

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

J.N., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
AVIATION DEPOT, Jacksonville, FL, Employer**

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**Docket No. 13-1761
Issued: July 1, 2014**

Appearances:
Paul H. Felser, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 19, 2013 appellant, through his attorney, filed a timely appeal from a January 23, 2013 decision of the Office of Workers' Compensation Programs (OWCP). 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 the case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant forfeited his right to compensation for the period July 20, 2007 to October 14, 2009; (2) whether it properly found that an overpayment in compensation in the amount of \$75,038.89 had been created because appellant did not report work activity; and (3) whether OWCP properly found that appellant was at fault in the creation of the overpayment and therefore it was not subject to waiver.

¹ 5 U.S.C. §§ 8101-8193.

² Appellant requested an oral argument. The Clerk of the Board mailed a letter to appellant on December 12, 2013 to confirm his continuing desire for an oral argument in Washington, DC. No written confirmation was received within the time allotted; thus, the Board in its direction, has decided the appeal on the record.

On appeal, appellant contends that he did not knowingly fail to report income because his traumatic brain injury rendered him incapable of having the capacity to correctly complete the forms.

FACTUAL HISTORY

On November 16, 1990 appellant, then a 38-year-old aviation machinist, was thrown from a bicycle at work when the front wheel locked. He stopped work on the date of injury and did not return. Appellant was diagnosed with a superficial hematoma and multiple abrasions. The claim was initially accepted for multiple contusions and abrasions and expanded to include temporary aggravation of anxiety and headaches. Appellant was placed on the periodic compensation rolls.

On April 8, 1991 Dr. Karen A. Steingarten, a neuropsychologist, noted administering a neuropsychological test battery to appellant on March 22, 1991. She noted a past history of significant psychiatric treatment as a young man when appellant had problems hearing voices and a recurrence of these symptoms in the Navy, where he was medically discharged with schizophrenia in remission. Overall, the testing gave a generally benign picture from an organic perspective and, although the erratic quality of his attention/concentration was abnormal, this was just as likely a product of a functional rather than an organic problem. Dr. Steingarten concluded that the testing was indicative of an individual with average abilities premorbidly who had not sustained any significant organic losses from the head injury.

Dr. Sarah Maulden, a Board-certified neurologist, saw appellant on November 21, 2003. Appellant reported persistent headaches since the 1990 work injury, short- and long-term memory loss, difficulty with cognitive tasks and depression. Dr. Maulden diagnosed chronic daily headaches, traumatic brain injury and depression. She referred appellant to Dr. Thomas Schenkenberg, Ph.D., a licensed clinical psychologist, for testing. On July 29, 2004 Dr. Schenkenberg assessed appellant's memory function. Appellant reported being totally disabled with intractable headaches since a closed-skull fracture on November 16, 1990 when he fell at work and struck head. Appellant's wife reported that he was sometimes paid for playing the drums. Dr. Schenkenberg indicated that an extensive battery of cognitive tests showed many inconsistencies. He specifically noted that appellant's performance on the Wechsler Memory Scale was extremely inconsistent and he knew of no organic condition that could produce the combination of scores seen. Dr. Schenkenberg also advised that appellant performed flawlessly on a memory-for-designs test and showed no evidence of word finding problems and that his fine motor speed and grip strength were excellent bilaterally. He noted that it would have been unlikely that the 1990 work injury produced residual, organically-based cognitive deficits but it did appear that a number of psychological features appeared after the accident or were worsened by it. Appellant began headache clinic treatment in September 2004 with a nurse practitioner who continued to treat appellant at two-month intervals.

On an OWCP EN1032 form, signed by appellant on July 6, 2005, he indicated that as a hobby he taught drums to school students and that he received no pay. On an EN1032 form he signed on October 25, 2005, he indicated that he did not work and was not self-employed for the previous 15 months.

On OWCP EN1032 forms, signed by appellant on October 6, 2006 and October 29, 2007, he indicated that he did not work for an employing establishment, was not self-employed and performed no volunteer work during the previous 15 months. Appellant also submitted an EN1032 form, signed on October 20, 2008, indicating that he did not work for an employer, was not self-employed and performed no volunteer work during the previous 15 months.

In December 12, 2008 correspondence, the employing establishment requested appellant's EN1032 forms, noting that a medical report indicated that he was a band teacher. Appellant's father subsequently advised OWCP that appellant taught drums part time and sporadically. On January 14, 2009 OWCP informed the employing establishment that his part-time, sporadic work was not suitable for determining wage-earning capacity.

In a letter dated May 11, 2009, an individual informed OWCP that appellant had been fraudulently claiming workers' compensation. The letter advised that appellant ran a private, nonreported drumming business while getting wage-loss compensation and boasted that he hid his income and purchased his new home in his wife's name. The Social Security Administration reported that he had no earnings recorded from July 2007 through September 2008. On August 24, 2009 the employing establishment requested a second-opinion evaluation. OWCP responded on September 3, 2009 that the case was not in posture for a second opinion.

Appellant signed an EN1032 form on October 14, 2009, indicating that he did not work for an employing establishment, was not self-employed and performed no volunteer work during the previous 15 months.

On January 13, 2010 Dr. Predrag V. Gligorovic, a Board-certified psychiatrist, indicated that appellant reported that he was being investigated by the Navy for disability fraud. Steven L. Ater, Psy.D., a licensed psychologist and associate of Dr. Ehab Abdallah, saw appellant on a weekly basis for behavioral therapy, beginning January 15, 2010.

On an EN1032 form, signed by appellant on November 25, 2010, he answered questions regarding work, self-employment and volunteer work "yes and no." In an attached 10-page statement, he maintained that he did not fully understand or comprehend how the EN1032 forms should be filled out due to his cognitive difficulties and impairments. Appellant indicated that for the past 15 months he sporadically taught adults and school-age children how to play the drums, including at a music store. He included a detailed explanation of creating a drum-line at a high school, hosting a drum clinic and presenting a drum-line presentation and stated that he performed occasionally as a drummer. Appellant provided an explanation of the fees he charged, again indicating that because of his cognitive reasoning problems, he did not know how it should be reported. He acquired a website for his drum instructor activities, which he paid for and registered a business name with the state so that his drum instruction would comply with state law. Appellant included a discussion of his business, including his conversations with his accountant. He indicated that this was "painfully and cognitively an exhausting experience." Appellant attached scheduled of lessons given and performances he participated in from June 2009 through December 2010.

In a May 4, 2011 report, Dr. Gligorovic noted appellant's report of a head injury with loss of consciousness, concussion and internal bleeds in 1990 and that he had since been

disabled. Due to the brain injury, appellant had a short attention span, an inability to appropriately communicate and could not concentrate and was also under increased stress due to a federal investigation. Dr. Gligorovic diagnosed traumatic brain injury induced anxiety disorder and major depressive disorder. He advised that appellant could not work due to cognitive problems, depression and anxiety.

In a May 27, 2011 neuropsychological evaluation report, Dr. Ater and Jennifer Stoll, M.S., stated that appellant was evaluated by Ms. Stoll on July 20, August 4 and September 30, 2010 and March 16, 2011. It noted his work injury, his indication of current difficulties and having more anxiety and severe daily migraines due to his injury. Appellant was oriented to person, place and time but he did not orient well to testing procedures, indicating anxiety and discomfort within the sessions. A test for possible signs of malingering was normal. The report stated that the results indicated that appellant's IQ was in the high average range for his age group, that mental processing speed was average and that focused attention and immediate recall of visually presented information was high average. A test to assess attention disorders and neurological functioning reflected an individual who struggled to maintain attention or who became inattentive over time. Performance on a deceptively complex task of cognitive flexibility and on tests of verbal and design fluency were normal. Appellant showed average performance on tests of working memory, recognition memory, inhibition, tasks requiring abstract reasoning abilities and performance on making a copy of a complex figure. His verbal comprehension, verbal reasoning and visual-spatial perception and reasoning skills were high average. Appellant demonstrated an above average level of cognitive functioning and, while he reported many difficulties, these were not corroborated by test scores. The report stated that he underestimated his abilities and continued to struggle from psychological of changes in his abilities and loss of function and recommended continued psychotherapy to address anxiety and depression. It concluded that it would be beneficial to address the dissonance between appellant's perception of his abilities and his actual abilities.

On July 25, 2011 a special agent with the Department of Labor (DOL) Office of Inspector General (OIG) informed OWCP that appellant had earnings in 2008 and 2009 as a self-employed drum instructor and was also employed by a local school district where he provided drum-line classes. In a July 26, 2011 memorandum, the agent informed OWCP that on EN1032 forms signed by appellant on October 20, 2008 and October 14, 2009 he declared that he had not worked for any employing establishment and was not self-employed during the preceding 15-month period. However, appellant had actual earnings as a drum instructor during these periods which he did not report. Therefore, the benefits he received during the 15 months prior to each completed EN1032 forms would be subject to forfeiture.

Appellant submitted weekly behavioral therapy treatment notes from Dr. Ater dated September 21, 2010 through January 25, 2012. On August 1, 2011 Dr. Ater noted that he went over the neuropsychological evaluation in detail with appellant. On January 10, 2012 he indicated that he and appellant had a long discussion about diagnostic issues related to his old traumatic brain injury and he told appellant that his test results were not consistent with a primary cognitive defect resulting from the injury but were more consistent with secondary factors. Dr. Gligorovic submitted additional reports describing appellant's condition, reiterating his diagnoses and indicating that appellant was totally disabled due to cognitive impairment.

On an EN1032 form, signed by appellant on October 12, 2011, appellant answered questions regarding work, self-employment and volunteer work “yes and no.” He again attached an extensive explanation of his drum business.

Appellant hit his head on the hatchback of his car on March 21, 2012. He went to the emergency room and was diagnosed by a physician’s assistant with minor head injury. A computerized tomography (CT) scan of his head was negative.

The special agent provided a May 22, 2012 investigation report with supporting documentation regarding appellant’s failure to report self-employment and income to OWCP while in receipt of FECA wage-loss compensation. The investigation began in December 2009 when DOL was notified that appellant was operating a drumming business. The report detailed a December 10, 2009 interview of him conducted by a DOL OIG agent and an investigator with the Naval Criminal Investigative Service. The interview was conducted at appellant’s home and he was accompanied by a nonattorney representative who did not participate in the interview. Appellant’s father also participated in the interview by telephone. Appellant was shown copies of five EN1032 forms and confirmed his signature on the forms. When questioned about his drum lesson business, he indicated that the lessons were a sporadic hobby done on an inconsistent basis, that he did not know how many students he had, that many did not pay him and that payments were made to the Idaho Falls Drum Institute and not him. Appellant was informed that the agents had information that he was paid \$20.00 per half hour of instruction, that he had 30 to 40 students and that he also worked for and was paid by the Idaho Falls High School to instruct their drum line. Appellant’s father indicated that he and appellant had sent three letters to DOL explaining that appellant taught drums sporadically as a hobby and the agents informed him that appellant should have provided this information on the EN1032 forms but instead indicated that he had zero income and no work activity of any kind. The interview was then discontinued, at appellant’s request.

The report also included interview reports with two employees of Chesbro Music who advised that for several years appellant had used space there to teach music for about four hours weekly and that he also played in local bands. The band director and business director with Idaho Falls High School were interviewed and stated that appellant was hired by the school district as a private contractor for drum-line instructions in 2008 and 2009. The business director noted that in 2007 appellant was entered into the accounting system by name, but in February 2009 the name was changed to Idaho Falls Drum Institute, under which he received payment. Several parents of appellant’s students were interviewed. Each indicated that appellant taught his or her child. The superintendent of the Blackfoot Tribal High School was interviewed and stated that appellant also attempted to obtain work there as a drum-line instructor in October 2009 but the contract was not finalized due to funding issues. Documentation regarding payments by the Idaho Falls School District to appellant and the Idaho Falls Drum Institute was also included, including payments for drums and copies of five OWCP EN1032 forms dating from October 2004 to October 2009.

In a June 22, 2012 decision, OWCP found that appellant forfeited his right to compensation from June 20, 2007 through October 14, 2009, because he knowingly failed to report employment activity and earnings on OWCP EN1032 forms. On June 22, 2012 it also made a preliminary finding that he received a \$75,038.89 overpayment of compensation for the

period July 20, 2007 through October 14, 2009, the period of the forfeiture. Appellant was found at fault in creating the overpayment because he failed to provide information which he knew or should have known was material, based on his failure to report earnings on OWCP EN1032 forms. An overpayment worksheet contained in the record indicates that he received compensation of \$75,038.89 for the period July 20, 2007 to October 14, 2009.

Appellant's attorney requested a hearing that was held on October 3, 2012. Appellant was not present at the hearing. Counsel argued that OWCP erred in not fully developing appellant's medical condition prior to forfeiture. He maintained that appellant had profound mental and physical deficits and did not understand the complexity of completing the EN1032 forms because he lacked the capacity to complete the forms and followed the advice of his father, who told him that his employment had been reported to OWCP.

On an EN1032 form, signed by appellant on November 1, 2012, he answered "yes" that he was employed. He again attached an explanation of his drum business. On November 8, 2012 OWCP informed appellant that, before further payments for wage loss could be made, it had to clarify his earnings and asked for specific information regarding his business and clients.³

Kimberly Davis, a paralegal with the employer's Office of General Counsel, provided comments on November 7, 2012. She maintained that, contrary to the attorney's assertions at the hearing, the evidence showed that appellant was a highly functioning individual who was capable of employment and took steps to hide reportable income and activities, not only for the period of the overpayment in question but back to 2003 and continuing. Ms. Davis provided information and documentation regarding his website and businesses, including drum instruction and playing in bands and indicated that he continued to underreport earnings. Certificates regarding the businesses of appellant and his wife, a list of expenses from a school district from November 2011 to January 2012 and documentation obtained from websites regarding appellant were attached.

On December 3, 2012 OWCP again informed appellant that, before further payments for wage loss could be made, he had to clarify his earnings.

Appellant's attorney submitted a brief to OWCP's Branch of Hearings and Review on December 7, 2012. He asserted that the forfeiture and subsequent overpayment decisions were in error because OWCP was aware of appellant's earnings as early as 2005 and because OWCP informed him that it considered such activity inconsequential, he did not willfully fail to report earnings. Counsel argued that appellant's traumatic brain injury led to diminished cognitive functioning and precluded him from knowing the complexities of completing EN1032 forms. He attached September 12 and October 24, 2012 reports from Dr. Gligorovic indicating that the 1990 work injury caused post-traumatic concussive syndrome with headaches, memory loss and frontotemporal dementia. Appellant was totally disabled due to the work-related conditions. Dr. Gligorovic also indicated that, due to appellant's cognitive impairment and emotional difficulties, he was not able to properly fill out the EN1032 forms. He recommended additional neuropsychological testing and concluded that appellant could unintentionally, even with his best

³ In correspondence dated November 10, 2012, appellant's attorney raised arguments concerning OWCP's posture regarding monetary compensation and submitted supportive documentation.

efforts, make errors of omission on the EN1032 forms. On December 6, 2012 Dr. Gligorovic indicated that appellant was depressed because his wage-loss compensation was terminated. He diagnosed traumatic brain injury-induced mood disorder; history of traumatic brain injury; impulse control disorder, personality disorder; seizure disorder, narcolepsy; erectile dysfunction; and marital, legal and financial problems. Dr. Gligorovic indicated that he was leaving the area and recommended a new psychiatrist.

In a January 23, 2013 decision, an OWCP hearing representative found that appellant forfeited compensation for the periods covered by OWCP EN1032 forms that he signed on October 20, 2008 and October 14, 2009, as he knowingly failed to report earnings. She noted that, as appellant reported on the EN1032 form completed on July 6, 2005, it was clear that he understood what should be entered and the psychological testing done by Dr. Ater showed that, while he had slight cognitive difficulties in some areas, he was a high functioning and intelligent individual. The hearing representative finalized the preliminary overpayment determination, finding appellant at fault because he failed to provide information which he knew or should have known to be material. As appellant submitted no financial information, the full amount of the overpayment of compensation, \$75,038.39, was found due and payable.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA provides that the Secretary of Labor may require an 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.”⁴

Section 10.5(g) of OWCP’s regulations defines 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.”⁵

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

⁵ 20 C.F.R. § 10.5(g).

To determine whether a compensation claimant 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.⁶ 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 regulation and Board precedent means “with knowledge; consciously; intelligently; willfully; intentionally.”⁷ 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.⁸

ANALYSIS -- ISSUE 1

OWCP determined that appellant forfeited his entitlement to compensation for the period July 20, 2007 to October 14, 2009. Appellant signed an OWCP EN1032 form on October 20, 2008 covering the period July 20, 2007 to October 20, 2008. He signed a second EN1032 form on October 14, 2009 covering the period July 14, 2008 to October 14, 2009. Appellant certified on the EN1032 forms that he had no employment, self-employment or involvement in a business and did not perform any volunteer work. The July 26, 2011 OIG report and accompanying documentation, however, establishes that he had earnings in 2008 and 2009 as a self-employed drum instructor and employment with a local school district where he provided drum-line classes. In a July 26, 2011 memorandum, the DOL OIG special agent informed OWCP that on EN1032 forms signed by appellant on October 20, 2008 and October 14, 2009 he declared that he had not worked for any employing establishment and was not self-employed during the preceding 15-month period. As appellant had actual earnings, however, as a drum instructor during these periods which he did not report, the benefits he received during the 15 months pertaining to each completed EN1032 form is subject to forfeiture.

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.⁹

The fact that appellant’s father reported that appellant taught drums sporadically and that he characterized teaching drums as a hobby, does not remove appellant’s responsibility to report self-employment, employment or volunteer services on EN1032 forms.¹⁰ As noted, the language

⁶ *Robert R. Holmes*, 49 ECAB 161 (1997); *id.* at § 10.5(n).

⁷ *Christine C. Burgess*, 43 ECAB 449 (1992).

⁸ *See J.J.*, 59 ECAB 542 (2008).

⁹ *P.M.*, Docket No. 07-2169 (issued March 3, 2009).

¹⁰ *J.S.*, 58 ECAB 515 (2007).

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.¹¹

Appellant contends on appeal that his cognitive difficulties rendered him incapable of completing the forms. The 1991 neurological testing by Dr. Steingarten indicated that he had average abilities and had not sustained any significant organic losses from the head injury. Appellant also had neurophysiological testing in 2004. At that time, Dr. Schenkenberg stated that an extensive battery of cognitive tests showed many inconsistencies. He specifically noted that appellant's performance on the Wechsler Memory Scale was extremely inconsistent and he knew of no organic condition that could produce the combination of scores seen. Dr. Schenkenberg further indicated that appellant performed flawlessly on a memory-for-designs test, he showed no evidence of word finding problems and that his fine motor speed was excellent. He opined that it would have been unlikely that the 1990 injury produced residual, organically-based cognitive deficits, but it did appear that a number of psychological features appeared after the accident or were worsened by it.

These findings are consistent with Dr. Ater's testing in 2012, which noted that appellant was oriented to person, place and time during the testing but had anxiety and discomfort within the sessions. He advised that appellant's IQ was in the high average range for his age group, that mental processing speed was average and that focused attention and immediate recall of visually presented information was high average. Performance on a deceptively complex task of cognitive flexibility and on tests of verbal and design fluency were normal. Appellant had average performance on tests of working memory, recognition memory, inhibition, abstract reasoning abilities and making a copy of a complex figure. His verbal comprehension, verbal reasoning and visual-spatial perception and reasoning skills were in the high average range. Dr. Ater advised that appellant demonstrated an above average level of cognitive functioning and that, while he reported many difficulties, these were not corroborated by test scores but instead he underestimated his abilities and continued to struggle from psychological changes in his abilities and loss of function.

While several treating physicians have indicated that appellant's traumatic brain injury led to cognitive deficits, the physicians did not adequately explain why he was so impaired as to be unable to complete EN1032 forms. Appellant did not submit sufficient evidence to establish that he was mentally incompetent to complete the EN1032 forms submitted to OWCP.¹² Furthermore, appellant proved himself capable of self-employment and employment by a school district for monetary gain. This is supported by the many interviews conducted by the OIG agents and in a lengthy response attached to an EN1032 form submitted by appellant on November 25, 2010, in which he went to great lengths answering questions regarding his business enterprises, including describing discussions with his accountant in detail.

¹¹ See *J.J.*, *supra* note 8.

¹² See *J.J.*, Docket No 13-1635 (issued February 18, 2014); *P.L. (G.L.)*, Docket No. 09-1488 (issued March 2, 2010).

Consequently, there is insufficient medical evidence showing that appellant was not capable of accurately completing OWCP EN1032 forms at issue

In this case, appellant completed OWCP EN1032 forms on October 20, 2008 and October 14, 2009, which advised him that he must report all employment and all earnings from employment, self-employment, involvement in a business enterprise and volunteer work. The forms clearly stated that he could be subject to criminal prosecution for false or evasive answers or omissions. The factual circumstances of record, including appellant's signing of a strongly worded certification clause on the EN1032 forms, provide persuasive evidence that he "knowingly" understated employment information regarding his involvement in self-employment teaching drums, employment by a school district and perhaps receiving remuneration playing in bands.¹³ The Board therefore finds that OWCP properly found that he forfeited his compensation for the period July 20, 2007 to October 14, 2009.

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of OWCP's implementing regulation provides 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."¹⁴

ANALYSIS -- ISSUE 2

OWCP's regulations provide that it may declare an overpayment of compensation for the period of a given forfeiture of compensation. If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by an EN1032 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.¹⁵ The record supports that OWCP paid him compensation in the amount of \$75,038.89 for the period July 20, 2007 to October 14, 2009. As OWCP properly found that appellant forfeited his entitlement to compensation during this period because he failed to report earnings from employment on an OWCP EN1032 form, there exists an overpayment of compensation in the amount of \$75,038.89.

¹³ See *Harold F. Franklin*, 57 ECAB 387 (2006).

¹⁴ 20 C.F.R. § 10.529.

¹⁵ *Louis P. McKenna, Jr.*, 46 ECAB 428 (1994).

LEGAL PRECEDENT -- ISSUE 3

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.”¹⁶

Section 10.433(a) of OWCP’s regulations provides 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;
- (2) Failed to provide information which he or she knew or should have known to be material;
- (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”¹⁷

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.¹⁸

ANALYSIS -- ISSUE 3

OWCP properly determined that appellant was at fault in the creation of the overpayment. Appellant failed to provide information which he knew or should have known to be material on OWCP EN1032 forms covering the period July 20, 2007 to October 14, 2009. The record establishes that he had unreported self-employment during the period and knowingly failed to furnish this material information to OWCP. Appellant signed a certification clause on the EN1032 forms, which advised him in explicit language that he might be subject to civil, administrative or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing the form, he is deemed to have acknowledged his duty to fill out the form properly, including the duty to report any

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

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

¹⁸ *Id.* at § 10.433(b); *Duane C. Rawlings*, 55 ECAB 366 (2004).

employment, self-employment or involvement in a business enterprise. Appellant failed to furnish information which he knew or should have known to be material to OWCP. As he is not without fault in creating the overpayment, it is not subject to waiver.¹⁹

CONCLUSION

The Board finds that appellant forfeited his entitlement to compensation for the period July 20, 2007 to October 14, 2009. The Board further finds that he was at fault in the creation of an overpayment of compensation in the amount of \$75,038.89 and was therefore not entitled to waiver.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁹ *Harold F. Franklin, supra* note 13. The Board notes that its jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. Where, as here, a claimant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to OWCP's recovery of the overpayment under the Debt Collection Act. *Albert Pineiro*, 51 ECAB 310 (2000).