

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

G.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Monsey, NY, Employer**

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**Docket No. 14-1847
Issued: January 9, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 20, 2014 appellant filed a timely appeal from an April 11 and May 14, 2014 merit decisions of the Office of Workers' Compensation Programs (OWCP). 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 OWCP properly determined appellant forfeited her compensation from December 13, 2010 to March 11, 2013; (2) whether OWCP properly found that an overpayment of \$4,950.68 was created; and (3) whether OWCP properly found appellant at fault in creating the overpayment and therefore not entitled to waiver.

FACTUAL HISTORY

On May 11, 1998 appellant, then a 46-year-old mail processor, filed a claim for an occupational disease or illness (Form CA-2) alleging that she sustained a mood disorder and

¹ 5 U.S.C. § 8101 *et seq.*

sleep deprivation as a result of her work shift hours commencing at 1:00 a.m. OWCP accepted the claim on January 25, 1999 for sleep disturbances and mood disorder secondary to sleep deprivation. On August 4, 1999 it issued a wage-earning capacity determination, finding that appellant's actual earnings at the employing establishment since March 20, 1999 represented her wage-earning capacity. Appellant continued to receive compensation based on wage-earning capacity.²

OWCP sent appellant EN-1032 forms that requested information, *inter alia*, regarding employment activity. The form covers a 15-month period and specifically asks the recipient whether she worked for any employing establishment, whether she was "self-employed or involved in any business enterprise" in the last 15 months. In an EN-1032 form signed on March 13, 2012, appellant responded "no" with respect to any employment or involvement in a business enterprise. She also responded "no" regarding employment activity in an EN-1032 form dated March 11, 2013.

On March 31, 2014 OWCP received a March 24, 2014 report from the employing establishment Office of Inspector General (OIG) regarding appellant's involvement in internet sales. According to the report, appellant was engaged in selling items on eBay with a registered PayPal account and eBay profile. The report includes a document listing eBay sales to appellant's account, indicating that, during the period December 23, 2011 to April 23, 2012, she sold 71 items on eBay.

By decision dated April 11, 2014, OWCP found that appellant had forfeited her compensation from December 13, 2010 to March 11, 2013. It found that she had earnings that were knowingly omitted from the EN-1032 forms signed March 13, 2012 and March 11, 2013.

In a preliminary determination dated April 11, 2014, OWCP found that an overpayment of \$4,950.68 was created. It indicated that this was the compensation paid from the current claim during the period December 13, 2010 to March 11, 2013.³ In addition, OWCP made a preliminary determination that appellant was at fault because she made an incorrect statement as to a material fact that she knew or should have known was incorrect.

On April 25, 2014 appellant submitted a statement from Allan Pisano, who stated that the eBay auctions belonged to him. Mr. Pisano acknowledged that payments were received into her PayPal account and transferred to her bank account, but this was done because at that time he did not have eBay, PayPal or bank accounts. He asserted that appellant was just helping a friend and did not make any money.

By decision dated May 14, 2014, OWCP finalized its determination of a \$4,950.68 overpayment of compensation. It found that appellant was required to report her business activity regarding her eBay account, even if it were for a friend. In addition, OWCP denied waiver of the overpayment, finding that she was at fault in creating the overpayment.

² Appellant filed a traumatic injury claim for injuries on February 12, 2003. This claim also involved the forfeiture issue, as well as separate decisions as to overpayments, fault, and recovery. Those decisions are addressed pursuant to the appeal docketed as No. 14-1848.

³ OWCP indicated that appellant's net and gross compensation was \$35.14 from December 13 to 18, 2010, \$4,903.04 from December 19, 2010 to March 9, 2013, and \$12.50 from March 10 and 11, 2013.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8106(b) 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 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.”

ANALYSIS -- ISSUE 1

In the present case, OWCP found that appellant failed to disclose earnings on EN-1032 forms signed March 13, 2012 and March 11, 2013. On these forms appellant stated that she was not self-employed or involved in a business enterprise. The period covered by each form is 15 months prior to the signature date.

The OIG report dated March 24, 2014 clearly documents that appellant had an eBay account and under this account conducted numerous sales of items on eBay. For the period December 23, 2011 through April 23, 2012, the report documented 71 sales transactions. In *S.R.*,⁴ a similar eBay case, the claimant had an eBay account and the record documented sales to the account. However, the claimant alleged that eBay sales were just a hobby. The Board found that the claimant should have reported the earnings on the EN-1032 forms.

Appellant does not contest that the sales were made. She submitted a brief statement from an individual stating that the sales transactions were actually his items and appellant's accounts were used because he did not have such accounts. This statement establishes that appellant did have earnings as it acknowledges that payments were sent to appellant's PayPal account and then transferred to her bank account. The EN-1032 form clearly explains that any involvement in a business enterprise must be reported. Appellant should have reported any eBay business activity on the EN-1032 forms signed March 13, 2012 and March 11, 2013. The documented sales activity occurred during the 15-month period covered by each EN-1032 form. The Board finds that the evidence or record establishes that appellant omitted earnings on these forms.

The next question is whether the omission of the earnings was “knowingly” made. The term “knowingly” is defined in the regulations governing administration of claims filed under FECA as “[w]ith knowledge, consciously, willfully, or intentionally.”⁵ In the case of *C.R.*,⁶ the claimant sold several paintings from his home for \$600.00. He had however called OWCP,

⁴ Docket No. 07-618 (issued July 10, 2007).

⁵ 20 C.F.R. § 10.5(n).

⁶ Docket No. 09-720 (issued October 15, 2009).

reported the sale, but had been told that it would not affect his benefits. The Board reversed the finding of knowing omission of earnings as appellant had established that he notified OWCP of his earnings. However, in the eBay case *S.R.*,⁷ the Board noted that EN-1032 forms provide clear language regarding the reporting requirement. In addition, the certification clauses on the form clearly state that a claimant is advised that any fraudulent concealment or failure to report income may result in both forfeiture of the right to compensation and criminal prosecution. The evidence in this case, which documents multiple sales transactions to appellant's accounts, supports a finding that she knowingly omitted earnings. OWCP may find that an omission was knowingly made, without an admission of knowledge by her, if the circumstances of the case are sufficient to establish that she knew that she should have reported the employment activity and earnings.⁸ The Board finds that appellant knowingly omitted earnings on EN-1032 forms dated March 13, 2012 and March 11, 2013. Appellant therefore forfeits her compensation for the 15-month periods covered by the forms, from December 13, 2010 to March 11, 2013.

On appeal, appellant reiterates her contention that she was just helping a friend and the sales were made on behalf of Mr. Pisano. For the reasons noted above, she was required to report the business activity. Appellant's failure to report the activity on the EN-1032 forms constitutes a knowing omission of earnings.

LEGAL PRECEDENT -- ISSUE 2

Under 5 U.S.C. 1806(b), "compensation forfeited under this subsection, if already paid, shall be recovered ... under section 8129 of this title, unless recovery is waived under that section."⁹

Section 10.529 of OWCP's implementing regulations provide as follows:

"(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

"(b) Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes."¹⁰

ANALYSIS -- ISSUE 2

As noted above, appellant has forfeited her right to compensation for the period December 13, 2010 to March 11, 2013. OWCP may recover the compensation paid under the

⁷ *Supra* note 3.

⁸ See *Terryl A. Geer*, 51 ECAB 168, 171-72 (1999).

⁹ 5 U.S.C. § 8106(b).

¹⁰ 20 C.F.R. § 10.529.

current claim for the period in question.¹¹ The evidence of record shows that appellant had received compensation under the current claim in the amount of \$4,950.68 during this period. OWCP found that the overpayment was \$4,950.68, and there is no contrary evidence. The Board finds that an overpayment of \$4,950.68 was created in this case.

LEGAL PRECEDENT -- ISSUE 3

5 U.S.C. 8129(b) provides: “Adjustment or recovery 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 [FECA] or would be against equity and good conscience.”¹² A claimant who is at fault in creating the overpayment is not entitled to waiver.¹³ On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(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 was incorrect. (This provision applies only to the overpaid individual.)”

ANALYSIS -- ISSUE 3

The finding of fault in this case was based on 20 C.F.R. § 10.433(a)(1), for making an incorrect statement regarding a material fact that appellant knew or should have known was incorrect. The incorrect statement in this case is answering “no” to the question as to self-employment or involvement in a business enterprise.

As the Board explained in *L.M.*,¹⁴ by signing the EN-1032 forms, appellant is deemed to have acknowledged her duty to fill out the forms properly, including the duty to correctly report self-employment income. Her understatement or omission of earnings is an incorrect statement as to a material fact.¹⁵ Based on the forfeiture discussion above, it is established that appellant knew or should have known that the statement she had no self-employment or involvement in a business enterprise was incorrect in this case. The Board accordingly finds that she is properly found to be at fault under 20 C.F.R. § 10.433(a)(1). Since appellant is at fault in creating the overpayment, she is not entitled to waiver.

On appeal, appellant asserts that she is not at fault as she answered truthfully on the EN-1032 forms. The evidence of record establishes however that appellant made an incorrect statement as to a material fact and is properly found to be at fault in creating the overpayment in this case.

¹¹ Appellant also received compensation pursuant to the traumatic injury claim, which will be addressed under Docket No. 14-1848.

¹² 5 U.S.C. § 8129(b).

¹³ See *T.O.*, Docket No. 12-426 (issued July 23, 2012).

¹⁴ Docket No. 12-405 (issued October 1, 2012).

¹⁵ *Id.*

CONCLUSION

The Board finds that OWCP properly found that appellant forfeited her compensation from December 13, 2010 to March 11, 2013. The Board further finds that OWCP properly found that an overpayment of \$4,950.68 was created, and waiver of the overpayment was properly denied.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 14 and April 11, 2014 are affirmed.

Issued: January 9, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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