

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

S.M., Appellant

and

**U.S. POSTAL SERVICE, FORT POINT
STATION, Boston, MA, Employer**

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**Docket No. 16-1612
Issued: April 11, 2018**

Appearances:

Jennifer E. Kline, Esq., for the appellant¹

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 August 4, 2016 appellant, through counsel, filed a timely appeal from a February 10, 2016 merit decision and a March 1, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for an oral hearing on its forfeiture decision as untimely under 5 U.S.C. § 8124(b); (2) whether it properly determined that she received a \$378,467.89 overpayment of compensation for the period August 13, 2003 through October 27, 2015 because she forfeited her right to compensation; and (3) whether appellant was at fault in the creation of the overpayment.

FACTUAL HISTORY

On January 26, 1998 appellant, then a 56-year-old letter carrier, injured her head and knee while at work when she fell down on a loading dock. OWCP accepted the claim for neck strain, a laceration of the forehead, right knee contusion, hyperkinetic syndrome of childhood, postconcussion syndrome, and mild recurrent major depression. Appellant stopped work on January 26, 1998, returned to limited-duty employment on February 3, 1998, and resumed her usual employment on October 2, 1998. On January 20, 2003 she stopped work and did not return. OWCP paid appellant compensation for total disability beginning April 1, 2003.

On November 12, 2004, November 3, 2006, March 31, 2008, January 10 and October 30, 2009, July 1 and October 24, 2011, November 13, 2012,³ November 26 and December 6, 2013, October 30, 2014, and October 27, 2015, appellant signed EN1032 forms which contained language advising her what type of employment activities, earnings, and volunteer activities that she was required to report for each 15-month period prior to the time she signed each form.⁴ 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. Appellant was directed to 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 for money, goods, or other services. The forms contained certification clauses informing her of the consequences of not accurately reporting her employment activities, such as being subjected to criminal penalties and losing the right to receive workers' compensation.

Regarding volunteer work, the EN1032 forms dated November 12, 2004 to July 1, 2011 inquired, "During the past 15 months, did you perform any volunteer work for which ANY FORM of monetary or in-kind compensation was received?" The question on the EN1032 forms regarding volunteer work changed in 2011. From October 24, 2011 to October 27, 2015 appellant completed EN1032 forms which asked her to respond to the question, "During the past 15 months, did you perform any volunteer work including volunteer work for which ANY FORM of monetary or in-kind compensation was received?"

On August 28, 2015 OWCP received a December 1, 2014 investigative memorandum from the employing establishment's Office of Inspector General (OIG) advising that appellant participated in work activities since 2001 at a nonprofit organization, The Knitting Connection.

³ Appellant indicated that the date was November 13, 2013; however, it is apparent this was a typographical error as it was received by OWCP on November 20, 2012.

⁴ The record does not contain EN1032 forms for 2005, 2007, and 2010.

The OIG agent who completed the report advised that a web site identified appellant as the president of The Knitting Connection and that information from the Internal Revenue Service (IRS) established that she worked 20 hours per week from 2001 through 2004 and 30 hours per week from 2005 through 2009 operating the nonprofit enterprise. He noted that the corporation's web site showed appellant at events in connection with the organization. The OIG conducted surveillance of appellant from November 7, 2013 through July 2, 2014. OIG agents witnessed appellant playing mahjong, using a computer, walking her dog, performing lifting, walking to a senior center to deliver yarn, using a vehicle registered to The Knitting Connection, and working at a storage facility. Appellant spoke with an undercover OIG agent about the nonprofit corporation and gave the agent yarn "in the hope the [agent] would have a family member donate knitted scarfs, mittens, and/or hats to The Knitting Connection."

Articles of Incorporation filed with the state provided that The Knitting Connection was organized for charitable purposes. It collected donated yarn and distributed the yarn to people who would knit and crochet clothing, which the organization then collected and distributed to individuals who could not afford clothing.

The OIG submitted a copy of annual reports submitted by The Knitting Connection to the state government dated 2001 to 2013 listing appellant as president. The November 2013 annual report indicated that her term expired in January 2016.

The OIG also submitted tax forms (Form PC) filed with the state's Office of Attorney General dated 2001 to 2006 and 2008 to 2012. The forms provided that the individuals associated with the business, including appellant, did not receive any monetary compensation. It listed her areas of responsibility as the custody and distribution of funds, fundraising, signing checks, and custody of financial records. The OIG also enclosed The Knitting Connection's federal 990-EZ short form tax returns for organizations exempt from income tax for 2001-2006, 2008, and 2009. The forms indicated that The Knitting Connection paid no salary or other benefits. Appellant advised on the forms that she devoted 20 hours per week to The Knitting Connection in 2001-2004 and 30 hours per week in 2005, 2006, 2008 and 2009.

The OIG further submitted a vehicle registration for a car listing the owner's name as The Knitting Connection, Facebook pages, a brochure for the organization, and donations advertisements for The Knitting Connection in church bulletins and other media. It also submitted surveillance memorandum dated November 2013 until July 2, 2014.

On October 27, 2015 appellant completed an EN1032 form advising that she was not employed or self-employed. She further responded "no" to the question of whether she performed any volunteer work including volunteer work for which she received any "monetary or in-kind compensation."

OWCP on December 8, 2015 suspended appellant's compensation effective January 10, 2016 because she failed to report her activity with The Knitting Connection on her October 2015 Form CA-1032.

By decision dated December 28, 2015, OWCP determined that appellant forfeited her entitlement to compensation from August 13, 2003 through October 27, 2015 in the amount of

\$378,487.89 because she knowingly failed to report her outside employment and earnings. It found that she did not report her self-employment as president of The Knitting Connection, a nonprofit organization that coordinated volunteer activity. OWCP determined that appellant worked 20 to 30 hours per week for the organization, but that she did “not take a salary as her organization primarily engaged in the coordination of volunteer activity.” It noted that if she had reported her volunteer work it could have performed a wage-earning capacity determination. OWCP concluded that appellant knowingly failed to report her outside employment and earnings and thus forfeited her compensation under section 8106(b).

On December 28, 2015 appellant requested that OWCP contact the accountant for The Knitting Connection to confirm that she received no “salary or monetary gains.”

OWCP, by letter dated December 28, 2015, notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$378,467.89 because she forfeited her entitlement to compensation from August 13, 2003 through October 27, 2015. It further advised her of its preliminary finding that she was at fault in the creation of the overpayment. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. 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 precoupment hearing.

By letter dated and postmarked January 28, 2016, appellant, through counsel, requested an oral hearing on the December 28, 2015 forfeiture decision. Counsel advised that she did not understand that the forfeiture decision had a separate deadline from the December 28, 2015 notice of suspension due to her traumatic brain injury. She requested a copy of the investigative report.

By decision dated February 10, 2016, OWCP found that appellant received an overpayment of compensation in the amount of \$378,467.89 for the period August 13, 2003 through October 27, 2015 because she failed to report work and volunteer activities and thus forfeited entitlement to compensation. It further determined that she was at fault in the creation of the overpayment as she did not report information that she knew or should have known was material and was thus ineligible for waiver. OWCP instructed appellant to submit \$500.00 per month for recovery of the overpayment, noting that her compensation benefits were suspended.

By decision dated March 1, 2016, OWCP denied appellant’s request for an oral hearing on the December 28, 2015 forfeiture decision as the request was not made within 30 days. It considered the matter within its discretion, but found that the issue could be equally well addressed by her requesting reconsideration and submitting additional evidence relevant to the forfeiture finding.

On appeal counsel argues that OWCP did not meet its burden of proof to establish that appellant received an overpayment of compensation, or that she was at fault in the creation of the overpayment. She asserts that appellant had no earnings from employment as verified by the Social Security Administration and the OIG’s report. Counsel notes that the EN1032 forms provided that volunteer work must be reported if monetary or in-kind compensation is received. She relates, “Since [appellant] *had not received* any monetary or in kind compensation from The Knitting Connection or any other entity she correctly responded ‘No.’ By the plan language of the

EN1032's appellant was not required to provide any further information." (Emphasis in the original.) Counsel further asserts that appellant did not notice the change in the Form EN1032 in 2011 requesting that all volunteer work be reported. She also maintains that OWCP had knowledge of appellant's activities with the nonprofit organization as it was mentioned in several doctor's reports.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his or her claim before a representative of the Secretary.⁵ Section 10.615 of the federal 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.⁶ The request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.⁷ A claimant is entitled to a hearing or review of the written record as a matter of right if the request is filed within 30 days.⁸

While a claimant may not be entitled to a hearing or review of the written record as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.⁹

ANALYSIS -- ISSUE 1

OWCP properly determined that appellant's request for an oral hearing was untimely filed as it was made more than 30 days after the issuance of OWCP's December 28, 2015 forfeiture decision. Appellant requested an oral hearing in a letter dated and postmarked January 28, 2016, more than 30 days from the date of the December 28, 2015 decision. OWCP, therefore, properly denied her hearing as a matter of right.¹⁰

OWCP exercised 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 could be resolved through the submission of evidence through the reconsideration process. OWCP, therefore, properly denied appellant's request for a hearing as untimely and properly exercised its discretion in denying appellant's request for a hearing as she had other review options available.

⁵ 5 U.S.C. § 8124(b)(1).

⁶ 20 C.F.R. § 10.615.

⁷ *Id.* at § 10.616(a).

⁸ *See Leona B. Jacobs*, 55 ECAB 753 (2004).

⁹ 20 C.F.R. § 10.616(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

¹⁰ *See R.B.*, Docket No. 15-1946 (issued September 2, 2016).

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.”¹¹

Section 8106(b) of FECA 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 the 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 by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”¹²

OWCP's procedures recognize that forfeiture is a penalty,¹³ and, as a penalty provision, it must be narrowly construed.¹⁴ In its regulations, knowingly is defined as: with knowledge, consciously, willfully, or intentionally.¹⁵ To meet this burden, OWCP is required to examine closely the employee's activities and statements. It may meet this burden without an admission

¹¹ 20 C.F.R. § 10.529.

¹² While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled, and not whether he or she received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and therefore a statutory provision about such earnings would be meaningless. *Id.* at 260.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

¹⁴ *Christine P. Burgess*, 43 ECAB 449 (1992).

¹⁵ 20 C.F.R. § 10.5(n); *see Anthony A. Nobile*, 44 ECAB 268 (1992).

by an employee if the circumstances of the case establish that she failed to reveal fully and truthfully the full extent of her employment activities and earnings.¹⁶

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 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.”¹⁷

ANALYSIS -- ISSUE 2

OWCP found that appellant received an overpayment of compensation in the amount of \$378,467.89 from August 13, 2003 through October 27, 2015 as she forfeited compensation for this period. In its forfeiture determination, OWCP found that she failed to report outside work activity as the president of The Knitting Connection, a nonprofit organization. It determined that appellant did not have any earnings for her services with the nonprofit organization, but performed work activities as a fundraiser that if reported would have allowed it to perform a wage-earning capacity determination.

The Board finds that OWCP has established that appellant knowingly failed to report work activity for the period August 13, 2003 to July 23, 2010. The evidence demonstrates that beginning in 2001 she acted as president of The Knitting Connection, a nonprofit organization that received donations of yarn, took the donated yarn to individuals to knit or crochet clothing, and then took the items of clothing to people in need. Tax reports submitted to the state support that appellant was in charge of the funds, fundraising, the financial records, and signing checks for The Knitting Connection during the period covered by the EN1032 forms signed from November 12, 2004 to July 1, 2011. Appellant did not receive any payment for her activities.

On EN1032 forms dated November 12, 2004 to July 1, 2011, appellant indicated that she did not perform any employment or self-employment. She further responded “no” to the question on the form of whether she received any monetary or in-kind compensation from volunteer work. While the language of the forms in use at the time indicated that only individuals who received a salary or in-kind compensation were required to report volunteer activity, the test of what

¹⁶ *Id.* at § 10.5(g); *see Monroe E. Hartzog*, 40 ECAB 329 (1988).

¹⁷ *Id.* at § 10.5(g).

constitutes reportable earnings is not whether the claimant received a salary, but what it would have cost someone else to do the work.¹⁸

OWCP had an interest in knowing of appellant's activities as president of a nonprofit organization. Her activities, which included appearing at events on behalf of the nonprofit organization, fundraising, signing checks, and performing other financial activity, were relevant to determining whether she had the capacity to earn some level of wages on the open market, even if she had no actual earnings. By not reporting her activities, appellant prevented OWCP from examining whether she was still entitled to compensation for total disability.¹⁹

In this case, appellant received monetary or in-kind compensation in the form of what it would have cost to hire someone to perform the work that she performed for The Knitting Connection. Tax forms filed beginning 2001 with the state indicate that she had responsibility for the custody and distribution of funds, fundraising, signing checks, and the custody of financial records, and that she devoted between 20 and 30 hours per week to The Knitting Connection. Thus, appellant had unreported work activity on forms EN1032 for the period August 13, 2003 to July 23, 2010.²⁰

Appellant can be subject to the forfeiture provision of section 8106(c) only if she knowingly failed to report earnings or employment. OWCP has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.²¹ Appellant signed EN1032 forms covering the period August 13, 2003 to July 23, 2010 declaring that she engaged in no volunteer work for which she received any monetary or in-kind compensation. As she had knowledge that she engaged in activities that it would have cost money to hire another individual to perform, the Board finds that she knowingly omitted work activity in violation of section 8106(c)(2).²² Consequently, appellant forfeited compensation from August 13, 2003 to July 23, 2010.

The Board further finds that appellant knowingly failed to report employment activity as a volunteer from July 24, 2010 to October 30, 2014. Beginning with the October 24, 2011 EN1032 form, covering the period July 24, 2010 to October 24, 2011, the question regarding volunteer work changed such that claimants were required to report all volunteer activity. Appellant completed EN1032 forms dated October 24, 2011, November 13, 2012, November 26 and December 6, 2013, and October 30, 2014 that advised her to report any volunteer work, including

¹⁸ *Id.*; see also *L.B.*, Docket No. 16-1385 (issued October 3, 2017).

¹⁹ See *T.G.*, Docket No. 13-0419 (issued June 13, 2013).

²⁰ See *M.D.*, Docket No. 11-1751 (issued April 20, 2012).

²¹ See *Christine C. Burgess*, 43 ECAB 449 (1992).

²² See *supra* note 19.

that for which she received monetary or in-kind compensation.²³ The form clearly provided that all volunteer work must be reported, regardless of whether compensation was received and advised that she could be subject to criminal prosecution for false or evasive answers or omissions. Tax records submitted to the state from 2010 to 2012 and annual reports to the state from 2010 to 2013 support that during the periods covered by the forms, appellant performed volunteer work as president of The Knitting Connection and that she performed employment activities as a volunteer that included custody of funds, signing checks, and fundraising. Appellant signing of the strongly worded certifications clauses on the EN1032 forms dating from October 24, 2011 to October 30, 2014 constitutes persuasive evidence that she knowingly omitted her volunteer work during this period. OWCP, consequently, properly found that she forfeited her entitlement to compensation from July 24, 2010 to October 30, 2014.²⁴

Regarding the period covered by the October 27, 2015 EN1032 form, the Board finds that OWCP has not established that appellant received an overpayment of compensation subsequent to October 30, 2014, the last date covered by the prior EN1032 form. The OIG's report and supporting evidence submitted with the report did not address whether appellant performed volunteer work for The Knitting Connection for any period after July 2, 2014. Consequently, OWCP has not met its burden of proof to establish an overpayment of compensation from October 31, 2014 to October 27, 2015.

On appeal counsel asserts that appellant did not notice the change in wording beginning in 2011 that required her to report all volunteer work and notes that she did not have earnings from employment. Appellant's signing of the certification clause and the clear wording on the form support that she knowingly omitted her volunteer work. Further, even unreimbursed activities are considered employment activities if such activities would have required the hiring of an individual to perform.²⁵ Appellant performed employment activities such as fundraising and the handling of funds that had a value as business activities.

Given the Board's finding regarding fact and amount of overpayment for the period October 31, 2014 to October 27, 2015, it is premature to consider the matter of fault in the creation of the overpayment.²⁶ After carrying out the necessary development in accordance with this decision, OWCP shall issue an appropriate decision regarding these overpayment issues.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for an oral hearing on its forfeiture decision as untimely under section 8124(b). The Board further finds that OWCP

²³ The October 24, 2011 form covered the period July 24, 2010 to October 24, 2011, the November 13, 2012 form covered the period August 13, 2011 to November 13, 2012, the November 26, 2013 form covered the period August 26, 2012 to November 26, 2013, the December 6, 2013 form covered the period September 6, 2012 to December 6, 2013, and the October 30, 2014 form covered the period July 30, 2012 to October 30, 2014.

²⁴ See generally *C.D.*, Docket No. 14-1165 (issued July 8, 2015).

²⁵ *Id.* at n.17.

²⁶ See *supra* note 24.

properly determined that appellant received an overpayment of compensation for the period August 13, 2003 to October 30, 2014, but improperly found an overpayment of compensation for the period October 31, 2014 to October 27, 2015. The case is remanded to OWCP for recalculation of the overpayment and the issuance of an appropriate overpayment decision.

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2016 decision of the Office of Workers' Compensation Programs is affirmed and the February 10, 2016 decision is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.²⁷

Issued: April 11, 2018
Washington, DC

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

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

²⁷ Colleen Duffy Kiko, Judge, participated in the preparation of this decision, but was no longer a member of the Board effective December 11, 2017.