

argument at a prerecoupment hearing. Counsel asserts that the subsidies he received from the United States Department of Agriculture (USDA) for not farming his land were not income and, thus, he was not required to report them to OWCP. Citing *Jack Sipe*,² she contended that appellant's farm subsidies constituted passive investment income. Appellant was no more than an owner of a farm who paid personal attention to it. Citing *Christine C. Burgess*,³ counsel contends that he is not subject to forfeiture because he did not knowingly fail to report his earnings. Appellant relied on information from an OWCP claims examiner who told him that his farm subsidies did not constitute income for purposes of completing a Form CA-1032.

FACTUAL HISTORY

This case was previously before the Board with respect to appellant's wage-earning capacity. In a May 7, 2002 decision, the Board reversed OWCP's October 2, 2000 and May 29, 2001 decisions, finding that OWCP failed to meet its burden of proof in determining that the selected position of information clerk reasonably represented appellant's wage-earning capacity.⁴ The Board found that the record was unclear as to whether appellant had a preexisting medical condition that continued to limit his wage-earning capacity. The facts as relevant to the present issue on appeal are set forth.

OWCP accepted that on May 30, 1991 appellant, then a 55-year-old former realty specialist, sustained a lumbar strain, herniated nucleus pulposus at L4-5 and spinal stenosis. It authorized decompression laminectomies which were performed on March 8 and August 14, 1993. Appellant stopped work on March 8, 1993 and received compensation for total disability on the periodic rolls.

In accordance with established OWCP procedure, appellant was required to complete Form CA-1032 questionnaire forms regarding his earnings and employment activity for the previous 15 months. The form explained that a claimant must report all self-employment or involvement in any business enterprise, including, but not limited to, farming, sales work, operating a business or providing services in exchange for money, goods or other services. In addition, Form CA-1032 advised the employee that, if duties were performed in any business enterprise for which he or she was not paid, he was to report the rate of pay it would have cost to hire someone to perform such duties. On CA-1032 forms signed on April 19, 1996, April 17, 1997, April 20, 1998, April 20, 1999, May 1, 2000, April 24, 2001, June 5, 2002, April 23, 2003, April 27, 2004, May 6, 2005, April 15, 2006, April 18, 2007 and April 15, 2008 appellant stated that he was not employed, self-employed and had not performed volunteer work for the previous 15 months covered by each form.

In an investigative report dated August 13, 2008 from the employing establishment's FECA Fraud Investigation Unit, Johnny M. Kisner, Jr., an investigator, documented the surveillance of appellant by himself and another investigator from August 1 through 6, 2008. He

² 43 ECAB 773 (1992).

³ 43 ECAB 449 (1992).

⁴ Docket No. 02-35 (issued May 7, 2002).

stated that appellant had flyers in his car which advertised Lyndal Carey Farms. An Internet search revealed that appellant was listed in the top 100 recipients of farm subsidies for a 10-year period from 1996 to 2006 from the USDA, totaling more than \$92,000.00. Appellant was involved in a pattern of real estate transactions and tenant farming that constituted a for-profit business. He also leased land to tenant farmers and then sold the land for profit and in some cases divided the land to sell as residential plots. Appellant managed and sold oil, gas and mineral rights from the lands he owned.

On August 5, 2008 Malinda Freeman, county executive director for a farm service agency, advised investigators about two types of subsidies. A crop subsidy program was for the production of crops. A Conservation Reserve Program (CRP) involved a landowner who let a portion of his land lay fallow to enhance soil conservation.

In a December 5, 2008 interview, John Segrist, Chief of Real Estate for the Mississippi Valley/Vicksburg District, advised Investigator Kisner that appellant's activity was in line with the duties of a journeyman realtor for the employing establishment. Mr. Segrist expected his realtors to be on the road three or four days a week conducting title searches, looking for properties and assisting real estate attorneys in the preparation of documents for land management. He stated that appellant's activities constituted land speculation as he purchased property and quickly turned it over to take advantage of fiscal growth.

In an April 14, 2009 investigative interview, appellant advised Special Agent Jason L. Reich from the employing establishment's Fraud Resident agency, that he had not reported income on his CA-1032 forms or worked or received any income from any business or company since he began receiving compensation in 1993. He had purchased three farms since 1995 and leased them to several farmers for profit. Appellant sold a farm in 2000 and another one in 2006 for profit. He still owned a farm of which he currently leased 2,500 acres for \$5.00 an acre on a yearly basis and received yearly subsidies for approximately 800 acres for \$35.00 an acre from the USDA. Appellant was unaware of the amount of money he received from leasing his farms, profits from the sale of his farms and subsidies he received on the farms. He purchased his first farm without a real estate agent, but used a real estate agency for the sale of the first farm and purchase of the other two farms. Appellant rented and leased the farms without the aid of a real estate agency. He was unaware that the monies he received from renting and leasing his farms and subsidies were considered income and should have been reported on his CA-1032 forms.

The August 13, 2008 investigative report was accompanied by a list of appellant's properties which indicated that from October 7, 1994 to December 3, 2010 he purchased \$1,025,361.51 and sold \$1,267,346.31 in real estate. A document dated 2009 from the Internal Revenue Service provided a definition and the reporting requirements for passive and nonpassive income regarding real estate.

In memoranda dated November 14, 2008 and January 22, 2009, the employing establishment reiterated its investigative findings that appellant was involved in a pattern of real estate transactions and tenant farming which constituted his involvement in a for-profit business from which he earned income that he did not report to OWCP.

In a May 18, 2010 letter, appellant stated that a portion of his property was enrolled in the USDA's CRP. He further stated the CRP contract went with the land and he had to assume it when he purchased the property, entitling him to receive any future payments as long as the contract was in force and he owned the property. Appellant stated that this enterprise was going on before or at the time he began receiving OWCP benefits and was allowed under FECA. He contended that his receipt of rental income never violated any physical restrictions or limitations set forth by his physician.

In a March 27, 2012 decision, OWCP found that appellant forfeited compensation paid in the amount of \$319,299.64 from January 17, 1996 through April 15, 2008 because he did not report his USDA subsidies on the CA-1032 forms as required. It also issued a preliminary determination that he received an overpayment of compensation in the amount of \$319,299.64 for the period January 17, 1996 through April 15, 2008 because he failed to provide information that he should have known was material on the CA-1032 forms. Appellant was informed of his options if he wished to contest the fact or amount of overpayment or request a waiver of recovery and was provided with an overpayment recovery questionnaire (Form OWCP-20). An electronic printout indicated that he received gross compensation in the amount of \$321,757.34 from January 17, 1996 to April 15, 2008.

On April 11, 2012 appellant, through his attorney, requested a prerecoupment hearing before an OWCP hearing representative. Counsel disagreed that the overpayment occurred and with the amount of the overpayment. He contended that the overpayment occurred through no fault of appellant and requested waiver of recovery of the overpayment. Appellant did not submit a completed Form OWCP-20.

During an August 9, 2012 telephone hearing,⁵ appellant was represented by counsel and testified that he understood that the farm subsidies he received were not considered income. In 1996, he was advised by a claims examiner that they were not income and that he did not have to report them. Appellant contended that his farm subsidies were not income because he did not earn them and, thus, they were not considered to be wages. The government paid him not to farm the land. Appellant contended that he followed all instructions regarding the reporting requirements on Form CA-1032 to the best of his knowledge.

In a September 7, 2012 letter, Investigator Kisner stated that, although the sole issue in the March 2012 overpayment determination was the unreported receipt of farm subsidies from 1996 to 2008 by appellant, the investigation by his office which commenced in 2008 revealed that appellant, acting on his own behalf, was heavily involved in acquiring land, subdividing that land and otherwise managing that land between 1994 and 2010. He contended that this activity proved a pattern of employability and suggested that appellant was self-employed during this period. Appellant routinely conducted activities that were listed in his federal position description. He abused the workers' compensation program by repeatedly failing to report these activities and the income they produced on his CA-1032 forms. Investigator Kisner related that his investigation determined that appellant's real estate transactions were recorded in six Texas counties and a county in Oklahoma some 300 to 400 miles from his home. Proof of these

⁵ Appellant was unable to appear in person at the scheduled prerecoupment hearing due to his medical conditions related to recent knee surgeries and upcoming eye surgery.

activities was found in county court documents showing the purchase, management and sale of real estate and mineral rights and in USDA records showing the management of properties for the receipt of farm subsidies. Investigator Kisner noted that on June 22, 2008 appellant was observed driving approximately four hours, about 244 miles. Appellant's activities were closely related to his original scope of work. He maintained his Texas real estate broker's license through 2005 and submitted continuing education credits earned from 1994 through 2000 to the state continuing which demonstrated a level of activity and desire to maintain a license for a field in which he was no longer physically able to work. Investigator Kisner contended that appellant should have been able to perform his date-of-injury job based on these activities. He submitted employment records which included a description of appellant's realty specialist position. Investigator Kisner also submitted maps of counties where appellant conducted real estate activities, a list of the farm subsidies he received from 1995 to 2011, a history of his real estate transactions and licensing and continuing education credits, a flyer for Lyndal Carey Farms and a description of mobile surveillance of appellant's route on June 22, 2008.

In an October 15, 2012 decision, an OWCP hearing representative affirmed as modified OWCP's decisions regarding the period of the forfeiture and overpayment and the amount of the overpayment. The correct period of the forfeiture and overpayment was January 17, 1996 through April 15, 2008 as January 17, 1996 was the beginning of the 15-month period covered by appellant's April 19, 1996 Form CA-1032. The hearing representative noted that a payment history submitted after the August 9, 2012 hearing showed that appellant received \$321,372.16 from January 17, 1996 to April 15, 2008. She directed repayment of the overpayment in full. Upon return of the case record, the hearing representative directed OWCP to provide a statement of accepted facts, which included appellant's physical activities as documented by the employing establishment's investigation and a description of his date-of-injury position to his treating physician to determine whether he was still totally disabled from performing the duties of this position due to his accepted May 30, 1991 employment injuries.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA provides in pertinent part:

“The Secretary of Labor may require a partially disabled employee to report his or her earnings from employment [pre] self-employment, by affidavit or otherwise, in the manner and at times the Secretary specifies.... 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 under this subsection, if already paid, shall be recovered under section 8129 of this title, unless recovery is waived under that section.”⁶

⁶ 5 U.S.C. § 8106(b).

Before OWCP can declare a forfeiture of compensation, it must establish that appellant has received earnings from his own employment, not from passive investment in business ventures.⁷ An individual can be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she knowingly failed to report employment or earnings. The term knowingly, as defined in OWCP's implementing regulations, means with knowledge, consciously, willfully or intentionally.⁸ OWCP has the burden of proof to establish that a claimant knowingly omitted or understated earnings.⁹ To meet this burden, it is required to examine closely appellant's activities and statements. OWCP may meet this burden without an admission by the claimant if the circumstances of the case establish that he failed to reveal fully and truthfully the full extent of his employment activities and earnings.¹⁰

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.”¹¹

In order to establish that compensation should forfeit the compensation received for the periods covered by completed CA-1032 forms, the evidence must establish that he knowingly omitted or understated his employment and earnings.¹² 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 CA-1032 forms. The term knowingly as defined in OWCP's implementing regulations and Board precedent means with knowledge; consciously; intelligently; willfully; intentionally.¹³ The language on CA-1032 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

⁷ *Anthony V. Knox*, 50 ECAB 402 (1999).

⁸ 20 C.F.R. § 10.5(n).

⁹ *See F.H.*, Docket No. 07-1379 (issued November 24, 2008).

¹⁰ *Terry A. Geer*, 51 ECAB 168 (1999).

¹¹ 20 C.F.R. § 10.5(g).

¹² *Robert R. Holmes*, 49 ECAB 161 (1997); *supra* note 8.

¹³ *Supra* note 3.

further emphasize that severe penalties may be applied for failure to report all work activities thoroughly and completely.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly found that appellant forfeited his right to compensation for periods between January 17, 1996 and April 15, 2008. The record establishes that appellant omitted employment activities and earnings on CA-1032 forms completed for periods between January 17, 1996 and April 15, 2008. In these forms, OWCP notified him of his responsibility to complete the forms and provide relevant information concerning his employment status and earnings during the periods covered by the forms. The record reveals, however, that appellant had employment and earnings during the periods covered by these forms in that he was self-employed and running his own real estate and farming businesses and had earnings from this employment.

An investigation conducted by Investigator Kisner from the employing establishment's FECA Fraud Investigation Unit revealed that appellant engaged in employment activities for which he received earnings from January 17, 1996 to April 15, 2008. In an August 13, 2008 report, he documented that appellant was the owner of Lyndal Carey Farms and that from 1996 to 2006 appellant engaged in real estate transactions and tenant farming, managed and sold oil, gas and mineral rights on the lands, leased land to tenant farmers and sold the land for profit or divided it to sell as residential plots. Investigator Kisner also documented that he received over \$92,000.00 in farm subsidies from the USDA under its CRP during this period. His report showed that appellant engaged in employment activities and had earnings for the periods January 17, 1996 to April 15, 2008 during the 15-month period covered by each CA-1032 form he signed. On December 5, 2008 Mr. Seagrist, Chief of Real Estate of the Mississippi Valley/Vicksburg District, advised Investigator Kisner that appellant's real estate activities resembled the duties of an employing establishment journeyman realtor. He stated that appellant's activities constituted land speculation since he purchased a property and quickly turned it over to take advantage of fiscal growth. Investigator Kisner concluded on September 7, 2012 that appellant was self-employed as he was heavily involved in acquiring land, subdividing the land and managing the land between 1994 and 2010 and he routinely performed activities that were the same as those listed in his former realty specialist position. He stated that proof of appellant's real estate transactions were found in county court records which showed the purchase, management and sale of real estate and mineral rights. Investigator Kisner further stated that USDA records showed management of properties for which appellant received farm subsidies.

Special Agent Reich, the employing establishment's FECA Fraud Investigation Unit, detailed an interview that he conducted with appellant on April 14, 2009. Appellant stated that since 1995 he had purchased three farms and leased them to farmers for profit. He sold two of the farms in 2000 and 2006 for profit. Appellant stated that he purchased his first farm without a real estate agent and rented and leased farms without the aid of a real estate agency. He acknowledged that he still owned a farm and leased 2,500 acres for \$5.00 an acre on a yearly

¹⁴ A.C., Docket No. 11-1760 (issued April 13, 2012).

basis and received yearly subsidies of \$35.00 an acre for approximately 800 acres from the USDA. Appellant related that he did not know how much money he received from leasing his farms, profits from the sale of his farms and subsidies he received from the USDA. He admitted that he did not report these activities on his CA-1032 forms, but contended that he was unaware that the monies he received from renting and leasing his farms and subsidies were considered income and should have been reported on his CA-1032 forms.

The Board has distinguished between income received from investment and earnings received by performing work. The former is not considered to be evidence of a claimant's ability to work and earn wages, but rather is considered to be a return on investment. The latter is considered to be wages if the source of income can be established to be the product of the claimant's work.¹⁵ The present case is similar to *Anthony V. Knox*¹⁶ where the claimant worked on his farm, had earnings from rental income from his and his family's rental properties and was actively involved in the maintenance and management of these properties. The Board found that the claimant forfeited his compensation for periods between April 17, 1986 through April 30, 1992 because the evidence established that he was an investor in real estate transactions and owned multiple rental properties, but that he was also an active manager of his own and his family's properties from which he derived earnings that he knowingly failed to report on CA-1032 forms submitted to OWCP. The present case is also similar to *P.K.*,¹⁷ where the claimant was the proprietor and president of a real estate development business. He oversaw numerous real estate development deals that included the purchase and sale of property which resulted in aggregate profits of several hundred thousand dollars. The Board found that the claimant forfeited his compensation for periods between November 12, 2002 and February 12, 2004 as the evidence established that his real estate activities, including running his own real estate business, were too extensive to be considered merely a passive business investment. The Board found there was no question that the claimant had earnings as the proprietor and owner of a real estate development business during the period in question which he knowingly failed to report on his CA-1032 forms.

In the present case, appellant collected money from leasing his farms without the aid of a real estate agent for profit, managed and sold oil, gas and mineral rights on the lands and sold the land for profit or divided it to sell as residential plots and received over \$92,000.00 in farm subsidies from the USDA based on the above-noted evidence. As in *Knox* and *P.K.*, appellant actively participated in the operation of his farming and real estate business enterprises and was obligated to report as earnings the amount that would have been paid to a person doing the work.¹⁸ The farm subsidies he received were a benefit provided by the government to a work enterprise.¹⁹ As noted above, reimbursed expenses are considered earnings from employment or

¹⁵ *Supra* note 7.

¹⁶ *Id.*

¹⁷ Docket No. 09-790 (issued December 3, 2009).

¹⁸ *Supra* note 7.

¹⁹ A subsidy is defined as a grant of money usually made by the government to any enterprise whose promotion is considered to be in the public interest. BLACK'S LAW DICTIONARY (9th ed. 2009); *see J.J.*, 56 ECAB 542 (2009).

self-employment. The subsidies are remuneration to appellant and the value of such remuneration constitutes earnings.²⁰ The Board finds that the evidence of record establishes that he was more than a passive investor in a farming and real estate business, but was an active owner running his farming and real estate business for which he had earnings during the period in question.

The Board further finds that appellant knowingly failed to report earnings and employment activities during the relevant period. The CA-1032 forms signed by appellant used such terms as business, enterprise and service to explain the obligation for reporting all forms of employment, self-employment such as, farming, sales, service or operating a business and earnings. It also stated that he must show as rate of pay what it would have cost to have hired someone to perform the work he did. Appellant did not report his self-employment for the period January 17, 1996 through April 15, 2008 as required. The explicit language of the CA-1032 forms clearly advised him that the nature of his work running a farming and real estate business would require him to report such employment activities on the forms. Appellant's signing of strongly-worded certification clauses on the CA-1032 forms further shows that he was aware of materiality of his failure to report his employment. Based on the evidence of record, the Board finds that he knowingly omitted earnings.²¹ Accordingly, the Board finds that OWCP properly determined that appellant forfeited his right to compensation for the period January 17, 1996 to April 15, 2008. Appellant received \$321,372.16 in compensation during the stated period and, therefore, he forfeited compensation in this amount.

On appeal, counsel cited *Jack Sipe*²² to support her contention that the farm subsidies appellant received from USDA for not farming his land constituted passive investment income which he was not required to report to OWCP. The instant case can be distinguished from *Sipe*. In *Sipe*, the Board found that OWCP improperly determined that the claimant forfeited his right to compensation benefits for failing to report income derived from the sale of cattle raised on the farm he owned. The Board stated that the evidence did not show that any income the claimant received from his cattle operation was the product of his work, rather it represented a return on his capital. The Board noted that the claimant occasionally used his tractor, sold hay, checked on the cattle and sometimes fed them, but that these were not the type of activities that would constitute a job that would generally be available in the open market and that it would be impractical to place a monetary value on the claimant's services.²³ In the instant case, the record establishes that appellant was involved in a pattern of farming and real estate transactions and received income from leasing his land to tenant farmers, dividing the land into residential plots,

²⁰ As the Board explained in *Christine P. Burgess*, *supra* note 3, every form of remuneration, including reimbursed expenses and similar benefits, must be reported as earnings.

²¹ See generally *Lewis George*, 45 ECAB 144 (1993).

²² See *supra* note 2.

²³ See also *Vernon Booth*, 7 ECAB 209 (1954) which involved an injured federal employee who owned a tavern. The Board stated that income or profits from business are not generally held to be the fruits of wage-earning capacity but of the investment, the management and the business acumen of the owner; and the return on the investment of an employee's capital, even though augmented by his personal attention in looking after the business in which it is invested, cannot be considered as if it were wages.

and selling oil, gas and mineral rights from his lands. The evidence also establishes that from 1996 to 2006 he received more than \$92,000.00 in farm subsidies from the USDA which constitute earnings.²⁴ For the stated reasons, the Board finds that appellant's farming and real estate activities were too extensive to be considered merely a passive business investment. Appellant actively participated in the operation of his business enterprise and was obligated to report as earnings the amount that would have been paid to a person doing the work.²⁵

Counsel cited to *Christine C. Burgess*²⁶ and contended that appellant was not subject to forfeiture because he did not knowingly fail to report his earnings as he relied on information from an OWCP claims examiner who advised him that his farm subsidies did not constitute income for purposes of completing a Form CA-1032. Appellant did not submit any evidence to support this assertion. Further, even if he received such advice, the advice would not be sufficient, in and of itself, to relieve appellant of his responsibility to report earnings from self-employment or to show that he did not knowingly fail to report earnings. The present case is distinguishable from *Burgess*. In *Burgess*, the Board found that the claimant did not knowingly fail to report earnings. The finding was based in part on the claimant's receipt of advice from her former boss at the employing establishment that she need not report an arrangement where she served as an escort for tours. However, in *Burgess*, the "employment" situation was more ambiguous than that in the present case, as the claimant there was told she was a volunteer whose reimbursements were not taxable. As noted above, Form CA-1032 specifically stated that earnings from self-employment must be reported over the prior 15-month period, as it was in appellant's farming and real estate business. Therefore, appellant knowingly omitted his earnings under section 8106(b)(2) of FECA by failing to report his employment activities and earnings on the applicable CA-1032 forms for the period January 17, 1996 to April 15, 2008, as he was on notice that he must report earnings from self-employment. The Board finds, therefore, that OWCP properly determined that appellant forfeited his compensation for the period in question.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.²⁷ Section 8129(a) of FECA provides, in pertinent part, "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."²⁸

²⁴ See *supra* note 19.

²⁵ *Supra* note 7.

²⁶ See *supra* note 3.

²⁷ 5 U.S.C. § 8102(a).

²⁸ *Id.* at § 8129(a).

ANALYSIS -- ISSUE 2

The Board finds that appellant received a \$321,372.16 overpayment of compensation. For the reasons explained above, appellant forfeited his compensation for the period January 17, 1996 to April 15, 2008. The evidence of record includes payment documents and printouts which show that he received \$321,372.16 in compensation during this period. Due to the forfeiture of compensation, appellant would not be entitled to this compensation and, therefore, he received a \$321,372.16 overpayment of compensation.

On appeal, counsel contended that the amount of the overpayment is incorrect and that OWCP did not adequately explain how the overpayment occurred. However, she did not submit any evidence to support her contention. The Board notes that while OWCP initially determined an incorrect amount for the overpayment in its preliminary determination, OWCP's hearing representative subsequently corrected the overpayment amount and explained the basis for her calculation. There is no evidence that the overpayment did not occur as found by OWCP. The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$321,372.16 from January 17, 2006 to April 15, 2008 as he forfeited his compensation for failure to report his self-employment earnings during this period.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of FECA²⁹ 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 equity and good conscience.³⁰ Thus, OWCP may not waive the overpayment of compensation unless appellant was without fault.³¹ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.³²

On the issue of fault, section 10.433 of OWCP's regulations provides that an individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

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

²⁹ 5 U.S.C. § 8129(b).

³⁰ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

³¹ *Norman F. Bligh*, 41 ECAB 230 (1989).

³² *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”³³

With respect to whether an individual is without fault, section 10.433(b) of OWCP’s regulations provide in relevant part:

“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 he or she is being overpaid.”³⁴

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly determined that appellant was at fault in creating the \$321,372.16 overpayment because he failed to provide information which he knew or should have known to be material on CA-1032 forms covering the period January 17, 1996 to April 15, 2008. As stated, the record establishes that appellant had unreported earnings from self-employment and knowingly failed to furnish this material information to OWCP. Appellant signed certification clauses on the CA-1032 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 forms, he is deemed to have acknowledged his duty to fill out the forms properly, including the duty to report any employment, self-employment or involvement in a business enterprise. Appellant failed to furnish information that he knew or should have known to be material to OWCP. The Board finds, therefore, that he was at fault in the creation of the overpayment in the amount of \$321,372.16 and is precluded from receiving a waiver.³⁵

With respect to recovery of the overpayment in compensation, the Board’s jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.³⁶ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.³⁷

On appeal, counsel contends that appellant was denied due process when he was deprived of his right to submit new evidence or argument at a prerecoupment hearing. However, she did not submit any evidence to support her contention. OWCP issued a preliminary determination of overpayment on March 27, 2012 and provided appellant 30 days to request a prerecoupment

³³ 20 C.F.R. § 10.433(a).

³⁴ *Id.* at § 10.433(b); *supra* note 32.

³⁵ *D.F.*, Docket No. 11-1595 (issued February 1, 2012).

³⁶ *Cheryl Thomas*, 55 ECAB 610 (2004).

³⁷ *See Desiderio Martinez*, 55 ECAB 245 (2004).

hearing. On April 11, 2012 counsel disagreed with the proposed action and requested a preresoupment hearing before an OWCP hearing representative. A telephone preresoupment hearing was held on August 9, 2012 because appellant was unable to travel to the hearing location due to his medical conditions and surgeries. Appellant was represented by counsel and he testified during the August 9, 2012 telephone hearing about his farm subsidies and failure to report them to OWCP. In light of the foregoing, the Board finds that OWCP did not deny appellant due process.

CONCLUSION

The Board finds that appellant forfeited his compensation for the period January 17, 1996 to April 15, 2008, that he received a \$321,372.16 overpayment of compensation and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2012 decision of the Office of Workers' Compensation Programs is affirmed.³⁸

Issued: September 12, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

³⁸ Richard J. Daschbach, Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after May 16, 2014.