

FACTUAL HISTORY

On August 1, 2009 appellant, a 26-year-old sales and service associate, filed a claim alleging that picking bags up from the work floor and hanging them caused right shoulder pain. She had a previous traumatic injury in the performance of duty a year earlier while marking and moving boxes, which OWCP accepted for cervical radiculitis and internal derangement of the right shoulder region.³ Following that injury, appellant resumed limited duty on July 25, 2009 but noticed the same symptoms she had felt before.

OWCP accepted appellant's claim for aggravation of brachial neuritis or radiculitis and aggravation of internal derangement of the right shoulder. Appellant stopped work on August 1, 2009 and received compensation for temporary total disability on the periodic rolls.

In a decision dated October 13, 2011, OWCP found that appellant forfeited her right to compensation from September 16, 2009 to September 3, 2010. It determined that she failed to report on a Form EN-1032 the \$500.00 she earned for singing at a birthday party on May 6, 2010. Appellant knowingly failed to report or underreported her earnings for the 15 months covered by the form and therefore forfeited her right to compensation for the entire period. "As you knowingly misrepresented your employment and earnings on the Form [EN]-1032, this compensation must be found to be forfeit."

Appellant requested an oral hearing before an OWCP hearing representative. On February 27, 2012 the hearing representative found that she had abandoned her request. Although appellant received written notification of the scheduled hearing, she failed to appear or explain, either before or after the hearing, her failure to appear. She exercised no other appeal right.

On May 11, 2012 OWCP made a preliminary determination that appellant received a \$33,161.07 overpayment from September 16, 2009 to September 3, 2010 as a result of her forfeiture of compensation. It found that she was at fault in creating this overpayment because the record supported that she knowingly failed to report or underreported earnings on the Form EN-1032 she completed on September 3, 2010, as explained in the October 30, 2011 forfeiture decision. OWCP attached a fiscal memorandum explaining how it calculated the amount of the overpayment.

At a telephonic hearing held on October 3, 2012, appellant testified that she did not deliberately attempt to avoid reporting the \$500.00 she received from the party; she honestly forgot that it was something that happened and did not know it was something she had to report. She did not see it as income because she did not consider it as a job. In fact, appellant did report income from a small office job she had a month earlier, so it was not that she was trying not to report earnings; she just did not understand that it was something she was supposed to report. She saw the small office job as an actual job where she received a pay stub. With the party, appellant did not associate being paid for a one-time event as the same thing. She also testified about her finances.

³ OWCP File No. xxxxxx524.

In a decision dated December 18, 2012, the hearing representative finalized OWCP's preliminary determination that appellant received a \$33,161.07 overpayment from September 16, 2009 to September 3, 2010 as a result of the forfeiture of compensation. The hearing representative noted that OWCP issued a forfeiture decision on October 13, 2011 finding that she knowingly omitted income information on a Form EN-1032. "Therefore, the evidence of file demonstrates that the claimant did knowingly omit earnings information from the Form [EN]-1032, thereby forfeiting entitlement to compensation for the period September 16, 2009 through September 3, 2010." The hearing representative found that appellant was aware that she was obligated to report income obtained from any source while she was receiving compensation. Appellant completed the Form EN-1032 and provided information regarding her small office job in April 2010; therefore "it stands to reason that she should have reported the May 2010 [singing engagement] income, even if she was n[o]t sure it should be included." The hearing representative found appellant at fault in creating the overpayment, thereby precluding consideration of waiver of recovery. As appellant's monthly expenses far exceeded her current monthly income and savings, the hearing representative determined that a repayment schedule could not be established. The hearing representative found the \$33,161.07 overpayment due and payable in full.

On appeal, appellant contested the finding that she knowingly failed to report income. She questioned the overpayment from September 16, 2009 to September 3, 2010 because she failed to report income on only one day, May 6, 2010, and did not receive any income after that date. Appellant argued that the standard for forfeiture is not the standard for fault. She also argued that it would be against equity and good conscience to hold her responsible for the alleged amount, as her expenses exceed her income.

LEGAL PRECEDENT

An employee who 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. Compensation forfeited under this section, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129, unless recovery is waived under that section.⁴

OWCP may 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 received 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 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; (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).⁵

⁴ 5 U.S.C. § 8106(b).

⁵ 20 C.F.R. § 10.433(a).

Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on 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 she is being overpaid.⁶

ANALYSIS

The fact of overpayment is well established. OWCP found in its October 13, 2011 decision that appellant forfeited her right to compensation from September 16, 2009 to September 3, 2010. The record establishes that she failed to report all of her earnings during this period, in particular, the \$500.00 she earned on May 6, 2010 for a singing engagement at a birthday party.

As FECA requires that appellant forfeit her right to compensation for the entire 15-month period for which the Form EN-1032 was required, the amount of the overpayment is her gross compensation from September 16, 2009 to September 3, 2010. While the earnings she failed to report were received on only one day and notwithstanding the fact that she had no further earnings after that date. Under FECA the statute imposes a penalty and importance is placed upon reporting all of a claimant's earnings.

OWCP's May 11, 2012 preliminary determination provided a fiscal memorandum explaining how it calculated the amount of the overpayment. Using appellant's compensation payment history, OWCP added gross compensation from September 16, 2009 to August 28, 2010 and then calculated how much compensation she was entitled to over the next six days. This amounted to \$33,161.07 in compensation. The Board has reviewed the calculation and finds it to be correct. The Board will therefore affirm OWCP's December 18, 2012 decision on the issues of fact and amount of overpayment.

In its May 11, 2012 preliminary determination, OWCP found appellant at fault in creating this overpayment because she knowingly failed to report or underreported earnings on the Form EN-1032 she completed on September 3, 2010, as explained in the October 30, 2011 forfeiture decision. This is the legal standard for forfeiture under section 8106(b) of FECA. It is not the standard for fault under section 10.433(a) of the regulations. As noted above, the legal standard for determining whether appellant was at fault in creating an overpayment is whether she: (1) made an incorrect statement as to a material fact which she knew or should have known to be incorrect; (2) failed to provide information which she knew or should have known to be material; or (3) accepted a payment which she knew or should have known to be incorrect.

OWCP did not notify appellant on which of these grounds it found her at fault. It simply adopted the finding made in its October 30, 2011 forfeiture decision. The fact that appellant knowingly omitted earnings does not necessarily mean she was at fault in creating an overpayment of compensation.⁷ Because OWCP applied the wrong legal standard to find her at

⁶ *Id.* at § 10.433(b).

⁷ *K.Z.*, Docket No. 12-784 (issued August 27, 2012) (finding the claimant not at fault for the overpayment arising from her forfeiture of compensation).

fault in creating the overpayment that arose from her forfeiture of compensation, the Board will set aside OWCP's December 18, 2012 decision on the issues of fault and recovery.

CONCLUSION

The Board finds that appellant received a \$33,161.07 overpayment of compensation from September 16, 2009 to September 3, 2010. The Board further finds that this case is not in posture for decision on the issue of fault because OWCP applied the wrong legal standard.

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2012 decision of the Office of Workers' Compensation Programs is affirmed on the issues of fact and amount of overpayment but is set aside on the issues of fault and recovery.

Issued: August 23, 2013
Washington, DC

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

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

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