



and EN1032 forms advised him of the need to report earnings and his employment activities related to the rental property.

In an April 25, 2016 notice, OWCP advised appellant of its preliminary determination that he received a \$557,577.17 overpayment of compensation because he failed to declare income from a rental property from September 23, 1997 to December 10, 2013 and compensation from this period was forfeited. It also informed appellant of its preliminary determination that he was at fault in the creation of the overpayment because he “knowingly accepted compensation to which [he was] not entitled.”<sup>3</sup> OWCP advised appellant that he could submit evidence challenging the overpayment in writing or at prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the preliminary determination.

Appellant requested a telephonic prerecoupment hearing with a representative of OWCP’s Branch of Hearings and Review. During the hearing held on December 7, 2016, counsel argued that appellant did not engage in “knowing avoidance” of reporting income.

By decision dated January 25, 2017, OWCP’s hearing representative determined that appellant received a \$306,919.56 overpayment of compensation for the periods September 23, 1997 to April 24, 1999 and December 6, 2005 to December 10, 2013.<sup>4</sup> The hearing representative found that appellant was at fault in the creation of the overpayment because he “knowingly failed to report his self-employment activity income on [EN1032] and [CA-8] forms.” Therefore, he determined that waiver of recovery of the overpayment was precluded.<sup>5</sup>

The Board finds that OWCP failed to provide adequate facts and findings in support of its January 25, 2017 decision and that the case must be remanded to OWCP for further development.

In deciding matters pertaining to a given claimant’s entitlement to compensation benefits, OWCP is required by statute and regulation to make findings of fact.<sup>6</sup> Its procedure further specifies that a final decision of OWCP “should be clear and detailed so that the reader understands the

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<sup>3</sup> OWCP’s April 25, 2016 cover letter that accompanied the preliminary finding noted that appellant was at fault because he “failed to furnish information which [he] should have known to be material.”

<sup>4</sup> OWCP’s hearing representative determined that an overpayment of compensation could not be found for the entire period September 23, 1997 to December 10, 2013 because appellant had not completed forms covering the period April 25, 1999 to December 5, 2005.

<sup>5</sup> The hearing representative required repayment of the overpayment by deducting \$6,000.00 from appellant’s continuing compensation payments every month.

<sup>6</sup> 5 U.S.C. § 8124(a) provides that OWCP “shall determine and make a finding of facts and make an award for or against payment of compensation.” 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP “shall contain findings of fact and a statement of reasons.”

reason for the disallowance of the benefit and the evidence necessary to overcome the defect of the claim.”<sup>7</sup> These requirements are supported by Board precedent.<sup>8</sup>

OWCP did not provide an adequate discussion of the basis of its finding that appellant received an overpayment of compensation in the amount of \$306,919.56. As noted, it issued an April 25, 2016 decision in which it found that appellant forfeited his right to compensation between September 23, 1997 and December 10, 2013. While a forfeiture determination could ostensibly serve as a basis for a finding that an overpayment of compensation was created, it is important to note that in the only OWCP decision presently within the Board’s jurisdiction, *i.e.*, the January 25, 2017 decision, OWCP’s hearing representative did not provide any discussion of OWCP’s earlier forfeiture determination.<sup>9</sup> He did not provide any mention of the relevant standards for determining forfeiture or apply the facts of the present case to these standards.<sup>10</sup> For example, the hearing representative did not discuss section 8106(b) of FECA which provides, in relevant part, that an employee who “knowingly” omits or understates any part of his or her earnings on an affidavit or report to OWCP forfeits his or her right to compensation with respect to any period for which the affidavit or report was required.<sup>11</sup>

The Board notes that an employee can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she “knowingly” omitted or understated earnings, and it is not enough to merely establish that there were unreported earnings.<sup>12</sup> OWCP’s procedures recognize that forfeiture is a penalty and, as a penalty provision, it must be narrowly construed.<sup>13</sup> In OWCP’s regulations, “knowingly” is defined as: “with knowledge, consciously, willfully or intentionally.”<sup>14</sup>

In the January 25, 2017 decision, OWCP’s hearing representative did not provide any discussion regarding whether, within the context of the forfeiture provision of 5 U.S.C. § 8106(b), appellant “knowingly” omitted or understated earnings. To meet this burden, OWCP is required

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<sup>7</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5c(3)(e) (February 2013).

<sup>8</sup> See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

<sup>9</sup> Although counsel referenced a prerecoupment hearing with respect to the April 25, 2016 preliminary overpayment determination, there is no indication in the record that either he or appellant explicitly appealed the April 25, 2016 forfeiture determination.

<sup>10</sup> OWCP’s hearing representative provided discussion of appellant’s case under the headings “Fact and Amount of Overpayment,” “Fault,” and “Recovery.” He did not mention OWCP’s April 25, 2016 decision regarding forfeiture, or provide any indication that he was evaluating the sufficiency of that decision. OWCP’s hearing representative noted that counsel had referenced a Board case at the December 7, 2016 prerecoupment hearing (*Anthony V. Knox*, 50 ECAB 402 (1999)), but he did not provide any discussion of the forfeiture principles delineated in the case or apply these principles to the facts of the present case.

<sup>11</sup> 5 U.S.C. § 8106(b).

<sup>12</sup> See *T.P.*, Docket No. 17-1717 (issued April 11, 2018).

<sup>13</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.5 (May 2012).

<sup>14</sup> 20 C.F.R. § 10.5(n).

to examine closely appellant's activities and statements.<sup>15</sup> In the section of the decision entitled "Fact and Amount of Overpayment," the hearing representative briefly discussed some of appellant's activities with respect to a rental property, but he did not provide any discussion of how the specific language of the forms completed by appellant between 1997 and 2013 would have alerted him to a need to report rental income on these forms.<sup>16</sup> Therefore, the hearing representative did not make a reasoned finding in this section of the decision that appellant forfeited compensation for "knowingly" omitting or understating earnings under the forfeiture provision of 5 U.S.C. § 8106(b).<sup>17</sup>

In the section of the January 25, 2017 decision entitled "Fault," the hearing representative did indicate the following: "The claimant knowingly failed to report his self-employment activity income on [EN1032] and [CA-8] forms. Consequently the claimant was at fault in the creation of the overpayment." However, he did not provide any explanation for this conclusory statement. As noted above, it is not enough to merely establish that there were unreported earnings when making a forfeiture determination, and the hearing representative did not explain in this or any other section of the decision of how appellant "knowingly" omitted or understated earnings within the meaning of the forfeiture provision of 5 U.S.C. § 8106(b).<sup>18</sup> Moreover, he made the above-noted statement in the context of determining whether appellant was at fault in the creation of an overpayment. The Board notes that the standard for finding fault in the creation of an overpayment is different than the standard for finding forfeiture of compensation for a given period.<sup>19</sup>

As the hearing representative failed to adequately discuss the sufficiency of OWCP's determination that appellant forfeited his right to compensation between September 23, 1997 and December 10, 2013, he did not adequately explain the basis for finding that an overpayment of compensation was created. For these reasons, OWCP has not adequately affirmed appellant regarding the specific reasons for its determination that he received a \$306,919.56 overpayment of compensation during a portion of that period.<sup>20</sup>

At present, appellant would not fully understand the reason for the disallowance of the benefit and the evidence necessary to overcome the defect of the claim.<sup>21</sup> Therefore, the case shall

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<sup>15</sup> See *Terry A. Geer*, 51 ECAB 168 (1999).

<sup>16</sup> The hearing representative merely noted that "for periods where the claimant failed to report rental income on OWCP forms he is not entitled to compensation."

<sup>17</sup> See *supra* notes 11 through 14.

<sup>18</sup> See *supra* note 12.

<sup>19</sup> Section 10.433(a) of Title 20 of the Code of Federal Regulations provides, in relevant part, that an individual will be found at fault in the creation of an overpayment if he or she made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect, failed to provide information which he or she knew or should have known to be material, or accepted a payment which he or she knew or should have known to be incorrect. 20 C.F.R. § 10.433(a). The Board further notes that, prior to making a finding of fault in the creation of an overpayment, an adequate finding should be made that an overpayment was in fact created.

<sup>20</sup> See *supra* notes 6 through 8.

<sup>21</sup> See *supra* note 7.

be remanded to OWCP for further development of appellant's claim, including the issuance of a *de novo* decision which contains adequate facts and findings regarding the above-described forfeiture and overpayment matters.<sup>22</sup>

**IT IS HEREBY ORDERED THAT** the January 25, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further action consistent with this order.

Issued: August 17, 2018  
Washington, DC

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

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

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

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<sup>22</sup> See *R.U.*, Docket No. 16-0027 (issued March 24, 2016) (remanding case to OWCP to issue a decision containing adequate facts and findings with respect to the fact and amount of an overpayment of compensation).