

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

J.W., Appellant)	
)	
and)	Docket No. 15-0459
)	Issued: June 23, 2016
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Charleston, SC, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 22, 2014 appellant filed a timely appeal from two December 4, 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 met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 6, 2014; (2) whether appellant has met her burden of proof to establish continuing residuals or disability after the April 6, 2014 termination of her compensation benefits; (3) whether appellant forfeited her compensation for the period June 16, 2012 through September 16, 2013 on the grounds that she knowingly failed to report her income pursuant to 5 U.S.C. § 8106(b); (4) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$26,738.64 from June 16, 2012 through September 16, 2013; and (5) whether OWCP properly found that appellant was at fault in the creation of such an overpayment, thereby precluding waiver of recovery.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² In a June 21, 2010 decision, the Board determined that OWCP did not meet its burden of proof in reducing appellant's compensation effective February 15, 2009 and reversed the January 28, 2009 decision. OWCP did not establish that the selected sales clerk position represented her wage-earning capacity due to insufficient medical evidence. The facts and circumstances set forth in the prior appeal are incorporated herein by reference. The facts relevant to the present appeal are set forth below.

Appellant, a 28-year-old transportation security screener, filed a claim for a traumatic injury (Form CA-1) alleging that she suffered back pain on April 11, 2006 while pulling a cart of boxes. On September 29, 2006 OWCP accepted the claim for subluxation of the lumbar spine. On November 30, 2006 it added lumbar dislocation as an accepted condition. Appellant stopped work on the date of injury and received wage-loss compensation.

Facts regarding the issues of whether OWCP met its burden of proof to terminate appellant's wage-loss and medical benefits effective April 6, 2014 and whether appellant has met her burden of proof to establish continuing residuals or disability after the April 6, 2014 termination of her compensation:

An October 8, 2010 report from, Dr. Timothy M. Zgleszewski, a Board-certified internist, noted appellant's history. His findings included that appellant was in minimal amount of pain; body habitus was normal for her age; she did not appear to be in acute distress; gait and station were nonantalgic; and she was able to raise up on her heels and toes. Inspection of the upper and lower extremities demonstrated intact radial and pedal pulses and no edema. The low back had normal lumbar lordosis. Pain was increased with palpation and he found tenderness in lumbar paraspinals. There was no generalized tenderness over the greater trochanters and no trigger points in the lumbosacral spine. Appellant had negative neural tension signs in both legs in the seated slumped position and a negative straight leg test bilaterally. Dr. Zgleszewski advised that her bilateral leg examination was stable and unchanged from his previous examination. He diagnosed lumbar facet syndrome, low back pain, and lumbago.

In a letter dated July 1, 2013, OWCP requested that appellant provide an update from her physician regarding her accepted work conditions. Appellant was advised that, if her physician did not provide an update, OWCP would refer her for a second opinion examination.

On November 14, 2013 OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Raju Vanapalli a Board-certified orthopedic surgeon to assess residuals of the work injury and her capacity to work.

In a December 4, 2013 report, Dr. Vanapalli described appellant's history of injury and treatment and noted that he had reviewed the statement of accepted facts. He reported that she stopped work on October 31, 2009 and had not returned to her duties. Appellant since relocated to Atlanta, GA and pursued a different career. Dr. Vanapalli examined appellant and provided findings. For the lumbosacral spine, he found no deformity, no tenderness, no spasm, no trigger

² Docket No. 09-1800 (issued June 21, 2010).

points, range of movement forward flexion to 90 degrees, side to side tilt of 20 degrees, rotation of 30 degrees, and extension to 20 degrees with no pain. Dr. Vanapalli advised that in the supine position, straight leg raising was to 70 degrees on both sides. Lasegue's and Patrick's tests were negative. Neurological examination was normal with intact sensation normal motor power. Dr. Vanapalli diagnosed status post lumbosacral strain, radiculitis L5-S1, bilateral, and facet joint degenerative arthropathy based on her records. He indicated that there were no objective findings related to work-related lumbosacral disc displacements. Dr. Vanapalli opined that the work-related lumbar strain had resolved. He further explained that the accepted lumbar subluxations had resolved. Dr. Vanapalli opined that appellant's current complaint of lumbosacral pain was secondary to degenerative facet arthropathy, which was documented on July 24, 2006 shortly after the reported injury. His examination revealed normal range of motion and no neurological deficits. Dr. Vanapalli found that appellant was not disabled from work due to the April 11, 2006 work injury, as his examination did not reveal any objective findings of neuromuscular deficit and no objective musculoskeletal residuals. He advised that she could return to her date-of-injury position as a transportation security screener. Dr. Vanapalli noted that, "she does not wish to go back to date-of-injury job and that she is pursuing alternative career." He indicated that no further treatment was necessary. In an accompanying December 4, 2013 work capacity evaluation, Dr. Vanapalli noted no restrictions.

Appellant, in a January 17, 2014 letter, disagreed with Dr. Vanapalli. She indicated that he only spent three minutes with her and only asked her how she injured herself. Appellant noted that Dr. Vanapalli did not want to know about her continued pain and did not want to discuss anything other than how she was doing on that date. She asserted that she had debilitating pain and her life changed due to her injury.

On January 28, 2014 OWCP proposed to terminate appellant's medical benefits and wage-loss compensation on the grounds that the medical evidence of file established that she no longer had any residuals or continuing disability from work. It accorded the weight of the evidence to Dr. Vanapalli, who found that she no longer had any residuals or continuing disability from work stemming from her work-related injury of April 11, 2006.³

On February 3, 2014 OWCP received a January 28, 2014 letter from Maury T. Walker, a special agent with the employing establishment's Office of Inspection -- Investigations Division General, advising that starting in September 2012, appellant posted comments on social media about "working out, running and trying to get fit and losing weight." Mr. Walker noted that these comments indicated that appellant was conducting activities in excess of her physical limitations. He indicated that she regularly exercised and ran to her gym. Mr. Walker noted that, once she learned she was being investigated, she stopped posting her exercise activities on social media.

In a February 5, 2014 letter, appellant responded to Mr. Walker's allegations. She noted, she was informed in October 2013 that she was being investigated. Appellant also indicated that the investigator had followed her to her appointment with Dr. Vanapalli and videotaped her without her permission. She indicated that she continued to have difficulty with her back and disagreed with the proposed termination.

³ OWCP noted that the latest report from appellant's treating physician, Dr. Zgleszewski, was dated October 8, 2010.

In a February 28, 2014 memorandum, OWCP noted that a surveillance video provided by the employing establishment's Office of Inspector General revealed that appellant engaged in activities to include exercising and moving freely at the gym without signs of pain.

On March 11, 2014 OWCP terminated appellant's compensation, effective April 6, 2014 as she no longer had any employment-related residuals or disability. It found that the weight of the medical evidence rested with Dr. Vanapalli, who determined that appellant could return to her date-of-injury job and that the residuals of the accepted conditions had ceased.

On March 8 and 21, 2014 appellant requested a hearing before an OWCP hearing representative, which was held on September 9, 2014.⁴

In a letter dated April 4, 2014, Mr. Walker provided further details of the investigation of appellant. He noted that a review of her social media blog revealed that as far back as 2007, she engaged in regular exercise, which included running a half marathon in 2011. Mr. Walker also found that appellant stopped seeking alternative employment back in April 2011. He provided excerpts from her blog posts and a detailed description of the dates and times of her runs which were almost a daily occurrence. Appellant indicated that she ran two miles five days a week. Mr. Walker also included surveillance video files to confirm the findings.

OWCP received an August 2, 2010 report from Dr. Zgleszewski who diagnosed lumbar facet syndrome and lumbago.

In a December 4, 2014 decision, OWCP's hearing representative affirmed the March 11, 2014 decision terminating appellant's wage-loss compensation and medical benefits as she no longer had any employment-related disability.

The facts related to the issues of Forfeiture, Overpayment and Fault:

On July 11 and September 16, 2013 appellant completed CA-1032 forms. In response to whether she worked for an employer for the past 15 months, she stated "No" on each form. Appellant also responded "no" when asked if she was self-employed or involved in any business enterprise in the past 15 months. The forms contained a notation that "SEVERE PENALITIES MAY BE APPLIED FOR FAILURE TO REPORT ALL WORK ACTIVITIES THOROUGHLY AND COMPLETELY." Additionally, the forms contained an advisement that appellant must report "ALL employment for which she received as salary, wages, income, sales commissions, piecework, or payment of any kind...."

On December 1, 2013 OWCP received a letter from Mr. Walker advising that the employing establishment's Office of Inspector General was conducting an ongoing criminal affairs investigation into alleged illegal and fraudulent activity by appellant. Mr. Walker noted

⁴ At the hearing, appellant testified that her work injury had not resolved and she was still disabled from work. She described pain and stiffness in the back when she did things around the house, like vacuuming, washing dishes, or anything that required prolonged standing. Appellant denied such problems before the injury. She confirmed that she was not currently receiving active medical treatment and indicated that she last saw a physician for her injury in 2010 or 2011. Appellant indicated that she worked at home as a writer and used heating pads. She asserted that Dr. Vanapalli formed his opinion before he examined her.

that his office had surveillance video recordings of appellant exercising at her health club and social media postings concerning her fitness regime.

On February 3, 2014 OWCP received a January 28, 2014 letter from Mr. Walker advising that, beginning in September 2012, appellant posted comments on social media which suggested that she had pursued a career as an author under a pen name. Appellant posted comments that she was blessed to pursue her “life’s work” as a successful author. Her first novel was published in June 2013 although she indicated that she was unemployed for the past 15 months on her CA-1032 Form. Mr. Walker noted that this was not accurate as she indicated that she “can now pay her bills” because she has been receiving an undetermined amount of money from the release of her first novel. Appellant was awaiting the release of her second novel in June 2014. An interview with appellant about her book, from an online publication, accompanied Mr. Walker’s report.⁵

By decision dated February 13, 2014, which was reissued on March 3, 2014, OWCP found that appellant forfeited wage-loss compensation for the period June 16, 2012 through September 16, 2013 for failure to report that she worked during this period and had earnings that she failed to report.⁶ The forfeiture period was for the 15 months prior to the CA-1032 that she signed on September 16, 2013. OWCP found that appellant knowingly provided false information about earnings and self-employment on the CA-1032 form. It found that all compensation paid during the period would be considered an overpayment.

Also on February 13, 2014, OWCP made a preliminary determination that appellant received a \$26,738.64 overpayment of compensation during the period June 16, 2012 through September 16, 2013 as a result of the forfeiture. It found that she was at fault in creating in the overpayment because she failed to report earnings for her book writing, publishing, and sales. An overpayment worksheet was provided. OWCP revealed that appellant received compensation payments totaling \$26,738.64 during the period June 16, 2012 through September 16, 2013. Worksheets for the period revealed that appellant received the compensation. For the period: June 16 to 30, 2012 appellant received \$869.46; for the period July 1, 2012 to January 12, 2013, appellant received \$10,482.78; for the period January 13 to February 9, 2013, appellant received \$1,491.90; for the period February 10 to March 9, 2013, appellant received \$1,500.90 for the period March 10 to August 24, 2013, appellant received \$9,119.40 for the period August 25 to September 16, 2016 appellant received \$1,356.18. The total compensation paid to appellant for this period was equal to \$24,820.62.

On February 25, 2014 appellant requested a prerecoupment hearing before an OWCP hearing representative. She completed the overpayment recovery questionnaire and argued that in August 2012 she signed a two-book deal in the amount of \$6,000.00, minus agency fees, to be paid in five installments over a two-year period. Appellant explained that upon signing, she

⁵ In the interview, given under her pen name, appellant indicated that she was working on another novel. She could write for five minutes or five hours and preferred to write at night. Appellant noted hobbies that included running, working out in the gym, shopping; organizing her house, and interior decorating. She also indicated that she had an exercise regimen she went through every morning. Furthermore, appellant related that she grew up traveling and made a point of traveling somewhere different every month. She noted that she had just driven from South Carolina to Texas and back to South Carolina.

⁶ The February 13, 2014 decision was reissued on March 3, 2014 as appellant had a new address.

notified her certified public accountant (CPA), who informed her that she did not have to report income under \$5,000.00 for the year. She explained that she did not earn enough income to file taxes in 2012 and 2013. It was a misunderstanding on appellant's part and not willful or intentional. She advised that she did not receive any royalties for either book and no other income. Appellant's tax returns were provided, which indicated that in 2013 she received miscellaneous income of \$2,200.00, and \$3,300.00 in 2012. She provided statements dated January 12 and 15, 2014 from Sara Camilli, her agent, who explained that advance royalties must be reported on the IRS Form 1099-MISC by her and the amount paid to include her commissions and expenses for a net income of \$2,483.06 for 2012 and \$1,698.62 for 2013. Ms. Camilli advised appellant to report gross royalties and advances and that she should deduct commissions and expenses withheld. A copy of a September 14, 2012 check, payable to appellant in the amount of \$1,695.80 was included as a signing payment.

In an April 4, 2014 letter, Mr. Walker provided further details of the investigation. He noted that a review of appellant's social media blog revealed that, as far back as 2007, she pursued a writing career and engaged in regular exercise that included running a half marathon in 2011.

In a letter dated September 26, 2014, appellant reiterated that she did not willingly withhold information from OWCP. It was due to a misunderstanding on her part. Appellant noted that she had since reported income from all sources for all periods.

In a separate September 26, 2014 letter, Peter A. Kent, appellant's accountant, indicated that appellant requested that he provide a letter regarding her income tax for the years 2012 to 2013. He indicated that her sole source of income during this period was the royalty payments. Mr. Kent noted that appellant's net income after commissions was \$2,843.00 and \$1,699.00. However, because her income in these years did not exceed her standard deductions and exemption that all taxpayers receive, he advised her that she did not have to file an income tax return.

By decision dated December 4, 2014, an OWCP hearing representative affirmed the forfeiture decision and finalized the preliminary overpayment finding.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁷ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁸ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

⁷ V.C., 59 ECAB 490 (2008); *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

⁸ *Id.*

⁹ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

ANALYSIS -- ISSUE 1

Appellant's claim was accepted for subluxation of the lumbar spine and closed lumbar dislocation.

In a December 4, 2013 report, Dr. Vanapalli, a second opinion physician, determined that appellant was status post lumbosacral strain, radiculitis L5-S1, bilateral, facet joint degenerative arthropathy. He indicated that there were no objective findings related to her work-related injury of lumbosacral disc displacements. Dr. Vanapalli opined that the work-related lumbar strain had resolved. He explained that her current complaint of lumbosacral pain was secondary to degenerative facet arthropathy, which was documented on July 24, 2008 shortly after the injury. Dr. Vanapalli indicated that his examination revealed normal range of motion and no neurological objective findings or deficits and that appellant was not disabled from work due to the work-related injury of April 11, 2006. He noted that his physical examination did not reveal any objective findings of neuromuscular deficit and no objective residuals of musculoskeletal system. Dr. Vanapalli reiterated that appellant could return to her date-of-injury position as a transportation security screener and noted that appellant stated that "she does not wish to go back to date-of-injury job and that she is pursuing alternative career." He indicated that no further treatment was necessary or recommended.

Although OWCP requested that appellant provide an update from her treating physician, none was received. The Board further notes the treating physician's most recent report was dated October 2, 2010 and he did not offer any current opinion regarding her physical status. Furthermore, he diagnosed lumbar facet syndrome and lumbago, which were not accepted conditions. Additionally, appellant confirmed that she had not been actively treated since 2010 or 2011.

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 6, 2014, as she was no longer disabled.

LEGAL PRECEDENT -- ISSUE 2

It is well established that after termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability, which continued after termination of compensation benefits.¹⁰

ANALYSIS -- ISSUE 2

Subsequent to the March 11, 2014 decision, which terminated appellant's compensation benefits effective April 6, 2014, the burden shifted to appellant to demonstrate that she continued to have disability for work on and after April 6, 2014 due to the accepted injury.¹¹

¹⁰ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

¹¹ *See id.*; *Virginia Davis-Banks*, 44 ECAB 389 (1993).

After the termination of appellant's compensation benefits, OWCP received an August 2, 2010 report in which Dr. Zgleszewski diagnosed lumbar facet and lumbago. The Board notes that this report is irrelevant as it predates the termination and does not otherwise support continuing injury-related residuals or disability after April 6, 2014. Appellant argued at the hearing that she continued to have pain but conceded that she had not seen a physician since 2010. She therefore has not met her burden of proof to establish continuing employment-related residuals or disability after April 6, 2014.

LEGAL PRECEDENT -- ISSUE 3

Section 8106(b) provides in pertinent part:

“The Secretary of Labor may require a 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. Compensation forfeited under this subsection, if already paid, shall be recovered under section 8129 of this title, unless recovery is waived under that section.”¹²

The Board has held that it is not enough merely to establish that there were unreported earnings or employment. Appellant can be subjected to the forfeiture provision of section 8106(b) only if she “knowingly” failed to report earnings from employment.¹³ The term “knowingly” as defined in OWCP's implementing regulations, means “with knowledge, consciously, willfully, or intentionally.”¹⁴ The Board has held that forfeiture, being a penalty provision, must be narrowly construed.¹⁵

Section 10.5(g) of OWCP's regulations define earnings from employment or self-employment as follows:

“(1) Gross earnings or wages before any deduction and includes the value of subsistence, quarters, reimbursed expenses, and any other goods or services received in kind as remuneration; or

“(2) A reasonable estimate of the cost to have someone else performs the duties of an individual who accepts no remuneration. Neither lack of profits, nor the

¹² 5 U.S.C. § 8106(b).

¹³ *Barbara L. Kanter*, 46 ECAB 165 (1994).

¹⁴ 20 C.F.R. § 10.5(n).

¹⁵ *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

characterization of the duties as a hobby, removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his or her duties."¹⁶

ANALYSIS -- ISSUE 3

The Board finds that appellant forfeited her right to compensation for the period June 16, 2012 to September 16, 2013 pursuant to section 8106(b)(2)¹⁷ on the basis that she knowingly failed to report her income related to her book on her CA-1032 forms.

The record reflects that appellant completed the Form CA-1032 on July 11 and September 16, 2013. In response to whether she worked for an employer for the past 15 months, appellant filled in "No." Appellant also responded "no" when asked if she was self-employed or involved in any business enterprise in the past 15 months. The form contains a notation that "SEVERE PENALITIES MAY BE APPLIED FOR FAILURE TO REPORT ALL WORK ACTIVITIES THOROUGHLY AND COMPLETELY." Additionally, the form advises that claimants must report "ALL employment for which she received as salary, wages, income, sales commissions, piecework, or payment of any kind..."

Appellant argued that she believed she did not have to report her income, as her accountant indicated that she did not have to report book earnings that were under \$5,000.00. The Board finds that this argument is unavailing. The language on the Form CA-1032 clearly directs appellant to report all employment or self-employment including "income, sales commissions, piecework, or payment of any kind." The Board also notes that the statement from appellant's accountant advised appellant regarding reporting for tax purposes. The Board finds that professional advice regarding the payment of taxes is separate from the reporting requirements of the Form CA-1032. Appellant's failure to report earnings from her book constituted false information regarding her earnings during the subject period, and that she provided false information regarding her earnings and self-employment. Although she argued that she misunderstood the reporting requirement, her argument is not supported by the evidence. The Form CA-1032 instructions clearly indicate all income and earnings must be reported. Appellant's signing of strongly-worded certification clauses on the CA-1032 forms show that she was aware of materiality of her failure to report her employment. The Board finds that the evidence establishes that appellant knowingly omitted her earnings from the reports that she provided to OWCP. Thus, appellant forfeited her right to all compensation she received for the period June 16, 2012 to September 16, 2013.

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.

¹⁶ 20 C.F.R. § 10.5(g); see *Monroe E. Hartzog*, 40 ECAB 329 (1988).

¹⁷ 5. U.S.C. § 8106(b)(2).

LEGAL PRECEDENT -- ISSUE 4

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.¹⁸ Section 8129(a) of FECA provides, in pertinent part, “When an overpayment has been made to an individual under this subchapter 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.”¹⁹

ANALYSIS -- ISSUE 4

As noted, appellant forfeited her compensation for the period June 16, 2012 through September 16, 2013 on the grounds that she knowingly failed to report her earnings. The Board finds that this forfeiture resulted in an overpayment of compensation. While OWCP calculated an overpayment in the amount of \$26,738.64 for the period June 16, 2012 through September 16, 2013, the Board notes that the overpayment worksheets show that she only received a total amount of \$24,820.62 for this period. As she failed to report her income, she forfeited her right to compensation with respect to any period for which the affidavit or report was required. The Board will modify the overpayment amount to \$24,820.62. As appellant received this amount during the forfeiture period, it is properly an overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 5

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.²⁰ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): 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 this subchapter or would be against equity and good conscience.²¹ No waiver of payment is possible if the claimant is not without fault in helping to create the overpayment.²²

In determining whether an individual is not without fault or alternatively, with fault, section 10.433(a) of Title 20 of the Code of Federal Regulations provide in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

¹⁸ 5 U.S.C. § 8102(a).

¹⁹ *Id.* at § 8129(a).

²⁰ *Id.*

²¹ *Id.* at § 8129(b).

²² *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

(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.”²³

Section 10.433(c) of OWCP’s regulations provide:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”²⁴

ANALYSIS -- ISSUE 5

The Board finds that appellant was at fault in the creation of the overpayment of compensation because she failed to provide information which she knew or should have known to be material on CA-1032 forms covering period June 16, 2012 to September 16, 2013. As discussed above, appellant received income during the periods covered by the relevant CA-1032 forms from royalties for a book that she had authorized. However she did not report such self-employment activities on the CA-1032 forms she submitted to OWCP. The explicit language of the CA-1032 forms clearly shows that appellant knew or should have known that her earnings from her book deal would require her to report such employment activities on the forms. Appellant’s signing of strongly-worded certification clauses on the CA-1032 forms, which indicate that she must report “ALL INCOME” and would face severe penalties for failure to do so further shows that she was aware of the materiality of her failure to report this income. Because appellant was at fault in the creation of the overpayment, OWCP properly determined that she was not entitled to waiver of recovery of the overpayment.²⁵

On appeal, appellant argues that she was being held responsible for \$26,738.64 for the period June 16, 2012 through September 16, 2013 due to her failure to report self-employment income. She argued that she was not self-employed, but only received payments due to a book advance for her book deal she was under at the time. Appellant explained that her accountant advised her that she did not have to report income if it was under \$5,000.00 for the year, and she misunderstood his advice. She argued that at no time did she intentionally withhold reporting of her income. Rather, it was just a misunderstanding. However, as found above, the Board finds that appellant knowingly failed to report her income. As such, her income was forfeited and she is at fault in creating the overpayment and, thus, not entitled to waiver of recovery.

²³ 20 C.F.R. § 10.433(a).

²⁴ *Id.* at § 10.433(c).

²⁵ *See supra* note 21.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 6, 2014. The Board also finds that appellant has not met her burden of proof to establish continuing residuals or disability following the April 6, 2014 termination of her benefits. The Board further finds that appellant forfeited her compensation for the period June 16, 2012 through September 16, 2013, as she knowingly failed to report her income pursuant to 5 U.S.C. § 8106(b). Additionally, OWCP properly found that she received an overpayment of compensation, which the Board has modified to reflect the amount of \$24,820.62 during this period, and that she was at fault in the creation of such an overpayment, thereby precluding waiver of recovery.

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2014 decision of the Office of Workers' Compensation Programs concerning OWCP's termination of appellant's benefits is affirmed. The December 4, 2014 decision concerning the forfeiture and overpayment is affirmed, as modified.

Issued: June 23, 2016
Washington, DC

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

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

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