

On appeal appellant disagrees with the overpayment finding, maintaining that OWCP declared forfeit periods not covered by OWCP EN1032 forms. He also contends that OWCP's hearing representative did not fairly and equitably determine a repayment schedule.

FACTUAL HISTORY

On November 18, 2009 appellant, then a 32-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that he strained his right knee and ankle that day while performing job duties. On December 17, 2009 OWCP accepted sprain of the anterior cruciate ligament (ACL) and tear of the medial meniscus of the right knee. On January 6, 2010 appellant underwent arthroscopic right partial lateral meniscectomy and debridement of the patellofemoral joint. He received continuation of pay for the period November 20, 2009 to January 3, 2010, and then filed claims for compensation (Forms CA-7). The Form CA-7 instructed, "you must report all earnings" and indicated that fraudulent concealment of employment or failure to report income may result in forfeiture of compensation benefits. In each claim filed, appellant checked a box marked "no," indicating that he had no outside earnings. FECA compensation coverage began on January 3, 2010. Appellant was placed on the periodic rolls.

Appellant was suspended by the employing establishment effective August 12, 2010 because his security clearance was revoked.

OWCP referred appellant to Dr. James R. Schwartz, a Board-certified orthopedic surgeon. In a December 22, 2010 report, Dr. Schwartz described physical examination findings and diagnosed sprain/strain of the right knee, tear in the medial meniscus of the right knee, and post-traumatic arthrosis of the right knee. He advised that appellant could work eight hours of modified duty daily. The employing establishment, however, indicated that it had no work available.

On September 30, 2011 appellant submitted an OWCP Form EN1032, signed on September 24, 2011, in which he attested that he had not been employed or self-employed in the past 15 months.² He did report having received Department of Veterans Affairs (VA) benefits for head scars, kidney stones, and sciatic nerve.

On February 15, 2012 appellant had an authorized right knee surgery.

On July 26, 2012 appellant submitted an OWCP Form EN1032 in which he attested that he had not been employed or self-employed in the past 15 months.³ He repeated that he was receiving VA benefits and included an additional diagnosis of osteoarthritis. On a third Form EN1032, signed on July 30, 2013, appellant also indicated that he had not been employed or self-employed in the past 15 months. He indicated that his VA benefit was 50 percent.

² This and subsequent EN1032 forms signed by appellant advised that a false or evasive answer may be grounds for forfeiting compensation benefits.

³ The date of signature recorded is July 19, 1977. This, however, is appellant's date of birth. As noted, the EN1032 form was received by OWCP on July 26, 2012.

On January 31, 2014 appellant began part-time work as a teller with Bank of America, earning \$12.05 an hour. He reported this employment on a Form EN1032, signed by him on July 7, 2014, and attached a statement indicating that his gross earnings from Bank of America were \$6,504.26, and from Gary Zambor Diving, \$600.00, for the 2013 tax year. He indicated that his VA benefit had been increased to 60 percent.

On October 17, 2014 the employing establishment forwarded to OWCP an October 16, 2014 summary of investigation by its investigative service (NCIS), conducted by the Department of Labor's, Office of Inspector General (OIG), and the Internal Revenue Service. This report, including attachments, documented that beginning no later than 2007 and continuing to present, appellant had operated a business G.Z. Diving which provided boat cleaning and repair services, and that each year from 2007 to present, he had earned income from the operation of that business. The summary indicated that appellant had admitted to providing a false statement to an NCIS investigator regarding FECA compensation, and reported that on October 3, 2014 appellant had pled guilty. The report indicated that sentencing was scheduled for January 6, 2015 and appellant had agreed to a recommended sentence of 15 days imprisonment to be followed by one-year supervision, home detention for a period of 60 days, and a court-imposed fine of \$1,000.00.

An indictment dated September 18, 2014, in the United States District Court for the Western District of Washington charged appellant with one count of violating 18 U.S.C. § 1920, making a false statement to obtain FECA benefits. A District Court plea agreement dated October 3, 2014 indicated that appellant pled guilty to the charge. The agreement noted that beginning in or about November 2009, continuing to the present, appellant was in receipt of FECA compensation, and on or about July 2011, and in the years 2012 and 2013, appellant completed, signed, and filed EN1032 forms with OWCP in which he stated he was not self-employed or involved in any business enterprise when, in fact, he owned and operated a boat repair and boat cleaning business and received income from that business.

On January 6, 2015 the United States District Court for the Western District of Washington found appellant guilty of one count of making a false statement to obtain FECA compensation under 18 U.S.C. § 1920. It sentenced him to probation for one year and ordered 80 hours of community service as directed by the probation office. He was to pay an assessment of \$25.00 and a fine of \$1,000.00.

A January 12, 2015 investigative memorandum, prepared by the Department of Labor's Office of the Inspector General for the OWCP District Director, described the investigative and court proceedings.

By decision dated February 25, 2015, OWCP found that appellant had forfeited his right to compensation benefits for the period January 3, 2010 to July 30, 2013. It explained that, on OWCP EN1032 forms, signed on September 24, 2011, July 26, 2012, and July 30, 2013, he answered "no" when asked if he had worked for any employer or was self-employed the prior 15 months. However, the investigation revealed that he had performed boat cleaning and repair services as Zambor Diving during this period. It described the District Court Judgment, and found that, pursuant to 20 C.F.R. § 10.529 and relevant statutes, because appellant knowingly

omitted earnings for the services provided by Zambor Diving on OWCP EN1032 forms, his compensation during this period was forfeited.

On February 25, 2015 OWCP also made a preliminary determination that appellant received an overpayment of compensation in the amount of \$73,513.31 because he was self-employed, involved in a business enterprise during the period January 3, 2010 to July 30, 2013; and failed to report this activity on his OWCP EN1032 forms. Appellant was found at fault in creating the overpayment because he knowingly accepted compensation to which he knew or should have known he was not entitled. An overpayment work sheet and computer printouts contained in the record indicates that appellant received compensation of \$73,513.31 for the period January 3, 2010 to July 30, 2013.

Appellant timely requested a hearing regarding the forfeiture decision and a precouplement hearing over the overpayment findings. Counsel at that time asserted that appellant's unreported earnings were *de minimis* and that the EN1032 form was difficult to follow. Appellant's finances were discussed, and the hearing representative informed appellant of the financial information needed, including an overpayment questionnaire (OWCP Form 20).

On August 28, 2015 appellant submitted an overpayment questionnaire and financial information.

In a September 17, 2015 decision, an OWCP hearing representative found that appellant forfeited compensation for the period January 3, 2010 through July 30, 2013, noting that he pled guilty in federal court to knowingly defrauding the government beginning in 2009. He noted that appellant had not reported earnings on claims for compensation (Forms CA-7) filed during this period and had not reported it on the EN1032 forms. The hearing representative found that the last three days of compensation had been computed incorrectly. He modified the amount of the overpayment to \$73,241.01, to reflect appellant's net compensation for the period January 3, 2010 through July 30, 2013.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA provides that 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 times the Secretary specifies. It states that an employee who:

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

“(2) 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.”⁴

⁴ 5 U.S.C. § 8106(b); *see F.C.*, 59 ECAB 666 (2007).

Section 10.5(g) of OWCP's regulations defines 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 perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the 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.”⁵

In order to establish that a compensationner should forfeit the compensation received for the periods covered by completed OWCP EN1032 forms or CA-7 forms, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.⁶ As forfeiture is a penalty, it is not enough merely to establish that there were underreported earnings from employment.

OWCP can, in several ways, meet its burden of proof in establishing that a claimant “knowingly” failed to report employment or earnings. This includes the claimant's own admission to OWCP that he failed to report employment or earnings which he knew should be reported, or establishing that the claimant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form EN1032.⁷ The inquiry is whether appellant knowingly omitted or understated his earnings from employment for the periods covered by the EN1032 forms. The term “knowingly” as defined in OWCP's implementing regulations and Board precedent means “with knowledge; consciously; intelligently; willfully; intentionally.”⁸ The language on OWCP EN1032 forms is clear and unambiguous in requiring a claimant to report earnings for the previous 15 months from any employer, self-employment or a business enterprise in which he worked. The forms further emphasize that severe penalties may be applied for failure to report all work activities thoroughly and completely.⁹ Likewise, the language on the CA-7 forms is also clear and unambiguous regarding self-employment, and specifically includes providing services in exchange for money, regardless of whether the income was paid to others.¹⁰

⁵ 20 C.F.R. § 10.5(g).

⁶ *Robert R. Holmes*, 49 ECAB 161 (1997); 20 C.F.R. § 10.5(n).

⁷ *Robert Ringo*, 53 ECAB 258 (2001).

⁸ *Joan Ross*, 57 ECAB 694 (2006).

⁹ *Id.*

¹⁰ *See E.V.*, Docket No. 15-0803 (issued October 15, 2015).

ANALYSIS -- ISSUE 1

The forfeiture determination in this case, beginning on January 6, 2010 and continuing to July 30, 2013, was based on the submission of specific EN1032 forms, completed by appellant in 2011, 2012, and 2013, and CA-7 forms, which he completed beginning in January 2010. On each of the EN1032 and CA-7 forms, appellant alleged that he was not employed and as such had no earnings. On October 3, 2014 appellant pled guilty to one count of making a false statement or fraud to obtain FECA compensation under 18 U.S.C. § 1920. Beginning in or about November 2009 and continuing, appellant was in receipt of FECA compensation. On January 6, 2015 appellant was found guilty of one count of making a false statement to obtain FECA compensation under 18 U.S.C. § 1920. He was sentenced to one year of probation, was to complete 80 hours of community service as directed by the probation office, and was to pay an assessment of \$25.00 and a fine of \$1,000.00. The Board affirms the finding that appellant knowingly failed to report earnings while in receipt of compensation benefits for the period January 3, 2010 to July 30, 2013.

For the period January 3 to April 24, 2010, appellant completed a series of Form CA-7 claims for compensation. The CA-7 forms instructed appellant to report all earnings from employment during the periods claimed. Appellant did not report earnings on any of these forms.

On each of the EN1032 forms submitted by appellant on September 30, 2011, July 26, 2012, and August 5, 2013, he denied any self-employment or involvement in a business enterprise, and reported no earnings for the previous 15 months. Thus, the evidence of record supports a finding that he failed to report earnings on these forms which cover the period April 24, 2010 to July 30, 2013.

Because the evidence establishes that appellant failed to report earnings during the period of forfeiture, the remaining question is whether his omission was knowingly. As noted above, OWCP's regulations define knowingly as: with knowledge, consciously, willfully, or intentionally.¹¹ The language in the EN1032 and CA-7 forms is clear and unambiguous regarding self-employment, and specifically includes providing services in exchange for money. Moreover, appellant filed a guilty plea in federal court to one count of making a false statement to obtain FECA compensation, and on January 6, 2015 was found guilty by the court. The plea agreement supports that appellant operated a business and received income.

On appeal appellant argues that OWCP declared forfeit periods not covered by the EN1032 forms. However, while those forms only cover a period beginning 15 months prior to the September 24, 2011 EN1032, or April 24, 2010, as discussed above, appellant submitted CA-7 forms in which he also failed to report earnings beginning in January 2010 when his continuation of pay ended, and he received compensation beginning January 3, 2010.

The language of both the EN1032 and CA-7 forms, advised that appellant had an affirmative obligation to report any work or ownership interest in any business enterprise. He did not do so. Based on the probative evidence of record, including the plea agreement and

¹¹ *Supra* note 9.

sentencing document, the Board finds that appellant knowingly omitted earnings on EN1032 and CA-7 forms from January 3, 2010 through July 30, 2013.

Pursuant to 5 U.S.C. § 8106(b), OWCP properly determined that he forfeited his FECA compensation for that period.¹²

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of OWCP's implementing regulations provide 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 and other relevant statutes.”¹³

ANALYSIS -- ISSUE 2

As noted above, OWCP regulations provide that OWCP may declare an overpayment of compensation for any compensation already paid for the period of a given forfeiture of compensation. If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by a EN1032 or CA-7 form which he or she fails to report, the claimant is not entitled to any compensation for any portion of the period covered by the report, even though he may not have had earnings during a portion of that period.¹⁴ Computer printouts contained in the record indicate that appellant received net compensation of \$73,241.01 for the period January 3, 2010 to July 30, 2013. Thus, the record supports that OWCP paid net compensation of \$73,241.01 for the relevant period. As OWCP properly found that appellant forfeited his entitlement to compensation during this period, there exists an overpayment of compensation in the amount of \$73,241.01.¹⁵

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “incorrect payment has been made to an individual who is without fault and

¹² *S.H.*, Docket No. 14-421 (issued August 27, 2014).

¹³ 20 C.F.R. § 10.529.

¹⁴ *Louis P. McKenna, Jr.*, 46 ECAB 428 (1994). *See also N.D.*, Docket No. 13-108 (issued September 17, 2014) (the plain language of Form CA-7 was sufficient to put appellant on notice that she was required to report all earnings outside her federal job even if considered *de minimis*).

¹⁵ *See J.N.*, Docket No. 13-1761 (issued July 1, 2014).

when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”¹⁶

Section 10.433(a) of OWCP’s regulations provide that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (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. (This provision applies only to the overpaid individual).”¹⁷

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.¹⁸

ANALYSIS -- ISSUE 3

OWCP properly determined that appellant was at fault in the creation of the overpayment because he failed to provide information which he knew or should have known to be material on OWCP EN1032 forms and CA-7 claims for compensation covering the period January 3, 2010 to July 30, 2013. The record establishes that appellant had unreported employment activity during this period and knowingly failed to furnish this material information to OWCP. Appellant signed a certification clause on the EN1032 forms which advised him in explicit language that he might be subject to civil, administrative, or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. Likewise, the CA-7 claim form advises that fraudulent concealment of employment or failure to report income may result in forfeiture of compensation benefits and/or criminal prosecution. By signing these forms, appellant is deemed to have acknowledged his duty to report any employment, self-employment, or involvement in a business enterprise. As appellant indicated that he had no employment or earnings from employment during the covered periods, he failed to furnish

¹⁶ 5 U.S.C. § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

¹⁷ 20 C.F.R. § 10.433; see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

¹⁸ *Id.* at § 10.433(b); *Duane C. Rawlings*, 55 ECAB 366 (2004).

information which he knew or should have known to be material to OWCP. As he is not without fault in creating the overpayment, it is not subject to waiver of recovery.¹⁹ Moreover, appellant admitted that he knowingly and willfully made false statements when he pled guilty to violating 18 U.S.C. § 1920. Thus, he is at fault in the creation of the \$73,241.01 overpayment of compensation.²⁰

The Board notes that its jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. Where, as here, a claimant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction over the amount or method of recovery of the overpayment under the Debt Collection Act.²¹

CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited his right to compensation pursuant to section 8106(b)(2) of FECA, for the period January 3, 2010 to July 30, 2013. The Board further finds that OWCP properly found that an overpayment of compensation in the amount of \$73,241.01 had been created and that, as appellant was at fault in the creation of the overpayment, the overpayment was not subject to waiver of recovery.²²

¹⁹ *Harold F. Franklin*, 57 ECAB 387 (2006).

²⁰ *J.C.*, Docket No. 13-726 (issued September 23, 2013).

²¹ *Albert Pineiro*, 51 ECAB 310 (2000).

²² The Board notes that by decision dated October 20, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits effective October 18, 2014 because he pled guilty to one count of fraud. It noted that, based on his guilty plea that he made false statements with regard to not reporting self-employment activities while in the receipt of FECA compensation. OWCP indicated that a separate decision concerning forfeiture for failure to report these earnings would be issued under separate cover after he was sentenced. On November 20, 2014 appellant requested a hearing from the October 20, 2014 decision. The record does not contain a decision from a hearing representative of the October 20, 2014 decision. Pursuant to the Board's *Rules of Procedure*, its jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.3(c); see *J.T.*, 59 ECAB 293 (2008).

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 19, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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