



## **ISSUES**

The issues are: (1) whether OWCP properly denied appellant's request for a prerecoupmment hearing regarding an overpayment of compensation as untimely; and (2) whether it properly determined that he forfeited his right to compensation for the period May 22, 2007 through August 12, 2009.

On appeal, appellant asserts that funds he received in 2008 were not for him but for a senior citizen he was assisting and therefore his compensation should not be forfeited.

## **FACTUAL HISTORY**

On June 13, 2000 appellant, then a 55-year-old distribution clerk, filed an occupational disease claim alleging severe left knee pain caused by his employment duties.<sup>3</sup> On October 4, 2000 OWCP accepted that he sustained an employment-related aggravation of left knee osteoarthritis. Appellant underwent an unauthorized arthroscopic repair of a left knee meniscal tear on February 12, 2003. On July 5, 2005 OWCP accepted permanent aggravation of left knee osteoarthritis.<sup>4</sup>

On August 18, 2005 appellant was granted a schedule award for 17 percent impairment of the left leg, for a total of 48.96 weeks to run from September 2, 2004 to August 10, 2005. On February 22, 2006 he underwent a left total knee replacement. Appellant received wage-loss compensation beginning that day. He returned to his modified duties on July 19, 2006. On August 3, 2007 appellant was granted a schedule award for an additional 58 percent left lower extremity impairment, for a total of 75 percent impairment. The award covered 167.04 weeks to run February 16, 2007 to April 30, 2010.

The record contains two OWCP EN1032 forms, signed by appellant on August 22, 2008 and August 12, 2009. The forms cover the periods May 22, 2007 through August 22, 2008 and May 12, 2008 through August 12, 2009 respectively.

On April 20, 2009 appellant filed a recurrence claim, alleging that the recurrence occurred on April 13, 2009 when he was sent home by management because no work was available within his restrictions. OWCP accepted the recurrence on June 17, 2009 and appellant

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<sup>3</sup> Appellant, a former letter carrier, was performing modified duties when he filed the instant claim. The record includes claim forms for traumatic injuries that occurred on June 17, 1983 (dog bite), July 18 (right ankle sprain) and November 19, 1985 (dog attack).

<sup>4</sup> The record also includes two subsidiary files. In a claim adjudicated by OWCP under file number xxxxxx668, on November 15, 2002 appellant filed both a traumatic injury claim alleging a left knee injury on April 12, 2000 and an occupational disease claim for agonizing left knee pain. OWCP denied the claim on February 7, 2003 on the grounds that he did not establish fact of injury. In a December 4, 2003 decision, it found that appellant had abandoned a request for a hearing. In a claim adjudicated under file number xxxxxx551, on November 23, 2002 he filed a traumatic injury claim alleging that he injured his left knee when he hit it on a desk. OWCP denied the claim on January 17, 2003 on the grounds that appellant did not establish fact of injury. The instant claim was adjudicated under file number xxxxxx352.

was placed on the periodic compensation rolls beginning June 7, 2009. Appellant's schedule award compensation was terminated that day.

Appellant retired effective October 31, 2009 and received a separation pay incentive of \$10,000.00. He elected FECA benefits, effective November 1, 2009, and on April 30, 2010 elected to receive civil service retirement benefits, effective May 10, 2010.

By decision dated June 21, 2010, OWCP issued an amended schedule award. It noted that the schedule award for 58 percent left leg impairment had been discontinued on April 21, 2009 when appellant began receiving wage-loss compensation. Appellant had since elected to receive retirement benefits, effective May 10, 2010, and the remainder of his schedule award was now payable. OWCP stated that 382 days remained on the schedule award.

In a report dated July 18, 2011, the Office of Inspector General (OIG) of the employing establishment advised that it conducted a joint investigation with the fraud division of the California Department of Insurance from December 17, 2009 to June 13, 2011. The report noted that appellant received undeclared gross income of \$1,947.60 from the County of Los Angeles In-Home Supportive Services Department (IHSS) from June 1 through July 31, 2008, while receiving compensation on the periodic rolls under FECA. The OIG report noted that he submitted a signed EN1032 form on August 22, 2008 which certified that he had not been employed, self-employed or involved in any business enterprise in the past 15 months. The report noted that the California Employment Development Division (CEDD) and IHSS documents established that appellant had provided in-home services for a client and received a gross payment of \$1,947.60, which covered the period June 1 through July 31, 2008. Appellant was interviewed by OIG special agents on February 28, 2011 and initially denied that he worked as a care provider; but, with the assistance of his wife, recalled that he helped the client who was a friend, for approximately two months. He asserted that he did not make any money. When shown the IHSS document that he had been paid \$1,947.60, appellant stated that he gave all the money to the client. He unsuccessfully tried to contact the client by telephone and an attempt by the OIG agents to speak with her was unsuccessful. Attached was the EN1032 form signed by appellant on August 22, 2008, a memorandum of interview with him dated February 28, 2011, an acknowledgement of rights signed by him on February 28, 2011, an IHSS document indicating that he was being investigated and IHSS documentation showing that he was paid a total of \$1,947.60.

By decision dated January 30, 2012, OWCP found that appellant forfeited his right to compensation for the period May 22, 2007 through August 12, 2009, because he knowingly failed to report employment activity on the EN1032 forms signed on August 22, 2008 and August 12, 2009. On January 30, 2012 it also made a preliminary determination that he received an overpayment of compensation in the amount of \$82,057.27 because he knowingly failed to report his employment activity for the period May 22, 2007 through August 12, 2009 and had received compensation totaling \$82,057.27 during this period. Appellant was found at fault in creating the overpayment because he made an incorrect statement as to a material fact which he knew or should have known was incorrect, he failed to provide information which he knew or should have known was material and accepted a payment which he knew or should have known was incorrect, based on his failure to report earnings on EN1032 forms. He was notified of the actions that he could take and was provided an overpayment action request form and a blank

EN1032 form. Appellant was given 30 days from the date of the letter to respond. Computer print-outs and OWCP memoranda of record establishes that he received compensation of \$82,057.27 for the period May 22, 2007 through August 12, 2009.

On March 6, 2012 OWCP finalized the overpayment determination, finding that appellant was at fault in the creating an \$82,057.27 overpayment of compensation. Appellant was informed that his only appeal right was with the Board.

On April 6, 2012 appellant returned two pages of an overpayment questionnaire and the overpayment action request, noting that he wanted a decision on the record. In an attached statement dated March 20, 2012, received by OWCP on April 6, 2012, appellant asserted that he did not fraudulently conceal his earnings because he gave the IHSS funds to the client. He submitted a second overpayment action request on April 17, 2012 in which he requested a prerecoupment hearing. In a letter dated May 2012, the client indicated that appellant had been paid by IHSS for June and July 2008. She did not state that he had transferred the funds to her. An unidentified statement forwarded with the statement from the client indicated that appellant did not pay her.

In undated correspondence, received by OWCP on July 24, 2012, appellant stated that he disagreed with the January 30, 2012 forfeiture decision and March 6, 2012 overpayment decision and requested a hearing and reconsideration.

In a May 8, 2012 decision, OWCP denied appellant's request for a prerecoupment hearing as untimely.

In a merit decision dated October 17, 2012, OWCP denied modification of the January 30, 2012 forfeiture decision finding that appellant forfeited compensation for the period May 22, 2007 to August 12, 2009.

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

OWCP regulations on the recovery of overpayments provide that, before collecting the overpayment, it must provide the claimant with written notice of the fact and amount of the overpayment, the finding of fault, the right to submit evidence challenging the fact, amount or finding of fault and the right to request waiver of the overpayment.<sup>5</sup> The regulations further provide that a claimant may request a prerecoupment hearing with respect to an overpayment.<sup>6</sup> Failure to request the prerecoupment hearing within 30 days shall constitute a waiver of the right

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<sup>5</sup> 20 C.F.R. § 10.431.

<sup>6</sup> *Id.* at § 10.432.

to a hearing.<sup>7</sup> The only right to a review of a final overpayment decision is to the Board.<sup>8</sup> The hearing provisions of 5 U.S.C. § 8124(b) of FECA do not apply to a final overpayment decision.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly denied appellant's request for a hearing as untimely. OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in a letter dated January 30, 2012. It informed him that he could request a telephone conference, a prerecoupment hearing or a final decision based on the written evidence within 30 days of the date of the letter. Appellant did not respond to the January 30, 2012 preliminary determination within 30 days and on March 6, 2012 OWCP finalized the overpayment determination and notified him that his only appeal right was with the Board. He did not return an overpayment action request until April 6, 2012, when he requested a decision on the record. It was not until April 17, 2012 that appellant requested a prerecoupment hearing. The overpayment action request is specific as to the 30-day time limitation and the method requesting a prerecoupment hearing. Appellant's request for a prerecoupment hearing was dated April 17, 2012, more than 30 days after OWCP's notification of overpayment on January 30, 2012. As provided in OWCP regulations, his hearing request was therefore untimely and he waived his right to a prerecoupment hearing.<sup>10</sup>

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

Section 8106(b) of FECA provides that the Secretary of Labor may require a partially disabled employee to report his or her 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.”<sup>11</sup>

Section 8101(12) of FECA defines “compensation” as “the money allowance payable to an employee or his or her dependents and any other benefits paid for from the Employees' Compensation Fund.”<sup>12</sup> Thus, section 8106(b)(2) of FECA contemplates a schedule award as

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<sup>7</sup> *Id.*

<sup>8</sup> 20 C.F.R. § 10.440(b); *see H.K.*, Docket No. 11-543 (issued November 25, 2011).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* The Board also notes that appellant did not timely file an appeal with the Board of the final overpayment decision. For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e); *R.C.*, Docket No. 10-2371 (issued July 14, 2011).

<sup>11</sup> 5 U.S.C. § 8106(b); *see F.C.*, 59 ECAB 666 (2007).

<sup>12</sup> *Id.* at § 8101(12).

compensation, for purposes of forfeiture as monetary compensation payable to an employee under section 8107 are payments made from the Employees' Compensation Fund.<sup>13</sup>

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.”<sup>14</sup>

In order to establish that a compensationner should forfeit the compensation received for the periods covered by completed OWCP EN1032 forms, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.<sup>15</sup> 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 EN1032 forms. The term “knowingly” as defined in OWCP's implementing regulations and Board precedent means “with knowledge; consciously; intelligently; willfully; intentionally.”<sup>16</sup> The language on OWCP EN1032 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.

### ANALYSIS -- ISSUE 2

OWCP determined that appellant forfeited his entitlement to compensation for the period May 22, 2007 through August 12, 2009. He signed an OWCP EN1032 form on August 22, 2008 covering the period May 22, 2007 through August 22, 2008. Appellant signed a second EN1032 form on August 12, 2009 covering the period May 12, 2008 through August 12, 2009. He indicated on both forms that he had no employment, self-employment or involvement in a business and did not perform volunteer work. The July 18, 2011 OIG report and accompanying documentation, however, establish that appellant earned \$1,947.60 as a home care attendant for the Los Angeles County IHSS for the period June 1 through July 31, 2008, a period during which he also received FECA benefits for total disability. Appellant alleged that he gave the earnings

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<sup>13</sup> See *William M. Vaughan*, Docket No. 96-501 (issued April 23, 1998).

<sup>14</sup> 20 C.F.R. § 10.5(g).

<sup>15</sup> *Robert R. Holmes*, 49 ECAB 161 (1997); 20 C.F.R. § 10.5(n).

<sup>16</sup> *Christine C. Burgess*, 43 ECAB 449 (1992).

he received to his client but this was not supported by her statement. He clearly had unreported earnings for this period.<sup>17</sup>

Appellant can be subject to the forfeiture provision of section 8106(b) only if he “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.<sup>18</sup> Although the penalty of forfeiture is to be narrowly applied, it is triggered by claimant’s dishonest declaration on an EN1032 form rather than by the period of earnings itself. In this case, appellant worked for two months, June 1 to July 31, 2008. He signed two EN1032 forms, both with a declaration that he had no work or earnings. These forms advised appellant that he must report all employment and all earnings from employment, self-employment and involvement in a business enterprise. The forms clearly stated that he could be subject to criminal prosecution for false or evasive answers or omissions. One form was signed on August 22, 2008 and the second was signed on August 12, 2009. Because appellant’s admitted, single period of work was fully within the 15-month span of each declaration, he is properly subject to the two periods of forfeiture required by OWCP for statements in both EN1032 forms. This increases appellant’s forfeiture period from 15 months to 26-plus months. Although harsh, this result is consistent with a proper application of the penalty.

The evidence of record, including appellant’s signing of a strongly worded certification clause on the EN1032 forms, provide persuasive evidence that he “knowingly” failed to report earnings he received from IHSS.<sup>19</sup> If a claimant has any earnings during a period covered by an EN1032 form which he or she knowingly fails to report, he or she 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.<sup>20</sup> The Board therefore finds that OWCP properly found that appellant forfeited compensation for the period May 22, 2007 through August 12, 2009.

### CONCLUSION

The Board finds that OWCP properly denied appellant’s request for a prerecoupment hearing as untimely and that he forfeited his entitlement to compensation for the period May 22, 2007 through August 12, 2009.

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<sup>17</sup> See *Harold F. Franklin*, 57 ECAB 387 (2006).

<sup>18</sup> *Supra* note 16.

<sup>19</sup> See *Harold F. Franklin*, *supra* note 16.

<sup>20</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 17 and May 8, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 25, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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