



found that appellant had forfeited her right to compensation from September 16, 2009 to September 3, 2010, because she failed to report all of her earnings during the period, in particular, the \$500.00 she earned on May 6, 2010 for a singing engagement at a birthday party. However, the Board set aside the December 18, 2012 decision on the issue of fault. The Board found that OWCP did not apply a proper standard under 20 C.F.R. § 10.433(a).<sup>3</sup>

On remand of the case, OWCP issued a final decision on September 9, 2013 finding appellant at fault because she failed to provide information which she knew or reasonably should have known to be material. The Board found that revising the grounds for fault in a final decision denied her the right to a precoupment hearing.<sup>4</sup> As extensive due process rights attach to any attempt by OWCP to recoup benefits already paid, even if paid in error, the Board set aside OWCP's September 9, 2013 decision and remanded the case to OWCP for a proper opportunity for appellant to respond to the allegation of fault and the right to a precoupment hearing prior to any final decision. The facts of this case, as set forth in the Board's prior decisions, are incorporated herein by reference.

On July 1, 2014 OWCP issued a preliminary determination that appellant was at fault in creating the \$33,161.07 overpayment because she failed to provide information which she knew or should have known to be material. It found that its August 20, 2010 Form EN1032 was sufficiently specific to indicate to any reasonable person that any monies earned for payment of any kind must be reported and as appellant failed to provide information which she knew or should have known to be material, she was at fault in creating the overpayment.

During a telephone hearing on February 13, 2015, appellant testified that music was a hobby, nothing that she profited from. She was actually spending money to do it. Appellant received a call one day to perform at a show. She performed and they offered a payment and she did not say no to it. When appellant filled in the paperwork from OWCP a few months later, the only income she was able to think of was a small temporary job answering telephones. She understood this work payment as an income because it was a check. Appellant did not think of the show as something she had to report. From her perspective the show was something that was totally outside of work. Appellant stated that there was no deliberate attempt on her part to avoid reporting the income. She would have reported it if she had realized it was income. Appellant asked that her ignorance of the situation be taken into account. "It was done unintentionally."

Appellant's representative argued that it would be against equity and good conscience to make appellant accountable for \$33,000.00 when her earning was less than her expenses. Questioning the period of the forfeiture, he argued the amount of the overpayment. Appellant's representative also argued that, if something was done improperly the first time, such as OWCP using the wrong standard for finding fault, it really seemed improper to allow it to be corrected. He argued that the Board did not remand the case for further action in its August 30, 2013

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<sup>3</sup> Appellant, a 26-year-old sales and service associate, sustained an occupational injury in the performance of duty while picking up bags from the workroom floor and hanging them. OWCP accepted her claim for aggravation of brachial neuritis or radiculitis not otherwise specified, and aggravation of internal derangement of the right shoulder.

<sup>4</sup> Docket No. 14-0508 (issued June 6, 2014).

decision, so setting aside OWCP's decision on the issue of fault should have ended appellant's responsibility at that point.

In a decision dated April 1, 2015, an OWCP hearing representative found that appellant was at fault in creating the overpayment because she failed to provide information which she knew or should have known to be material. The information provided on the Form EN1032 was sufficient to convey to a reasonable person that receipt of any money or payment of any kind must be reported.

On appeal, appellant's representative argues over the language of the overpayment recovery questionnaire. He argues the Board's August 23, 2013 decision did not remand the case and did not justify OWCP correcting its grounds for fault, thus putting appellant in double jeopardy. Appellant's representative argues that recovery would be against equity and good conscience, as appellant would suffer severe financial hardship in trying to repay the debt. He argues that, in 2012, a hearing representative found that appellant's expenses exceeded her income. Appellant's representative argues that appellant did submit all of her financial records. He argues that OWCP used incorrect information about the website mentioned in the case. Appellant's representative takes issue with the Board's most recent decision which provided appellant an opportunity to have a precoupment hearing.

#### **LEGAL PRECEDENT**

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. Section 8129(b) 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.”<sup>5</sup>

Thus, 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.<sup>6</sup>

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<sup>5</sup> 5 U.S.C. § 8129(b).

<sup>6</sup> 20 C.F.R. § 10.433(a) (1999).

Whether OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances of the overpayment. 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.<sup>7</sup>

### ANALYSIS

In its April 1, 2015 decision, OWCP found that appellant was at fault in creating the \$33,161.07 overpayment that arose from the forfeiture of her compensation. It found that she was at fault under the second standard, namely, she failed to provide information which she knew or should have known to be material.

On the Form EN1032 she signed on September 3, 2010, appellant failed to provide information about \$500.00 she earned for a singing engagement at a birthday party on May 6, 2010. She and her representative concede the point with explanation: Appellant did not provide the information for a reason, they argue. The Board has reviewed the form and can find no disclosure by her of the money she earned that date. Accordingly, the first part of the fault standard is established. Appellant failed to provide the required information.

The only question that remains is whether appellant knew or should have known that this information was material. The form made clear that she was required to report any services provided in exchange for money, and including any odd jobs. The form asked appellant to read the section carefully before answering, and in capital letters it warned her that severe penalties may be applied for failure to report all work activities thoroughly and completely. This is sufficient to put her on notice that the information requested was material.

The Board finds that a reasonable person in her position should have known that she was required to report any services she provided in exchange for money or any odd jobs she might have performed during the period.

Under the circumstances, the Board finds that appellant is at fault in creating the \$33,161.07 overpayment that arose from the forfeiture of her compensation. Accordingly, the Board will affirm OWCP's April 1, 2015 decision on the issue of fault. The issues of fact and amount of overpayment were previously adjudicated by this Board. The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where OWCP decreases later payments of compensation to which the individual is entitled.<sup>8</sup> Because collection of the overpayment in this case cannot be made by adjusting later payments, as appellant is not currently receiving compensation for wage loss,<sup>9</sup> but must be recovered by other means, the Board lacks jurisdiction to review the issue of recovery.

The Board has reviewed the arguments presented by appellant's representative. The overpayment recovery questionnaire is irrelevant to the issues on this appeal, because appellant

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<sup>7</sup> *Id.* at § 10.433(b).

<sup>8</sup> 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

<sup>9</sup> Appellant was last paid compensation through September 12, 2011.

is at fault, she is not eligible for consideration of waiver. OWCP and the Board therefore have no occasion to review whether adjustment or recovery of the overpayment would defeat the purpose of FECA or whether adjustment or recovery of the overpayment would be against equity and good conscience. Appellant failed to provide information about the money she received for the singing engagement. The Board's August 23, 2013 decision found that the case was not in posture for decision on the issue of fault. That did not mean the matter was closed. It only meant that the matter could not be decided without further action by OWCP. Any disagreement appellant's representative might have with respect to the Board's most recent decision should have been presented in a petition for reconsideration filed with the Board within 30 days of the date of that decision. The Board found in its August 23, 2013 decision that OWCP did not provide appellant due process and therefore remanded the case for further action.

**CONCLUSION**

The Board finds that OWCP properly found appellant at fault in creating a \$33,161.07 overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 1, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 28, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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