment of compensation because she forfeited compensation from April 9, 2000 through April 4, 2009 when she knowingly failed to report self-employment earnings. Appellant was at fault in creating the overpayment because she made an incorrect statement as to a material fact which she knew or should have known to be incorrect, failed to provide information which she knew or should have known to be material, or accepted a payment which she knew or should have known to be incorrect. She was provided with an overpayment action request and an overpayment questionnaire and the actions she could take were explained to her. Appellant was given 30 days to respond. Computer print-outs and an overpayment worksheet contained in the record show that she received wage-loss compensation totaling \$137,183.05 for the period April 9, 2000 through April 4, 2009.

In a second August 26, 2011 preliminary determination, OWCP found that appellant was at fault in creating a \$9,339.11 overpayment of compensation for the period April 5, 2009 through July 2, 2011 because she knowingly failed to report self-employment and other earnings on CA-1032 forms and should have been aware that her work activity should be reported. Based on self-employment, she had average weekly earnings of \$384.81, and that on a 1032 form she signed on June 21, 2010, she reported earnings at Sunset Auto Center for 30 hours per week, at an hourly rate of \$10.00, for a weekly rate of \$300.00. OWCP noted that for the period April 5, 2009 through July 2, 2011 appellant received compensation of \$39,234.50; that based on her self-employment earnings of \$384.81 she should have received compensation of \$12,161.25 for the period April 5, 2009 through February 13, 2010; and, based on weekly earnings at Sunset of \$684.81 for the period February 14, 2010 through July 2, 2011, she should have received compensation of \$17,734.14. Thus, when the amount of compensation she should have received for the period April 5, 2009 through July 2, 2011, or \$29,895.39, was deducted from the compensation she received, or \$39,234.50, an overpayment in compensation of \$9,339.11 was created. Computer print-outs and an overpayment worksheet contained in the record indicate that appellant received compensation totaling \$39,234.50 for the period April 5, 2009 through July 2, 2011.

In an August 31, 2011 decision, OWCP found that appellant's actual earnings fairly and reasonably represented her wage-earning capacity. It found that she earned \$610.63 a week at Sunset Auto Center, effective February 14, 2010, and had earned \$384.81 a week in her many years of self-employment as a manicurist, or a total weekly wage of \$995.44. OWCP found that she had a wage-earning capacity of 92 percent and reduced her monetary benefits to \$221.00 each compensation period.³

Appellant submitted an overpayment questionnaire signed on September 13, 2011. She stated that, if OWCP had not paid her compensation at an incorrect rate, she would not have had to go to work to support her family. Effective March 31, 2011, appellant was no longer self-

³ OWCP initially reduced appellant's compensation on August 26, 2011. This decision was rescinded by the August 31, 2011 decision. In the latter decision, OWCP noted that appellant had reported increased earnings on a CA-1032 form signed by her on June 21, 2011.

employed as a manicurist and was only working at Sunset Auto Center. She noted that she had a monthly income of \$1,800.00 and monthly expenses of \$2,255.00.⁴

By decision dated October 20, 2011, OWCP finalized the determination that appellant was at fault in creating a \$137,183.05 overpayment of compensation for the period April 9, 2000 through April 4, 2009 because she forfeited compensation as she failed to report self-employment earnings. Repayment was scheduled at the rate of \$221.00 each compensation period, which reduced her compensation to zero.

On October 21, 2011 OWCP finalized the overpayment of compensation for the period April 5, 2009 through July 2, 2011. It found that, based on earnings reported by appellant, the correct overpayment amount was \$20,047.65. OWCP noted that she received compensation totaling \$39,234.50 from April 5, 2009 to July 2, 2011. It indicated that, from April 5, 2009 through February 13, 2010, based on appellant's self-employment weekly earnings of \$384.81, she should have received compensation of \$12,161.25; that, for the period February 14, 2010 through March 31, 2011, she should have received compensation of \$3,191.00, based on weekly earnings (from self-employment and work at Sunset) of \$995.44; and that, for the period March 31 through July 2, 2011, she should have received compensation of \$3,834.60, based on \$610.63 weekly earnings at Sunset. Thus, when the compensation she should have received for the period April 5, 2009 through July 2, 2011, or \$19,186.85, was deducted from the compensation she actually received, or \$39,234.50, an overpayment of \$20,047.65 was created. OWCP advised appellant to repay the overpayment at the rate of \$240.00 each month.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.⁵ Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.⁶ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁷ has been codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.⁸ Its procedures provide that OWCP can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work

⁴ Appellant did not return the overpayment action request. She listed monthly expenses of \$900.00 for rent or mortgage, \$300.00 for food, \$750.00 for utilities and a \$255.00 payment to Wells Fargo Auto.

⁵ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁶ *Lottie M. Williams*, 56 ECAB 302 (2005).

⁷ *Albert C. Shadrick*, *supra* note 2.

⁸ 20 C.F.R. § 10.403 (2011).

stoppage did not occur because of any change in his injury-related condition affecting the ability to work.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant's actual earnings in private employment at Sunset Auto Center and her self-employment as a manicurist represent her wage-earning capacity. On June 21, 2011 appellant signed a CA-1032 form in which she stated that she was employed at Sunset with hourly earnings of \$12.00 and had annual earnings of \$31,753.00. She worked at least 40 hours a week at Sunset. Appellant also worked in self-employment as a manicurist. On August 31, 2011 OWCP issued a formal loss of wage-earning capacity decision, finding that her earnings fairly and reasonably represented her wage-earning capacity.

The Board finds that appellant's actual earnings in internet/telephone sales with Sunset plus her self-employment as a manicurist fairly and reasonably represent her wage-earning capacity. Appellant began full-time work at Sunset on February 14, 2010 and continued in self-employment as a manicurist. She worked in these positions for more than 60 days, and there is no evidence that her employment was seasonal or temporary and no evidence to show that she was not working eight hours a day.¹⁰ There is also no evidence that the positions consisted of makeshift work designed for appellant's particular needs.¹¹ There is no evidence that she stopped work as a manicurist because of a change in her injury-related condition.¹² As there is no evidence that appellant's wages in the sales position at Sunset and her self-employment as a manicurist did not fairly and reasonably represent her wage-earning capacity, they must be accepted as the best measure of her wage-earning capacity.¹³

In applying the *Shadrick* formula, OWCP properly found that the weekly pay rate when the disability occurred on April 20, 1997 was \$659.60, for Item 1. For Item 2, it properly utilized the current pay rate for the job and step when appellant was injured, or \$1,080.27. OWCP then properly found that her current weekly wage in her position with Sunset and her self-employment earnings was \$995.44, for Item 3.¹⁴ It then properly followed the *Shadrick* formula and divided Item 3 by Item 2, yielding a 92 percent wage-earning capacity, Item 4. Item 4 was then multiplied by Item 1, for an adjusted wage-earning capacity of \$606.83, Item 5. Item 5 was then subtracted from Item 1, yielding a loss in wage-earning capacity of \$52.77 per week,

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity* Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

¹⁰ *Id.*

¹¹ *See J.C.*, *supra* note 2.

¹² *Supra* note 9.

¹³ *See Daniel A. Reed*, Docket No. 93-1052 (issued February 27, 1995).

¹⁴ OWCP calculated appellant's earnings at Sunset at \$610.63. In a CA-1032 form signed by appellant on June 21, 2011, she indicated that she had earned \$31,753.00 at Sunset annually. In the August 31, 2011 decision, OWCP also determined that appellant had self-employment earnings as a manicurist of \$384.81 a week. Special Agent Bolz advised in a June 30, 2011 investigative report that appellant had annual earnings as a manicurist were at least \$20,000.00.

Item 6. OWCP then determined that compensation at the 75 percent augmented rate totaled \$39.58, Item 7, which was increased by cost-of-living adjustments to \$55.25 a week. The Board finds that OWCP properly applied the *Shadrick* formula in determining appellant's loss of wage-earning capacity.¹⁵

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

LEGAL PRECEDENT -- ISSUE 2

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.”¹⁶

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.”¹⁷

In order to establish that a compensationoner should forfeit the compensation received for the periods covered by completed CA-1032 forms, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.¹⁸ 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 CA-1032 forms. The term “knowingly” as defined in OWCP's implementing regulations and Board precedent means “with knowledge;

¹⁵ *Albert C. Shadrick*, *supra* note 2.

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

¹⁷ 20 C.F.R. § 10.5(g) (2011).

¹⁸ *Robert R. Holmes*, 49 ECAB 161 (1997); 20 C.F.R. § 10.5(n) (2011).

consciously; intelligently; willfully; intentionally.”¹⁹ The language on CA-1032 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.²⁰

ANALYSIS -- ISSUE 2

OWCP determined that appellant forfeited her entitlement to compensation for the period April 9, 2000 to April 5, 2009. Appellant signed CA-1032 forms on July 9, 2001, June 17, 2002, November 7, 2003, July 20, 2004, June 22, 2005, August 7, 2006, August 1, 2007, June 30, 2008, July 31 and October 6, 2009. She stated that she was not employed, self-employed and had not performed volunteer work on the forms, each of which covered the preceding 15 months. The June 30, 2011 investigative report and accompanying documentation, including an affidavit signed by appellant on March 18, 2011, establish that she was self-employed as a manicurist during the period of forfeiture. Appellant’s sworn statement and the findings documented in the investigative memorandum support that she was self-employed. She clearly had unreported earnings for the period April 9, 2000 to April 5, 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.²¹ OWCP may meet this burden in several ways: by an employee’s admission that he or she failed to report earnings he or she knew should be reported; by establishing that an employee pled guilty to violating applicable federal statutes by falsely completing the affidavits in CA-1032 forms; or by showing that, upon further inquiry by OWCP as to employment activities, the employee continued to not fully and truthfully reveal the nature of the employment activities.²²

Appellant acknowledged that she failed to report earnings she knew should have been reported to OWCP. Although the March 7, 2011 agreement for pretrial diversion on charges of making false statements on CA-1032 forms is not a guilty plea, it constitutes persuasive evidence of appellant’s knowledge that she understated her earnings for the period June 1, 2005 to July 31, 2009. Based on her admission that she did not report earnings, the Board finds that she knowingly failed to report earnings for the period April 9, 2000 to April 5, 2010, and she therefore forfeited her right to compensation for this period.²³

¹⁹ *Christine C. Burgess*, 43 ECAB 449 (1992).

²⁰ A.C., Docket No. 11-1760 (issued April 13, 2012).

²¹ *Supra* note 17.

²² *Melvin E. Gibbs*, 54 ECAB 473 (2003).

²³ *Barbara Hughes*, 48 ECAB 398 (1997). As to her argument before OWCP that she had to work because she was paid at an incorrect compensation rate, the issue here is failure to report earnings, not that she had earnings.

LEGAL PRECEDENT -- ISSUES 3 & 4

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 times 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. Compensation forfeited under this subsection, if already paid, shall be recovered under section 8129 of this title, unless recovery is waived under that section.”²⁴

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.”²⁵

ANALYSIS -- ISSUE 3

Regarding the overpayment of compensation in the amount of \$137,183.05, OWCP regulations provide that it may declare an overpayment of compensation for the period of a forfeiture of compensation. If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by a CA-1032 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.²⁶

OWCP paid appellant compensation in the amount of \$137,183.05 from April 9, 2000 to April 5, 2009. As it properly found that appellant forfeited her entitlement to compensation during this period because she failed to report earnings from employment on CA-1032 forms, there exists an overpayment of compensation in the amount of \$137,183.05.

²⁴ 5 U.S.C. § 8106(b).

²⁵ 20 C.F.R. § 10.529 (2011).

²⁶ *Louis P. McKenna, Jr.*, 46 ECAB 428 (1994).

ANALYSIS -- ISSUE 4

Regarding the \$20,047.75 overpayment of compensation, OWCP found that this overpayment was created from April 5, 2009 to July 2, 2011 because appellant knowingly understated her earnings from outside employment for that period on CA-1032 forms. On the CA-1032 form, appellant signed on July 5, 2010, she indicated that she earned \$10.00 an hour at Sunset and continued self-employment as a manicurist, with actual earnings of \$8,325.00. On the CA-1032 form she submitted on June 21, 2011, she indicated that she had annual earnings at Sunset of \$31,753.00. Appellant also reported that from January to March 31, 2011 she had actual earnings of \$10,546.00 as a manicurist.

Appellant reported on a CA-1032 form, signed by her on July 5, 2010, that her actual self-employment earnings as a manicurist for the previous 15 months were \$8,325.00. As noted above, OWCP determined that her actual earnings as a manicurist were at least \$20,000.00 a year or \$384.81 a week. Thus for the 15-month period covered by the July 5, 2010 form, appellant's actual earnings as a manicurist would have been approximately \$25,000.00, not the \$8,325.00 she reported. She also submitted a CA-1032 form on June 21, 2011 in which she also underreported self-employment earnings, indicating that, for the 15 months covered by the CA-1032 report, she had earnings of \$10,546.00. Even though appellant stated that she stopped work as a manicurist on March 31, 2011, since the CA-1032 form covered the prior 15 months, based on annual earnings of \$20,000.00, she would have earned approximately that amount prior to stopping self-employment. The evidence thus supports that she knowingly understated her earnings from self-employment and an overpayment of compensation was created.

In the October 21, 2011 decision, OWCP properly found that appellant was entitled to \$12,161.25 in compensation for the period April 5, 2009 through February 13, 2010, when offset by her manicurist earnings of \$384.81 per week. For the period February 14, 2010 through March 31, 2011, it properly found that she was entitled to compensation of \$3,191.00, when offset by her combined earnings of \$610.63 a week at Sunset and \$384.81 a week as a manicurist. Finally, OWCP properly found that appellant was entitled to compensation of \$3,834.60 for the period April 1 through July 2, 2011, when offset by her weekly earnings of \$610.63 from Sunset. Appellant received compensation totaling \$39,234.50 for the period April 5, 2009 through July 2, 2011, when she should have received compensation of \$19,186.85 (\$12,161.25 + \$3,191.00 + \$3,834.60). Therefore, an overpayment of compensation in the amount of \$20,047.65 was created.

LEGAL PRECEDENT -- ISSUE 5

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."²⁷

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

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).”²⁸

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.²⁹

ANALYSIS -- ISSUE 5

The Board finds that OWCP properly determined that appellant was at fault in creating the \$137,183.05 overpayment because she failed to provide information which she knew or should have known to be material on CA-1032 forms covering the period April 9, 2000 to April 5, 2009. The record establishes that she had unreported self-employment activity during this period and knowingly failed to furnish this material information to OWCP. Appellant signed certification clauses on the 1032 forms 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 forms, she is deemed to have acknowledged her duty to fill out the forms properly, including the duty to report any employment, self-employment, or involvement in a business enterprise. Appellant failed to furnish information that she knew or should have known to be material to OWCP. As she is not without fault in creating the overpayment in the amount of \$137,183.05, she is not entitled to waiver.³⁰

The Board also finds that OWCP properly determined that appellant was at fault in creating the \$20,047.75 overpayment of compensation because she knowingly understated her earnings on CA-1032 forms signed on July 5, 2010 and June 21, 2011. Under the standards for finding fault in the creation of an overpayment, a claimant is at fault if he or she fails to provide information that he or she knew or should have known was material or made an incorrect statement as to a material fact that he or she knew or should have known was incorrect. As

²⁸ 20 C.F.R. § 10.433 (2011); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

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

³⁰ *Harold F. Franklin*, 57 ECAB 387 (2006).

noted, the evidence establishes that appellant made incorrect statements on the CA-1032 forms signed by her on July 5, 2010 and June 21, 2011 because she underreported her self-employment earnings. By signing the forms, appellant is deemed to have acknowledged her duty to fill out the forms properly, including the duty to correctly report self-employment income. Her understatement of earnings is an incorrect statement as to a material fact, and she was thus at fault in creating an overpayment of \$20,047.75 for the period April 5, 2009 to July 2, 2011. As appellant is not without fault in creating the overpayment, she is not entitled to waiver.³¹

LEGAL PRECEDENT -- ISSUE 6

OWCP's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.³²

ANALYSIS -- ISSUE 6

Regarding repayment of the \$137,183.05 overpayment of compensation, OWCP's October 20, 2011 decision set a rate of recovery of \$221.00 from appellant's continuing compensation per compensation period. This reduced her compensation to zero. For repayment of the \$20,047.65 overpayment, OWCP's October 21, 2011 decision directed appellant to send in a check in the amount of \$240.00 each month to repay the overpayment.

The record supports that appellant underreported her income and did not provide documentation to support her claimed expenses on the overpayment questionnaire she signed on September 13, 2011. The Board finds that OWCP abused its discretion in setting the methods of recovery of the two overpayments because it did not give due regard to the relevant factors found in section 10.441 of the implementing federal regulations in either the October 20 or 21, 2011 final overpayment decisions. In the former, OWCP merely indicated that \$221.00 would be withheld from appellant's continuing compensation, reducing her compensation to zero. The decision did not mention the overpayment questionnaire or provide any discussion of the factors described in section 10.441. While OWCP noted that appellant had understated her monthly income in the October 21, 2011 decision, again OWCP stated that she should submit a \$240.00 check each month to repay the overpayment and again did not discuss the relevant factors. Furthermore, the Board notes that, as she is receiving monetary compensation, recovery of the overpayment must be made by decreasing subsequent payments of compensation.³³

The Board will set aside the October 20 and 21, 2011 decisions on the issue of recovery only.³⁴ On remand OWCP should reconsider the method of recovery for these overpayments.

³¹ *Id.*

³² 20 C.F.R. § 10.441(a) (2011).

³³ *See Barbara Hughes*, 48 ECAB 398, 403 (1997).

³⁴ 20 C.F.R. § 10.441; *see L.G.*, Docket No. 11-1472 (issued February 6, 2012).

CONCLUSION

The Board finds that appellant's actual earnings reasonably represented her wage-earning capacity; that she forfeited her right to compensation for the period April 9, 2000 to April 5, 2009 because she failed to report work activity; that she received a \$137,183.05 overpayment of compensation for that period; that she received a \$20,047.75 overpayment of compensation for the period April 5, 2009 through July 2, 2011; and that OWCP properly found that appellant was at fault in the creation of the overpayments. The Board also finds that OWCP abused its discretion with regard to repayment of the overpayments.

ORDER

IT IS HEREBY ORDERED THAT the August 31 and 26, 2011 decisions of the Office of Workers' Compensation Programs are affirmed. The October 21 and 20, 2011 decisions of OWCP are affirmed in part and set aside in part and remanded to OWCP for proceedings consistent with opinion of the Board.

Issued: October 1, 2012
Washington, DC

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

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

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