

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

R.A., Appellant)	
)	
and)	Docket No. 18-0406
)	Issued: January 28, 2019
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE, Washington, DC,)	
Employer)	
)	

Appearances:
Appellant, pro se
No appearance, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 18, 2017 appellant filed a timely appeal from a November 3, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly determined that appellant forfeited his right to compensation for the period December 21, 2013 to March 21, 2015 because he knowingly failed to report employment activities and earnings.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 26, 2013 appellant, then a 45-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that, on February 13, 2013, he sustained a back injury when he was filling potholes while in the performance of duty. He reported that he was about to enter his truck when he stepped on leaves which were covered by a large rock, lost his balance and fell backwards onto a boulder, injuring his back. OWCP accepted the claim for sprain of back, thoracic region.²

Appellant stopped work on February 14, 2013 and did not return. OWCP paid him appropriate wage-loss compensation on the supplemental rolls beginning April 1, 2013 and placed him on the periodic rolls, effective August 24, 2014.

On February 24, 2015 OWCP provided appellant with Forms EN1032 to complete regarding his earnings and employment activity for the preceding 15-month period. The form advised that appellant must report all employment for which he received a salary, wages, income, sales commissions, piecework, or any payment of any kind, and that he must also report self-employment or involvement in any business enterprise in the past 15 months. The form contained certification clauses which informed him of the consequences of inaccurately reporting his employment activities, such as being subjected to criminal penalties and losing the right to receive workers' compensation.

In an EN1032 form signed on March 21, 2015, appellant responded "no" with respect to any employment or involvement in a business enterprise during the past 15 months.

In the employing establishment's Office of Inspector General (OIG) investigative activity report dated November 13, 2015, D.N. reported that he and W.R., serving as OIG special agents, conducted a telephonic interview with appellant regarding possible false claims for workers' compensation. D.N. reported that, during the interview, appellant informed him that he drove buses part time for Haymarket Transportation, Inc. (Haymarket) from 2007 to April or May 2015. He reported that appellant declared his income from Haymarket for April or May 2015 and believed that he also claimed other periods in the past. Appellant stated that his supervisor was

² The Board notes that appellant also has the following accepted claims:

Appellant filed a Form CA-1 for a December 18, 2009 injury when he was involved in a motor vehicle accident while in the performance of duty after another vehicle crossed the center line and struck his vehicle head on. OWCP accepted the claim for sprain of back thoracic region under File No. xxxxxx503.

Appellant filed a notice of recurrence (Form CA-2a) alleging a back injury on August 3, 2010 when attempting to pull a sign post out of the ground. OWCP accepted the claim for sprain of back lumbar region as a new traumatic injury, under File No. xxxxxx378.

Appellant filed another Form CA-1 for an April 4, 2012 injury when he injured his back while shoveling and raking dirt to repair a road. OWCP accepted the claim for sprain of back lumbar region and sprain of back thoracic region under File No. xxxxxx653.

On July 30, 2014 OWCP has administratively combined File Nos. xxxxxx653, xxxxxx503, xxxxxx378, and xxxxxx653, with the latter serving as the master file.

aware that he was driving part time for a company and never expressed any concerns with his outside employment. He reported that no one informed him that there was a conflict between driving buses for Haymarket and his workers' compensation claim.

In an EN1032 form signed on February 22, 2016, appellant indicated that he drove buses for Haymarket from April 13 to 19, 2015, and three days in May 2015. He reported wages of \$14.00 an hour with earnings totaling \$1,472.00 for the entire year.

In a May 17, 2016 letter, the employing establishment's OIG informed OWCP that it had conducted an investigation into appellant after it was alleged that he may have been involved in a workers' compensation fraud scheme. The investigation revealed that appellant was employed by a private sector transportation company while claiming FECA workers' compensation with the employing establishment. It noted that he did not report his work status on the annual EN1032 forms until February 19, 2016. OIG requested OWCP issue a forfeiture determination based on appellant's nondisclosure of his employment activity. It provided a copy of his March 21, 2015 EN1032 form, a November 13, 2015 report summarizing its investigatory interview of him, a January 6, 2016 Form EN1032 document review, and a January 27, 2016 summary report of the investigation.

In a January 6, 2016 OIG Form EN1032 document review, agent D.N. reported that appellant's signed March 21, 2015 Form EN1032 stated that he did not work for any employing establishment during the past 15 months. The agent further stated that, during appellant's November 21, 2015 interview, he informed them that he was employed part time by Haymarket from 2007 until April or May 2015. Appellant reported that his spouse was his then-representative and submitted his workers' compensation paperwork on his behalf.

OIG provided a January 27, 2016 summary report which determined that appellant worked in the private sector while also in receipt of FECA benefits during the entire period of his workers' compensation claim spanning from April 2013 to March 2015. During a telephonic interview, appellant admitted that he had driven buses for Haymarket part time from 2007 to 2015. He stated that his wife submitted OWCP paperwork on his behalf and that he had declared his most recent period of employment with Haymarket. Appellant believed that he had reported all other periods of employment. OIG reported that his EN1032 form, signed on March 21, 2015, indicated that he did not work for any employing establishment during the past 15 months.

By decision dated July 26, 2016, OWCP found that appellant forfeited his compensation from December 21, 2013 to March 21, 2015 based on his failure to report earnings while receiving compensation for total disability.³ It found that he knowingly failed to report his earnings from Haymarket when he was employed for the company from 2007 through April or May 2015.

³ The Board notes that, on October 29, 2015, OWCP notified appellant of a proposal to terminate his wage-loss compensation and medical benefits because his work-related injuries and disability had resolved. By decision dated February 23, 2016, OWCP terminated his wage-loss compensation and medical benefits, effective February 19, 2016, finding that the medical evidence of record established that he no longer had any residuals causally related to the accepted work-related conditions or continued disability as a result of the February 13, 2013 work injury.

OWCP referenced appellant's EN1032 form dated March 21, 2015, which certified that he did not work for any employing establishment during the past 15 months.

By separate decision dated July 26, 2016, OWCP preliminarily determined that an overpayment of compensation in the amount of \$45,425.19 was created due to the forfeiture of compensation for the period December 21, 2013 through March 21, 2015. It further found that appellant "appeared to be" at fault in the creation of the overpayment. OWCP informed him of his rights with regard to further review and instructed him to complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation within 30 days.

In an appeal request form postmarked on August 26, 2016, appellant contested the July 26, 2016 forfeiture decision and requested an oral hearing before an OWCP hearing representative.

In an overpayment action request postmarked on August 26, 2016, appellant disagreed with the fact and amount of overpayment and requested a prerecoupment hearing.

By decision dated September 13, 2016, an OWCP hearing representative denied appellant's request for a hearing regarding the forfeiture decision, finding that his request was not made within 30 days of the July 26, 2016 decision. The hearing representative further determined that the issue in the case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

By separate decision dated September 13, 2016, an OWCP hearing representative denied appellant's request for a prerecoupment hearing, finding that his request was not made within 30 days of the July 26, 2016 preliminary overpayment decision.

On October 28, 2016 appellant requested reconsideration of the forfeiture decision. He contended that his compensation from December 21, 2013 through March 21, 2015 should not be forfeited because he was not employed by Haymarket during that time.

An October 21, 2016 letter provided by Haymarket reported that appellant had been on the contractor roster for Haymarket as a driver contractor since November 2005. However, appellant did not actually work between the dates of December 21, 2013 and March 21, 2015.

By decision dated January 19, 2017, OWCP denied modification of its July 26, 2016 forfeiture decision. It found that the evidence of record was insufficient to support that appellant did not receive payment from Haymarket during the period December 21, 2013 through March 21, 2015 while also receiving FECA compensation benefits.

By separate decision dated January 19, 2017, OWCP finalized the preliminary overpayment determination, finding that appellant was overpaid in the amount of \$45,425.19 from December 21, 2013 through March 21, 2015. It further found that he was at fault in the creation of the overpayment because he knew or should have known that he was required to complete the

EN1032 form accurately and failed to state that he was employed while receiving compensation on the periodic rolls. OWCP determined that the entire overpayment was due and payable in full.⁴

On February 22, 2017 appellant requested reconsideration of the January 19, 2017 forfeiture decision.

In a February 18, 2017 statement, appellant reported that both his 2013 Internal Revenue Service (IRS) wage and tax statement (Form W-2) and tax return showed that none of his 2013 wages were from Haymarket. He reported that his 2014 IRS tax return, along with his spouse's Statement of Annuity form (1099-R), showed that her income was the sole income for 2014, which established that he was not employed by Haymarket during that period. Appellant stated that his 2015 miscellaneous income form (1099-MISC) from Haymarket showed that he earned \$1,472.00 for the entire year from the private-sector employment. He explained that he did not earn income from Haymarket during the period December 21, 2013 through March 21, 2015, and that the \$1,472.00 earned occurred later in 2015.

In support of his claim, appellant submitted his 2013 W-2 from the Department of the Interior reflecting wages amounting to \$15,126.07. He also submitted a 2013 Department of the Interior W-2 for his wife reflecting wages amounting to \$29,479.35. The remaining information on the 2013 W-2 statements were redacted. A joint IRS tax return for 2013 was submitted for appellant and his wife. Wages were noted as \$44,605.00 and adjusted gross income amounted to \$61,505.00. The tax return was stamped "preview copy, do not file." The information on the remainder of the form was redacted. A redacted 2014 statement of annuity 1099-R form reflected that appellant's spouse received \$33,386.80 for disability payment. A 2014 joint IRS tax return reflected wages of \$33,387.00 with an adjusted gross income amounting to the same. The remainder of the document was redacted. In a 2015 Haymarket Miscellaneous Income form (1099-MISC), appellant earned \$1,472.00 for nonemployee compensation.

By decision dated May 22, 2017, OWCP denied modification of its July 26, 2016 forfeiture decision. It noted that the evidence submitted was redacted, the tax returns were not official copies, and the 2015 form 1099-MISC from Haymarket did not provide dates to indicate whether the income was earned after March 21, 2015.

On July 26, 2017 appellant requested reconsideration of the May 22, 2017 decision. In an accompanying statement, he noted submission of IRS wage and income transcripts for 2013, 2014, and 2015, none of which were redacted. Appellant reported that, from January to December 2013, he earned \$15,126.00 from the Department of the Interior. From January to December 2014, he earned \$71.00 from the Department of the Interior. From January to December 2015, appellant earned \$1,472.00 from Haymarket which was earned after March 2015.

A 2013 IRS Form W-2 wage and tax statement printout for appellant revealed his employing establishment as the Department of the Interior with wages amounting to \$15,126.00. A 2014 IRS form W-2 wage and tax statement printout for him revealed his employing

⁴ On February 17, 2017 appellant contested the overpayment decision and requested a prerecoupment hearing. By decision dated March 20, 2017, an OWCP hearing representative notified him that the final January 19, 2017 overpayment decision was not subject to the hearing provision of 5 U.S.C. § 8124(b).

establishment as the Department of the Interior with wages amounting to \$71.00. A Haymarket report for the period January through December 2015 indicated that appellant received a May 1, 2015 check for 56.5 hours of work, a May 15, 2015 check for 17.25 hours of work, and a June 26, 2015 check for 18.25 hours of work, amounting to \$1,472.00 in earnings for 2015.

By decision dated November 3, 2017, OWCP denied modification of its May 22, 2017 decision. It found that appellant's 2014 W-2 established that he earned \$71.00 from the Department of the Interior which substantiated that during the 15-month forfeiture period he received earnings that he did not report.

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 [or her] earnings, forfeits his [or her] right to compensation with respect to any period for which the affidavit or report was required.”⁵

Earnings from employment or self-employment means: (1) gross earnings or wages before any deductions 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.⁶ 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 duties.⁷

In order to establish that a compensationner should forfeit the compensation received for the periods covered by completed EN1032 forms, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.⁸ The language on EN1032 forms is clear and unambiguous in requiring a claimant to report earnings for the previous 15 months from any employing establishment, 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.⁹

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. It is not enough to merely establish that there were unreported earnings or employment. OWCP procedures recognize that forfeiture is a

⁵ *Id.* at § 8106(b).

⁶ 20 C.F.R. § 10.5(g).

⁷ *Id.*

⁸ *Robert R. Holmes*, 49 ECAB 161 (1997).

⁹ *B.T.*, Docket No. 09-2190 (issued August 6, 2010).

penalty,¹⁰ and as a penalty provision, it must be narrowly construed.¹¹ In its regulations, “knowingly” is defined as: “with knowledge, consciously, willfully, or intentionally.”¹² OWCP has the burden of proof to establish that a claimant, either with knowledge, consciously, willfully, or intentionally, failed to report earnings or employment activities.¹³ Its procedures provide that an OWCP forfeiture decision should specifically discuss the evidence which supports that the claimant knowingly failed to report earnings or employment.¹⁴ To meet its burden of proof to establish forfeiture, OWCP is required to examine closely the employee’s activities and statements. It can meet this burden of proof in several ways, including by appellant’s own admission to OWCP that he failed to report employment or earnings which he knew he should report.¹⁵

OWCP’s implementing regulations provide:

“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.”¹⁶

The Board has held that OWCP may not base its application of the forfeiture provision strictly on conclusions drawn in an investigation; rather, the evidence of record must establish that the claimant has had unreported earnings from employment which were knowingly not reported.¹⁷ In FECA Bulletin No. 83-7, OWCP noted that an investigative report showing that a claimant has had unreported earnings from employment must be used in conjunction with other evidence of record in order to properly find a forfeiture of compensation.¹⁸

ANALYSIS

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

In finding that appellant forfeited compensation, OWCP relied on a January 27, 2016 investigative activity report produced by the employing establishment’s OIG which concluded that

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

¹¹ *Christine P. Burgess*, 43 ECAB 449 (1992).

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

¹³ *Billy J. McCamey*, Docket No. 00-2725 (issued June 11, 2002).

¹⁴ *See supra* note 10 at Chapter 2.1402.8d.

¹⁵ *Harold F. Franklin*, 57 ECAB 387 (2006).

¹⁶ 20 C.F.R. § 10.529.

¹⁷ *Antonia J. Giunta*, 53 ECAB 370, 377 (2002); *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

¹⁸ FECA Bulletin No. 83-07 (March 31, 1984).

he worked in the private sector for a transportation company while also in receipt of FECA benefits during the 15-month period December 21, 2013 to March 21, 2015, covered by the EN1032 form he signed on March 21, 2015. The investigation relied on appellant's November 13, 2015 telephonic interview where he admitted that he had driven buses for Haymarket part time from 2007 to 2015. OIG determined that he failed to disclose these earnings on his March 21, 2015 EN1032 form which stated that he did not work for any employing establishment during the preceding 15 months. It noted that appellant did not report his work status on the annual EN1032 form until February 19, 2016. Based on the November 13, 2015 telephonic interview and summary therefrom, and the March 21, 2015 EN1032, OWCP determined that he knowingly misrepresented his employment and earnings from Haymarket, subjecting him to forfeiture of his compensation for the period December 21, 2013 to March 21, 2015.

The Board finds that OWCP did not present sufficient evidence to support its determination that appellant was employed by Haymarket during the forfeiture period in question. In the November 13, 2015 OIG memorandum, agent D.N. merely summarized the telephonic interview conducted with appellant, reporting that appellant informed him that he drove buses part time for Haymarket from 2007 to April or May 2015. OWCP relied on this interview summary to determine that appellant forfeited his right to compensation during the December 21, 2013 to March 21, 2015 period in question. The Board notes that the record does not contain any transcript detailing the questions agent D.N. asked of appellant as the interviewee, or the actual responses made by him. There is no individual statement signed by appellant as the party questioned.

In *Claudia J. Thibault*,¹⁹ the Board found that OWCP relied only upon a memorandum in which an agent with the employing establishment's OIG memorialized a telephone interview with a witness who commented on the employee's activities in finding forfeiture. The Board noted that a special agent wrote the memorandum instead of the person interviewed. The Board determined that this was insufficient evidence to outweigh the employee's testimony that she did not have earnings.

In the case of *R.W.*,²⁰ the Board found that OWCP based its forfeiture determination on a memorandum in which a special agent from the employing establishment's OIG provided summaries of interviews conducted with the employee and several witnesses. The memorandum did not specify the actual questions asked of the witnesses or contain the actual answers provided. There was nothing signed by any of the individuals attesting to the accuracy of the information provided. The Board found that the evidence was insufficient to support the forfeiture decision.

Similarly, in *R.M.*, the Board found that OWCP relied heavily on interview summaries conducted by the employing establishment's OIG without the benefit of detailed documentation reflecting the actual questions asked, answers provided, or attestations establishing the accuracy of the information. The Board found that this evidence was insufficient to support the forfeiture decision. The Board further explained that a number of the individuals interviewed by investigating agents produced signed statements in which they disputed the characterization of their statements as reported in OIG memorandum. Moreover, the Board found that the evidence

¹⁹ 40 ECAB 836 (1989).

²⁰ Docket No. 09-1607 (issued July 26, 2010).

of record failed to clearly show that appellant had employment or earnings during the periods of forfeiture, explaining that, while the record contained checks made out to him, in most cases there was no indication for what purpose the checks were written.²¹

The facts and the circumstances in the present case, are similar to those in *Thibault*, *R.W.*, and *R.M.* given the fact that, in finding periods of forfeiture, great emphasis was placed on interview summary contained in an investigative memorandum without the benefit of detailed documentation confirming the accuracy of the interview summary contained therein.²²

In this instance, similar to *R.M.*, appellant disputed the characterization of his statement provided in the interview as reported in OIG memorandum which indicated that he was employed by Haymarket during the period in question.²³ Following OWCP's forfeiture decision, he asserted that although he worked part time for Haymarket from 2007 to 2015, he was not employed by the company from December 21, 2013 through March 21, 2015. Appellant went on to explain that he worked for the company in April and May 2015, subsequent to the forfeiture period in question, which he reported on his February 19, 2016 EN1032 form. He further submitted an October 21, 2016 letter from Haymarket in support of his assertion. The letter prepared by the accounting and human resources department at Haymarket, reported that appellant had been on the contractor roster for Haymarket as a driver contractor from November 2005 through the present. However, it clarified that he did not actually work between the dates of December 21, 2013 and March 21, 2015. Given the inadequacies of OIG interview summary, coupled with statements provided by appellant and Haymarket, the evidence failed to provide support that he had earnings or salary from Haymarket during the period in question.²⁴

The Board has held that OWCP may not base its application of the forfeiture provision strictly on conclusions drawn in an investigation, but rather the evidence of record must establish that the claimant had earnings from employment which were knowingly unreported.²⁵ The Board has further held that, in the absence of actual signed statements or clear documentation of work activities, there is inadequate evidence to establish that appellant had earnings or was engaged in employment activities which were required to be reported on the EN1032 forms he submitted.²⁶

Given the above, the Board finds that the forfeiture determination requires further development. OWCP must present sufficient evidence to establish that appellant misrepresented his earnings and employment activity which would subject him to the forfeiture provisions of FECA. The evidence should be clear in establishing that he earned income during the period December 21, 2013 through March 21, 2015, which he knowingly omitted or understated such that

²¹ Docket No. 13-2169 (issued August 26, 2014).

²² *Id.*

²³ *Id.*

²⁴ *E.L.*, Docket No. 11-1046 (issued August 22, 2012).

²⁵ *B.Y.*, Docket No. 11-1798 (issued July 24, 2012); *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

²⁶ *J.C.*, Docket No. 16-1058 (issued July 10, 2017).

he is subject to forfeiture under 5 U.S.C. § 8106(b). The case will be remanded to OWCP for proper findings and a *de novo* decision.²⁷

CONCLUSION

The Board finds that this case is not in posture for decision with respect to the forfeiture of compensation.

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2017 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: January 28, 2019
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

²⁷ *T.P.*, Docket No. 15-1016 (issued March 23, 2016).