

**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. 14-1848
Issued: August 4, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 20, 2014 appellant filed a timely appeal from April 3 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 determined an overpayment of compensation in the amount of \$78,941.92 was created; (3) whether OWCP properly found appellant at fault in creating the overpayment and therefore not entitled to waiver of recovery of the overpayment; and (4) whether OWCP properly determined the overpayment would be recovered by deducting \$2,110.00 from appellant's continuing compensation payments.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 27, 2003 appellant, then a 50-year-old window clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries on February 12, 2003 when a customer pushed her into a metal divider.² The claim was accepted for subluxations of the lumbar, cervical, and thoracic spine. Appellant stopped working on March 30, 2003 and began receiving wage-loss compensation on the periodic rolls.

OWCP sent appellant (Form CA-1032) that requests 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 a CA-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 a CA-1032 form dated March 11, 2013.

On March 31, 2014 OWCP received a 54-page 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 document indicates that during the period December 23, 2011 to April 23, 2012, she sold 71 items on eBay.

By decision dated April 3, 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 CA-1032 forms signed March 13, 2012 and March 11, 2013.³

In a preliminary determination dated April 3, 2014, OWCP found that an overpayment of compensation in the amount of \$78,941.92 was created. It indicated that this was the gross compensation paid from the current claim during the period December 13, 2010 to March 11, 2013.⁴ 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. OWCP pointed out that appellant was aware or reasonably should have been aware that she was to report all earnings and employment activities. It enclosed an overpayment recovery questionnaire requesting financial information, stating that such information was necessary to determine a fair repayment method.

On April 23, 2014 appellant submitted a statement from an Allan Pisano, who stated that the eBay auctions belonged to him. Mr. Pisano acknowledged that payments were received into

² Appellant had a prior occupational disease claim filed on May 27, 1998, accepted for mood disorder secondary to sleep deprivation. OWCP issued forfeiture and overpayment decisions with respect to this claim and the Board reviewed those decisions under Docket No. 14-1847 (issued January 9, 2015).

³ OWCP also issued a similar forfeiture decision on April 11, 2014 with respect to the occupational disease claim filed in May 1998. *See id.*

⁴ OWCP indicated that appellant was paid \$561.21 in gross compensation from December 13 to 18, 2010, \$78,181.00 from December 19, 2010 to March 9, 2013, and \$199.71 from March 10 and 11, 2013.

appellant's 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 preliminary determination of a \$78,941.92 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 recovery of the overpayment, finding that she was at fault in creating the overpayment. With respect to repayment, it indicated that the overpayment would be recovered by deducting \$2,110.00 from each 28-day compensation payment.

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 CA-1032 forms signed March 13, 2012 and March 11, 2013.⁵ 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.*,⁶ another eBay case, the claimant had an eBay account and the record documented sales to the account. The Board found that the claimant should have reported the earnings on the CA-1032 forms.

Appellant does not contest that the sales were made. She submitted a brief statement from Mr. Pisano stating that the sales transactions were actually his items and her accounts were used because he did not have such accounts. This statement does not establish that appellant was not involved in a business enterprise. It confirms that she did have earnings as it acknowledges

⁵ OWCP made similar findings under the prior occupational disease claim filed in May 1998. The Board's forfeiture issue analysis in the current case is also provided under Docket No. 14-1847 (issued January 9, 2015).

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

that payments were sent to her PayPal account and then transferred to her bank account. There is no documentation of record to support a finding that appellant had no actual earnings from these eBay sales. The CA-1032 explains that any involvement in a business enterprise must be reported. Appellant should have reported her eBay business activity on the CA-1032 forms signed March 13, 2012 and March 11, 2013. The documented sales activity occurred during the 15-month period covered by each CA-1032 form. The Board finds the evidence of 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.”⁷ As the Board noted in *S.R.*,⁸ the eBay case, the CA-1032 forms provide clear language regarding the reporting requirement. In addition, the certification clauses on the form clearly state that the claimant knows 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 appellant knew that she should have reported the employment activity and earnings.⁹ These facts are unlike those of *C.R.*,¹⁰ wherein the claimant had sold paintings from his home, but had telephoned OWCP to inform of such sales. Since the claimant in *C.R.*, notified OWCP of the sales, he did not knowingly omit or fail to report income. The Board finds that appellant knowingly omitted earnings on CA-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 employment activity. Appellant’s failure to report the activity on the CA-1032 forms constitutes a knowing omission of earnings.

LEGAL PRECEDENT -- ISSUE 2

Under 5 U.S.C. § 8106(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.”¹¹

⁷ 20 C.F.R. § 10.5(n).

⁸ *Supra* note 5.

⁹ See *Terryl A. Geer*, 51 ECAB 168, 171-72 (1999).

¹⁰ Docket No. 09-720 (issued October 15, 2009).

¹¹ 5 U.S.C. § 8106(b).

Section 10.529 of OWCP's implementing regulations provides 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.”¹²

ANALYSIS -- ISSUE 2

Appellant has forfeited her right to compensation for the period December 13, 2010 to March 11, 2013. As noted above, OWCP may recover the compensation paid under the current claim for the period in question. The evidence of record shows that appellant had received gross compensation in the amount of \$78,941.92 during this period.¹³ OWCP found that the overpayment was \$78,941.92 and there is no contrary evidence. The Board accordingly finds that an overpayment of \$78,941.92 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.”¹⁴ A claimant who is at fault in creating the overpayment is not entitled to waiver.¹⁵ 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

¹² 20 C.F.R. § 10.529.

¹³ In a forfeiture case, the gross compensation paid represents the overpayment of compensation. See *K.R.*, Docket No. 14-434 (issued October 7, 2014).

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

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.*,¹⁶ by signing the CA-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. Appellant’s understatement of earnings is an incorrect statement as to a material fact.¹⁷ Based on the forfeiture discussion above, it is established that she knew or should have known that the statement was incorrect in this case. The Board accordingly finds that appellant 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 CA-1032 forms. The evidence of record establishes, however, that she made an incorrect statement as to a material fact and is properly found to be at fault in creating the overpayment in this case.

LEGAL PRECEDENT -- ISSUE 4

OWCP regulations provide:

“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 his or her attention is called to the 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 hardship.”¹⁸

When an individual fails to provide requested information on income, expenses, and assets, OWCP should follow minimum collection guidelines, which state 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.¹⁹

ANALYSIS -- ISSUE 4

In the present case, appellant did not provide any financial information that would allow OWCP to review the financial circumstances and minimize hardship. As noted above, when she fails to submit the requested financial information, OWCP may recover the overpayment from continuing compensation in a manner that would collect the debt promptly.

¹⁶ Docket No. 12-405 (issued October 1, 2012).

¹⁷ *Id.*

¹⁸ 20 C.F.R. § 10.441.

¹⁹ See *J.L.*, Docket No. 14-396 (issued May 19, 2014); *Gail M. Roe*, 47 ECAB 268 (1995); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Overpayment Actions*, Chapter 2.600.4 (June 2009).

OWCP found that the \$78,941.92 overpayment should be recovered by deducting \$2,110.00 from appellant's 28-day compensation payments. In the absence of any relevant financial information, this was a reasonable amount to collect the debt promptly. The Board finds no error with respect to recovery of the overpayment.

CONCLUSION

The Board finds that appellant forfeited her compensation from December 13, 2010 to March 11, 2013. The Board further finds that OWCP properly found an overpayment of compensation in the amount of \$78,941.92 was created, that she was not entitled to waiver of recovery of the overpayment and that it may be recovered by deducting \$2,110.00 from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 14 and April 3, 2014 are affirmed.

Issued: August 4, 2016
Washington, DC

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

Christopher J. Godfrey, Chief Judge, dissenting:

I dissent from the opinion and order of the majority.

OWCP bears the burden of proof to justify forfeiture of appellant's compensation benefits. The record of evidence in this case does not support forfeiture and should therefore be reversed. The holding of the majority shifts the burden of proof in forfeiture cases onto appellants. Rather than requiring OWCP to meet its burden to prove that appellant had earnings

and knowingly omitted such earnings from her periodic EN1032 forms,¹ the holding of the majority erroneously places the burden on appellant to disprove evidence consisting in this case of nothing more than a few sheets of paper printed off from eBay records. As will be noted below, appellant presented compelling evidence that she had no earnings. Thereafter, OWCP performed no further investigation to counter her additional evidence and summarily concluded that appellant had not only earnings, but also knowingly violated of the reporting requirement on two EN1032 forms. Such a process and result violates the intent of FECA.

The law as to forfeiture of benefits is primarily statutory. 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.”

The Board has held that it is not enough to merely establish that there was unreported employment or earnings. A claimant can only be subjected to the forfeiture provisions of 5 U.S.C. § 8106(b) if he or she knowingly failed to report employment or earnings.² The term knowingly, as defined in OWCP’s implementing regulations, means with knowledge, consciously, willfully, or intentionally.³ The Board has found in interpreting the forfeiture statute 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 earnings which he or she knew should be reported or by establishing that a claimant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the EN1032 forms.⁴ As the penalty of

¹ The applicable EN1032 forms in this case instructed appellant to report all employment for which she received a salary, wages, income, sales commissions, piecework, or payment of any kind. Appellant 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 for money, goods, or other services. Examples of services that she 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 applicable EN1032 forms further instructed appellant to report any work or ownership interest in any business enterprise, even if the business lost money or if profits or income were reinvested or paid to others. If appellant performed any duties in a business enterprise for which she was not paid, she was required to show what the rate of pay 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 her 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.

² *Harold F. Franklin*, 57 ECAB 387 (2006).

³ 20 C.F.R. § 10.5(n).

⁴ *Supra* note 2.

forfeiture is substantial -- if not life altering for the claimant -- the burden of proof placed on OWCP must remain substantial. Unlike an overpayment analysis of fault, where recovery is limited to the overpayment amount and the finding of fault looks to what appellant “knew or should have known,” forfeiture requires sole consideration of a knowing failure to report earnings.⁵

In its April 3 and May 14, 2014 merit decisions, OWCP found that appellant failed to disclose earnings from sales of items on eBay on her EN1032 forms signed March 13, 2012 and March 11, 2013.⁶ On these forms appellant attested 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.

As noted, forfeiture is a penalty, and thus OWCP bears the burden of proof to establish that appellant knowingly failed to report employment or earnings. OWCP does not base its forfeiture decision on either an admission by appellant of a failure to report employment earnings which she knew should have been reported or by a guilty plea to violating federal statutes by falsely completing the EN1032 forms. Instead, it based its forfeiture decision on the finding that appellant knowingly omitted earnings as concluded in the OIG report dated March 24, 2014. The “case summary” of the OIG report determined that appellant was “gainfully employed” during the period December 13, 2011 to April 23, 2012. The majority finds “there is no documentation of record to support a finding that appellant had no actual earnings from these eBay sales.” Such a finding has shifted the burden from OWCP to appellant. Moreover, the finding is wrong.

The EN1032 forms required appellant to report employment for which she received salary or wages, self-employment, or involvement in a business enterprise. OWCP found that it was reasonable to conclude that appellant was involved in self-employment activities related to the use of her eBay account and that she was therefore required to inform OWCP of her activities and earnings. However, it does not explain in its decision how her activities, *i.e.*, the sales activity described in the OIG report would rise to the level of self-employment as opposed to everyday activities of an individual with a home computer, or even a smartphone, and Internet access. Would OWCP hold every claimant to a standard that near-effortless activities of daily living such as selling a car on Craigslist or taking unwanted personal items to a consignment shop constitute gainful self-employment? There is no defined, logical line that has been drawn and therefore this process has become a trap which can easily ensnare the occasional unwitting individual. The “knowing,” “conscious,” “willful,” or “intentional” qualifications must be proven by OWCP for the specific purpose of avoiding ensnaring the truly unwitting. Regardless, by relying solely upon the OIG report, OWCP’s evidence of self-employment in this case is limited to the printout received from eBay relating to the account registered to appellant and mere speculation and surmise.

⁵ *J.S.*, 58 ECAB 515 (2007).

⁶ To the extent that this decision is decided to ensure consistency with the decision in Docket No. 14-1847, I conclude this decision should stand on its own merits regardless of a prior Board decision with a different panel.

On the other side of the proverbial scale, appellant presented compelling evidence to OWCP, as was requested of her, to refute the evidence and the OIG findings. In a statement, she argued that some of the sales transactions were not her own, but were sold on behalf of a friend. On April 23, 2014 appellant submitted a notarized and signed statement, refuting the facts underlying the forfeiture decision, from Allan Pisano who confirmed that the eBay auctions belonged to him and that appellant merely allowed him to post his items for sale using her computer and accounts. Mr. Pisano acknowledged that payments were received after the sale of goods into appellant's PayPal account and thereafter transferred to her bank account, but this was done because at that time he did not have eBay, PayPal, or bank accounts of his own. He asserted that appellant was just helping a friend, she did not take part in his auctions, and she was not paid any money as she provided him with all proceeds from the sale of his auction items. Mr. Pisano's statement indicates that he took his own pictures, listed and maintained his own auctions, and that he performed all of his own packing and shipping from his own home. He attached to his statement a business card associated with his internet sales for "Al's Attic." Mr. Pisano informed OWCP that if there were any questions that they were free to contact him. While the Board is free to question the veracity of Mr. Pisano, to disprove his statement requires actual evidence. In this case, there is no such evidence in the record and the opinion of the majority, unsurprisingly, cites to none. The burden to prove forfeiture is meant to be high. If the present decision demonstrates the level of proof required to prove forfeiture, it is now almost nonexistent.

Following appellant's submission of her compelling evidence, neither OWCP nor the OIG investigated the veracity of the new evidence or disproved it. There are no findings in the forfeiture decision regarding the involvement of Mr. Pisano on the eBay account and whether his activities fully encompassed the activity attributed to appellant by the OIG. Furthermore, there is no finding as to the specific amount of time appellant was allegedly engaged in business activity while selling items on eBay. OWCP does not cite, in its forfeiture decision, to any evidence of record to establish that appellant actually performed any of the activities attributed to her by OIG. For instance, there is no evidence in the OIG report that she took photographs, posted items for sale, shipped goods to buyers, or kept books and records. Such evidence is particularly important when appellant submitted a signed statement from an individual who accepted responsibility for performing all of the alleged acts. OWCP's forfeiture decision fails to make any findings regarding the statement of Mr. Pisano such that appellant can be presented an understanding of why his statement is insufficient to overcome forfeiture or what additional evidence she can now present to refute the findings of the OIG and the forfeiture decision. Should appellant choose to file a request for reconsideration with OWCP (which is her legal right to do in this matter),⁷ what would the last merit OWCP decision or the decision of the majority, tell her about what evidence would be relevant and pertinent new evidence to support her claim? Appellant's dilemma is akin to a forfeiture case with video surveillance evidence wherein a claimant presents evidence that the person depicted on the video is someone else and documents that it could not be him or her -- yet OWCP proceeds by ignoring the evidence and argument and moves forward with forfeiture based solely on the video evidence. If the compelling evidence appellant submitted in this case does not trigger the need for further OIG

⁷ Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

investigation, then the process is broken. When viewing the evidence of record it is clearly insufficient to establish self-employment, a knowing omission from the EN1032 forms, or for OWCP to prove that a penalty of forfeiture is warranted.

The law is clear, 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 has had unreported employment activities, earnings from employment, or volunteer work which were knowingly unreported. In the absence of actual signed statements or clear documentation of work activities, there is inadequate evidence to establish that a claimant had earnings or was engaged in employment activities which were required to be reported on the EN1032 forms. This harsh penalty, based on mere speculation and surmise, violates the intent of FECA and thus it is troubling and compels the length and tone of this dissent.

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