

ISSUES

The issues are: (1) whether appellant forfeited her right to compensation for the period August 23, 2006 through November 24, 2010, because she knowingly failed to report her employment activities and earnings; (2) whether appellant received an overpayment of compensation in the amount of \$148,642.54; and (3) whether OWCP properly found that appellant was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the prior Board decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On February 9, 1990 appellant, then a 40-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging neck and back injuries due to performance of repetitive motions while casing, carrying, and delivering mail. OWCP accepted the claim for thoracic outlet syndrome and tendinitis of the right wrist. Appellant received intermittent wage-loss compensation. She stopped work and did not return as of August 7, 2001. OWCP paid appellant compensation benefits on the periodic rolls commencing June 16, 2002.

On EN1032 forms signed by appellant on November 23, 2007, November 28, 2008, and November 21, 2009, she indicated that, for the past 15 months, she had not worked, was not self-employed, and was not involved in any business enterprise. On the EN1032 form, signed on November 24, 2010, she indicated that since October 1, 2009 she had been added to a farm business license, but that she had not done any work for money or performed volunteer work worth money.

Additional information forwarded by appellant included partial Internal Revenue Service (IRS) income tax returns for the years 2006, 2007, and 2008, filed jointly by her and her husband.⁵ The form for tax year 2006 listed business income of \$3,025.00. No business income was listed for the years 2007 and 2008.

Special Agent S.H. of the Office of Inspector General at the employing establishment submitted an investigative report dated May 29, 2012. She indicated that on December 21, 2006 the employing establishment was informed that appellant was working at Willow Creek Ranch which was owned by her and her husband.⁶ S.H. reported that surveillance was conducted at Willow Creek Ranch commencing June 12, 2007 through November 5, 2009 by her, other special agents, workers' compensation analysts (WCA) with the employing establishment, and other investigators including a technical operations officer. She reported that she, along with other

⁴ Docket No. 16-1843 (issued September 14, 2017); Docket No. 14-0706 (issued June 10, 2015); Docket No. 13-1840, *Order Remanding Case* (issued September 24, 2013).

⁵ These included the first pages only.

⁶ The enterprise was also identified as Willow Creek Farm.

investigators had gone to Willow Creek Ranch on several occasions and purchased products from appellant and her husband. S.H. indicated that she purchased a farm tour and cheese-making class that was advertised on the farm's website, and these activities were conducted by appellant on July 7, 2008. During the farm tour, appellant reported that she made quilts for sale and sold cow shares. In November 2009, she and other special agent's visited the farm and purchased quilts, and she also indicated that she sold eggs, cheese, butter, pigs, and puppies. A number of exhibits were attached, including an investigation report dated July 12, 2007 in which WCA T.B. indicated that he went to the farm that day and appellant reported that she ran the farm and sold eggs, butter, and cheese. He related that he bought eggs from her that day.

In a lengthy report, T.S., a California district attorney investigator, noted meeting with S.H. to discuss appellant's business activities including surveillance of appellant, and forms she had signed. He attached a report of his interview he and S.H. had conducted with appellant on May 17, 2010 in which she indicated that she sold eggs and made quilts for sale, but indicated that they never made a profit. T.S. questioned appellant about her reporting on the EN1032 forms. He concluded that the case should be referred to the district attorney for review.

Additional exhibits included County of Calaveras business licenses for calendar years 2006, 2007, 2008, 2009, and 2010. These indicated that appellant, her husband, and her daughter were doing business as Willow Creek Ranch. Also included were brochures advertising Willow Creek Ranch that noted the availability of an overnight farm stay experience, day tours, and farm products, quilts, and other embroidered goods for sale. Copies of internet advertisements and bank statements were included. An excerpt from a book entitled "California's Women Farmers" included a description of appellant's work at Willow Creek Ranch.⁷

By decision dated April 5, 2013, OWCP found that appellant had forfeited compensation for the period August 23, 2006 to November 24, 2010. It explained that on OWCP EN1032 forms she signed on November 23, 2007, November 28, 2008, November 21, 2009, and November 24, 2010 she indicated that she was not self-employed or involved in a business enterprise for the past 15 months. OWCP listed evidence it relied on to find that appellant had operated a farm, on which she was self-employed, from at least 2007 and continuing.⁸ Citing section 8106(b) of FECA,⁹ it found that she knowingly omitted self-employment during the periods covered by the EN1032 forms.

OWCP issued a preliminary determination dated April 25, 2013 finding an overpayment of compensation in the amount of \$148,642.64 due to the fact that appellant had failed to disclose employment activities on EN1032 forms dated November 23, 2007, November 28, 2008, November 21, 2009, and November 24, 2010. It found in its April 25, 2013 preliminary determination that she had sold items at her farm and engaged in other employment activity, such

⁷ Also included was a report of an investigation conducted in 2004, an undated newspaper article describing appellant's FECA case, and a brochure prepared by appellant entitled "Tips for Effective Presentation of Your Injury Compensation or Personal Injury Case."

⁸ This included the investigative report prepared by SA S.H., 302 pages of bank deposits, information regarding the criminal complaint, permits, items sold and available for sale, and articles about appellant.

⁹ 5 U.S.C. § 8106(b).

as offering tours, while receiving FECA compensation. OWCP found that an overpayment had been created for the period August 23, 2006 (15 months prior to the November 23, 2007 EN1032) through November 24, 2010. According to the preliminary determination, appellant was overpaid for this period “because [appellant] did not report self-employment on EN1032 forms and knew or should have known [that] she was creating an overpayment.” OWCP also made a preliminary finding that she was at fault in creating the overpayment, as she should have known that her compensation was “subject to recovery” if she did not respond truthfully to the questions on the EN1032 forms. Appellant was provided an overpayment action request and an overpayment recovery questionnaire (Form OWCP-20). An overpayment worksheet indicates that she received \$148,642.64 in net wage-loss compensation for the period August 23, 2006 through November 24, 2010.

On April 30, 2013 appellant elected Office of Personnel Management (OPM) retirement benefits, effective June 20, 2013. OWCP terminated her wage-loss compensation effective that day.¹⁰

On May 29, 2013 appellant submitted an overpayment recovery questionnaire in which she reported monthly income of \$5,948.00 and monthly expenses of \$7,553.40. She provided a list of receipts and checks for the period January 3, 2007 to December 28, 2008 and an IRS income tax return form for the year 2007 different than that previously submitted. This indicated business net income of \$7,044.00.¹¹ Appellant maintained that she lived on a family farm that was not operated as a business.¹²

By decision dated May 29, 2013, OWCP found that appellant had not submitted evidence either refuting the amount of the overpayment or the finding of fault.

On August 5, 2013 appellant appealed to the Board. By order dated September 24, 2013, the Board noted that she had submitted additional evidence on May 29, 2013 which OWCP had not reviewed, set aside the May 29, 2013 OWCP decision, and remanded the case for proper review of the evidence of record.¹³

By decision dated January 24, 2014, OWCP found that an overpayment of compensation in the amount of \$148,642.54 had been created for the period August 23, 2006 through November 24, 2010, and that appellant was at fault in the creation of the overpayment because she should have known that she made an incorrect statement to a material fact on OWCP EN1032 forms. It noted that evidence provided by the employing establishment established that she was engaged in a business enterprise related to Willow Creek Ranch.

¹⁰ Appellant had accepted voluntary retirement from the employing establishment effective January 20, 2004.

¹¹ *Supra* note 5.

¹² At that time appellant was represented by The Vaughn Law Firm. The Vaughn Law Firm withdrew representation on June 25, 2013.

¹³ Docket No. 13-1840 (issued September 24, 2013).

On February 11, 2014 appellant again appealed to the Board. Oral argument was held on September 16, 2014. By decision dated June 10, 2015, the Board set aside the January 24, 2014 decision, finding that OWCP had failed to establish that appellant knowingly omitted or understated her employment activities. The Board explained that OWCP had not cited to 5 U.S.C. § 8106(b), or to any other authority when finding that the simple failure to provide information on the EN1032 forms results in forfeiture of compensation. In addition, the Board noted that section 8106(b) was a penalty provision, and must be strictly construed. Thus, as OWCP failed to adequately address the underlying basis for the declared overpayment of compensation, the Board remanded the case for proper findings with respect to the overpayment issues.¹⁴

By decision dated September 30, 2015, OWCP found that appellant had forfeited her compensation under 5 U.S.C. § 8106(b)(2). It determined that she had knowingly omitted or understated earnings because she was owner/operator of Willow Creek Ranch, a for-profit farm during the periods covered by the EN1032 forms she had signed on November 23, 2007, November 28, 2008, November 21, 2009, and November 24, 2010.

In a letter dated October 30, 2015, OWCP issued a preliminary determination that an overpayment of \$148,642.64 had been created, based on the forfeiture of compensation, and that appellant was at fault in creating the overpayment. A second preliminary determination was issued on November 16, 2015.

On November 25, 2015 appellant timely requested a prerecoupment hearing before a hearing representative of OWCP's Branch of Hearings and Review, contesting the occurrence of the overpayment and the finding of fault. She disagreed that the overpayment occurred because all charges against her were dismissed in court on January 9, 2012. Appellant described financial difficulties related to her husband's health and reported that their farm had been impacted by a wildfire. She also indicated that they filed for bankruptcy in 2008, and disputed the facts of S.H.'s investigative report, stating that she had not earned money from the sale of eggs, quilts, *etc.* and had not given any tours. Appellant maintained that she answered all questions truthfully on the EN1032 forms. She also submitted additional financial information including federal tax forms for the years 2006, 2007, 2008, 2009, and 2010, credit card and bank statements with some cancelled checks, Social Security Administration and her retirement annuity information, her husband's earnings statements, and a federal tax bill.

At the hearing, held on July 11, 2016, appellant testified that she was legitimately receiving FECA compensation. She maintained that she had not sold anything to anyone and was not operating a business. The hearing representative advised appellant to provide more detailed information regarding the claimed monthly expenditures. Appellant submitted nothing further.

By decision dated August 31, 2016, the hearing representative held that the "forfeiture is not the issue on appeal and is therefore assumed to be correct and valid, insofar as [appellant] has not, to date, contested it." She finalized the \$148,642.64 overpayment and the finding of fault. The hearing representative set repayment at \$500.00 per month.

¹⁴ Docket No. 14-0706 (issued June 10, 2015).

On September 20, 2016 appellant filed a timely appeal with the Board. By decision dated September 14, 2017, the Board found that the case was not in posture for decision. The Board found that OWCP's hearing representative should have addressed the forfeiture issue prior to adjudicating the overpayment issue and remanded the case for OWCP to properly review the forfeiture issue and resulting overpayment issues.¹⁵

Subsequently, a hearing was held before an OWCP hearing representative on November 17, 2017. Appellant testified that she never sold anything and did not charge for cheese-making classes. She discussed her monthly income and expenses.

By decision dated December 21, 2017, an OWCP hearing representative cited section 8106(b) of FECA and section 10.529 of OWCP regulations. She found that appellant had failed to report her farming activity such that OWCP could determine the value of her work and, as such, appellant forfeited entitlement to compensation for the period August 23, 2006 through November 24, 2010. The hearing representative further found appellant at fault in the creation of an overpayment in the amount of \$148,642.54 and set repayment at \$500.00 per month.

LEGAL PRECEDENT -- ISSUE 1

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.”¹⁶

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 characterization of the duties as a hobby, removes an unremunerated individual's

¹⁵ Docket No. 16-1843 (issued September 14, 2017).

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

responsibility to report the estimated cost to have someone else perform his or her duties.”¹⁷

The Board has further explained that in order to establish that a compensation claimant 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 or earnings.¹⁸ As forfeiture is a penalty, it is not enough merely to establish that there were underreported earnings from employment.

The term “knowingly” as defined in OWCP’s implementing regulations and Board precedent means “with knowledge; consciously; intelligently; willfully; and intentionally.”¹⁹ 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.”²⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant forfeited her right to compensation for the period August 23, 2006 through November 24, 2010, because she knowingly failed to report her employment activities and earnings.

The EN1032 forms sent by OWCP to appellant advised her of her responsibility to complete the forms and provide relevant information concerning her employment status and earnings during the 15-month period covered by the forms. These forms she signed noted that she must report all self-employment or involvement in business enterprises and specifically listed farming. This included such activities as overseeing a business of any kind, including a family business. The explicit language of the EN1032 forms clearly advised appellant that the nature of her farming business required her to report such activities.²¹

On EN1032 forms signed by appellant on November 23, 2007, November 30, 2008, and November 21, 2009, she indicated that for the previous 15 months she had not worked and was not self-employed or involved in a business enterprise. On the form she signed on November 24, 2010 she indicated that she had not worked for an employing establishment during the past 15 months, but wrote “yes,” that she had been involved in a business enterprise, continuing that in

¹⁷ 20 C.F.R. § 10.5(g).

¹⁸ *Robert R. Holmes*, 49 ECAB 161 (1997); *Id.* at § 10.5(n).

¹⁹ *B.K.*, Docket No. 17-0406 (issued December 12, 2017).

²⁰ 20 C.F.R. § 10.529.

²¹ *See supra* note 19.

October 2009 she was added to the farm's business license. Appellant maintained that the farm always lost money and that she had not performed work for money.

Appellant's signing of a strongly worded certification clause on each of the EN1032 forms demonstrates that she was aware of the materiality of her failure to report her employment activity.²²

Information forwarded by appellant included partial IRS income tax returns for the years 2006, 2007, and 2008, filed jointly by she and her husband. The form for tax year 2006 listed business income of \$3,025.00. One of the forms for the year 2007 indicated business net income of \$7,044.00. No business income was listed for the year 2008.

Regarding the forfeiture period of August 23, 2006 through November 28, 2008, on the EN1032 forms appellant signed on November 23, 2007 and November 28, 2008 she denied self-employment or involvement in a business enterprise and reported no earnings for the previous 15 months. However, as noted above, 2006 and 2007 tax returns of record support the fact that she had business income.

In the case *F.H.*, the Board found that reports on tax forms are persuasive evidence for the issue of forfeiture.²³ Although appellant also indicated that she had a business loss in income on the 2007 tax return, this would not obviate the reporting requirement that she was involved in a business enterprise.²⁴ The Board finds that her filing of tax returns advising the IRS of income generated by a business enterprise is persuasive evidence that she knew that she had income from employment and therefore finds that she knowingly failed to comply with the reporting requirements.²⁵

Moreover, the record contains additional documentary evidence indicating that appellant was involved in a business enterprise at Willow Creek Farm/Ranch. This includes County of Calaveras business licenses for calendar years 2006, 2007, 2008, 2009, and 2010 indicating that she, her husband, and her daughter, were doing business as Willow Creek Ranch, brochures advertising Willow Creek Ranch that noted the availability of an overnight farm stay experience, day tours, and farm products, quilts, and other embroidered goods for sale, copies of internet advertisements, and an excerpt from a book entitled "California's Women Farmers" which included a description of appellant's work at Willow Creek Ranch.²⁶ In the case of *T.P.*,²⁷ the Board explained that because a compensationner had misrepresented his duties and official

²² *Id.*

²³ *F.H.*, Docket No. 07-1379 (issued November 24, 2008).

²⁴ *See I.S.*, Docket No. 17-0897 (issued April 9, 2018).

²⁵ *Id.*

²⁶ Also included was a report of an investigation conducted in 2004, an undated newspaper article describing appellant's FECA case, and a brochure prepared by appellant entitled "Tips for Effective Presentation of Your Injury Compensation or Personal Injury Case."

²⁷ Docket No. 17-0717 (issued April 11, 2018).

responsibilities relative to his self-employment business enterprise on EN1032 forms, his compensation was subject to forfeiture.

As to the period November 28, 2008 to November 24, 2010, appellant testified at the July 11, 2006 hearing that she had never sold anything to anyone and reiterated this at the November 17, 2017 hearing. As discussed below, her sworn testimony is belied by the evidence of record. S.H. reported that in November 2009 special agent's visited the farm and purchased quilts and appellant indicated that she also sold eggs, cheese, butter, pigs, and puppies. A number of exhibits were attached, including T.S.'s report of his interview with appellant. T.S., a state of California investigator, reported that he and S.H. had met with appellant on May 17, 2010, at which time she indicated that she sold eggs and made quilts for sale. In a similar case, *P.H.*,²⁸ the Board explained that the evidence of record included documentation of appellant's daily activities at her family's snow cone stand. Appellant's misrepresentation of her activities on EN1032 forms required forfeiture of compensation.

The EN1032 forms require reporting employment activities even if no wages are earned. Appellant's activities included making and selling farm products, conducting farm tours, and conducting classes in farm activities such as cheese-making. Thus, as appellant misrepresented her employment activity, the Board finds that based on her omissions of employment on EN1032 forms for the period August 23, 2006 through November 24, 2010, she knowingly failed to report employment activity and forfeited her right to compensation for the period August 23, 2006 through November 24, 2010.²⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.³⁰ Section 8129(a) of FECA provides, in pertinent part, "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."³¹

Section 10.529 (b) of OWCP's implementing regulations provides as follows:

"(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."³²

²⁸ Docket No. 17-1362 (issued March 13, 2018).

²⁹ *Supra* note 19.

³⁰ 5 U.S.C. § 8102(b).

³¹ *Id.* at § 8129(a).

³² 20 C.F.R. § 10.529.

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of \$148,642.54.

As noted above, OWCP regulations provide that OWCP must declare an overpayment of compensation for any compensation already paid the period of a given forfeiture of compensation.³³ If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by a EN1032 form which he or she fails to report, the claimant is not entitled to compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.³⁴

The record includes a worksheet from OWCP showing that appellant received an overpayment of compensation in the amount of \$148,642.54 for the period August 23, 2006 through November 24, 2010. The Board has reviewed the calculations performed by OWCP, notes that she does not contest the amount of the overpayment, and thus finds that the overpayment was properly calculated and that she received an overpayment of compensation in the amount of \$148,642.54.³⁵

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”³⁶

Section 10.433(a) of OWCP’s regulations provides that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

³³ *Id.*

³⁴ *Id.*

³⁵ *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

³⁶ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

(2) Failed to provide information which he or she knew or should have known to be material; or

(3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).³⁷

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.³⁸

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

As discussed above, the record supports that appellant had employment activity for the periods, covered by EN1032 forms she had signed on November 23, 2007, November 28, 2008, November 21, 2009, and November 24, 2010.

The explicit language of the EN1032 forms demonstrate that appellant knew or should have known that the nature of her work activity at Willow Creek Farm would require her to report such employment activities and earnings on the forms.³⁹ Appellant's failure to accurately report her earnings and employment activities on the EN1032 forms also constitutes a failure to provide information which she knew or should have known to be material in the creation of the overpayment.⁴⁰ Consequently, she is not eligible for a waiver of recovery of the overpayment.

Lastly, the Board notes that its jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. Appellant elected OPM retirement benefits effective June 20, 2013 and OWCP terminated her wage-loss compensation that day. Thus, as she was not in receipt of wage-loss compensation benefits at the time of OWCP's decision, the Board lacks jurisdiction over OWCP's recovery of the overpayment.⁴¹

CONCLUSION

The Board finds that appellant forfeited her right to compensation for the period August 23, 2006 through November 24, 2010, because she knowingly failed to report her employment activities and earnings. The Board further finds that she received an overpayment of compensation

³⁷ 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

³⁸ *Id.* at § 10.433(b); *Duane C. Rawlings*, 55 ECAB 366 (2004).

³⁹ *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

⁴⁰ *See supra* note 19.

⁴¹ *See D.R.*, 59 ECAB 148 (2007) (with respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits under FECA).

in the amount of \$148,642.54. The Board also finds that OWCP properly found that appellant was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 25, 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