

fault in creating the \$37,906.53 overpayment, such that it was not subject to waiver; and (4) whether OWCP properly determined that repayment was due and payable in full.

FACTUAL HISTORY

On March 29, 2010 appellant, then a 54-year-old mail processor, filed a traumatic injury claim alleging that on March 27, 2010 he sustained a back injury as a result of his federal employment duties. On May 21, 2010 OWCP accepted the claim for sprain of lumbar back. On February 7, 2011 it expanded the claim to include exacerbation of lumbar degenerative disc disease and lumbar radiculopathy.

Appellant submitted claim for compensation forms (CA-7) for the period May 11 through October 8, 2010. In Section 3 of the Form CA-7, he was advised that he must report all earnings from employment outside of his federal job. The form stated, "You must report all earnings from employment (outside your federal job); include any employment for which you received a salary, wages, income, sales commissions, piecework or payment of any kind during the period(s) claimed in Section 2. Include self-employment, involvement in business enterprises, as well as service with the military forces. Fraudulent concealment of employment or failure to report income may result in forfeiture of compensation benefits and/or criminal prosecution." On each form appellant checked the box marked "no" that he did not have earnings from employment.

Appellant received daily rolls payments for compensation for wage loss for the period May 11 through September 25, 2010. Effective September 26, 2010, he was placed on the periodic rolls for automatic payment every 28 days.

On March 21, 2011 OWCP provided appellant with an EN1032 form requesting information with respect to any employment activity, dependents and receipt of any other federal benefits. The form requested information for the preceding 15 months.

On April 11, 2011 appellant submitted the EN1032 form affidavits of earnings and employment covering the period May 11, 2010 to April 11, 2011. In Section 1 of the form, when asked if he worked for any employer during the past 15 months, he answered "yes" and stated the dates of employment as September 2009 through March 25, 2010 making collections for Star News Group. For Section 2, which asked if he was self-employed or involved in any business enterprise in the past 15 months, appellant answered "no" and did not report any employment. He provided an attached statement with his EN1032 form stating that the last day he worked for Star News Group was March 25, 2010. Appellant stated that he received his check for that day on April 2, 2010 and also received his vacation days that were due to him since he was no longer working there. He stated that this was the only outside money he received.

In a subsequent EN1032 form signed September 2, 2011, covering the period June 2, 2010 to September 2, 2011, appellant reported that he had worked on May 6 and 13 and September 10, 2010 for the Star News Group. In a description of the work done, he stated, "pick up of money and return of papers."

In a letter dated November 10, 2011, Star News Group publisher of “The Coast Star” confirmed appellant’s employment stating that his inclusive employment dates were December 20, 2007 through September 9, 2010. It further noted that he tendered his resignation in September 2010 after taking a long break from his part-time delivery position. Appellant’s last pay date was noted as September 10, 2010 and he last worked on May 14, 2010.

A December 22, 2011 letter from the U.S. Postal Service, Office of Inspector General (OIG) revealed that appellant was found to be employed by “The Coast Star” delivering newspapers during his period of total disability. His CA-7 forms and a Form EN1032 during that period of time stated that he had no earnings.

On December 15, 2011 appellant pled guilty in U.S. District Court of the District of New Jersey for violating 18 U.S.C. § 1920, Fraud to Gain Federal Employee Compensation. As part of the plea agreement, he was placed on probation for one year and was ordered to pay restitution of \$695.00. A copy of the judgment was attached.

As a result of this plea, by decision dated January 11, 2012, OWCP terminated appellant’s compensation benefits, effective December 15, 2011, the date the plea was accepted by the District Judge.

By decision dated January 13, 2012, OWCP forfeited compensation for the entire period, May 11, 2010 through April 11, 2011, because appellant had failed to report employment income as required under 5 U.S.C. § 8106(b) in the EN1032 form dated April 11, 2011 and CA-7 forms for the same period.

On January 13, 2012 OWCP declared the compensation received by appellant from May 11, 2010 to April 11, 2011 as an overpayment in the amount of \$37,906.53 due to the forfeiture of his compensation. It found that he was at fault in the creation of the overpayment.

On February 6, 2012 appellant appealed OWCP’s January 13, 2012 decisions and requested an oral hearing before the Branch of Hearings and Review. In a narrative statement that same date, he reported that he was not employed by Star News Group during his period of disability but that his son was working for the company. Appellant stated that it took a while for the company to change the checks from his name into his son’s name. He therefore received some checks during this period of disability. In support of his claim, appellant enclosed copies of his son’s pay stubs from May 15 through August 27, 2010. At the June 11, 2012 hearing, he testified that, even though he received some checks, it was actually his son who did the work for Star News Group. Appellant confirmed that he pled guilty to a misdemeanor.

By decision dated August 8, 2012, the hearing officer affirmed OWCP’s decision of January 13, 2012 that declared a forfeiture of compensation benefits for the period May 11, 2010 through April 11, 2011. It also finalized the preliminary determination finding that appellant had been overpaid due to the forfeiture of compensation in the amount of \$37,906.53. OWCP found that, based on the plea agreement, he knew or reasonably should have known that he could not receive compensation for total disability while at the same time working and earning wages. It found appellant at fault in the creation of the overpayment and found the entire overpayment due and payable.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA provides that an employee who fails to make an affidavit or report when required, or 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.³

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.”⁴

In order to establish that a compensationner should forfeit the compensation received, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.⁵ The language in both the CA-7 and 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 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.⁶ The Board has held that it is not enough merely to establish that there was unreported employment or earnings. Appellant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she knowingly failed to report employment or earnings.⁷ The term knowingly as defined in OWCP's implementing regulations, means with knowledge, consciously, willfully or intentionally.⁸ The Board has found that OWCP can meet this burden of proof in several ways, including by appellant's own admission to OWCP that he failed to report employment or earnings which he knew he should report, or by establishing that he has pled guilty to violating applicable federal statutes by falsely completing EN1032 and CA-7 forms.⁹

³ 5 U.S.C. § 8106(b).

⁴ 20 C.F.R. § 10.5(g).

⁵ *Robert R. Holmes*, 49 ECAB 161 (1997).

⁶ *B.T.*, Docket No. 09-2190 (issued August 6, 2010).

⁷ *Harold F. Franklin*, 57 ECAB 387 (2006).

⁸ 20 C.F.R. § 10.5(n).

⁹ *Supra* note 7.

ANALYSIS -- ISSUE 1

The Board finds that appellant forfeited his right to compensation benefits for the period May 11, 2010 through April 11, 2011 because he knowingly omitted earnings.

On December 15, 2011 appellant entered a guilty plea to one count of violating 18 U.S.C. § 1920 when he knowingly made false statements regarding his employment, self-employment and income to obtain Federal Employees' Compensation Benefits.

Based on the facts presented, appellant submitted an April 11, 2011 EN1032 form and failed to report his earnings during the period covered by the form (May 11, 2010 to April 11, 2011). He did report that he worked for Star News Group from September 2009 through March 25, 2010, a period prior to the coverage of the form, but no earnings were reported for the covered period. In a subsequent September 2, 2011 EN1032 form, appellant, however, changed his response and reported that he had worked for Star News Group on May 6 and 13 and September 10, 2010. His CA-7 forms covering that period also indicated that he did not have any other earnings from employment. Star News Group confirmed appellant's employment stating that his last paycheck was on September 10, 2010 and that his prior date of employment had been May 14, 2010. The language on the forms is clear and unambiguous in requiring that appellant report all earnings. The record supports that he had worked for Star News Group in the 15 months preceding his April 11, 2011 EN1032 affidavit and that he was obligated to report those earnings.¹⁰ Appellant's signature on the EN1032 form dated April 11, 2011 and his CA-7 forms for that period certified that all the statements made in response to questions on the form were true, complete and correct to the best of his knowledge and belief. As his involvement with Star News Group clearly equated to earnings as defined by 20 C.F.R. § 10.5(g), the Board finds that appellant knowingly failed to fully report his work activities.¹¹

Appellant argued that, although he did receive checks during that period from Star News Group, in fact those checks should have been made payable to his son who had done the work. He stated that the company took a while to change the checks over to his son's name. Although appellant has attempted to explain away the guilty plea, the fact remains that he pled guilty in Federal District Court to a criminal count of violating 18 U.S.C. § 1920. The Board cannot overlook the fact that the plea was under oath, with legal representation and against his own interest.¹² Appellant's plea agreement constitutes substantial evidence that he received outside earnings during this period of disability.¹³ Thus, the Board finds that appellant forfeits the right to all compensation benefits for the entire period covered by the April 11, 2011 Form EN1032.

¹⁰ *J.S.*, 58 ECAB 515 (2007).

¹¹ *Albert A. Garcia*, 54 ECAB 206 (2002).

¹² *Iris E. Ramsey*, 43 ECAB 1075 (1992).

¹³ *M.C.*, Docket No. 10-881 (issued February 7, 2011); *supra* note 6.

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 [recovery of overpayments] and other relevant statutes.”¹⁴

ANALYSIS -- ISSUE 2

If a claimant has any earnings during a period covered by CA-7 or EN1032 forms which he knowingly failed to report, he is not entitled to any compensation for any portion of the period covered by the report, even though, as here, he may only have had earnings during a small portion of that period.¹⁵ Statutory and regulatory provisions require that OWCP recover all compensation for the period of forfeiture.¹⁶

CA-7 forms submitted by appellant for the period May 11 through August 13, 2010 and August 28 through October 28, 2010 reflected no other earnings from employment. Appellant's EN1032 form dated April 11, 2011 also reported no earnings during that reporting period.

OWCP paid appellant compensation in the amount of \$37,906.53 for the period May 11, 2010 to April 11, 2011. It properly found that he forfeited his entitlement to compensation during this time because he failed to report employment activities and earnings. The record contains documentation of OWCP's calculations and there is no contrary evidence. Therefore, there exists an overpayment of compensation, due to the forfeiture, in the amount of \$37,906.53.¹⁷

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of FECA¹⁸ provides that an overpayment of 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

¹⁴ 20 C.F.R. § 10.529. See also *supra* note 7.

¹⁵ *Robert Ringo*, 53 ECAB 258 (2001).

¹⁶ 5 U.S.C. § 8129 and *supra* note 13.

¹⁷ *T.O.*, Docket No. 12-426 (issued July 23, 2012).

¹⁸ *Supra* note 15.

equity and good conscience.¹⁹ Thus, OWCP may not waive the overpayment of compensation unless appellant was without fault.²⁰ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.²¹

On the issue of fault, section 10.433 of OWCP's regulations, provide that an individual will be found at fault if he or she has done any of the following:

“(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 was incorrect.”²²

ANALYSIS -- ISSUE 3

The Board finds that appellant is at fault in the creation of the overpayment.

In this case, OWCP applied the first and second standards in determining that appellant was at fault in creating the overpayment. Appellant signed an EN1032 form dated April 11, 2011 where he stated that his last day of employment with Star News Group was March 25, 2010. His CA-7 forms indicated that he did not have any other earnings from employment. As appellant indicated that he had no employment or earnings from employment during the covered periods, he made an incorrect statement as to a material fact which he knew or should have known to be incorrect and failed to furnish information which he knew or should have known to be material to OWCP.²³

Appellant admitted that he knowingly and willfully made false statements when he pled guilty to violating 18 U.S.C. § 1920. Thus, he is at fault in the creation of the \$37,906.53 overpayment.²⁴

¹⁹ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

²⁰ *Norman F. Bligh*, 41 ECAB 230 (1989).

²¹ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

²² 20 C.F.R. § 10.433(a).

²³ *Id.*

²⁴ *Id.*

LEGAL PRECEDENT -- ISSUE 4

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. Section 10.441(b) of the regulations provide:

“When an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to [OWCP] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. The overpayment is subject to the provisions of the Federal Claims Collection Act of 1966 (as amended) and may be reported to the Internal Revenue Service as income.”²⁵

ANALYSIS -- ISSUE 4

As appellant's right to future compensation benefits has been terminated under the forfeiture provision of section 8148(a), he is not entitled to continuing compensation benefits and the Board does not have jurisdiction over OWCP's recovery of the overpayment.²⁶ It is noted, however, that when a judgment in a criminal case orders restitution to be paid to the Department of Labor, as it did in this case, procedures indicate that he should receive credit for this amount.²⁷

CONCLUSION

The Board finds that appellant forfeited his right to compensation for the period May 11, 2010 through April 11, 2011 and that an overpayment was created in the amount of \$37,906.53. The Board further finds that OWCP properly found him at fault in creating the overpayment and that it is without jurisdiction to review the method of repayment.

²⁵ 20 C.F.R. § 10.441 (b).

²⁶ *Robert Ringo, supra* note 15 at 266, n.20; *Robert S. Luciano*, 47 ECAB 793, 799 (1996).

²⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.18 (June 2009). *See also Martin James Sullivan*, 50 ECAB 158 (1998).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated August 8, 2012 is affirmed.

Issued: September 23, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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