

On appeal, appellant asserts that she signed Forms EN1032 while her judgment was impaired by prescription drugs. She acknowledged signing “receiving papers,” writing checks and executing a “Doing Business As” agreement. Appellant contended that, as she never physically worked for the business, she did not consider herself involved.

FACTUAL HISTORY

OWCP accepted that on or before April 17, 2001 appellant, then a 42-year-old city letter carrier, sustained an aggravation of low back pain. It later accepted the claim for displacement of a lumbar intervertebral disc. Following a period of light duty, appellant stopped work in 2004. OWCP placed her on the periodic compensation rolls effective August 7, 2004.

In a January 19, 2005 letter accompanying a direct deposit authorization, appellant advised OWCP that she had not received any compensation or money from any source of work since July 10, 2004 to present. She asserted that she had not worked outside the employing establishment or did voluntary work of any kind.

In a February 10, 2005 letter, appellant was notified that, if she obtained work, she must immediately notify OWCP regarding the identity of her employer, type of work performed, dates of employment and any monies received.

On August 15 and 18, 2005 appellant underwent a two-stage lumbar fusion with hardware and allograft fixation. OWCP approved the procedures.

In Forms EN1032 completed on February 2, 2006, January 31, 2007 and January 22, 2008, appellant attested that she had no employment, self-employment or earnings from employment activities during the 15-month period prior to completing each form.² She remained under medical care through April 2008. Appellant returned to full-time light-duty work on May 14, 2008.

On January 10, 2013 the employing establishment’s investigative unit submitted documents demonstrating that on July 12, 2007 appellant executed a “Doing Business As” agreement as a general partner in Sandblast Specialties, a sandblast and painting business. Appellant executed a “Doing Business As” agreement on August 1, 2007 as the owner of Sandblast Specialties and appointed a business agent on June 26, 2007. She also wrote checks, ordered supplies, completed tracking forms and applied for permits for a wild animal sanctuary from January 7 to October 19, 2007. In memoranda dated January 7, 2008 and March 18, 2009, investigative officers listed \$250,602.50 in bank deposits made by appellant related to the two businesses from 2004 through October 9, 2007. In a March 18, 2009 interview, appellant acknowledge to signing the checks but contended that she did not perform work or receive wages. She also admitted feeding animals, purchasing supplies and transporting tiger cubs for the wildlife sanctuary.

On October 17, 2012 appellant signed a pretrial diversion agreement acknowledging that she made false statements relating to health care matters, in violation of 18 U.S.C. § 1035.

² This covers the period from November 2, 2004 to January 22, 2008.

OWCP reviewed compensation payment logs and determined that, from November 2, 2004 to May 13, 2008, appellant received a total of \$116,749.43 in temporary total disability compensation.

By decision dated March 1, 2013, OWCP found that appellant forfeited her right to compensation for the period November 2, 2004 to May 13, 2008 as she knowingly failed to report work activities on EN1032 forms signed and dated on February 2, 2006, January 31, 2007 and January 22, 2008. It terminated her medical benefits effective that day.

By notice dated March 1, 2013, OWCP advised appellant of its preliminary determination that she was overpaid \$116,749.43 as her compensation was forfeit from November 2, 2004 to May 13, 2008 because she knowingly failed to report employment activities and earnings from participation in the wildlife sanctuary businesses. It found that, on EN1032 forms dated February 2, 2006, January 31, 2007 and January 22, 2008, she knowingly failed to report her work activities and the income received therefrom.

In a March 27, 2013 letter, appellant requested an oral hearing regarding the forfeiture determination and a prereducement hearing regarding the overpayment determination. She contended that there was no overpayment and that any overpayment occurred through no fault of her own. Appellant argued that the pretrial agreement did not state that she would lose any benefits. OWCP scheduled a telephonic hearing. Appellant did not call in at the required time.

By decision dated and finalized October 29, 2013, an OWCP hearing representative affirmed the March 1, 2013 forfeiture decision, finding that appellant knowingly failed to report her work activities with the wildlife sanctuary for the period November 2, 2004 to May 13, 2008. The hearing representative found that OWCP met its burden of proof by submitting documentation of appellant's business activities and her statements acknowledging those activities. He also finalized the finding of an \$116,749.43 overpayment of compensation for the period November 2, 2004 to May 13, 2008. The hearing representative further found that appellant was at fault in creation of the overpayment as she forfeited her compensation by committing compensation fraud, as she failed to report earnings from the wildlife sanctuary businesses on EN1032 forms dated February 2, 2006, January 31, 2007 and January 22, 2008. Therefore, the overpayment was not subject to waiver.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA provides that an employee who "fails to make an affidavit or report when required or knowingly omits or understates any part of his earnings; forfeits his or her right to compensation with respect to any period for which the affidavit or report was required."³

The Board has held that it is not enough merely to establish that there was unreported employment or earnings. A claimant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she "knowingly" failed to report employment or earnings.⁴ The term

³ 5 U.S.C. § 8106(b).

⁴ *Harold F. Franklin*, 57 ECAB 387 (2006).

“knowingly” as defined in OWCP’s implementing regulations, means with knowledge, consciously, willfully or intentionally.⁵ The Board has found that OWCP can meet this burden of proof in several ways, including by a claimant’s own admission to OWCP that he or she failed to report employment or earnings which he or she knew he or she should report or by establishing that a claimant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Forms EN1032.⁶

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a displaced lumbar disc and an aggravation of low back pain. Appellant received total disability compensation on the periodic rolls beginning on August 7, 2004. On Forms EN1032 dated February 2, 2006, January 31, 2007 and January 22, 2008, she certified that she had no employment, self-employment or earnings from employment activities during the 15-month period prior to completing the forms. The Board notes that appellant made similar assertions in a January 19, 2005 letter. However, the employing establishment investigation documented that, from 2004 through October 2007, she owned or operated a sandblasting business and a wildlife sanctuary.

The evidence of record establishes that appellant knowingly concealed her earnings and employment activities from OWCP. Appellant admitted to her business activities, including feeding and transporting tiger cubs, during a March 18, 2009 investigative interview. On October 17, 2012 she signed a pretrial diversion agreement acknowledging her false statements. The Board finds that these statements constitute persuasive evidence that appellant knowingly omitted her earnings and employment activities when she completed the EN1032 forms affidavit on February 2, 2006, January 31, 2007 and January 22, 2008. The provisions of 5 U.S.C. § 8106(b)(2) therefore apply to the period covered by the affidavits, November 2, 2004 to January 22, 2008. This period is therefore appropriately subject to forfeiture.

The record does not reflect any additional affidavits in which appellant failed to report her income and employment activities from January 22 to May 13, 2008. The forfeiture provision is a penalty provision and is thus narrowly construed.⁷ As there are no Form EN1032 affidavits on which to base a forfeiture of compensation payments for the period January 22 to May 13, 2008, the Board will reverse the findings of forfeiture for that period.

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,

⁵ 20 C.F.R. § 10.5(n).

⁶ *Harold F. Franklin*, *supra* note 4.

⁷ *M.C.*, Docket No. 10-881 (issued February 7, 2011); *Karen Spurling*, 56 ECAB 189, 194 fn. 9 (2004).

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

OWCP regulations provide that it may declare an overpayment of compensation for the period of a given forfeiture of compensation. If a claimant has any earnings during a period covered by a Form EN1032, which she knowingly fails to report, she 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.⁹ OWCP paid appellant compensation in the amount of \$116,749.43 for the period November 2, 2004 to May 13, 2008. It properly found that she forfeited her entitlement to compensation from November 2, 2004 to January 22, 2008 because she failed to report employment activities and earnings related to her business ownership and activities on Forms EN1032. Therefore, the compensation issued during this period constitutes an overpayment of compensation.

The Board finds that, although the fact of overpayment is well established, the amount of the overpayment is not in posture for a decision. OWCP predicated the \$116,749.43 amount of overpayment on the total compensation received and forfeited from November 2, 2004 to May 13, 2008. As stated above, there is no Form EN1032 of record covering the period January 22 to May 13, 2008. The compensation paid during this period should not have been included in the amount of forfeiture and therefore may not be included in the overpayment. On return of the case, OWCP should undertake appropriate development to recalculate the amount of the overpayment.

On appeal, appellant asserts that prescription medications and health issues rendered her unable to understand the reporting requirements. Moreover, she did not consider writing checks, executing a “Doing Business As” agreement and completing workplace documents to be work activities. However, no physician of record found that appellant was mentally incompetent or impaired at any time. Reporting such earnings or activities was required.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁰ The only exception to this requirement is a situation, which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery

⁸ 20 C.F.R. § 10.529. See also *Harold F. Franklin*, *supra* note 4.

⁹ *Robert Ringo*, 53 ECAB 258 (2001).

¹⁰ 5 U.S.C. § 8129(a).

by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹¹ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is “without fault,” section 10.433(a) of OWCP’s federal regulations provide, in relevant part:

“A recipient who has done any of the following will be found at fault with respect to 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; or
- (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

ANALYSIS -- ISSUE 3

In this case, the Board finds that appellant was at fault under the first standard as she made incorrect statements as to a material fact, which she knew or should have known to be incorrect. The Board notes that, in the October 17, 2012 pretrial diversion agreement, she admitted making false statements. Appellant accepted payments of compensation from November 2, 2004 to January 22, 2008 which she knew or should have known to be incorrect.¹³ She received and signed multiple Forms EN1032, which directed her to return any and all payments to which she was not entitled. However, appellant accepted incorrect compensation payments for the period November 2, 2004 to January 22, 2008. Therefore, she is at fault in creation of the overpayment, such that it was not subject to waiver.¹⁴

CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited her right to compensation for the period November 2, 2004 to January 22, 2008 as she knowingly failed to report her employment activities. The Board further finds that there is no forfeiture of compensation for the period January 22, 2008 to May 13, 2008 as there are no EN1032 affidavits covering this period. The Board further finds that appellant received an overpayment of compensation for the period November 2, 2004 to January 22, 2008 based on her forfeiture of

¹¹ *Id.* at § 8129(b).

¹² 20 C.F.R. § 10.320(b).

¹³ *See Bob R. Gilley*, 51 ECAB 377 (2000).

¹⁴ *Albert Pineiro*, 51 ECAB 310 (2000).

compensation. There is no overpayment established for the period January 22 to May 13, 2008. The Board further finds that OWCP properly found appellant at fault in creating the overpayment, such that it was not subject to waiver.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 29, 2013 is affirmed as modified.

Issued: September 18, 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