

She contends that her involvement in the rental properties was passive; that she was denied due process in that she was not provided an opportunity to confront her accuser; that the U.S. Attorney's office declined to prosecute her for not reporting income; and that the investigator's report was deficient.²

FACTUAL HISTORY

This case has previously been before the Board. The facts as set forth in the Board's prior decision are hereby incorporated by reference.³

Between February 6, 1998 and December 14, 2009 appellant completed numerous EN1032 forms containing extensive language advising her of what types of employment activities and earnings she was required to report for each 15-month period prior to the time she signed each form.⁴ The EN1032 forms instructed appellant to report all employment for which she received a salary, wages, income, sales commissions, piecework or payment of any kind. She was directed to report all self-employment or involvement in business enterprises, including (but not limited to) farming, sales work, operating a business and providing services in exchange of money, goods or other services. The kind of services that appellant was required to report included such activities as carpentry, mechanical work, painting, contracting, child care, keeping books and records, odd jobs and managing and overseeing a business of any kind, including a family business. Such activities had to be reported even if they were part time or intermittent. The EN1032 forms also instructed appellant to report any work or ownership interest in any business enterprise, even if the business lost money or its profits or income were reinvested or paid to others. If she performed any duties in a business enterprise for which she was not paid, she had to show as the rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties she did, even if the work was for her or a family member or relative. The forms contained certification clauses which informed appellant of the consequences of not accurately reporting her employment activities, such as being subjected to criminal penalties and losing the right to receive workers' compensation.

On March 21, 2011 OWCP received an investigation report conducted for the employing establishment. Special Agent Derek Lindbom conducted an interview on October 14, 2010 with appellant. He noted that appellant acknowledged that she was in receipt of compensation benefits following an employment injury and acknowledged that "she and her husband have

² Appellant filed multiple pleadings and letters in this appeal. In a March 15, 2014 letter, she requested oral argument; however, her request was made more than 60 days after she filed her appeal on July 26, 2013. Therefore, her request for oral argument was untimely. *See* 20 C.F.R. § 501.5(b). Appellant also submitted new evidence on appeal. The Board may not consider new evidence on appeal as its review is limited to the evidence that was before OWCP at the time of its final decision. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

³ Docket No. 11-1607 (issued April 23, 2012). Appellant has an accepted occupational disease claim from 1991 for cervical strain, bilateral carpal tunnel syndrome and cervical spondylosis with myelopathy. On August 21, 2006 OWCP found that appellant had the capacity to earn wages as an information clerk and reduced her monetary compensation. This determination was affirmed by the Board in the prior appeal.

⁴ Appellant completed EN1032 forms on February 6 and December 10, 1998; January 6 and December 18, 2000; May 10 and December 16, 2002; December 12, 2004; December 13, 2005; December 8, 2006; February 7, 2008; January 17 and December 14, 2009.

multiple rental properties in which they receive rental income.” Special Agent Lindbom noted that appellant stated that she never recorded her income from her rental property on her annual EN1032 form because it was her understanding that income from rental property was not considered employment. He noted that when asked about her involvement with the rental properties, appellant stated that she worked approximately two to three hours a week in matters concerning ensuring receipt of rental payments, balancing business bank accounts, lease preparation, placing ads for new tenants, addressing tenant concerns, coordinating major repairs to rental property and end of the year tax preparation. Appellant estimated that it would probably cost approximately \$10.00 to \$12.00 per hour to complete the general type of bookkeeping she performed for the rental property. The investigation interview report was not signed by appellant.

Special Agent Lindbom submitted evidence including court documents, deeds and correspondence to reflect that appellant acted to collect rent, utility bills and evict tenants. In an April 6, 2010 report, he stated that property records from Oregon and Georgia indicated that appellant owned approximately 11 pieces of rental property with her husband, with several pieces of property containing multiple dwelling units on individual lots. The property records indicated that she received rental income on multiple properties.

In an investigation report dated March 24, 2010, Agent Jim Sills of the employing establishment stated that appellant and her husband owned two upholstery businesses in Oregon and numerous properties. He specifically noted that they owned four properties in Cartersville, Georgia; one in White, Georgia; and three in Oregon City, Oregon; and one in Milwaukie, Oregon. Agent Sills drove by one of the properties and it had a “for rent” sign with appellant’s telephone number. He stated that appellant sold properties located in Portland, Oregon in January 2002, September 2005 and April 2007. Agent Sills also noted that he conducted surveillance on her home and that he observed appellant travel to Lowe’s Home Improvement store on July 6, 2009. He noted that on July 7, 2009 a construction crew performed work on her residence. Agent Sills interviewed one of appellant’s tenants, Diana Taylor, on August 7, 2009. Ms. Taylor advised that she had been renting property from appellant for approximately 11 years and that appellant did work on the property, including painting, moving a dishwasher, putting some electrical wiring on the stove and spraying mold killer in the attic. He interviewed another tenant, Michael James Bush, on February 24, 2010, who indicated that he had lived in the residence between 8 and 10 years and that he paid rent deposited into an account belonging to appellant. Another tenant, Kristi Toner, interviewed on the same date, had lived in her residence since November 2009 and paid rent to appellant. She did not observe appellant do any physical labor on the residence, but did state that appellant had to fly to Portland from Georgia several times to deal with a lawsuit between her and the former tenant. None of the interview reports were signed by the individuals interviewed by Agent Sills.

In an October 19, 2010 letter to OWCP, appellant noted that she was not aware that she needed to claim her two-hour involvement in paperwork or periodically talking with tenants regarding the rental properties on her Form EN1032. She stated that most of the rents were automatically deposited in the bank account belonging to herself and her husband. Appellant noted that they sold the Ogden property in 2007 and that her Oregon properties were managed by her brother and sister with the exception of a house where her son resided. With regard to the property in Georgia, she stated that Johnny Dover collected most of the rents and did

maintenance, unless it was electrical or heating and air, in which case Perry Redd performed the work. Appellant noted that in 2008 and 2009, their passive income was a loss of \$9,619.00 for 2008 and \$13,293.00 for 2009. She stated that, although her name was on the properties, her husband's income made it possible for them to purchase the majority of the properties and maintain them. In a January 26, 2011 letter, appellant reiterated that her family in Oregon dealt with the Oregon properties and that bills were either sent to her and her husband directly or they were provided credit card information over the phone. She noted that her husband performed the major repairs when necessary. Appellant and her husband jointly reviewed the rental applicants and that "Johnny" made necessary calls verifying employment and tenant selection. She stated that this year she spent at most four hours on the property.

In a decision dated May 26, 2011, OWCP determined that appellant had willfully and knowingly omitted and/or understated her earnings on her EN1032 forms covering the period November 7, 2007 through January 17, 2009. Therefore she forfeited all compensation for this period which created an overpayment. In another decision dated May 26, 2011, OWCP made a preliminary determination that appellant was overpaid in the amount of \$27,731.25 because she made false statements on her EN1032 forms covering the period November 7, 2007 through January 17, 2009. OWCP made a preliminary finding that appellant was at fault in the creation of the overpayment and was not eligible for waiver.

By letter dated June 20, 2011, appellant requested a prerecoupment hearing before an OWCP hearing representative. She noted that she disagreed with the fact and amount of the overpayment and finding of fault.

By decision dated September 8, 2011, an OWCP hearing representative set aside the May 26, 2011 decisions. She remanded the case for a complete review of investigative evidence of record prior to 2007 and a determination as to whether it supported that appellant failed to report self-employment or work duties as early as 1999. The hearing representative further noted that if forfeiture was found for these periods, then a greater overpayment would exist.

In a September 20, 2011 letter, appellant argued that an overpayment was not created because the IRS did not require owners of rental property to pay self-employment tax, that she unintentionally did not report the two hours of paperwork she performed on her rental properties and that her husband only owned one upholstery shop and she did not assist him with that business.

Further investigative reports and exhibits were submitted. In notes from a February 3, 2006 interview of appellant, Agent Gregory R. Michigan reported that appellant and her husband owned most of their properties prior to her injury and that the tenants in her rental property located next to the upholstery shop did not pay rent because they looked after the property. He noted that appellant owned four properties in Oregon and three in Georgia, but that their daughter managed the properties and collected the rent. Agent Michigan indicated that appellant spends approximately two hours a month working on paperwork, her husband handled all the repairs and that an accountant did the tax work. When there was a turnover in tenants, appellant's son or husband performed clean-up work and her niece was paid to paint. When

there was an opening, appellant reviewed the applications in a single day, but there was not much turnover.⁵ Again, neither appellant nor her husband signed the interview report.

On March 1, 2006, Mark Mansfield, an investigator for the employing establishment, noted contact with OWCP concerning the information regarding appellant and the interview in which she admitted working approximately two hours a month on paperwork related to the rental properties. The investigator was apprised by OWCP that while appellant should have disclosed her activity, her admission would not have changed her compensation benefits had she reported it on her EN1032 forms. The income received by appellant from the rental properties was viewed as investment income.

On April 7, 2006 Mr. Mansfield contacted the Office of the Inspector General with the Department of Labor in Seattle, who had coordinated with the Assistant U.S. Attorney's office in Portland, Oregon. It was noted that the U.S. Attorney declined to prosecute appellant based on a lack of physical evidence to warrant an indictment. The U.S. Attorney made reference to OWCP's decision not to reduce appellant's compensation based on her admission that she worked approximately two hours a month on paperwork related to the rental properties. Further, the investigative findings were past the statute of limitations and could not be considered for criminal charges.

In an October 3, 2011 letter, appellant's husband stated that appellant did not help him with his upholstery business. He also stated his understanding that their real estate was considered investment income and not self-employment income.

By decision dated June 27, 2012, OWCP advised appellant that she forfeited compensation for the period November 6, 1996 to December 14, 2009 in the amount of \$362,751.51. In a separate decision dated June 27, 2012, it determined that an overpayment was created in the amount of \$362,751.51 because she forfeited compensation for the following periods: November 6, 1996 to December 18, 2000; February 10, 2001 to December 16, 2002; September 12, 2003 to February 7, 2008; and September 14, 2008 to December 14, 2009. OWCP also made a preliminary determination that appellant was at fault in the creation of the overpayment.

On July 19, 2012 appellant requested a preresoupment hearing. She disagreed with the fact and amount of the overpayment and finding of fault.

At the hearing held on October 3, 2012, appellant's counsel argued that the overpayment findings should have been handled separately for each period of forfeiture, that the investigative reports were deficient, that OWCP should have provided more information to appellant concerning the reporting requirements and that her involvement with the rental properties was passive and not active.

⁵ In an October 28, 2009 letter to appellant, the interim electrical inspector supervisor for Oregon City, Oregon discussed electrical work on a house in Milwaukie, Oregon. In another October 28, 2009 letter, a Plans Examiner for Oregon City noted that a plumbing violation complaint was closed as there was no evidence of sewage leakage or new plumbing work.

In an October 29, 2012 letter to OWCP, the employing establishment argued that appellant admitted to active work in her husband's upholstery business and the management of their rental properties. It contended that she failed to report her activities on the EN1032 forms submitted.⁶

In a brief dated December 17, 2012, appellant's counsel argued that the forfeiture decision and the overpayment decision should be reversed. He contended that three separate attempts at criminal prosecution had been refused; that the videotape evidence did not support the statement by the investigators; that the agent's reports distorted the evidence; that appellant reasonably concluded that her involvement with the rental properties was passive; that her involvement with the rental properties was considerably less than 20 hours a month; and that any error was perpetuated by OWCP as it knew of appellant's investment properties but failed to follow up for over a decade. Counsel concluded that OWCP has not met its burden of proof.

By decision dated February 1, 2013, an OWCP hearing representative affirmed the forfeiture and overpayment decisions of June 27, 2012.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA⁷ provides in pertinent part:

“The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the 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 earnings;

forfeits his 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 by a deduction from the compensation

⁶ By letter dated November 16, 2012, the employing establishment forwarded to OWCP physical evidence to support the investigative reports, which included videotapes and photographs.

⁷ 5 U.S.C. § 8106(b).

payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”⁸

Section 10.5(g) of OWCP’s implementing federal 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 not 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.”⁹

An employee can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he knowingly omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. OWCP procedure manual recognizes that forfeiture is a penalty.¹⁰ As a penalty provision, it must be narrowly construed.¹¹ Under OWCP’s regulations, knowingly is defined as: with knowledge, consciously, willfully or intentionally.¹² To meet this burden, OWCP is required to examine closely appellant’s activities and statements. OWCP may meet this burden without an admission by an employee if the circumstances of the case establish that he failed to reveal fully and truthfully the full extent of his employment activities and earnings.¹³

The Board has held that OWCP may not base its application of the forfeiture provision strictly on conclusions drawn in an investigation; rather, the evidence of record must establish that the claimant had unreported earnings from employment which were knowingly not reported.¹⁴ In FECA Bulletin No. 83-7, OWCP noted that an investigative report showing that a claimant had unreported earnings from employment must be used in conjunction with other

⁸ While section 8106(b) refer only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and therefore a statutory provision about such earnings would be meaningless. *Id.* at 260.

⁹ 20 C.F.R. §10.5(g).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

¹¹ See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

¹² 20 C.F.R. § 10.5(n); see *Anthony A. Nobile*, 44 ECAB 268, 271-73 (1992).

¹³ *Terry A. Geer*, 51 ECAB 168 (1999).

¹⁴ *B.Y.*, Docket No. 11-1798 (issued July 24, 2012); *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

evidence of record in order to properly find a forfeiture of compensation.¹⁵ FECA Bulletin No. 83-7 was cited in *Claudia J. Thibault*,¹⁶ in support of the finding that the evidence of record was insufficient to establish that the employee had earnings within the meaning of FECA. In finding forfeiture, the only document was a memorandum in which a special agent with the employing establishment's Office of Inspector General memorialized a telephone interview with a witness who commented on the employee's activities. The Board noted that the memorandum was written by the special agent rather than the person interviewed and found that it was not sufficient evidence to outweigh the employee's testimony that she did not have earnings.

ANALYSIS -- ISSUE 1

OWCP determined that appellant forfeited her compensation between November 6, 1996 and December 14, 2009 finding that she knowingly failed to report earnings and employment activities related to management of rental properties on the EN1032 forms submitted to the record. The amount of compensation found to be forfeited was \$362,751.51, which created an overpayment of compensation for which she was found at fault.

On appeal, appellant contended that her involvement with the rental properties owned jointly with her husband was passive. She denied that she was a property manager, noting that the fact that her name was on several leases established only that she was a landlord with her husband. Counsel for appellant argued that the forfeiture and overpayment decisions should be reversed. He noted that criminal prosecution had been refused; that the videotape evidence did not support work activities; that the investigative reports distorted the evidence; that appellant's involvement with the rental properties was passive and considerably less than 20 hours a month; and that OWCP knew of appellant's investment properties for over a decade.

The Board has held that OWCP may not base its application of the forfeiture provision strictly on conclusions drawn from investigation reports. Rather, the evidence of record must establish that appellant had unreported earnings from employment activities that were knowingly not reported.¹⁷ The Board finds insufficient evidence of record to establish that appellant failed to report earnings or employment activities on the EN1032 forms she completed such that she should be subjected to the forfeiture provisions of FECA.

In finding that appellant forfeited compensation, OWCP relied on memoranda of interviews obtained by special agents of the employing establishment. In the memoranda memorializing interviews, Special Agent Lindbom noted that he conducted an interview with appellant on October 14, 2010. He stated that she acknowledged being in receipt of compensation benefits and that she and her husband owned multiple rental properties in Georgia and Oregon from which they received rental income. Special Agent Lindbom noted appellant's understanding that such income was not considered employment. He listed that she worked approximately two to three hours a week in ensuring receipt of rents, balancing bank accounts,

¹⁵ FECA Bulletin No. 83-7 (issued March 31, 1984).

¹⁶ 40 ECAB 836, 846 (1989).

¹⁷ *R. W.*, Docket No. 09-1607 (issued July 26, 2010).

lease preparation, placing ads for tenants and coordinating major repairs. The Board notes that appellant subsequently disputed this information as inaccurate, stating that she did not work more than two hours a month. Appellant stated that the rents were automatically deposited to a joint bank account with her husband, that the Oregon properties were managed by her brother and sister, with the exception of the house in which her son resided. With regard to the Georgia properties, she identified two individuals who collected the rents and performed maintenance.

The Board notes that the investigative reports of record by Special Agent Lindbom and others merely provided summaries of the interviews conducted by the various special agents. The record does not contain any transcript detailing the questions the investigators asked of appellant or the tenants of the rental properties or the actual responses made by the interviewees. There are no individual statements signed by any of the parties questioned with the exception of appellant and her husband who disagreed with certain aspects of the reports. Agent Sills drove to certain of the properties and conducted surveillance on appellant's home. His reports noted that he observed appellant drive to Home Depot on July 6, 2009, without further information. On July 7, 2009, he observed a construction crew at her home, but did not observe appellant. His interviews with various tenants are summarized without any signature by any individual as to the questions asked or accuracy of the responses made.

In the case of *R.W.*,¹⁸ the Board found that the forfeiture determination by OWCP was based on memorandum in which a special agent from the employer's OIG provided summaries of interviews conducted with the employee and several witnesses. The memorandum did not delineate the questions asked of the witnesses or contain the actual answers provided. There was nothing signed by any of the individuals attesting to the accuracy of the information provided. The Board found that the evidence was not sufficient to support the forfeiture decision. The facts of this case are substantially similar.

With regard to earlier investigative reports, the Board notes that on February 3, 2006 appellant advised Mr. Michigan that she spent approximately two hours a month on paperwork related to the rental properties. On March 1, 2006 Mr. Mansfield noted contact with OWCP concerning this information. He was advised by a representative of OWCP that while appellant should have noted her activity on the EN1032 forms, her admission would not have changed her receipt of compensation as the income was viewed as investment income. Mr. Mansfield also had contact with the U.S. Attorney's office on April 7, 2006, who declined prosecution of appellant based on the lack of physical evidence to warrant an indictment. Reference was made to OWCP's decision not to reduce appellant's compensation based on this information. The record reflects that OWCP was informed as to the nature of appellant's participation in rental properties owned with her husband. The Board finds that as in *Thibault* and *R.W.*, the evidence of record is not sufficient to support the forfeiture finding in this case. OWCP did not meet its burden of proof to establish that appellant knowingly omitted earnings or employment activities so as to forfeit her compensation from November 6, 1996 and December 14, 2009. Based on this determination, the evidence of record does not support the fact of overpayment. The issue is rendered moot.

¹⁸ Docket No. 09-1607 (issued July 26, 2010).

CONCLUSION

The Board finds that OWCP improperly determined that appellant forfeited her right to compensation from November 6, 1996 and December 14, 2009. For this reason, the fact of overpayment is not established and moot.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 11, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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