

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

N.D., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
East Brunswick, NJ, Employer)

Docket No. 13-108
Issued: September 17, 2014

Appearances:

Jason S. Lomax, 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 October 15, 2012¹ appellant, through counsel, filed a timely appeal of an April 16, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issue are: (1) whether appellant forfeited her right to compensation for the periods May 24 through June 17, 2011 and July 16 through 29, 2011 because she knowingly failed to

¹ By order dated February 12, 2014, the Board dismissed appellant's appeal finding that it was not filed within the requisite 180 days, pursuant to 20 C.F.R. § 501.3(e). *See Order Dismissing Appeal*, Docket No. 13-108 (issued February 12, 2014). Appellant's counsel timely filed a petition for reconsideration and submitted evidence of timely mailing. *See* 20 C.F.R. § 501.3(f)(1). By order dated July 22, 2014, the Board granted appellant's petition for reconsideration and reinstated the appeal docketed as No. 13-108. *See Order Granting Petition for Reconsideration*, Docket No. 13-108 (issued July 22, 2014).

² 5 U.S.C. § 8101 *et seq.*

report earnings from self-employment; (2) whether appellant received an overpayment of compensation in the amount of \$4,322.37 because she knowingly failed to report earnings from self-employment; and (3) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of the recovery.

On appeal counsel contends that the decision was based on flawed conclusions of law and findings of fact.

FACTUAL HISTORY

On March 19, 2011 appellant, then a 37-year-old city carrier, filed a traumatic injury claim alleging that she injured her right shoulder that day when she closed the door of her postal vehicle and heard her shoulder pop. OWCP accepted the claim for right shoulder and upper arm sprain.

On June 3, 17 and July 29, 2011 appellant completed CA-7 forms to claim compensation for the periods May 24 through June 17, 2011 and July 16 through 29, 2011. Each form asked her to respond to the following:

“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. **Have you worked outside your federal job for the period(s) claimed in Section 2?**” (Emphasis in the original.)

If appellant had worked outside her federal job, the form asked her to provide the name and address of the business, the dates worked and the type of work performed. On each form she answered “No.”

In computer printouts dated June 13 and 27, 2011, OWCP issued supplemental roll payments to appellant for the period May 24 to June 3, 2011 in the amount of \$1,118.73 and for the period June 4 to 17, 2011 in the amount of \$1,601.82.

In a July 13, 2011 letter, postal investigators stated that an investigation of appellant revealed that she performed in a band called the “Take 5” band as a singer. The investigation covered the period April 15 to July 13, 2011 during which appellant performed at various restaurants and clubs on the dates of May 21, June 1 and July 7, 2011 based on information obtained from a social media page for “Take 5” band and surveillance by the postal investigators. The report noted that she completed three claims in which she represented that she earned no income and was not involved in any business activity. Appellant was observed and videotaped moving her shoulders, twisting her body, singing, standing, dancing, clapping her hands and performing other activities. The investigation revealed that she performed at various locations in New Jersey during the period April 3 to June 24, 2011.

OWCP also issued a supplemental rolls payment to appellant for the period July 16 to July 29, 2011 in the amount of \$1,601.82.

On August 31, 2011 postal investigators submitted a supplemental report which stated that appellant had provided false information on three CA-7 claims for compensation forms when she stated she was not involved in any business activity, employment or self-employment. The CA-7 forms were dated June 3, 17 and 29, 2011 and covered the periods May 24 through June 17, 2011 and July 16 through 29, 2011. Attached to the report were invoices and statements from managers of the places where appellant performed with her band on May 21, June 4 and July 29, 2011.

On October 24, 2011 OWCP found that appellant had forfeited her entitlement to compensation for the periods May 24 through June 17, 2011 and July 16 through 29, 2011 on the grounds that she knowingly failed to report earnings as required on her CA-7 forms. It determined that appellant knowingly omitted her earnings from performing in the band on each of her CA-7 forms dated May 24 through June 17, 2011 and July 16 to July 29, 2011. Therefore she forfeited all compensation for that period. OWCP also issued a preliminary determination that an overpayment was created in the amount of \$4,322.27³ due to appellant's failure to report her earnings from outside employment on the CA-7 forms. It further found her with fault in the creation of the overpayment because she knowingly omitted her earnings from outside employment. OWCP informed appellant that, if she disagreed with the preliminary determination, she could, within 30 days, submit evidence or argument to OWCP, or request a precoupment hearing with the Branch of Hearings and Review. Appellant did not respond.

On November 1, 2011 appellant's counsel requested a hearing before an OWCP hearing representative, which was held on February 8, 2012.

By decision dated April 16, 2012, an OWCP hearing representative affirmed the finding of forfeiture for the periods May 24 through June 17, 2011 and July 16 to 29, 2011 due to appellant's failure to report her employment activities as required by the CA-7 forms. He finalized the overpayment in the amount of \$4,322.37 overpayment as a result of the forfeiture. OWCP found appellant at fault in the creation of the overpayment and found the entire amount due and payable.

LEGAL PRECEDENT -- ISSUE 1

The Secretary of Labor may require a partially disabled employee to report her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the time the Secretary specifies. An employee who knowingly omits or understates any part of her earnings forfeits her right to compensation with respect to any period for which the affidavit or report was required.⁴

³ There appears to be an error in addition as the correct total should reflect an overpayment in the amount of \$4,322.37 not \$4,322.27.

⁴ 5 U.S.C. § 8106(b)(2); 20 C.F.R. § 10.529. See *Joan Ross*, 57 ECAB 694 (2006).

The employee, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he or she knowingly failed to report employment or earnings. It is not enough merely to establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty and thus must be narrowly construed.⁵ The term knowingly is defined by regulations as with knowledge, consciously, willfully or intentionally.⁶

ANALYSIS -- ISSUE 1

OWCP found that appellant forfeited her right to compensation from May 24 to June 17, 2011 and July 16 to 29, 2011 on the basis that she knowingly failed to report employment activities and earnings on three CA-7 forms.

On the CA-7 forms dated and signed by appellant on June 3, 17 and July 29, 2011, she answered “No” to section 3 which instructed her to report all earnings, whether from employment or self-employment or involvement in a business enterprise and not just salary or wages, but income, sales commissions, piecework or payment of any kind. The memoranda of the postal inspectors provided dates and places where appellant and her band performed on May 21, June 4 and July 29, 2011 and documented invoices and statements from the managers at locations where appellant and the band performed. The evidence establishes that appellant knowingly failed to report earnings from her self-employment from these periods. Therefore, she is subject to the forfeiture provision of section 8106(b).

On appeal counsel contends that appellant did not consider the earnings her band received as earnings. He stated that her participation was limited, the bookings sporadic and the actual remuneration was minimal. Counsel also argued that the earnings were *de minimis* and, thus, insufficient to trigger the penalty provisions of section 8106(b)(2). The Board notes, however, that the plain language of Form CA-7, section 3, was sufficient to put appellant on notice that she was required to report all earnings outside her federal job even if considered *de minimis*.⁷ Appellant knew that she had earnings from her band engagements, but answered “No” to section 3 on the forms submitted to OWCP.

The clear language of section 3 instructed appellant to report all earnings, whether from employment or self-employment or involvement in a business enterprise and not just salary or wages, but income, sales commissions, piecework or payment of any kind. The purpose was one of full disclosure so that OWCP could determine whether the earnings, under the circumstances, made any difference to the amount of compensation appellant should receive. Claimants must report all earnings outside their federal jobs, no matter the amount or source. The Board finds that appellant knowingly omitted her earnings from her singing in a band and thereby forfeited her entitlement to compensation for the period in question.

⁵ *P.M.*, Docket No. 07-2169 (issued March 3, 2009); *Anthony A. Nobile*, 44 ECAB 268 (1992).

⁶ 20 C.F.R. § 10.5(n). *See J.J.*, 59 ECAB 542 (2008); *Harold F. Franklin*, 57 ECAB 387 (2006).

⁷ *Cf. Kenneth T. Truhlar*, Docket No. 05-1500 (issued January 12, 2006) (Have you worked outside your federal job during the period(s) claimed in [s]ection 2?) (Include salaried, self-employed, commissioned, volunteer, etc.); *Karen Spurling*, 56 ECAB 189 (2004); *Billy J. McCamey*, Docket No. 00-2725 (issued June 11, 2002) (finding that the Form CA-8s that the claimant completed were insufficient to support a forfeiture of compensation).

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.”⁸

ANALYSIS -- ISSUE 2

If a claimant has any earnings during a period covered by CA-7 forms which she knowingly failed to report, she is not entitled to any compensation for any portion of the period covered by the report, even though, as here, she may only have had earnings during a small portion of that period.⁹ Statutory and regulatory provisions require that OWCP recover all compensation for the period of forfeiture.¹⁰

CA-7 forms submitted by appellant for the periods May 24 through June 17, 2011 and July 16 to 29, 2011 reflected no other earnings from employment. OWCP paid her compensation in the amount of \$4,322.37, for the periods May 24 to June 17, 2011 and July 16 to 29, 2011. It properly found that appellant forfeited her entitlement to compensation during this time because she failed to report employment activities and earnings as a singer in a band. 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 \$4,322.37.¹¹

LEGAL PRECEDENT -- ISSUE 3

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 appellant received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an

⁸ 20 C.F.R. § 10.429. See *Harold F. Franklin*, *supra* note 6.

⁹ *Robert Ringo*, 53 ECAB 258 (2001).

¹⁰ 5 U.S.C. § 8129; see *M.C.*, Docket No. 10-881 (issued February 7, 2011); *B.T.*, Docket No. 09-2190 (issued August 6, 2010); *Joan Ross*, *supra* note 4.

¹¹ *T.O.*, Docket No. 12-426 (issued July 23, 2012).

overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).¹²

Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances of 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.¹³

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 CA-7 forms dated June 3, 17 and July 29, 2011 where she indicated that she did not have any other earnings from employment. As she indicated that she had no employment or earnings from employment during the covered periods, she made an incorrect statement as to a material fact which she knew or should have known to be incorrect and failed to furnish information which she knew or should have known to be material to OWCP.¹⁴

CONCLUSION

The Board finds that appellant forfeited her right to compensation for the periods May 24 to June 17, 2011 and July 16 to 29, 2011 and that an overpayment was created in the amount of \$4,322.37. The Board further finds that OWCP properly found her at fault in creating the overpayment, thereby precluding waiver of recovery.

¹² 20 C.F.R. § 10.433(a).

¹³ *Id.* at 10.433(b).

¹⁴ *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 16, 2012 is affirmed.

Issued: September 17, 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