



## **FACTUAL HISTORY**

On May 17, 1993 appellant, a 28-year-old payroll technician, sustained a traumatic injury in the performance of duty while walking up stairs. Her heel got stuck and she twisted her left ankle. OWCP accepted appellant's claim for left ankle strain, herniated discs and depression. She received compensation for temporary total disability on the periodic rolls.

Beginning on June 12, 2001, appellant annually completed EN1032 forms indicating that during the past 15 months she did not work for any employer, was not self-employed or involved in any business enterprise, was unemployed, and performed no volunteer work for which any form of monetary or in-kind compensation was received.

In 2012 OWCP received an investigative report from the Department of Labor, Office of the Inspector General (OIG), Office of Labor Racketeering and Fraud Investigations. The report found that appellant worked as a legal assistant for the Law Office of Harry D. Harmon from February 1999 to January 2006; she served as an administrative assistant for the Urban League of Hampton Roads from February 2004 to August 2006; she worked as the Resident Agent, Chief Executive Officer and President of Hampton Roads Disability Claims Resource Center, Inc. (HRDCRC) since incorporating the business on July 10, 2008; and she was appointed by the governor of Virginia to serve as a board member of the Norfolk State University Board of Visitors (NSUBOV) from July 2010 to July 2011.

The investigation noted that during the first meeting she attended of NSUBOV, appellant was recognized as "one of the fastest adults" and raised the most funds for a participant in the Norfolk State University Run/Walk for Excellence. According to the NSUBOV Executive Vice President and Chief Operating Officer, she was an avid runner and discussed exercising a lot. Appellant participated in a 5k run and came in as one of the top finishers. An NSUBOV Liaison and Office Manager corroborated appellant's participation in the Run for Excellence. According to an NSUBOV board member, appellant never mentioned being injured and was able to attend and sit through meetings lasting several hours without having to stand up or walk around.

During an interview with agents, appellant admitted that since she began HRDCRC in 2008 she inaccurately answered "no" to the Form EN1032 question about self-employment and involvement in any business enterprise.

In a sworn statement, appellant explained that she did not disclose to OWCP that she had an actual business location for HRDCRC "out of fear of the unknown as to how this could affect my disability claim."

The OIG investigation found that, since her injury in 1993, appellant had applied for over 50 jobs on the Office of Personnel Management website, using HRDCRC, NSUBOV and other positions to bolster her résumé. On her résumé, appellant stated that she worked as a volunteer legal assistant February 1999 to January 2006 and as a volunteer administrative assistant February 2004 to August 2006. She listed that she worked as the CEO and Founder of HRDCRC from January 2008 to present.<sup>2</sup>

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<sup>2</sup> The OIG found that appellant incorporated HRDCRC on July 10, 2008.

On June 26, 2012 OWCP issued a decision finding that appellant forfeited her right to compensation from March 12, 2000 to May 18, 2011 on the grounds that, under 5 U.S.C. § 8016(b), she knowingly failed to report her self-employment, business activity and volunteer work for that period.

Also on June 26, 2012 OWCP made a preliminary determination that appellant received a \$243,055.55 overpayment of compensation from March 12, 2000 to May 18, 2011 because she forfeited her right to compensation for that period. It found that she was at fault in creating the overpayment because she knowingly failed to report her employment activities and because she knowingly accepted compensation to which she was not entitled. OWCP attached a detailed compensation payment history for the period and explained how it calculated the amount of the overpayment.<sup>3</sup>

On an overpayment recovery questionnaire, appellant indicated that she had no income and monthly household expenses of \$1,912.00. She added that she had \$2,145.00 in her checking and saving accounts. Appellant did not believe that she was at fault in creating the overpayment because she answered all questions to the best of her ability, did not receive payment of any kind for any activity, fully complied with all OWCP requirements and did not intentionally provide incorrect statements. She stated that she needed substantially all her income to meet necessary living expenses.

On August 16, 2012 OWCP finalized its overpayment decision. It found that appellant was at fault in creating the overpayment because she was aware or reasonably should have been aware that her compensation could be forfeited for making incorrect statements and failing to provide information of a material nature. OWCP concluded that she was at fault as she knowingly accepted wage-loss compensation to which she was not entitled. It advised that the overpayment would be recovered by deducting \$25.00 from continuing compensation.

On appeal, appellant submits a new medical report. She argues that OWCP did not thoroughly examine the evidence or the totality of the circumstances before declaring forfeiture. Appellant argues, citing medical evidence, that her accepted severe depression imposed significant restrictions on her ability to perform basic work activities. She states that she did not knowingly omit or understate any earnings or work activity in making a report, and did not intentionally fail to report her employment activities and earnings on forms covering the period. Appellant argues that OWCP has established no earnings or other forms of remuneration from her activities with the law office, the Urban League, the HRDCRC or otherwise, nor did OWCP establish any financial interest in those activities or any benefit that inured to her based on those activities. She also argues that she was not at fault in creating the overpayment and that OWCP abused its discretion in denying waiver of recovery of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

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. Compensation forfeited, if

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<sup>3</sup> Starting with gross compensation from February 27, 2000 to May 7, 2011, OWCP subtracted compensation from February 27 to March 11, 2000 and added compensation from May 8 to 18, 2011.

already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under 5 U.S.C. § 8129, unless recovery is waived under that section.<sup>4</sup>

An employee who is receiving compensation for partial or total disability must advise OWCP immediately of any return to work, either part time or full time. An employee must report all outside employment, including any concurrent dissimilar employment held at the time of injury, even if the injury did not result in any lost time in that position. In addition, an employee who is receiving compensation for partial or total disability will periodically be required to submit a report of earnings from employment or self-employment, either part time or full time. The employee must report even those earnings that do not seem likely to affect his or her level of benefits. Many kinds of income, though not all, will result in a reduction of compensation benefits. While earning income will not necessarily result in a reduction of compensation, failure to report income may result in forfeiture of all benefits paid during the reporting period.<sup>5</sup>

An employee who is receiving compensation for partial or total disability is periodically required to report volunteer activity or any other kind of activity which shows that the employee is no longer totally disabled for work. The fact that the employee did not receive any salary for this work is not a basis for failing to report this activity; instead the employee must report the cost, if any, to have someone else do the work or activity.<sup>6</sup>

OWCP periodically requires each employee who is receiving compensation benefits to complete an affidavit as to any work, or activity indicating an ability to work, which the employee has performed for the prior 15 months.<sup>7</sup> 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.<sup>8</sup>

An employee is subject to the forfeiture provision of section 8106(b)(2) only if he or she knowingly omitted or understated earnings. OWCP's FECA procedure manual recognizes that forfeiture is a penalty,<sup>9</sup> and as a penalty provision, it must be narrowly construed.<sup>10</sup> The term "knowingly" is not defined within FECA or its regulations, but in common usage it is defined as "with knowledge; consciously; intelligently; willfully; intentionally."<sup>11</sup>

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<sup>4</sup> 5 U.S.C. § 8106(b).

<sup>5</sup> 20 C.F.R. § 10.525.

<sup>6</sup> *Id.* at § 10.526.

<sup>7</sup> *Id.* at § 10.528.

<sup>8</sup> *Id.* at § 10.529(a). These regulations have remained basically unchanged since they were revised effective April 1, 1999.

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.11.a(5) (March 2010).

<sup>10</sup> *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

<sup>11</sup> Black's Law Dictionary (5<sup>th</sup> ed. 1979); *Anthony A. Nobile*, 44 ECAB 268, 271-73 (1992).

## **ANALYSIS -- ISSUE 1**

OWCP found that appellant forfeited her right to compensation from March 12, 2000 to May 18, 2011 on the grounds that she knowingly failed to report her self-employment, business activity and volunteer work for that period. An OIG investigative report found that she worked as a legal assistant for the Law Office of Harry D. Harmon from February 1999 to January 2006; she served as an administrative assistant for The Urban League of Hampton Roads from February 2004 to August 2006; she worked as the Resident Agent, Chief Executive Officer and President of HRDCRC since July 10, 2008; and she served as a board member of NSUBOV from July 2010 to July 2011.

The Board has set standards pertaining to the probative value of investigative reports used as evidence under a FECA claim.<sup>12</sup> In this case, the investigative report was signed, unredacted,<sup>13</sup> and provided some probative evidence to support the findings made therein, including a résumé and signed affidavit from appellant.<sup>14</sup> Appellant did not deny that she engaged in the cited activities during the period at issue. She argued instead that she did not knowingly omit or understate any earnings or work activity in connection with her EN1032 forms.

Earnings are not a prerequisite to disclosure on Form EN1032. An employee who is receiving compensation for partial or total disability is periodically required to report volunteer activity or any other kind of activity which shows that the employee is no longer totally disabled for work. OWCP had an interest in knowing whether appellant performed any activity as a legal assistant, as an administrative assistant, as a resident agent or a chief executive officer or president, or as a board member. Such activities may indicate that her accepted employment injuries no longer totally disabled her for all work. Such activities are relevant to whether appellant had the capacity to earn some level of wages in the open labor market, even if she had no actual earnings. This information was material to her entitlement to compensation for wage loss. By not reporting her activities, appellant prevented OWCP from examining whether she was still entitled to compensation for total disability.

As appellant obviously had knowledge that she engaged in the cited activities, and as she was conscious of the fact that she did not disclose those activities on her EN1032 forms, the Board finds that she knowingly omitted work activity in violation of 5 U.S.C. § 8106(b)(2) and the implementing regulations. She thereby forfeited her right to compensation with respect to each reporting period for which disclosure was required.

The evidence indicates that appellant performed certain volunteer work activity from February 1999 to August 2006. The OIG found that she performed other work activity since

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<sup>12</sup> *B.Y.*, Docket No. 11-1798 (issued July 24, 2012); *S.G.*, Docket No. 11-942 (issued April 4, 2012) (Groom, M., Alternate Judge, concurring); *R.W.*, Docket No. 09-1607 (issued July 26, 2010); *Marvin L. Ralph*, 47 ECAB 626 (1996); *Eugene R. Anderson*, 40 ECAB 452 (1989).

<sup>13</sup> *R.B.*, Docket No. 12-455 (issued February 25, 2013).

<sup>14</sup> Reports of Interview, usually prepared a few days after the interview, were unsigned by the party being interviewed and will not be used to validate the information contained therein. *See B.Y.*, *supra* note 12.

incorporating HRDCRC on July 10, 2008. This leaves a gap in activity from August 2006 to July 10, 2008. OWCP did not address this gap.

The Form EN1032 that appellant signed on May 29, 2008 covered the previous 15 months, a period that falls within the gap of her work activity. She had left her position as a volunteer administrative assistant with the Urban League in 2006, and she had not yet incorporated HRDCRC on July 10, 2008, according to the OIG investigation. The record does not establish that appellant had work activity to disclose on this Form EN1032.

Appellant's résumé does indicate that she founded and served as CEO of HRDCRC beginning January 2008, six months earlier than the OIG reported. That would place her work activity within the period covered by the Form EN1032 she signed on May 29, 2008. Knowing omission of this activity would result in forfeiture for the entire period, but the evidence of when she began this activity is conflicting. The Board finds that OWCP has failed to establish that appellant forfeited her right to all compensation during this period. The Board will modify OWCP's June 26, 2012 decision accordingly.<sup>15</sup>

On appeal, appellant submits a new medical report. The Board's review of a case, however, is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.<sup>16</sup> As appellant submitted the medical report in question after OWCP's June 26, 2012 forfeiture decision, the Board has no jurisdiction to review the report on this appeal.

Appellant argues that OWCP did not thoroughly examine the evidence or the totality of the circumstances before declaring forfeiture, but the operative facts are clear. During the period at issue, she performed, by her own admission, activities as a legal assistant, administrative assistant, resident agent, chief executive officer, president and board member. Appellant's answers to the Form EN1032 questions about self-employment, involvement in any business enterprise and volunteer work were not accurate: they were a knowing nondisclosure of her work activities. She knew that she had been involved in some business enterprise and had performed some volunteer work that she deliberately failed to disclose on the forms. With the exception of the May 29, 2008 Form EN1032, both the evidence and the circumstances support OWCP's finding of forfeiture.

Medical evidence on appellant's ability to perform basic work activities is immaterial to whether she knowingly omitted her involvement in any business enterprise and her performance of any volunteer work on the Forms EN1032. Again, it does not matter whether she had any

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<sup>15</sup> Because the previous and subsequent EN1032 forms overlap the period covered by the May 29, 2008 report, appellant did forfeit some compensation at the beginning and end of that period, leaving her approximately eight months during which she remained entitled to compensation.

<sup>16</sup> 20 C.F.R. § 501.2(c)(1).

earnings or other forms of remuneration from her activities.<sup>17</sup> The penalty is imposed for nondisclosure, for not keeping OWCP informed about activities that might, or might not, affect her compensation for wage loss.

### **LEGAL PRECEDENT -- ISSUE 2**

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.<sup>18</sup>

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 she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in regard to receipt of her benefits. Such care includes reporting events which may affect entitlement to or the amount of benefits. 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 she knew or should have known to be incorrect; or

“(2) Failed to provide information which she knew or should have known to be material; or

“(3) Accepted a payment which the recipient knew or should have known to be incorrect. (This provision applied only to the overpaid individual.)”<sup>19</sup>

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.<sup>20</sup>

### **ANALYSIS -- ISSUE 2**

As appellant forfeited her right to compensation, fact of overpayment is established. The amount of the overpayment, however, warrants further development because she did not forfeit

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<sup>17</sup> In the case of *Daniel A. Mashe*, 50 ECAB 419 (1999), the Board found that OWCP improperly determined that the claimant forfeited his right to compensation for the period September 10, 1990 through June 27, 1992. At that time, forfeiture required knowingly omitting earnings or other forms of remuneration. The claimant had clearly engaged in work activities, but without the receipt of earnings or other remuneration for his efforts, the record provided no basis to invoke the penalty provision of Section 8106(b)(2). Since that time, however, the law has changed. The scope of what must be disclosed has broadened. A claimant is now required to report, as appellant was required to report here, any activity indicating an ability to work, such as any involvement in a business enterprise or the performance of any volunteer work, regardless of whether the claimant received any wages or other forms of remuneration or financial benefit.

<sup>18</sup> 20 C.F.R. § 10.529(b).

<sup>19</sup> *Id.* at § 10.433(a).

<sup>20</sup> *Id.* at § 10.433(b).

her right to all compensation from February 19, 2008 to May 18, 2011. Appellant remains entitled to some compensation during the period covered by her May 29, 2008 Form EN1032. The Board will set aside OWCP's August 16, 2012 decision on the issue of amount of overpayment.

In finding appellant at fault in creating the overpayment, OWCP implicated all three grounds: making incorrect statements, failing to report and accepting incorrect payments. The Board finds that the first grounds are the most appropriate. On the relevant EN1032 forms, appellant made an incorrect statement as to a material fact which she knew or should have known to be incorrect. She denied any involvement in any business enterprise and disclosed none of her volunteer work. This information was material to the proper payment of appellant's compensation, and she should have known that her answers were incorrect. Her answers left OWCP with the impression that she at no time worked as a legal assistant for a law office, that she never served as an administrative assistant for the Urban League, that she was never a founder and CEO of a disability resource center, and was never appointed to serve as a board member of a university board of visitors. Rather than disclose these activities so that OWCP could determine whether they affected her compensation, she kept the information to herself, as she indicated in her affidavit, knowing that this information might affect her compensation.

Appellant had an obligation to show good faith and exercise a high degree of care in regard to receipt of her benefits. Such care included reporting events which may affect entitlement to or the amount of benefits. The Board will affirm OWCP's August 16, 2012 decision on the issue fault. Appellant is not eligible for consideration of waiver.

### **LEGAL PRECEDENT -- ISSUE 3**

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information will be used to determine the repayment schedule, if necessary.<sup>21</sup>

Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to 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 resulting hardship upon such individual.<sup>22</sup>

### **ANALYSIS -- ISSUE 3**

OWCP was aware of the probable extent of future compensation payments and the rate of appellant's compensation. Appellant completed an overpayment recovery questionnaire showing her financial circumstances. The Board therefore finds that OWCP gave due regard to relevant circumstances when it found that the overpayment should be recovered at a minimal rate of \$25.00 every four weeks so as to minimize any resulting hardship. The Board will affirm OWCP's August 16, 2012 decision on the issue of rate of recovery.

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<sup>21</sup> *Id.* at § 10.438(a).

<sup>22</sup> *Id.* at § 10.441(a).

## **CONCLUSION**

The Board finds that appellant forfeited her right to compensation for the period March 12, 2000 to June 10, 2007 and from February 19, 2008 to May 18, 2011. Although the amount of the resulting overpayment requires further development, the Board finds that she was at fault in its creation. The Board also finds that OWCP properly set the rate of recovery from continuing compensation.

## **ORDER**

**IT IS HEREBY ORDERED THAT** the June 26, 2012 decision of the Office of Workers' Compensation Programs is modified to find that appellant did not forfeit her right to all compensation for the period covered by her May 29, 2008 Form EN1032. The June 26, 2012 decision is otherwise affirmed. The August 16, 2012 decision of OWCP is set aside on the issue of amount of overpayment and is otherwise affirmed.

Issued: June 13, 2013  
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