

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

R.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Delhi, LA, Employer**

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**Docket No. 14-831
Issued: September 19, 2014**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge

MICHAEL E. GROOM, Alternate Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 4, 2014 appellant, through her attorney, filed a timely appeal from the February 7, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP), which found that she forfeited compensation and was at fault in the resulting overpayment. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant forfeited her right to compensation from July 28, 2012 to February 13, 2013; (2) whether appellant was at fault in creating the resulting overpayment in the amount of \$10,848.63; and (3) whether OWCP properly directed recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 12, 2012 appellant, a 35-year-old rural carrier associate, sustained a traumatic injury in the performance of duty when her vehicle was struck from behind. OWCP accepted her claim for neck sprain and cervical spondylosis with myelopathy.

At the time of acceptance, OWCP notified appellant that any claim for lost wages must be submitted on Form CA-7 and that she must report any employment or employment activities on that form.

Appellant submitted Forms CA-7 to claim lost wages. The forms advised her that failure to report income may result in forfeiture of compensation benefits. Appellant attested that she had no earnings outside her federal job.

Appellant received compensation for wage loss beginning July 28, 2012. She would later receive compensation on the periodic rolls.

On February 13, 2013 appellant completed a Form EN1032, which notified her that the information requested was required in connection with her benefits: "This information will be used to decide whether you are entitled to continue receiving these benefits or whether your benefits should be adjusted." The form warned her that a false answer may be grounds for forfeiting her compensation benefits. The form further warned that severe penalties may be applied for failure to report all work activities thoroughly and completely over the past 15 months. Appellant responded that, apart from her federal employment, she was not self-employed or involved in any business enterprise. She certified: "I know that fraudulently concealing or failing to report income or other information in claiming payment or benefits under FECA may result in the forfeiture of compensation for the period covered by this form...."

When appellant completed another Form EN1032 on April 1, 2013, she attached a supplemental statement. As the instructions advised her to include any information if she had a question whether it was material or relevant, she informed OWCP that she obtained a one-time license in 2012 to hunt alligators. In September 2012, appellant caught and killed three alligators. She sold the first for approximately \$300.00 and sold the other two for approximately \$500.00. Appellant explained: "I hunted alligators strictly for fun and for entertainment for me, my family and friends. I did not hunt the alligators in order to start a business enterprise of any sort. Although I never considered this activity to be entrepreneurial in nature, I felt like I should include it in this form since I did sell the alligators."

In a decision dated June 21, 2013, OWCP found that appellant forfeited her right to compensation from July 28, 2012 to February 13, 2013. It was clear from the evidence that she had earnings from hunting activity but knowingly failed to report those earnings on her February 13, 2013 EN1032 form. OWCP explained that appellant therefore forfeited her right to compensation for the period covered by that form.

On June 21, 2013 OWCP also issued a preliminary determination that appellant was at fault in creating an overpayment of \$10,848.63 because she failed to provide information which she knew or should have known was material. It showed how it calculated the amount of the

overpayment: OWCP added all the payments issued from July 28, 2012 to February 9, 2013, then added four days of compensation at the prorated rate.

In a decision dated February 7, 2014, an OWCP hearing representative affirmed the finding of forfeiture, as appellant knowingly omitted her employment activity or earnings. The hearing representative also finalized OWCP's finding that appellant was at fault in creating an overpayment of \$10,848.63, as she failed to furnish information which she knew or should have known to be material.

Because appellant did not submit an overpayment recovery questionnaire and the financial documentation required to support her income, expenses and assets, the hearing representative found that OWCP did not have the necessary financial information to develop an equitable repayment plan. The hearing representative therefore directed OWCP to collect the overpayment in its entirety. Appellant was notified that OWCP could ask her employing establishment to recover the overpayment from current salary or ask the Office of Personnel Management (OPM) to recover the overpayment from money otherwise payable from the Civil Service Retirement Fund. "If you are employed by the Federal [G]overnment or are eligible for or receiving Civil Service annuity and if we do not receive a check or otherwise hear from you in regard to repaying this debt within 30 days, we will pursue course of action."

LEGAL PRECEDENT -- ISSUE 1

An employee who fails to make an affidavit or report when required or who 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 by a deduction from the compensation payable to the employee or otherwise recovered under section 8129, unless recovery is waived under that section.²

The employee must report even those earnings which do not seem likely to affect his or her level of benefits. Many kinds of income, though not all, will result in a reduction of compensation benefits. While earning income will not necessarily result in a reduction of compensation, failure to report income may result in forfeiture of all benefits paid during the reporting period.³

An employee who is receiving compensation for partial or total disability is periodically required to report volunteer activity or any other kind of activity which shows that the employee is no longer totally disabled for work. The fact that the employee did not receive any salary for this work is not a basis for failing to report this activity. Instead, the employee must report the cost, if any, to have someone else do the work or activity.⁴

² 5 U.S.C. § 8106(b).

³ 20 C.F.R. § 10.525(b).

⁴ *Id.* at § 10.526.

ANALYSIS -- ISSUE 1

Appellant advised on her CA-7 forms that she had no earnings outside of her federal job. On the EN1032 form she completed on February 13, 2013; she stated that she was not self-employed during the previous 15 months. The record establishes, however, that appellant did earn income during that period from selling alligators. She caught and killed three alligators and sold them for approximately \$800.00.

This was the kind of information appellant should have disclosed. She was receiving compensation for wage loss on the grounds that the May 12, 2012 employment injury had caused and was continuing to cause, a complete loss of wage-earning capacity.⁵ To monitor appellant's entitlement to such benefits, OWCP needed to know whether she was able to perform any kind of activity that might show a partial capacity to earn wages. It also needed to know whether she had earned any income. It did not matter whether the income seemed likely to affect her level of benefits. Appellant was obligated to disclose the information so that OWCP could make that determination.

When she completed her EN1032 form on February 13, 2013, appellant failed to disclose the income she had earned from selling alligators. She certified her understanding that failing to report income might result in the forfeiture of compensation for the period covered by the form. Nonetheless, appellant failed to report the income.

Appellant knowingly omitted this income from her February 13, 2013 EN1032 form, but she offered a reason for doing so. She hunted the alligators strictly for fun and entertainment. It was not a business enterprise of any sort and she did not consider the activity to be entrepreneurial in nature. Nonetheless, appellant did generate earnings directly from customers and she was therefore obligated to disclose any such self-employment.

In the case of *S.R.*,⁶ the claimant sold merchandise on eBay while receiving compensation for temporary total disability on the periodic rolls. She characterized the activity as a hobby and did not disclose her earnings on Forms EN1032s. The Board found that *S.R.*, had undisclosed earnings from self-employment and affirmed OWCP's finding that she forfeited her entitlement to compensation for the periods covered by the forms.

In the case of *Barbara L. Kanter*,⁷ the claimant participated in dog shows and advertised her dogs. She sold seven puppies during a four-year period from \$250.00 to \$350.00 a piece. The Board affirmed a finding of forfeiture, as the employee knowingly failed to report earnings from her self-employment sales activities.

In the case of *C.R.*,⁸ the claimant sold several drawings from his home for \$600.00. He telephoned OWCP to report the sale and was told that it would not affect his benefits. When

⁵ *Id.* at § 10.5(f) (definition of disability).

⁶ Docket No. 07-618 (issued July 10, 2007).

⁷ 46 ECAB 165 (1994).

⁸ Docket No. 09-720 (issued October 15, 2009).

C.R., then failed to disclose the sale on a Form EN1032, OWCP found that he forfeited his entitlement to compensation. The Board reversed, finding that the telephone memorandum was sufficient to establish that he had notified OWCP.

In the present case, appellant omitted her income from the sale of several alligators. As she did so knowingly, for reasons that, were insufficient, the Board finds that she forfeited her right to compensation with respect to the 15-month period for which the Form EN1032 was required or from July 28, 2012, when she first received compensation for wage loss, to February 13, 2013, when she signed the form. The Board will therefore affirm OWCP's February 7, 2014 decision on the issue of forfeiture.

LEGAL PRECEDENT -- ISSUE 2

When an overpayment of compensation has been made 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.⁹ Section 8129(b) of FECA describes the only exception:

“Adjustment or recovery by the United States may not be made when incorrect payment had 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.”¹⁰

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 she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault 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; (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.¹¹

Whether or not an individual was at fault with respect to the creation of an overpayment depends on the circumstances. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that she is being overpaid.¹²

⁹ 5 U.S.C. § 8129(a).

¹⁰ *Id.* at § 8129(b).

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(b).

ANALYSIS -- ISSUE 2

The fact and amount of overpayment in this case are well established. The forfeiture of compensation from July 28, 2012 to February 13, 2013 created an overpayment of \$10,848.63, representing all the compensation paid during the period.

OWCP found appellant at fault in creating this overpayment on the grounds that she failed to provide information which she knew or should have known to be material. It is already established that she failed to provide information concerning her sale of several alligators. The question for determination is whether she knew or should have known that this information was material.

The EN1032 form that appellant signed on February 13, 2013 advised that the information requested therein was required in connection with her benefits and would be used to decide whether she was entitled to continue receiving those benefits or whether her benefits should be adjusted. This was sufficient to put her on notice that the requested information was material to her receipt of benefits. Further, when OWCP accepted appellant's claim, it notified her that she must report any employment or employment activities on CA-7 forms. The CA-7 forms that appellant completed warned her that failure to report income may result in forfeiture of compensation benefits. The EN1032 form described her responsibilities and warned that severe penalties may be applied for failure to report all work activities thoroughly and completely over the past 15 months. Indeed, if appellant had any question whether the information was material, the form advised her to include it.

Under the circumstances, the Board finds that appellant should have known that the disclosure of income earned from the sale of alligators to customers was material. OWCP made clear the reason for the information and the notifications and warnings were extensive and sufficiently broad to have put her on notice that any kind of sales work was material to her receipt of benefits and should have been disclosed. Accordingly, as appellant failed to provide information which she should have known to be material, the Board finds that she was at fault in creating the overpayment resulting from her forfeiture of compensation. The Board will therefore affirm OWCP's February 7, 2014 decision on the issue of fault.

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.¹³

¹³ 20 C.F.R. § 10.441(a).

ANALYSIS -- ISSUE 3

As appellant was at fault in creating the overpayment, OWCP must, by law, recover the debt by decreasing later payments to which she is entitled. The hearing representative, however, was unaware that appellant was still receiving compensation for temporary total disability on the periodic rolls. Appellant was asked to send a check and was advised that the employing establishment could recover the overpayment from current salary or OPM could recover the overpayment from money otherwise payable from the Civil Service Retirement Fund.

In the case of *Gail M. Roe*,¹⁴ when an individual failed to provide the requested information on income, expenses and assets, the Board found that OWCP did not abuse its discretion in following minimum collection guidelines, which stated in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.¹⁵

In the case of *Ralph P. Beachum, Sr.*,¹⁶ the claimant failed to submit an overpayment recovery questionnaire or other financial information. Citing OWCP regulations,¹⁷ the Board noted that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. When an individual fails to provide that information, the Board held that OWCP should follow minimum collection guidelines.

When the claimant in the case of *R.C.*,¹⁸ failed to respond to OWCP's request for financial information within 30 days, the Board found that OWCP properly set the rate of recovery by deducting \$50.00 from each continuing compensation payment until the \$1,563.46 debt was collected. The Board found no evidence that the recovery rate was unreasonable.

As appellant is entitled to continuing payments of compensation, the Board finds that the hearing representative improperly directed recovery.¹⁹ The Board will set aside OWCP's February 7, 2014 decision on the issue of recovery and will remand the case for OWCP to follow minimum collection guidelines in decreasing later payments to which appellant is entitled.

¹⁴ 47 ECAB 268 (1995).

¹⁵ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4.d(1)(b) (June 2009). The Federal Claims Collection Standards, published jointly by the Department of the Treasury and the Department of Justice (31 C.F.R. Parts 900 through 904) state that government claims should be collected in full. If an installment plan is accepted, the installments should be large enough to collect the debt promptly.

¹⁶ 55 ECAB 442 (2004).

¹⁷ 20 C.F.R. § 10.438(a).

¹⁸ Docket No. 06-615 (issued September 12, 2006).

¹⁹ See *L.L.*, Docket No. 12-1724 (issued March 26, 2013) (holding, under the same circumstances, that OWCP properly found the overpayment due in full). Because the claimant in *L.L.*, was entitled to further payments of compensation, it was unclear how OWCP could recover the debt in full given sections 8106(b) and 8129(a) of FECA and section 10.441(a) of OWCP's regulations.

Appellant may at any time, of course, provide the financial information requested to ensure that any hardship is minimized.

CONCLUSION

The Board finds that appellant forfeited her right to compensation from July 28, 2012 to February 13, 2013. The Board finds that she was at fault in creating the resulting overpayment. The Board further finds that OWCP improperly found the overpayment due in full. Further action is warranted on the issue of recovery.

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2014 decision of the Office of Workers' Compensation Programs is affirmed on the issues of forfeiture, fact of overpayment, amount of overpayment and fault and is set aside on the issue of recovery. The case is remanded for further action.

Issued: September 19, 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