

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

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<b>T.G., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-0051</b>
	)	<b>Issued: August 20, 2019</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Marshfield, VT, Employer</b>	)	
_____	)	

*Appearances:*  
*Patricia K. Turley, Esq.,* for the appellant<sup>1</sup>  
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 9, 2018 appellant, through counsel, filed a timely appeal from a May 3, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the May 3, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedures* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether OWCP properly determined that appellant forfeited his entitlement to wage-loss compensation for the periods November 29, 2013 to July 7, 2014 and July 26, 2014 to June 25, 2015 as he knowingly failed to report employment activities and earnings, pursuant to 5 U.S.C. § 8106(b).

## **FACTUAL HISTORY**

This case has been previously before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 18, 2013 appellant, then a 44-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 12, 2013 he pulled muscles in his neck, shoulder, and upper back while in the performance of duty. OWCP accepted the claim for a sprain of the neck and left shoulder, a left superior glenoid labrum lesion, and a disorder of bursae and tendons in the left shoulder region.

On December 17, 2013 appellant filed a claim for compensation (Form CA-7) requesting wage-loss compensation for the period November 29 to December 13, 2013. The form advised him that he must report any and all earnings from employment, self-employment, or involvement in a business enterprise for which he received a salary, wages, income, commissions, or payment of any kind during the period(s) claimed. Appellant signed the form and indicated that he had not performed work outside of his federal job for the period claimed.

Appellant additionally submitted CA-7 forms requesting wage-loss compensation for total disability for the periods November 29, 2013 to June 13, 2014 and July 26 through September 14, 2014. He indicated on the forms that he had not worked during the periods claimed.

OWCP paid appellant wage-loss compensation for total disability for the period November 29, 2013 to September 20, 2014 on the supplemental rolls.

In a July 7, 2014 Form EN1032, appellant advised that he had been self-employed for the preceding 15-month period as co-owner/manager of Hilltop Auto Body. He maintained that he had not participated in the business enterprise since his October 12, 2013 employment injury. Appellant indicated that he had not received pay or actual earnings from the business.

Appellant returned to part-time modified employment on September 26, 2014.<sup>5</sup> He submitted claims for compensation (Form CA-7) requesting wage-loss compensation for intermittent periods of disability from employment from October 7, 2014 to July 24, 2015.

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<sup>4</sup> Docket No. 16-1379 (issued August 4, 2017).

<sup>5</sup> From May 4 through September 20, 2014, appellant was paid compensation on the periodic rolls. Wage-loss compensation payments before and after this period were paid on the supplemental rolls pursuant to CA-7 forms filed by appellant.

Appellant indicated on the forms either that he had not worked during the period claimed or failed to respond to the question.

OWCP paid appellant compensation for intermittent time lost from work from September 21, 2014 until July 24, 2015.

In a case summary report covering January 30 to October 4, 2014, the employing establishment's Office of the Inspector General (OIG) advised that insurance companies had written checks to appellant or Hilltop Auto Body from October 2013 to March 2014. It provided supporting documentation, including estimates provided by Hilltop Auto Body to insurance companies, copies of payments made directly to him based on the estimates, and invoices from Hilltop Auto Body to customers listing him as the point of contact.

In an addendum dated December 10, 2014, covering the period October 5 to December 4, 2014, the OIG submitted interviews from witnesses identifying appellant as the owner of Hilltop Auto Body. It related that bank account statements established that he used a sole proprietorship account for Hilltop Auto Body with deposits for April through July 2014 totaling \$127,992.00. The OIG submitted evidence showing that Hilltop Auto Body deposited over \$29,000.00 in payments from March to May 2014 and \$127,992.00 from April through July 2014.

A 2013 Schedule C, Profit or Loss from Business tax form completed by appellant showed that Hilltop Auto Body had gross sales of \$217,861.00 and gross income of \$94,577.00. He listed a net loss on the form of \$31,638.00. Appellant identified himself on the form as a sole proprietor of Hilltop Auto Body. He responded "yes" to the question on the form of whether he materially participated in the operation of the business in 2013.

In a July 7, 2015 addendum, the OIG submitted deposit slips and checks made out to either appellant or Hilltop Auto Body dated July 16, 2014 to May 18, 2015 and invoices through June 2015. It provided a 2014 Schedule C tax form completed by him as the sole proprietor of Hilltop Auto Body showing gross sales of \$246,455.00 and gross income as \$112,604.00. Appellant responded "yes" to the question on the form of whether he materially participated in the business during that year. He claimed a net loss from the business of \$7,653.00.

By decision dated July 23, 2015, OWCP found that appellant had forfeited his entitlement to compensation for the period November 29, 2013 to June 25, 2015 because he knowingly failed to disclose his outside earnings and employment pursuant to 5 U.S.C. § 8106(b). It determined that he had failed to fully disclose his earnings and employment on a July 7, 2014 EN1032 form covering the period April 7, 2013 through July 7, 2014 and had failed to disclose employment on CA-7 forms covering the period July 26, 2014 through June 25, 2015.

On July 23, 2015 OWCP advised appellant of its preliminary determination that he had received a \$50,802.10 overpayment of compensation as he forfeited entitlement to compensation from November 29, 2013 through June 25, 2015 and that he was at fault in its creation.

On August 20, 2015 appellant requested a telephonic conference regarding the preliminary determination of overpayment. He challenged fact and amount of overpayment and the finding that he was at fault in its creation. Appellant asserted that he worked less than three or four hours per week performing managerial duties and had no earnings.

On October 5, 2015 appellant, through counsel, requested reconsideration of the July 23, 2015 forfeiture decision. In an accompanying September 18, 2015 statement, counsel argued that appellant had properly completed the CA-7 forms as he had not received a salary, wages, income, or other payments and reported his employment on the EN1032 form. She contended that his work was passive, that he spent four or five hours per week on managerial duties, and that his expenses were greater than his income. Counsel maintained that the investigative report demonstrated bias as it failed to provide complete information.

In a September 27, 2015 affidavit, appellant advised that he believed that he had no earnings. He maintained that he performed no repair work and had no taxable earnings.

In a May 3, 2016 memorandum of telephone conference regarding the preliminary overpayment determination, counsel advised that appellant had reported that he co-owned a business and asserted that his involvement was passive in nature. She also contended that his business operated at a loss and thus had not generated income.

By decision dated March 24, 2016, OWCP found that appellant had received an overpayment of compensation in the amount of \$50,802.10 from November 29, 2013 through June 25, 2015 as he forfeited his entitlement to compensation for this period. It further determined that he was at fault in creating the overpayment. OWCP instructed appellant to forward a check for the full amount of the overpayment as repayment.

Appellant appealed the March 24, 2016 overpayment determination to the Board.

By decision dated August 4, 2017, the Board affirmed in part and set aside in part the March 24, 2016 decision.<sup>6</sup> The Board found that appellant had received an overpayment of compensation, but that the case was not in posture for determination regarding the amount of the overpayment as the evidence was insufficient to support that he forfeited his entitlement to compensation for the period July 7 to 26, 2014. The Board noted that there was no EN1032 form or CA-7 form in the record covering this period. The Board determined that appellant had forfeited his entitlement to compensation for the periods November 29, 2013 through July 7, 2014 and July 26, 2014 through June 25, 2015 as he knowingly failed to report earnings or employment activities and thus had received an overpayment of compensation during these periods. The Board further found that he was at fault in the creation of the overpayment of compensation and thus not entitled to waiver of recovery of the overpayment.

On February 15, 2018 counsel telephoned OWCP regarding the status of appellant's request for reconsideration of the July 23, 2015 forfeiture decision.<sup>7</sup>

On March 7, 2018 OWCP requested that counsel again file her September 18, 2015 request for reconsideration and provide any additional arguments following review of the Board's August 4, 2017 decision.

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<sup>6</sup> *Supra* note 4.

<sup>7</sup> OWCP issued a January 19, 2018 preliminary overpayment determination finding that appellant had received an overpayment of wage-loss compensation in the amount of \$48,435.90 because he forfeited compensation for the periods November 29, 2013 to July 7, 2014 and July 26, 2014 to June 25, 2015.

On March 13, 2018 appellant, through counsel, resubmitted the September 18, 2015 reconsideration request. Appellant further submitted a November 26, 2016 arbitration decision finding that the employing establishment lacked just cause to remove him for failing to report his outside work to OWCP. The arbitrator modified the disciplinary action to a 30-day suspension with back pay as appropriate. She found that the record established that appellant had received financial benefit from work outside the employing establishment which he failed to report on forms, and thus found “just cause to discipline the grievant for misconduct.” The arbitrator determined, however, that the discipline was excessive as he had acknowledged his outside work on an EN1032 form and as the employing establishment had actual knowledge that he owned an auto body shop. The arbitrator found that appellant had failed to report his income, but without the intent to conceal his employment.

Counsel also submitted a December 15, 2016 letter in which she argued that the arbitrator had ruled favorably on some issues, including that appellant had not concealed his employment and that any earnings were minor compared with his salary from the employing establishment.

By decision dated May 3, 2018, OWCP vacated in part, modified in part, and affirmed in part its July 23, 2015 forfeiture determination. It indicated that it had reopened appellant’s claim for reconsideration of the forfeiture upon the expiration of the Board’s jurisdiction over the case. OWCP noted that, with his reconsideration request, he had submitted evidence previously reviewed by the Board in reaching its findings regarding the overpayment of compensation based on the forfeiture decision. It also indicated that appellant had submitted an arbitrator’s decision modifying his removal from the employing establishment for failing to report outside employment to OWCP to a 30-day suspension. OWCP found that the evidence supported that he knowingly failed to report employment earnings and activities from November 29, 2013 through July 7, 2014 and July 26, 2014 through June 25, 2015 and thus forfeited his entitlement to compensation for this period. It vacated its finding in the July 23, 2015 decision that appellant had forfeited entitlement to compensation from July 7 to 26, 2014 as there was no Form CA-7 or EN1032 covering that period. OWCP noted that he had to report earnings and employment activities even if his business operated at a loss or he did not receive a salary.

### **LEGAL PRECEDENT**

Section 8106(b) of FECA provides that an employee who “fails to make an affidavit or report when required or knowingly omits or understates any part of his earnings, forfeits his right to compensation with respect to any period for which the affidavit or report was required.”<sup>8</sup>

An employee, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he or she knowingly failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as

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<sup>8</sup> 5 U.S.C. § 8106(b).

a penalty provision, it must be narrowly construed.<sup>9</sup> The term knowingly is defined within OWCP's regulations as with knowledge, consciously, willfully, or intentionally.<sup>10</sup>

OWCP regulations define earnings from employment or self-employment as: (1) gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses and any offer 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.<sup>11</sup> 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.<sup>12</sup>

### ANALYSIS

The Board finds that appellant forfeited his entitlement to wage-loss compensation for the periods November 29, 2013 to July 7, 2014 and July 26, 2014 to June 25, 2015 as he knowingly failed to report employment activities and earnings.

Preliminarily, the Board notes that it is unnecessary to consider the evidence prior to the issuance of OWCP's March 24, 2016 decision as it reviewed that evidence in its August 4, 2017 decision. Based on its consideration of the evidence, the Board found that appellant had received an overpayment of compensation due to his forfeiture of his entitlement to compensation for the periods November 29, 2013 to July 7, 2014 and from July 26, 2014 to June 25, 2015 as he knowingly failed to report earnings and employment activities. Findings made based on evidence reviewed in prior Board decisions are *res judicata* absent further review and reconsideration by OWCP under section 8128 of FECA.<sup>13</sup>

In a statement dated September 18, 2015, appellant contended that he had properly completed the CA-7 forms, that his work was passive and consisted of managerial duties not exceeding four or five hours per week, and that his expenses from the business exceeded his income. He submitted a September 27, 2015 affidavit maintaining that he had not performed repair work, had no taxable income, and did not believe that he had earnings. Again, however, the Board previously considered these arguments in its prior decision, and thus the matter is *res judicata*.<sup>14</sup>

In a December 15, 2016 statement, appellant maintained that an arbitrator had found that he had not concealed his employment and that any earnings were minor when compared with his salary from the employing establishment. He submitted a November 26, 2016 arbitration decision. The arbitrator determined that the employing establishment lacked proper cause for removing appellant from employment based on his failure to report his outside work to OWCP. The

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<sup>9</sup> *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

<sup>10</sup> 20 C.F.R. § 10.5(n); *R.A.*, Docket No. 18-0406 (issued January 28, 2019).

<sup>11</sup> *Id.* at § 10.5(g).

<sup>12</sup> *Id.*

<sup>13</sup> *See C.B.*, Docket No. 19-0175 (issued May 8, 2019); *V.P.*, Docket No. 18-1815 (issued April 22, 2019).

<sup>14</sup> *J.F.*, Docket No. 18-1802 (issued May 20, 2019).

arbitrator found that he had received a financial benefit from outside employment which he had failed to report and that the employing establishment consequently had cause to issue discipline for misconduct. However, she modified the removal to a 30-day suspension with back pay as appropriate after finding that the removal was excessive given that the employing establishment had actual knowledge of his outside work and as he reported his work on an EN1032 form. The arbitrator determined that appellant had failed to report his income, but without the intent to conceal his employment. It is well established, however, that decisions of other federal agencies or governmental bodies are not dispositive to issues raised under FECA. Decisions made by such tribunals are pursuant to different statutes which have varying standards.<sup>15</sup>

On appeal counsel asserts that appellant disclosed his employment activities, that he had not earned income from employment, and that the forfeiture decision violated his right to due process. As discussed, however, he knowingly failed to report earnings during the period in question and thus forfeited his right to compensation for the periods November 29, 2013 to July 7, 2014 and July 26, 2014 to June 24, 2015.<sup>16</sup> Further, regarding appellant's due process claim, as an administrative body the Board does not have jurisdiction to review a constitutional claim.<sup>17</sup>

### **CONCLUSION**

The Board finds that appellant forfeited his entitlement to wage-loss compensation for the periods November 29, 2013 to July 7, 2014 and from July 26, 2014 to June 25, 2015 as he knowingly failed to report employment activities and earnings pursuant to 5 U.S.C. § 8106(b).

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<sup>15</sup> See *C.S.*, Docket No. 16-1784 (issued May 7, 2018); *F.M.*, Docket N. 15-1869 (issued May 4, 2016).

<sup>16</sup> See *M.O.*, Docket No. 18-0686 (issued January 25, 2019).

<sup>17</sup> See *Woodruff v U.S. Department of Labor*, 954 f2d 634 (11<sup>th</sup> Cir. 1992); see also *C.D.*, Docket No. 17-1915 (issued February 21, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 2019  
Washington, DC

Christopher J. Godfrey, 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