

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

A.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Louisville, KY, Employer**

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**Docket No. 16-0962
Issued: December 8, 2017**

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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 6, 2016 appellant filed a timely appeal from March 3 and 8, 2016 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 terminated appellant's compensation as she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2); (2) whether appellant received an overpayment of compensation in the amount of \$10,943.93 because she forfeited compensation for the period March 1 to November 30, 2015; and (3) whether she was at fault in the creation of the overpayment and thus not entitled to waiver.

FACTUAL HISTORY

On September 11, 2014 appellant, then a 29-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her left leg, back,

¹ 5 U.S.C. § 8101 *et seq.*

breast, and hip in a motor vehicle accident. She stopped work on September 11, 2014. OWCP accepted the claim for neck, lumbar, and thoracic sprain and paid appellant compensation for total disability beginning October 27, 2014.

Appellant received medical treatment following her injury from Dr. Thomas J. Schroeder, specializing in family medicine. In a report dated May 21, 2015, Dr. Schroeder diagnosed strains of the cervical, thoracic, and lumbar muscles, right shoulder sprain, post-traumatic sacroilitis, and post-traumatic headaches. He found that appellant could not perform her usual employment and might need vocational rehabilitation service. Dr. Schroeder opined that appellant had reached maximum medical improvement and had restrictions of no lifting over 10 pounds and no reaching overhead, bending, and twisting.

On April 6 and 20, May 18, and June 15, 2015 appellant filed claims for compensation (Form CA-7) for wage loss from March 21 to June 12, 2015 due to her work injury. The forms advised that she must report any and all earnings from employment, self-employment, or involvement in a business enterprise for which she received a salary, wages, income, or payment of any kind during the period(s) claimed, and that fraudulently concealing employment or failing to report income may result in forfeiture of compensation benefits and/or criminal prosecution. Appellant indicated on the forms that she had not worked during the claimed periods.

On June 15, 2015 Dr. Anbu K. Nadar, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed sprains of the neck, and thoracic and lumbar spine. He found that appellant could not resume her usual employment, but could work four hours per day in a sedentary position lifting, pushing, and pulling up to 10 pounds.

OWCP, on August 20, 2015, referred appellant to a vocational rehabilitation counselor for vocational rehabilitation services.

On November 11, 2015 appellant underwent a functional capacity evaluation (FCE). The FCE found that she could perform the physical requirements of a mail carrier performing work with medium physical demands. It indicated that appellant could occasionally lift up to 30 pounds from the floor to her waist and 25 pounds from her waist to shoulder, carry up to 25 pounds, push 30 pounds, and pull 48 pounds.

In a Form EN1032 signed November 30, 2015, appellant advised that she had not worked for an employer and had not been self-employed for the preceding 15-month period. The EN1032 forms instructed her to report all employment for which she received a salary, wages, income, sales commissions, piecework, or payment of any kind. The forms also indicated that appellant should 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 of money, goods, or other services. The forms contained certification clauses, which informed her of the consequences of failing to accurately report her employment activities, such as being subjected to criminal penalties and losing the right to receive workers' compensation.

The employing establishment, on December 3, 2015, offered appellant a modified position as a rural carrier associate. The work hours were from 7:30 a.m. until 4:00 p.m. four days a week. The duties of the position included standing and lifting up to 30 pounds for 2 hours per day casing mail and loading and unloading a vehicle, pushing and pulling under 30 pounds for 15 minutes twice a day, driving to deliver mail for 6 hours per day, and walking to deliver

parcels as needed. Appellant declined the offered position, providing as a reason her physical condition.

On December 9, 2015 OWCP requested that Dr. Nadar review the FCE and provide updated work restrictions.

On December 10, 2015 the vocational rehabilitation counselor requested that Dr. Schroeder advise whether appellant could work in a medium capacity and whether she could perform the activities found by the FCE of occasional lifting of 30 pounds or 25 pounds from the floor to waist, carrying up to 25 pounds from the waist to shoulder, pushing 30 pounds, and pulling 48 pounds. In response, Dr. Schroeder indicated by checkmark "yes" that she could perform work in a medium physical demand category.

The employing establishment's Office of the Inspector General (OIG), on January 13, 2016, asserted that an investigation determined that appellant had engaged in work activity as a sales consultant for Pure Romance products beginning March 1, 2015, but that she failed to disclose the activity on OWCP forms. It advised that she purchased \$7,778.80 in Pure Romance products from March 1 through October 29, 2015 and that Facebook pages showed her attending training sessions as a consultant and advertising for clients. Appellant also rode on a motorcycle while receiving disability compensation.

On January 28, 2016 OWCP notified appellant of its proposed termination of her compensation as she had refused a temporary light-duty assignment as a modified rural carrier associate working 32 hours per week. It found that her wages in the position would meet or exceed those in her date-of-injury position, and thus she would not be entitled to further compensation for wage loss. OWCP discussed its regulations at 20 C.F.R. § 10.500(a) and advised appellant that her entitlement to wage-loss compensation would be terminated under section 10.500(a) if she did not accept the temporary offered assignment or provide a written explanation of her reasons for not doing so within 30 days of the date of the letter.

By letter dated January 29, 2016, OWCP notified appellant of its preliminary determination that she received an overpayment of \$10,943.93 because she failed to report earnings on a Form EN1032 covering the period March 1 to November 30, 2015. It indicated that appellant forfeited all compensation during that period. OWCP reviewed the evidence submitted on January 13, 2016 from the OIG and found that it established that she had failed to report business activities as a consultant for Pure Romance. It calculated the overpayment by multiplying appellant's daily compensation rate by the amount of days in the period of the forfeiture. OWCP further advised her of its preliminary finding that she was at fault in the creation of the overpayment as she had concealed employment activity and earnings from March 1 to November 30, 2015. It requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoumpment hearing.

On February 17, 2016 appellant requested a decision based on the written evidence. She disagreed with fact and amount of overpayment and requested waiver. Appellant completed an overpayment recovery questionnaire.

By decision dated March 3, 2016, OWCP found that appellant received an overpayment of compensation for the period March 1 to November 30, 2015 based on her forfeiture of compensation.² It further determined that she was at fault in creating the overpayment as she failed to advise OWCP that she was running a business. OWCP found that appellant should forward full payment of the amount of the overpayment.

In a decision dated March 8, 2016, OWCP terminated appellant's compensation and entitlement to a schedule award under 5 U.S.C. § 8106(c)(2). It found that the December 3, 2015 job offer was within the restrictions set forth by Dr. Schroeder on December 10, 2015 and the results of the FCE.

On appeal appellant contends that her work selling Pure Romance products resulted in an economic loss and she did not understand the ramifications of not reporting her business. She argues that she was not overpaid.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ Section 8106(c)(2) of FECA⁴ provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.⁵ To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁶ Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.⁷

Section 10.517(a) of FECA's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee has the burden of showing that such refusal or failure to work was reasonable or justified.⁸ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.⁹

² OWCP referred to a January 29, 2016 forfeiture decision; however, the record does not contain a forfeiture decision.

³ *Linda D. Guerrero*, 54 ECAB 556 (2003).

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

⁶ *Ronald M. Jones*, 52 ECAB 190 (2000).

⁷ *Joan F. Burke*, 54 ECAB 406 (2003).

⁸ 20 C.F.R. § 10.517(a); *see supra* note 6.

⁹ *Id.* at § 10.516.

Section 10.500(a) of the Code of Federal Regulations provides:

“(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents [her] from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage loss claimed on a [Form] CA-7 to the extent that evidence contemporaneous with the period claimed on a [Form] CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing [establishment] had offered, in accordance with OWCP procedures, a temporary light-duty assignment within the employee’s work restrictions. (The penalty provision of 5 U.S.C. § 8106(c) will not be imposed on such assignments under this paragraph).”¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted appellant’s claim for neck, lumbar, and thoracic sprain and paid her wage-loss compensation for total disability beginning October 27, 2014. The employing establishment offered her a position on December 3, 2015 as a modified rural carrier associate working 32 hours per week. On January 28, 2016 OWCP notified appellant that it proposed to reduce her compensation to zero as the employing establishment offered her a temporary position as a part-time modified rural carrier that accommodated her work-related limitations.¹¹ It advised her of the provisions of 20 C.F.R. § 10.500(a) that compensation was only available while her wages precluded her from earning the same wages as before her injury. By decision dated March 8, 2016, OWCP terminated appellant’s compensation and entitlement to a schedule award as she refused an offer of suitable work under section 8106(c)(2).

The Board finds that OWCP failed to follow its established procedures under section 8106(c) following the December 3, 2015 job offer from the employing establishment. Essential due process principles require that a claimant have notice and an opportunity to respond prior to termination under section 8106(c).¹² OWCP did not follow these procedures and thus did not afford appellant the protections set forth by Board case law and OWCP’s regulations.¹³ Prior to terminating compensation under section 8106(c), it must advise the claimant that the offered position is suitable and that she has 30 days to accept the job or provide a written explanation of her refusal. OWCP must further advise her of the penalty provision of section 8106(c).¹⁴

¹⁰ *Id.* at § 10.500(a).

¹¹ It is unclear from the record whether the position offered by the employing establishment was temporary.

¹² *See Sandra K. Cummings*, 54 ECAB 493 (2003).

¹³ 20 C.F.R. § 10.516; *see also Juan A. Dejesus*, 54 ECAB 721 (2003) (essential due process principles require that a claimant have notice and an opportunity to respond prior to termination under section 8106(c)).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter. 2.814.4(d) (June 2013).

Instead, it issued a letter informing appellant of its proposed reduction of her compensation to zero under the provisions of section 10.500(a). Appellant was not afforded any formal notice of a termination under section 8106(c) until she received the March 8, 2016 termination decision. As noted, OWCP may not impose the penalty provision of section 8106(c) to a job assignment found appropriate under section 10.500(a).¹⁵ The procedural requirements for invoking 5 U.S.C. § 8106(c) are different from those for invoking 20 C.F.R. § 10.500(a).¹⁶

The Board accordingly finds that OWCP failed to follow its established procedures with respect to termination of compensation under section 8106(c). The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.¹⁷ Appellant was not provided notice or an opportunity to respond with respect to a determination that she refused an offer of suitable work, and thus, OWCP improperly terminated her eligibility for wage-loss and schedule award compensation based upon a refusal of suitable work under section 8106(c)(2).¹⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8106(b) of FECA provides that an employee who "fails to make an affidavit or report when required or knowingly omits or understates any part of his or her earnings, forfeits his or her right to compensation with respect to any period for which the affidavit or report was required."¹⁹

OWCP's implementing regulation provides:

"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."²⁰

OWCP's procedures, regarding issuing a penalty decision, provides:

"*Advising the Claimant.* When the evidence shows that the claimant had earnings and knowingly did not report them on Form EN1032, the Senior Claims Examiner

¹⁵ See *supra* note 10.

¹⁶ Compare Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter. 2.814.4, 2.814.5, 2.814.6 (June 2013) (sets forth procedures for terminating compensation under 5 U.S.C. § 8106(c) for a refusal of suitable work) and Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter. 2.814.9 (June 2013) (sets forth procedure for reducing or terminating compensation under 20 C.F.R. § 10.500(a) for refusal of a temporary light-duty assignment; explains that the penalty language of 5 U.S.C. § 8106(c) cannot be applied).

¹⁷ See *J. Adrian Osborne*, 48 ECAB 556 (1997).

¹⁸ See 20 C.F.R. § 10.516; see also *S.M.*, Docket No. 16-1913 (issued April 11, 2017).

¹⁹ 5 U.S.C. § 8106(b).

²⁰ 20 C.F.R. § 10.529.

should prepare a formal decision declaring the compensation forfeit. The forfeiture decision must clearly address the period of activity and how the determination was made that the claimant knowingly made an omission or understatement. Note also that when composing the decision, the Senior Claims Examiner should not rely solely on investigative summaries; rather, the Senior Claims Examiner should cite specific evidence....”²¹

OWCP procedures indicate that it should issue a preliminary overpayment decision with the forfeiture decision.²²

Regarding overpayments that result from a new decision on entitlement, OWCP’s procedures further provide:

“Regardless of whether the claimant is ‘with fault or without fault,’ a new determination on entitlement which results in an overpayment (*e.g.*, an amended schedule award, the correction of an incorrect pay rate, the forfeiture of compensation) entitles the claimant to request reconsideration and a hearing and/or review by the Employees’ Compensation Appeals Board (ECAB) on the entitlement issue. Therefore, a separate formal decision on the claimant’s *entitlement* to benefits, with full appeal rights, should be issued along with the preliminary overpayment finding. Form CA-2201 and Form CA-2202 are preliminary finding notices, and are not proper for use in place of the entitlement decision on the issue that resulted in the overpayment.”²³ (Emphasis in the original).

ANALYSIS -- ISSUE 2

OWCP, in its March 3, 2016 overpayment decision, determined that appellant received a \$10,943.93 overpayment of compensation from March 1 to November 30, 2015 due to the fact that she failed to report her employment activity and earnings on a Form CA-1032 covering this period and thus forfeited compensation. However, it failed to issue a forfeiture decision for this period prior to issuing its final overpayment decision. OWCP procedures provide that a new determination on entitlement that results in an overpayment, such as a finding of forfeiture, entitles appellant to a separate decision on the entitlement issue with full appeal rights.²⁴ However, it failed to issue a separate forfeiture decision with appeal rights prior to issuing its overpayment decision. As OWCP failed to comply with its procedures, it has not met its burden of proof to show an overpayment of \$10,943.93 from March 1 to November 30, 2015 due to a

²¹ Federal (FECA) Procedural Manual, Part 2 -- Claims, *Periodic Review of Disability Claims*, Chapter 2.1402.8(b) (May 2012).

²² *Id.* at Chapter 2.1402.8(e).

²³ Federal (FECA) Procedural Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a) (May 2004).

²⁴ *Id.*; *see also B.S.*, Docket No. 07-0564 (issued October 10, 2007).

forfeiture as it has not yet issued a separate formal decision finding a forfeiture of compensation for the period in question.²⁵

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation as she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2). The Board further finds that OWCP has not established that appellant received an overpayment of compensation in the amount of \$10,943.93 because she forfeited compensation for the period March 1 to November 30, 2015.²⁶

ORDER

IT IS HEREBY ORDERED THAT the March 8 and 3, 2016 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: December 8, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²⁵ See *B.S.*, *id.*

²⁶ In view of the Board's finding regarding the overpayment of compensation, the issue of whether appellant was at fault in the creation of an overpayment is moot.