

(6) whether it properly denied appellant's request for reconsideration on the merits of her termination decision pursuant to 5 U.S.C. § 8128(a).

On appeal appellant contends that she worked intermittently as a substitute teacher from November 22, 2004 through June 30, 2005. She also notes that she did not earn wages from September 28, 2008 through March 29, 2009. Appellant denies actually forming the business, Yes We Can Achieve. She also noted that no dates were listed to confirm wages from Street Sense and AmeriCorps.

FACTUAL HISTORY

On August 6, 1991 appellant, then a 34-year-old cook, injured her back and neck when unloading boxes of mess hall supplies on an army base in Germany. OWCP accepted her claim for low back strain as well as displacement of cervical disc. On December 31, 1991 the employing establishment terminated appellant due to lack of funds. OWCP entered appellant on the periodic rolls on February 19, 1992 with a 28-day payment of \$1,316.00.

Appellant completed EN1032 forms on March 30 and April 4, 1993, March 15 and 20, 1994, March 17 and May 10, 1995 as well as March 10, 1996. These forms notified appellant that she was required to report all employment for which she received a salary, wages, income, sales commissions, piecework, or payment of any kind. Appellant denied any employment or self-employment during the 15-month periods covered by each Form EN1032.

Appellant completed EN1032 forms on March 17, 1997, April 21, 1998, March 15, 1999, March 5, 2000, March 15, 2001, May 9 and 12, 2002, as well as April 26, 2003, and April 29, 2004 indicating that she was neither employed nor self-employed during the 15-month period covered by the forms. She also denied performing volunteer work.

On May 29, 2005 appellant informed OWCP that her physician had released her to work sitting for three to four hours a day. She indicated that she "tried filling in monitoring students as needed on some of my better days." Appellant alleged that she could not sit more than four hours without swelling in her leg and back pain.

Appellant completed a Form EN1032 on May 29, 2005 and indicated that she worked as classroom monitor in September 2005 and earned \$425.00. She indicated that she had no other employment or self-employment during the 15-month period covered by this form. This form required appellant to report all employment for which she received a salary, wages, income, sales commissions, piecework, or payment of any kind. On July 13, 2006 appellant completed a Form EN1032 and indicated that she worked from May to June 2005 as a substitute teacher earning \$659.00. This form also required appellant to report all employment for which she received a salary, wages, income, sales commissions, piecework, or payment of any kind. Appellant indicated that she had no other employment or self-employment during the 15-month period covered by this form. Appellant completed a Form EN1032 on January 19, 2008 and indicated that she worked as a substitute teacher from September through October 2007 earning \$1,700.00. She also reported that she volunteered to grade papers for two weeks with no pay in October.

On March 25, 2009 appellant completed a Form EN1032 and indicated that while she did not work and was not self-employed, she volunteered as an advocate for the homeless from March 2008 through September 29, 2008 with compensation of \$554.66. On April 15, 2009 she

completed a Form EN1032 with similar information that she worked as a paid volunteer from August to October and March through September 29, 2008 as an advocate for the homeless. Appellant completed a Form EN1032 on April 15, 2010 and stated that she was unemployed for the past 15 months and did not perform any volunteer work.

Dr. Margery G. Myers, a family practitioner, completed a work capacity evaluation (Form OWCP-5) on February 4, 2008 and indicated that appellant could work three hours a day with restrictions.

On March 26, 2008 OWCP referred appellant for vocational rehabilitation. The vocational rehabilitation counselor noted that appellant reported that she was depressed, that she had attended unaccredited schools, but that she could not find work. On August 28, 2008 OWCP granted appellant 90 days of job placement assistance.

Dr. Myers completed a Form OWCP-5 on September 15, 2008 and indicated that appellant was totally disabled. Appellant underwent a magnetic resonance imaging (MRI) scan on October 10, 2008 which demonstrated disc bulges at C3-4 and C5-6. This scan also demonstrated multilevel spondyloarthropathy and disc desiccation of varying degrees throughout the entire spine.

OWCP referred appellant for a second opinion evaluation on December 22, 2010 with Dr. Robert Smith, a Board-certified orthopedic surgeon. In a January 5, 2011 report Dr. Smith reviewed appellant's medical and injury history. He found no spasm, atrophy, trigger points, or deformity in her neck and back. Dr. Smith reported that appellant showed nonphysiologic behavior with no focal deficit or sign of radiculopathy. He opined that appellant had reached maximum medical improvement from the 1991 injury, but had a nonindustrial and preexisting condition of arthritis of her spine which was stable. Dr. Smith found no objective residuals from the August 6, 1991 employment injury either clinically or from diagnostic studies. He reported that appellant had a great deal of psychological overlay with regard to her pain complaints which were exaggerated given the lack of objective findings. Dr. Smith concluded that appellant could return to her date-of-injury position with no restrictions. He found no need for any additional treatment or testing due to appellant's accepted work conditions.

OWCP referred appellant for an impartial medical examination with Dr. A. Rosenthal, a Board-certified orthopedic surgeon, to resolve the conflict of medical evidence between Dr. Myers and Dr. Smith on March 18, 2011. In an April 12, 2011 report, Dr. Rosenthal described appellant's history of injury as loading boxes with a sharp pain causing her to fall. He found tenderness in the right paravertebral musculature of the cervical spine with limited range of motion. Dr. Rosenthal noted decreased right triceps jerk, and decreased sensation right C1-8. He found positive impingement test on abduction of the right shoulder and decreased motor tone in the right shoulder. For the lumbar spine, Dr. Rosenthal found a wide-based gait. Appellant was not capable of walking on her toes or her heels. He also reported decreased right knee and ankle jerk with decreased sensation of L1-S1. Dr. Rosenthal diagnosed cervical spine strain superimposed on degenerative changes and lumbosacral strain superimposed upon degenerative changes. He found both objective and subjective symptoms resulting in significant limitation on her normal activities. Dr. Rosenthal concluded that appellant's gainful employment was doubtful because of the duration of her symptomatology and an ability to perform sedentary work only.

Appellant completed EN1032 forms on April 25, 2011, May 15, 2012, and May 5, 2013 indicating that she was neither employed, self-employed, nor volunteered during the 15-month period covered by the forms. On July 25, 2014 she completed a Form EN1032 and denied working for an employer during the past 15 months. However, appellant indicated that she was self-employed, but not sure if her employment was considered a business as she was helping a military family. She further indicated that she needed to apply for tuition reimbursement and that she wanted to teach online.

In a letter dated August 11, 2014, OWCP requested that appellant fully complete the July 25, 2014 EN1032 including a description of her self-employment located on page two of the form. Appellant signed and completed the missing page on August 16, 2014. She indicated that she provided childcare for a military friend's family from March 14 through July 1, 2014 and earned \$2,160.00.

The employing establishment provided OWCP with an investigative report on October 3, 2014. This report alleged that appellant worked as a substitute teacher for the local school system from November 2004 through March 2006 earning from \$14.00 to \$20.25 per hour in total amount of \$4,724.97 for that time period. In October 2005, appellant became a registered agent for "Yes, We Can Achieve, Inc." a nonprofit home-based business for education, tutoring, and mentoring services. She also worked as a vendor for Street Sense, a nonprofit periodical from February to September 2008 earning \$5,446.66 during that period. Appellant also earned \$1,965.60 from AmeriCorps VISTA during a year-long contract that she did not complete.

In support of these allegations, the employing establishment submitted a letter from the school system noting that appellant was employed from November 22, 2004 through March 10, 2006. The school system provided a record of appellant's work hours and earnings from December 6 through 20, 2004, intermittently from January 28 through December 16, 2005, and from January 19 through March 10, 2006. Appellant's wage and tax statement (W-2) from 2004 from the school indicated earnings of \$315.19, while her 2005 W-2 demonstrated earnings of \$3,829.57, and her 2006 W-2 was for \$580.21.

The investigative report included two articles in Street Sense which were dated February through March 2008 and written by appellant as the vendor manager. A payroll report from Street Sense indicated that appellant earned \$475.00 from February through July 21, 2008. Appellant's 2008 W-2 from Street Sense indicated that she had earnings of \$5,446.66. In the first quarter of 2008 she earned \$1,900.00 from Street Sense while in the second quarter of 2008 she earned \$2,850.00, and in the third quarter appellant earned \$696.66. Appellant also earned \$1,965.60 from AmeriCorps from August 2 through September 27, 2008. On July 31, 2006 she was registered as the agent of process and president for a nonprofit business in West Virginia, Yes We Can Achieve, Inc., to provide educational, recreational service, and preschool on line. Appellant scheduled a talent show rehearsal at a local high school on November 15, 2008 and paid a facility fee of \$135.00.

In a preliminary determination dated March 4, 2015, OWCP found that appellant was overpaid in the amount of \$87,777.96 because she failed to report all of her employment earnings on the EN1032 forms signed on May 29, 2005, July 13, 2006, and March 25, 2009 and continued to accept compensation for total disability for the period February 29, 2004 through May 29, 2005, May 30, 2005 through July 13, 2006 and December 25, 2007 through

March 25, 2009. It found that appellant was at fault in the creation of the overpayment. In a letter dated April 10, 2015, OWCP reissued the March 4, 2015 overpayment decision noting that the decision had been returned.

By decision dated March 4, 2015, OWCP found that appellant forfeited her compensation benefits from February 29, 2004 through July 13, 2006 and from December 25, 2007² through March 25, 2009.³ It found that appellant knowingly failed to report her earnings as a substitute teacher from February 29, 2004 through July 13, 2006, as a vendor for Street Sense from February to September 2008 and as a volunteer for AmeriCorps from August 2 through September 27, 2008. OWCP found that appellant under reported or failed to report her earnings on EN1032s dated May 29, 2005, July 13, 2006, and March 25, 2009.

On an appeal request form dated April 9, 2015, postmarked April 11, 2015, and received by OWCP's Branch of Hearings and Review on April 14, 2015, appellant requested an oral hearing before a hearing representative regarding the forfeiture decision. She completed an appeal request form requesting reconsideration on the same date. OWCP acknowledged appellant's change of address on April 22, 2015.

OWCP received an e-mail dated May 14, 2015 from the employing establishment in which it asserted that appellant was operating a home-based daycare business with the proper inspections, and required training completed since October 22, 2013. The employing establishment provided an October 22, 2013 letter addressed to appellant providing her with a family child care registration certificate for eight children dated from October 22, 2013 through September 30, 2015. The employing establishment also provided appellant's initial training requirements completion and her family child care checklist listing appellant, her husband, and Ms. D as completing applications. On July 31, 2013 Dr. Joseph Roswarski, a physician, listed appellant's physical impairment to provide child care as hypertension only.

OWCP referred appellant for a second opinion evaluation with Dr. Stuart J. Gordon, a Board-certified orthopedic surgeon, on May 20, 2015. Dr. Gordon submitted a report dated June 2, 2015. He reviewed the statement of accepted facts and described the employment incident. Dr. Gordon noted that appellant reported that, although she was licensed for a childcare center, it "never got off the ground." Appellant indicated that she had watched someone else's child for a time. Dr. Gordon reviewed appellant's past medical treatment and examined her. He found no muscle spasm in the cervical, thoracic, or lumbar spines. Appellant volitionally restricted cervical motion, but when distracted her range of motion improved. She complained of pain diffusely in a nonanatomic fashion in her thoracic spine. Appellant had full range of motion of the lumbar spine with negative straight leg raising. Dr. Gordon found that her motor and sensory examination was normal with intact reflexes. He diagnosed diffuse spinal degenerative disease and spinal stenosis unrelated to her employment. Dr. Gordon found no evidence of residual sacroiliac sprain or displacement of cervical disc. He opined that appellant could return to full-duty work and did not require further medical treatment. Dr. Gordon noted that appellant's complaints were nonspecific and diffuse, with no significant objective abnormality consistent with appellant's accepted conditions.

² It was dated December 5, 2007, but that appears to be a typographical error as other documents of record indicate that this portion of the forfeiture and period began on December 25, 2007.

³ OWCP issued this decision to appellant's post office box.

OWCP issued a notice of proposed termination on June 10, 2015 based on Dr. Gordon's report. It allowed appellant 30 days for a response.

By decision dated June 22, 2015, a hearing representative denied appellant's request for an oral hearing as it was untimely. He found that the issue could equally well be addressed by requesting reconsideration and submitting additional new evidence.

Dr. Galen B. Halick, an internist, completed a work capacity evaluation on June 23, 2015 noting that appellant could not work more than four hours a day due to chronic pain. He provided work restrictions due to appellant's chronic neck, thoracic, and low back pain.

Appellant submitted MRI scans from 2008 and 2010 showing multilevel degenerative disc disease in the cervical, thoracic, and lumbar spine with spinal stenosis and cord deformities. She underwent an additional MRI scan of the spine on August 28 and September 14, 2014 which demonstrated mild degenerative disc and facet disease with no significant nerve root compression. Appellant's cervical MRI scan exhibited moderate right neural foraminal narrowing at C3-4 and C5-6 as well as severe bilateral foraminal narrowing at the C4-5 level.

By decision dated July 22, 2015, OWCP terminated appellant's medical benefits and wage-loss compensation effective July 26, 2015. It found that the June 2, 2015 report of Dr. Gordon was entitled to the weight of the medical evidence.⁴

Appellant requested reconsideration of the termination decision in an August 1, 2015 letter and asserted that Dr. Gordon's report was inaccurate. She stated that Dr. Gordon had not provided an accurate medical report and did not complete a formal examination.

On August 11, 2015 OWCP denied appellant's reconsideration request without conducting a merit review of the claim.

OWCP issued a decision dated August 25, 2015, finding that appellant had received an overpayment of compensation in the amount of \$87,777.96⁵ for which she was at fault. It based this overpayment on the findings of forfeiture. OWCP noted that appellant had received compensation in the amount of \$55,380.37 for the period February 29, 2004 through July 13, 2006. It further found that appellant received compensation in the amount of \$32,387.59 for the period December 25, 2007 through March 29, 2009. OWCP noted that appellant had not responded to the preliminary determination of overpayment and that the overpayment repayment would be requested in full within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b) of FECA concerning a claimant's entitlement to a hearing before an OWCP representative, states: "Before review under section 8128(a) of this title, a claimant ...

⁴ On February 16 and July 17, 2016 OWCP issued merit decisions regarding the July 22, 2015 termination decision. However, the Board acquired jurisdiction over this appeal on September 28, 2015. Therefore, the February 16 and July 17, 2016 decisions are null and void. The Board and OWCP may not have concurrent jurisdiction over the same issue in a case. See *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

⁵ The actual total of \$55,380.37 plus \$32,387.59 is \$87,767.96.

not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary.”⁶ Section 10.615 of OWCP’s regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.⁷ OWCP regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.⁸

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings and reviews of the written record in certain circumstances where no legal provision was made for such reviews and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing or review of the written record.⁹ OWCP procedures, which require OWCP to exercise its discretion to grant or deny a hearing or review of the written record when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.¹⁰

ANALYSIS -- ISSUE 1

In the instant case, OWCP properly determined appellant’s request for an oral hearing was untimely filed as it was made more than 30 days after the issuance of OWCP’s March 4, 2015 forfeiture decision. In an appeal request form postmarked April 11, 2015, appellant requested an oral hearing regarding the March 4, 2015 forfeiture decision. OWCP, therefore, properly denied appellant’s hearing as a matter of right.

OWCP then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. It determined that a hearing was not necessary as the issue in the case was medical and could be resolved through the submission of medical evidence in the reconsideration process. Therefore, OWCP properly denied appellant’s request for a hearing as untimely and properly exercised its discretion in determining to deny appellant’s request for a hearing as she had other review options available.

LEGAL PRECEDENT -- ISSUE 2

Section 8106(b) of FECA 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 the time the Secretary specifies.... An employee who --

(1) fails to make an affidavit or report when required; or

⁶ 5 U.S.C. § 8124(b)(1).

⁷ 20 C.F.R. § 10.615.

⁸ 20 C.F.R. § 616(a).

⁹ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹⁰ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

(2) *knowingly omits* or understates any part of her earnings;

forfeits her right to compensation with respect to any period for which the affidavit or report was required.”¹¹ (Emphasis added.)

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if she “knowingly” failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.¹² The term “knowingly” is defined within OWCP’s regulations as “with knowledge, consciously, willfully, or intentionally.”¹³

ANALYSIS -- ISSUE 2

The Board finds that appellant forfeited her compensation benefits from February 29, 2004 through July 13, 2006 based on EN1032 forms that were incorrectly completed on May 29, 2005 and July 13, 2006. These forms cover the 15-month periods from February 29, 2004 through May 29, 2005 and from April 13, 2005 through July 13, 2006 respectively. These forms clearly indicated that appellant was required to report all employment for which she received a salary, wages, income, sales commissions, piecework, or payment of any kind. On these forms appellant underreported her earnings as a substitute teacher from November 22, 2004 through March 10, 2006. She indicated on the EN1032 dated May 29, 2005 that she had earnings from monitoring a classroom in the amount of \$425.00 and on the July 13, 2006 she reported earnings of \$659.00. The record establishes that appellant earned \$4,724.97 as a substitute teacher during the 15-month periods covered by these forms.¹⁴

The Board further finds that appellant forfeited her compensation benefits from December 25, 2007 through March 25, 2009 based on an EN1032 completed incorrectly on March 25, 2009. On this form appellant reported earnings from volunteering of \$554.55. The investigative report establishes that appellant had earnings of \$5,446.66 from Street Sense and \$1,965.60 from AmeriCorps VISTA during the 15-month period covered by this form.

As appellant did not report the full extent of her earnings when she completed the EN1032 forms on May 29, 2005, July 13, 2006 and March 25, 2009, the Board finds that appellant knowingly understated her earnings.¹⁵ The EN1032 forms explicitly advised appellant that all of her earnings must be reported. Appellant’s knowledge of the reporting requirement is documented by her reporting of some of her earnings. The failure to fully report earnings is

¹¹ 5 U.S.C. § 8106(b).

¹² *Anthony A. Nobile*, 44 ECAB 268, 271-72(1992).

¹³ 20 C.F.R. § 10.5(n); *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

¹⁴ If an EN1032 is improperly completed resulting in a finding of forfeiture, the Board has found that the period of forfeiture is the entire 15-month period covered by the form in question. *Martin James Sullivan*, 50 ECAB 158 (1998).

¹⁵ See *Albert A. Garcia*, 54 ECAB 206 (2002) (in which an appellant report some, but not all of his earnings on EN1032 forms resulting in a finding of forfeiture).

found to be a knowing omission by appellant. Accordingly, she forfeited her right to compensation for these periods.¹⁶

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.

LEGAL PRECEDENT -- ISSUE 3

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.¹⁷ 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.”¹⁸

ANALYSIS -- ISSUE 3

As found, appellant forfeited all compensation for the periods from February 29, 2004 through July 13, 2006 and from December 25, 2007 through March 25, 2009 as she knowingly underreported her earnings. The Board finds that this forfeiture resulted in an overpayment of compensation. OWCP calculated the amount of the overpayment as \$87,767.96. It noted that appellant received compensation in the amount of \$55,380.37 for the period February 29, 2004 through July 13, 2006. OWCP further found that appellant received compensation in the amount of \$32,387.59 for the period December 25, 2007 through March 29, 2009. As she failed to report her income, appellant forfeited her right to compensation with respect to any period for which the affidavit or report was required. She has not contested the amount of the overpayment and the Board finds that she received an overpayment in the amount of \$87,767.96.¹⁹

LEGAL PRECEDENT -- ISSUE 4

Section 8129(a) of FECA²⁰ provides that, where an overpayment of compensation has been made “because of an error or fact of law,” adjustment shall be made by decreasing later payments to which an individual is entitled. 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 FECA or would be

¹⁶ *Id.*

¹⁷ 5 U.S.C. § 8102(a).

¹⁸ *Id.* at § 8129(a).

¹⁹ The calculation of adding the two periods of compensation is incorrect. The Board finds that \$55,330.37 plus \$32,387.59 equals \$87,767.96. The Board will reduce the overpayment amount to \$87,767.96.

²⁰ *Id.* at § 8101-8193, 8129(a).

against equity and good conscience.”²¹ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.433(a) of OWCP’s regulations²² provides in relevant part:

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

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

Failed to furnish information which he or she knew or should have known to be material; or

Accepted a payment which he or she knew or should have known was incorrect.”²³

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 was made on the EN1032s when appellant failed to fully report her earnings.

As the Board explained in *L.M.*,²⁴ by signing the EN1032 forms, appellant is deemed to have acknowledged her duty to fill out the forms properly, including the duty to correctly report earnings. Her understatement of earnings is an incorrect statement as to a material fact.²⁵ Based on the forfeiture discussion above, it is established that appellant knew or should have known that the statements of her earnings were incorrect. The Board accordingly finds that she was properly found to be at fault and is not entitled to waiver.

With respect to the recovery of the overpayment, the Board notes its jurisdiction on appeal is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under the FECA.²⁶ As appellant is no longer in receipt of compensation, the Board has no jurisdiction to review the repayment.

²¹ *Id.* at § 8129(b).

²² 20 C.F.R. § 10.433(a).

²³ *Id.*

²⁴ Docket No. 12-0405 (issued October 1, 2012).

²⁵ *Id.*; *G.G.*, Docket No. 14-1847 (issued January 9, 2015).

²⁶ *D.R.*, 59 ECAB 148 (2007).

LEGAL PRECEDENT -- ISSUE 4

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.²⁷ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.²⁸ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.²⁹ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.³⁰

ANALYSIS -- ISSUE 4

The Board finds that OWCP met its burden of proof to terminate appellant's medical benefits and wage-loss compensation effective July 26, 2015.

OWCP accepted appellant's claim for low back strain as well as displacement of cervical disc. Appellant sought a medical release to open a childcare center. On July 31, 2013 appellant's physician, Dr. Roswarski, found appellant's only physical impairment was hypertension. OWCP then referred appellant for a second opinion examination with Dr. Gordon. Dr. Gordon completed a report on June 2, 2015 providing a review of the statement of accepted facts, a review of the medical history, and findings on physical examination. He found no muscle spasm in the cervical, thoracic, or lumbar spines. Dr. Gordon noted that appellant's range of motion was "volitionally restricted" and that she complained of pain diffusely in a nonanatomic fashion. He found that her motor and sensory examination was normal with intact reflexes. Dr. Gordon diagnosed diffuse spinal degenerative disease and spinal stenosis unrelated to her employment. He found no evidence of residual sacroiliac sprain or displacement of cervical disc. Dr. Gordon opined that appellant could return to full-duty work and did not require further medical treatment. He found no significant objective abnormality consistent with appellant's accepted conditions.

The Board finds that this report is entitled to the weight of the medical evidence and establishes that appellant has no continuing disability or medical residuals as a result of her 1991 lumbar and cervical conditions. Dr. Gordon's report is in keeping with the findings of appellant's physician, Dr. Roswarski, and there is no contemporaneous medical evidence supporting either continuing medical residuals or continuing disability for work.

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.

²⁷ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

²⁸ *Id.*

²⁹ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

³⁰ *Id.*

LEGAL PRECEDENT -- ISSUE 6

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.³¹ Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence that either shows that OWCP erroneously applied or interpreted a specific point of law, or advances a relevant legal argument not previously considered by OWCP, or constitutes relevant and pertinent new evidence not previously considered by OWCP.³² Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does not meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.³³ Section 10.607(a) of OWCP's regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought.³⁴

ANALYSIS -- ISSUE 6

The Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits pursuant to 5 U.S.C. § 8128(a).

OWCP terminated appellant's medical benefits and wage-loss compensation effective July 26, 2015 by decision dated July 22, 2016. Appellant requested reconsideration of this decision on August 1, 2015. In support of her request for reconsideration, she submitted a letter alleging that Dr. Gordon had not provided an accurate medical report and had not completed a formal examination.

Appellant did not set forth arguments or evidence to show that OWCP had erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by OWCP, and also failed to provide relevant and pertinent new evidence not previously considered by OWCP. Her allegations regarding Dr. Gordon's examination were not supported by any medical evidence and therefore did not establish a legal error on a specific point of law or advance a new relevant legal argument.³⁵

CONCLUSION

The Board finds that OWCP properly denied appellant's request for an oral hearing of the forfeiture decision as untimely. The Board further finds that appellant forfeited her wage-loss compensation benefits for the periods from February 29, 2004 through July 13, 2006 and

³¹ 5 U.S.C. § 8128(a).

³² 20 C.F.R. § 10.606(b)(3).

³³ *Id.* at § 10.608.

³⁴ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

³⁵ *S.O.*, Docket No. 15-1421 (issued December 8, 2015); *B.J.*, Docket No. 14-1028 (issued September 17, 2014).

from December 25, 2007 through March 25, 2009 resulting in an overpayment of compensation in the amount of \$87,767.96 for which she was at fault and therefore not entitled to waiver of recovery. The Board further finds that OWCP met its burden of proof to terminate appellant's medical benefits and wage-loss compensation effective July 26, 2015 and that OWCP properly denied appellant's request for reconsideration on the merits of her termination decision.

ORDER

IT IS HEREBY ORDERED THAT the August 25 and 11, July 22, and June 22, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 2, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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