

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

I.S., Appellant)	
)	
and)	Docket No. 17-0897
)	Issued: April 9, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Kearny, NJ, Employer)	
)	

Appearances:
Stephen Larkin, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 19, 2017 appellant, through her representative, filed a timely appeal from a January 26, 2017 merit 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 the case.³

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.*

³ The record also contains a March 15, 2017 overpayment decision. Appellant's representative did not appeal this decision.

ISSUE

The issue is whether OWCP properly determined that appellant forfeited her right to compensation for the periods of November 1, 2005 to February 1, 2007 and December 13, 2010 to May 4, 2015, pursuant to section 8106(b)(2) of FECA.

On appeal appellant's representative maintains that she received no wage-loss compensation for the period November 1, 2005 through September 10, 2006 and, therefore, a forfeiture is improper for this period, and that she did not knowingly misrepresent her earnings during the period December 13, 2010 to May 4, 2015.

FACTUAL HISTORY

On August 1, 2006 appellant, then a 49-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured her back, right side, and shoulder on July 27, 2006 while retrieving mail from a postal container. She stopped work on July 27, 2006.

On August 18, 2006 OWCP accepted thoracic or lumbosacral neuritis or radiculitis. Appellant received continuation of pay from July 28 to September 10, 2006, and wage-loss compensation thereafter. She was placed on the periodic compensation rolls in October 2006.

The record includes OWCP EN1032 forms signed by appellant from February 1, 2007 to May 4, 2015. On the form signed by her on February 1, 2007 appellant indicated that, for the past 15 months, she only worked for the employing establishment and was not self-employed or involved in any business enterprise. On forms signed on January 26, 2008, March 14, 2009, March 11, 2010, March 9, 2011, March 13, 2012, and March 13, 2013 she indicated that she had not worked for any employers and was not self-employed or involved in a business enterprise. Appellant listed no income. On EN1032 form signed by appellant on March 13, 2014 and submitted to OWCP on March 24, 2014 she again listed no work or involvement in a business enterprise.

By letter dated April 30, 2014, OWCP informed appellant that the form she signed on March 13, 2014 was not completed properly as she did not answer all questions as required. Appellant then submitted an amended EN1032 form on May 13, 2014, that she signed on May 4, 2014. On that form she indicated that she was involved in a jewelry business and had earnings of \$2,062.00.

On the EN1032 form she signed on May 4, 2015, appellant advised that she was self-employed from September to December 2014 in a jewelry business with earnings of \$1,500.00.⁴

By letter dated May 26, 2015, OWCP asked that appellant furnish more information about the jewelry business she reported. Appellant was asked to provide the name and address of the business, who managed the business, the exact duties she performed, a list of three suppliers and

⁴ By letter dated April 30, 2015, OWCP informed appellant that her benefits would be suspended effective May 5, 2015 because she failed to submit the requested EN1032 form.

three customers, and other information regarding banking, permit, premises leased, insurance, and taxes.

In a June 6, 2015 response, appellant indicated that she was the operator and manager of the business. She indicated that she sent clients to a jeweler to select and purchase primarily diamonds, engagement rings, and wedding sets. The jeweler set the price and appellant received a percentage and kept bookkeeping, and the jeweler kept the receipts. Appellant noted that she had no supplies, stock, employees, pay rate, or specific hours of operation, did not lease premises, and had no business insurance. She related that she was billed by the jeweler, and the client would pay either the jeweler or her, and the jeweler would hold her liable for nonpayment. Appellant provided a list of two jewelers and three clients, and indicated that she had earnings of \$15,000.00 since the business was established.

Appellant forwarded documentation including a State of New Jersey business registration certificate indicating that on August 1, 2012 a license was issued with a trade name of Ida's Personal Jewelry Consultant, with appellant listed as the taxpayer. She included Internal Revenue Service (IRS) Profit or Loss from Business forms (Form 1040 Schedule C) for jewelry sales for the year 2006 which showed a loss, and personal IRS tax returns for the years 2006, where she reported business income loss; 2007, where she reported no business income; 2010 where she reported income of \$4,642.00; 2011 where she reported business income of \$13,775.00; 2012 where she reported business income of \$12,350.00; 2013 where she reported business income of \$9,360.00; and 2014 where she reported business income of \$6,500.00.

By decision dated February 18, 2016,⁵ OWCP found that appellant forfeited compensation for the periods November 1, 2005 through February 1, 2007 and December 13, 2010 through May 4, 2015. It explained that on OWCP EN1032 forms she signed on February 1, 2007, March 13, 2012, March 13, 2013, March 13, 2014, and May 4, 2015 she knowingly failed to report earnings and employment activities. The decision included copies of appellant's affirmations and signatures on the above-listed EN1032 forms. OWCP found that appellant either did not report or underreported earnings from her jewelry business, as shown on IRS income tax forms for the years 2006, 2010, 2011, 2012, 2013, and 2014. It concluded that, since the evidence supported that she knowingly omitted and/or understated earnings, she forfeited the right to wage-loss compensation for the period November 1, 2005 through February 1, 2007 and December 13, 2010 through May 4, 2015. OWCP also notified appellant that an overpayment of compensation had been created for these periods.

Appellant timely requested a hearing with OWCP's Branch of Hearings and Review. At the hearing, held on October 4, 2016, she testified that the only outside earnings she had in 2006 were before the employment injury. Appellant indicated that, in the EN1032 forms completed on March 13, 2013 and March 13, 2014, she had no profit, and that she did not receive an EN1032 form in 2015 until one was sent to her attached to OWCP's April 30, 2015 letter.⁶ She testified

⁵ OWCP initially issued a forfeiture decision on December 11, 2015, but reissued it on February 18, 2016 because appeal rights had not been included in the December 11, 2015 decision.

⁶ *Supra* note 4.

that she reported income on the form she returned in May 2015. Appellant also indicated that she last received FECA compensation in April 2015.

By decision dated December 9, 2016, an OWCP hearing representative found that appellant knowingly failed to comply with the reporting requirement for the periods November 1, 2005 through February 1, 2007 and December 13, 2010 through May 4, 2015 and affirmed the February 18, 2016 decision.

On December 29, 2016 appellant, through her representative, requested reconsideration. Appellant's representative asserted that appellant truthfully reported her earnings on an amended EN1032 form signed by appellant on May 4, 2014, and on the form signed by her on May 4, 2015, asserting that OWCP's hearing representative mischaracterized her earnings, and also indicated that "the income reported for 2011 and 2012 were errors," noting that she submitted an amended 2012 tax form showing that she had no income, and she had no income in 2011. He submitted IRS profit and loss from business tax forms (Schedule C) for 2011, 2013, and 2014, and amended tax returns for 2012 and 2014. The Schedule C form for 2013 indicated that appellant had a gross income of \$2,062.00, and the Schedule C for 2014 indicated a gross income of \$1,500.00.

By decision dated January 26, 2017, OWCP denied modification of the December 9, 2016 decision. It noted that the evidence submitted with appellant's December 29, 2016 reconsideration request showed that appellant did have income which was either not reported or reported incorrectly.

LEGAL PRECEDENT

Section 8106(b) of FECA provides that the Secretary of Labor may require a partially disabled employee to report his or her 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.”⁷

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

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

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.”⁸

In order to establish that a compensation recipient should forfeit the compensation received for the periods covered by completed OWCP EN1032 forms, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.⁹ 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 or she failed to report employment or earnings which he or she knew should be reported, or establishing that the claimant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the EN1032 form.¹⁰ The inquiry is whether appellant knowingly omitted or understated her 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, and intentionally.”¹¹ 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 or she worked. The forms further emphasize that severe penalties may be applied for failure to report all work activities thoroughly and completely.¹²

ANALYSIS

OWCP found that appellant forfeited wage-loss compensation for the periods November 1, 2005 to February 1, 2007 and December 13, 2010 to May 4, 2015 because she reported no earnings or underreported her earnings from a jewelry business. It based its forfeiture determination on the submission of EN1032 forms which appellant completed in 2007, 2008, 2009, 2010, 2011, 2013, 2014, and 2015.

Regarding the forfeiture period of November 1, 2005 to February 1, 2007, in the EN1032 form, appellant signed on February 7, 2007, she denied any self-employment or involvement in a business enterprise and reported no earnings for the previous 15 months. A 2006 tax return found in the record supports that appellant had business income. In the case of *F.H.*, the Board found

⁸ 20 C.F.R. § 10.5(g).

⁹ *Robert R. Holmes*, 49 ECAB 161 (1997); *Id.* at § 10.5(n).

¹⁰ *Robert Ringo*, 53 ECAB 258 (2001).

¹¹ *Joan Ross*, 57 ECAB 694 (2006).

¹² *Id.* The penalty language in OWCP EN1032-0494, EN1032-0595, and EN1032 08-10 states, “**SEVERE PENALTIES MAY BE APPLIED FOR FAILURE TO REPORT ALL WORK ACTIVITIES THOROUGHLY AND COMPLETELY.**” (Emphasis in the original.) The penalty language in OWCP EN1032 (Rev. 04-14) states, “**CRIMINAL, CIVIL, AND ADMINISTRATIVE PENALTIES MAY BE APPLIED FOR FAILURE TO REPORT ALL WORK ACTIVITIES THOROUGHLY AND COMPLETELY.**” (Emphasis in the original.)

that reports on tax forms are persuasive evidence of forfeiture.¹³ IRS Profit or Loss from Business forms (Form 1040 Schedule C) for jewelry sales for the year 2006 showed a loss. On appellant's personal IRS tax return for the year 2006, she reported business income loss, and on her 2007 tax return, she reported no business income. Although she declared a loss, this would not obviate the reporting requirement that she was involved in a business enterprise.¹⁴

As forfeiture is a penalty, it is not enough to establish that the claimant failed to report earnings from employment or self-employment.¹⁵ A claimant can be subjected to the forfeiture provisions of section 8106(b) of FECA only if he or she knowingly failed to report employment or earnings. The term "knowingly" as defined in OWCP's implementing regulations means with knowledge, consciously, willfully, or intentionally. In determining whether a claimant knowingly failed to report earnings, OWCP procedures provide that the circumstances of the case should be carefully evaluated with respect to the nature of the employment/earnings involved and any other relevant factors.¹⁶

As the EN1032 form signed by appellant on February 7, 2007 clearly informed her that she must report all employment, self-employment, and involvement in a business enterprise, even if the business lost money, this evidence, including appellant's signing of the strongly worded certification clause on the EN1032 form, is persuasive evidence that she knowingly understated her earnings and employment information.¹⁷

Appellant's representative asserted on appeal that, because appellant was not in receipt of FECA compensation for the period November 1, 2005 to September 10, 2006, forfeiture was not appropriate. Section 8106(b) of the 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 the right to compensation with respect to any period for which the affidavit or report was required.¹⁸ Because appellant did not report business earnings on the EN1032 form she signed on February 1, 2007, she forfeited the right to compensation for the previous 15 months. The fact that she did not begin receipt of wage-loss compensation until September 11, 2006 is reflected in the March 15, 2017 overpayment decision, not at issue in the present decision.¹⁹ The Board affirms the finding that appellant knowingly failed to comply with the reporting requirements fully

¹³ See *F.H.*, Docket No. 07-1379 (issued November 24, 2008).

¹⁴ See *Gary L. Allen*, 47 ECAB 409, 415 (1996).

¹⁵ *J.S.*, 58 ECAB 515 (2007).

¹⁶ 20 C.F.R. § 10.5(g); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.7 (May 2012); see *C.R.*, Docket No. 09-0720 (issued October 15, 2009).

¹⁷ *Supra* note 12. The EN1032 form signed by appellant on February 7, 2007 was form EN1032-0494. *Supra* note 12.

¹⁸ 5 U.S.C. § 8106(b); see *C.R.*, *supra* note 16.

¹⁹ *Supra* note 3.

explained on the EN1032 form she signed on February 7, 2007. Appellant, therefore, forfeited FECA compensation for the period November 1, 2005 to February 1, 2007.

Likewise, for the period December 13, 2010 to March 13, 2013, on EN1032 forms signed by appellant on March 13, 2012 and March 13, 2013 she denied any self-employment or involvement in a business enterprise and reported no earnings for the previous 15 months. While appellant did not disclose that she was involved in a business enterprise, she reported business income on her 2010, 2011, 2012, and 2013 tax returns. On her 2010 tax return she reported income of \$4,642.00, in 2011 she reported business income of \$13,775.00, in 2012 she reported business income of \$12,350.00, in 2013 she reported business income of \$9,360.00, and in 2014 she reported business income of \$6,500.00. The Board therefore finds that appellant's filing of tax returns advising the IRS of income generated by her business is persuasive evidence that she knew that she had income from employment and therefore rejects her representative's assertion on appeal that she did not knowingly fail to comply with the reporting requirements.²⁰ As appellant knowingly failed to comply with the reporting requirements fully explained on the EN1032 forms she signed on March 13, 2012 and March 13, 2013, she forfeited compensation for the period December 13, 2010 to March 13, 2013.²¹

As to the period covered by the EN1032 forms signed by appellant on May 4, 2014 and May 4, 2015, OWCP found that appellant forfeited compensation because she underreported her business income. The record, however, supports that on IRS profit or loss from business tax forms (Schedule C) submitted by appellant with her December 29, 2016 reconsideration request, show that she had gross income of \$2,062.00 in 2013 and gross income of \$1,500.00 in 2014. On the EN1032 form signed by appellant on May 4, 2014, she reported \$2,062.00 in earnings, and on the EN1032 form signed by her on May 4, 2015, she reported \$1,500.00 in earnings. The Board finds that, as appellant reported her gross income on the 2014 and 2015 EN1032 forms, this does not rise to the level of "knowingly" as contemplated by section 10.5(g) of OWCP's regulations, which provides that gross earnings must be reported, and by Board precedent.²² 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.²³ Its procedures recognize that forfeiture is a penalty,²⁴ and, as a penalty provision, it must be narrowly construed.²⁵ Appellant reported earnings on EN1032 forms signed on May 4, 2014 and May 4, 2015. The Board thus finds that

²⁰ *Id.*

²¹ The EN1032 form signed by appellant on March 9, 2011 was form EN1032-0595. The forms signed on March 13, 2012 and March 13, 2013 were EN1032 08-10 forms. *Supra* note 12.

²² 5 U.S.C. § 10.5(g); *see C.R.*, *supra* note 16.

²³ 20 C.F.R. § 10.5(n); *see L.B.*, Docket No. 15-1648 (issued September 18, 2017).

²⁴ Federal (FECA) Procedure Manual, *supra* note 16 at Chapter 2.1402.8 (May 2012).

²⁵ 20 C.F.R. § 0.5(n); *see Anthony A. Nobile*, 44 ECAB 268 (1992).

OWCP improperly determined that appellant forfeited her compensation for the period March 14, 2013 to May 4, 2015.²⁶

The Board concludes that appellant's knowing omissions of employment activities on the EN1032 forms she signed on February 1, 2007, March 13, 2012, and March 13, 2013 justify findings of forfeiture for the periods November 1, 2005 to February 1, 2007 and December 13, 2010 to March 13, 2013. Accordingly, OWCP's forfeiture finding is modified to reflect these periods of forfeiture.²⁷ Upon return of the case record, it shall redetermine the amount of the forfeiture of compensation and any resulting overpayment consistent with this decision.

CONCLUSION

The Board finds that appellant forfeited her right to compensation for the periods November 1, 2005 to February 1, 2007 and December 13, 2010 to March 13, 2013.

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2017 and December 9, 2016 decisions of the Office of Workers' Compensation Programs are affirmed as modified.²⁸

Issued: April 9, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

²⁶ See generally *L.B.*, *supra* note 23.

²⁷ See *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

²⁸ Colleen Duffy Kiko, Judge, participated in the decision, but was no longer a member of the Board effective December 11, 2017.