

FACTUAL HISTORY

This case has previously been before the Board.² The facts of the case as presented in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On February 9, 1990 appellant, then a 40 year-old rural carrier, filed a notice of occupational disease (Form CA-2) alleging neck and back injuries due to performance of repetitive motions while casing, carrying and delivering mail. OWCP accepted appellant's claim for thoracic outlet syndrome and tendonitis of the right wrist. Appellant received intermittent wage-loss compensation during the period February 10, 1990 through November 6, 1996. She returned to full time limited duty on April 27, 1996.

Appellant filed a claim for compensation (Form CA-7) for leave without pay on February 28, 2001 and received intermittent compensation through June 14, 2001 due to her accepted wrist tendinitis condition. She returned to full-time limited duty on June 14, 2001. Appellant underwent an authorized surgical procedure related to her thoracic outlet syndrome in September 2001. She did not return to work after September 2001. The record substantiates periodic roll payments commencing June 16, 2002.

OWCP issued a preliminary determination dated April 25, 2013 finding an overpayment of compensation. According to the record, appellant had failed to disclose employment activities on Form EN1032's dated November 23, 2007, November 28, 2008, November 21, 2009, and November 24, 2010. It found in its April 25, 2013 preliminary determination that appellant had sold items at her farm and engaged in other employment activity, such as offering tours, while receiving FECA compensation. OWCP found that an overpayment was created from August 23, 2006 (15 months prior to the November 23, 2007 EN1032) through November 24, 2010. According to the preliminary determination, appellant was overpaid for this period "because she did not report self-employment on EN1032 forms and knew or should have known she was creating an overpayment." It also made a preliminary finding that appellant was with fault in creating the overpayment, as she should have known her compensation was "subject to recovery" if she did not respond truthfully to the questions on the EN1032 forms.

On May 29, 2013 appellant submitted 36 pages of argument and evidence regarding the overpayment issues.

OWCP issued a final overpayment decision dated May 29, 2013, finding that appellant had chosen not to submit evidence either refuting the amount of the overpayment or the finding of fault.

On August 5, 2013 appellant appealed to the Board. The Board remanded the case for proper review of the evidence of record.³

² Docket No. 13-1840, *Order Remanding Case* (issued September 24, 2013); Docket No. 14-0706 (issued June 10, 2015).

³ Docket No. 13-1840 (issued September 24, 2013).

In a letter dated November 8, 2013, OWCP reported that, in a telephone conference, appellant had been advised to provide sufficient proof of her monthly expenses. It provided her 15 days to submit the additional evidence. By letter dated November 13, 2013, appellant stated that she had previously explained that her insurance rates had increased and her Social Security payment had been reduced, but that OWCP had refused to listen. She submitted receipts, copies of invoices, and other financial documents.

By decision dated January 24, 2014, OWCP issued a final determination with respect to an overpayment of compensation in the amount of \$148,642.64 and finding of fault. As to fault, it found that appellant should have known her compensation was “subject to forfeiture.”

On February 11, 2014 appellant again appealed to the Board. By decision dated June 10, 2015, the Board set aside the January 24, 2014 decision, finding that OWCP had failed to establish that appellant knowingly omitted or understated her employment activities. The Board explained that OWCP had not cited to 5 U.S.C. § 8106(b), nor any other authority when finding that the simple failure to provide information on the EN1032 forms results in forfeiture of compensation. In addition, the Board noted that 5 U.S.C. § 8106(b) was a penalty provision, and must be strictly construed. OWCP failed to adequately address the underlying basis for the declared overpayment of compensation. The case was remanded for proper findings with respect to the overpayment issues.

On remand OWCP issued a decision dated September 30, 2015, finding that appellant had forfeited her compensation under 5 U.S.C. § 8106(b)(2). It held that appellant had knowingly omitted or understated earnings because she was owner/operator of Willow Creek Ranch, a for-profit farm during the periods covered by the CA-1032 forms signed on November 23, 1007, November 28, 2008, November 21, 2009, and November 24, 2010.

In a letter dated October 30, 2015, OWCP issued a preliminary determination that an overpayment of \$148,642.64 was created because of the forfeiture of compensation, and appellant was at fault in creating the overpayment. On November 25, 2015 appellant timely requested a prerecoupment hearing before an OWCP hearing representative, contesting the occurrence of the overpayment and the finding of fault. A telephonic hearing was held on July 11, 2016 before an OWCP hearing representative.

By decision dated August 31, 2016, the hearing representative held that the “forfeiture is not the issue on appeal and is, therefore, assumed to be correct and valid, insofar as [appellant] has not, to date, contested it.” The hearing representative finalized the \$148,642.64 overpayment and the finding of fault.

LEGAL PRECEDENT

5 U.S.C. § 8106(b) provides in pertinent part:

“The Secretary of Labor may require a partially disabled employee to report [her] 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 [her] earnings;

forfeits [her] 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.”⁴

ANALYSIS

In the present case, OWCP found that appellant had forfeited her compensation from August 23, 2006 (15 months prior to the November 23, 2007 EN1032) through November 24, 2010, creating an overpayment of compensation in the amount of \$148,642.64. The Board finds the case must be remanded to OWCP as the hearing representative did not properly address the issues presented.

The overpayment in this case was based on a determination that appellant had forfeited compensation in the amount of \$148,642.64. As the overpayment is based on the forfeiture, a review of the overpayment issues, including fact of overpayment, amount, and fault, must properly address the forfeiture issue. In reviewing an overpayment decision, the determination of whether an overpayment occurred includes an examination of the underlying OWCP decision that created the alleged overpayment.⁵

Often OWCP issues a final forfeiture decision and a preliminary determination of an overpayment resulting from the forfeiture, on the same day and when a claimant pursues a prerecoupment hearing on the overpayment, the forfeiture issue is before the hearing representative.⁶ This also holds true when OWCP issues a preliminary determination of an overpayment approximately one month after the forfeiture decision, as in the present case. In *J.A.*,⁷ a case cited in the Board’s prior decision, OWCP had issued a forfeiture decision on March 24, 2011, and then an April 20, 2011 preliminary determination of an overpayment based on the forfeiture. Following a request for a prerecoupment hearing on the overpayment, the hearing representative remanded the case to consider whether the forfeiture period was correct. Even though appellant had not exercised the appeal rights provided with the September 30, 2015 forfeiture decision, the Board held that the forfeiture issue was properly before the hearing representative. The Board found that although the hearing representative indicated that she was only addressing the overpayment of compensation issue, the underlying basis for the preliminary overpayment determination was the forfeiture of compensation.⁸

⁴ 5 U.S.C. § 8106(b).

⁵ See *John A. Deyampert*, Docket No. 95-0831 (issued November 24, 1997) (fact of overpayment was based on forfeiture and the forfeiture decision must be reviewed by the Board).

⁶ See, e.g., *L.C.*, Docket No. 13-0265 (issued September 12, 2014).

⁷ Docket No. 12-1793 (issued May 7, 2013).

⁸ *Id.*

In the August 31, 2016 decision, the hearing representative held that the “forfeiture is not the issue on appeal and is, therefore, assumed to be correct and valid, insofar as [appellant] has not, to date, contested it.” However, the hearing representative in the August 31, 2016 decision should have considered the forfeiture issue and made a proper determination as to whether it was correct as to its occurrence. Appellant contested the occurrence of an overpayment and the finding of fault, and these issues cannot be adjudicated without a proper review of the underlying forfeiture of compensation issue.⁹ The case will accordingly be remanded to OWCP for a proper review of the forfeiture issue and the resulting overpayment issues. After such development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated August 31, 2016 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: September 14, 2017
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

⁹ *Supra* note 5.