

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

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**M.G., Appellant**

**and**

**U.S. POSTAL SERVICE, STOCKYARD POST  
OFFICE, Chicago, IL, Employer**

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**Docket No. 20-0735  
Issued: October 23, 2020**

*Appearances:*

*Alan J. Shapiro, 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, Deputy Chief Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 17, 2020 appellant, through counsel, filed a timely appeal from a September 24, 2019 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.

**ISSUE**

The issue is whether OWCP properly determined that appellant forfeited her entitlement to wage-loss compensation for the period May 26, 2016 through January 20, 2017 as she knowingly failed to report employment activities and earnings, pursuant to 5 U.S.C. § 8106(b).

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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.

## **FACTUAL HISTORY**

On January 22, 2016 appellant, then a 53-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on December 23, 2015 she sustained an injury to her left foot when a shelf from an automated postal center fell on her left foot while in the performance of duty. She stopped work on January 23, 2016 and returned to modified-duty work on February 3, 2016. OWCP accepted her claim for displaced fracture of the second metatarsal bone of the left foot, and paid her wage-loss compensation on the supplemental rolls, beginning on May 4, 2016.

On July 5, 2016 appellant filed a claim for wage-loss compensation (Form CA-7) for intermittent dates of total and partial disability, beginning May 4, 2016, indicating that she was in a leave without pay (LWOP) status because there was no work available. Section 3 of the CA-7 form advised her that she must report any and all earnings from employment, self-employment, or involvement in a business enterprise for which she received a salary, wages, income, commissions, or payment of any kind during the period(s) claimed. Appellant checked a box marked “No” indicating that she had not performed work outside of her federal job for the period claimed on the form. The Form CA-7 also contains a warning that fraudulent concealment of employment or failure to report income may result in forfeiture of compensation benefits and/or criminal prosecution.

Appellant additionally submitted CA-7 forms requesting wage-loss compensation for intermittent periods of partial and total disability for the period June 30, 2016 through January 20, 2017. She indicated on the forms that she was in LWOP status and, thus, had not worked during the periods claimed.

OWCP paid appellant wage-loss compensation on the supplemental rolls for the claimed dates of disability from May 4, 2016 through January 20, 2017. On January 25, 2017 appellant accepted a part-time job offer as a limited-duty carrier.

In a July 13, 2018 case summary report, the employing establishment’s Office of the Inspector General (OIG) advised that appellant had failed to disclose her earnings as a Lyft and UBER driver and benefits from the Supplemental Nutrition Assistance Program (SNAP). The employing establishment’s OIG provided several Memorandum of Activity reports, which detailed the employing establishment’s OIG’s investigative activities, along with attachments that documented surveillance, internet research, and findings.

In a May 23, 2017 memorandum, an employing establishment OIG agent indicated that he had reviewed the amount of income reported by UBER, Lyft, and SNAP for appellant from June 2016 to February 2017 and calculated that appellant had received \$3,923.86 from UBER, \$751.69 from Lyft, and received \$3,213.00 in SNAP benefits.

In a sworn OIG statement dated April 4, 2017, appellant noted that she was driving for UBER and Lyft because OWCP had not paid her in a bi-weekly manner and had withheld her paychecks. She explained that she had to find a part-time job because she was not receiving any money and had dependents to support. Appellant reported that she did not know that she had to report this part-time income.

In an April 6, 2017 memorandum, an employing establishment OIG agent summarized his interview with appellant on that date. Appellant explained the difficulty that she had experienced in receiving compensation from OWCP. She indicated that she started driving for UBER and Lyft in August 2016 and stopped around November 2016. Appellant also noted that she had and was receiving public assistance to help take care of her household. The OIG agent reported that he read Section 7 of the CA-7 form and appellant indicated that she understood the section. Appellant explained that she did not report her income from UBER and Lyft or her supplemental public assistance because she was not operating outside of her medical restrictions and she did not think it was necessary.

OWCP received a February 27, 2017 letter from UBER in response to a subpoena. It noted that appellant's UBER account began on May 26, 2016 and provided the dates that she drove from June 11 through October 23, 2016.

OWCP also received a May 2, 2017 letter from Lyft, which indicated that it was providing information in response to a subpoena. It noted that appellant was approved as a driver on June 19, 2016, and provided her driver payouts from July 6, 2016 to February 1, 2017.

By decision dated March 28, 2019, OWCP found that appellant had forfeited her entitlement to compensation for the period May 26, 2016 through January 20, 2017 because she knowingly failed to disclose her outside earnings and employment, pursuant to 5 U.S.C. § 8106(b). It explained that she had knowingly failed to report earnings and employment activities when submitting CA-7 forms covering the period May 14, 2016 through January 20, 2017.<sup>2</sup>

On April 2, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review regarding the March 28, 2019 forfeiture decision. The telephonic hearing was held on July 17, 2019. Appellant testified that she did not know that she had to report her employment with UBER and Lyft because she was working within her physical restrictions.

By decision dated September 24, 2019, an OWCP hearing representative affirmed the March 28, 2019 decision.

### **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 her earnings, forfeits his or her right to compensation with respect to any period for which the affidavit or report was required.<sup>3</sup>

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<sup>2</sup> On April 2, 2019 OWCP advised appellant of its preliminary determination that she had received a \$13,963.50 overpayment of compensation as she forfeited entitlement to compensation from May 26, 2016 through January 20, 2017 and that she was at fault in its creation. By decision dated July 26, 2019, OWCP finalized the preliminary overpayment determination in the amount of \$13,963.50 for the period May 26, 2016 through January 20, 2017. The July 26, 2019 overpayment determination is not before the Board as it was issued more than 180 days from the date of docketing of the current appeal. *See* 20 C.F.R. § 501.3.

<sup>3</sup> 5 U.S.C. § 8106(b).

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.<sup>4</sup> OWCP procedures recognize that forfeiture is a penalty,<sup>5</sup> and, as a penalty provision, it must be narrowly construed.<sup>6</sup> The term knowingly is defined within OWCP's regulations as with knowledge, consciously, willfully, or intentionally.<sup>7</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>8</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>9</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant forfeited her entitlement to wage-loss compensation for the period June 11, 2016 through January 20, 2017 as she knowingly failed to report employment activities and earnings, pursuant to 5 U.S.C. § 8106(b).

OWCP accepted appellant's claim for displaced fracture of the second metatarsal bone of the left foot and paid wage-loss compensation for partial and total disability on the supplemental rolls from May 4, 2016 to January 20, 2017.

According to a July 13, 2016 case summary report by the employing establishment's OIG, appellant had failed to disclose her earnings as a Lyft and UBER driver from June 2016 to January 2017. In a May 23, 2017 memorandum, an employing establishment OIG agent indicated that he had reviewed the income reported by UBER and Lyft for appellant from June 2016 to February 2017 and calculated that appellant had received \$3,923.86 in earnings from UBER and \$751.69 in earnings from Lyft. The employing establishment's OIG provided a May 2, 2017 letter from Lyft, which noted that appellant was approved as a driver on June 19, 2016 and provided her driver payouts from July 6, 2016 to February 1, 2017. It also submitted a February 27, 2017 letter from UBER, which indicated that appellant's UBER? account began on May 26, 2016, and provided the dates that she drove from June 11 through October 23, 2016.

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<sup>4</sup> *T.G.*, Docket No. 19-0051 (issued August 20, 2019); *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

<sup>6</sup> *Christine P. Burgess*, 43 ECAB 449 (1992).

<sup>7</sup> 20 C.F.R. § 10.5(n); *R.A.*, Docket No. 18-0406 (issued January 28, 2019); *Anthony A. Nobile*, 44 ECAB 268 (1992).

<sup>8</sup> *Id.* at § 10.5(g).

<sup>9</sup> *Id.*

The Board finds that the evidence of record establishes that appellant received earnings from employment as a driver for Lyft and UBER during the period June 11, 2016 to February 1, 2017 and failed to report her employment and earnings on CA-7 forms she had filed between July 5, 2016 and January 20, 2017. Accordingly, the Board finds that OWCP properly found that appellant had forfeited her entitlement to compensation for the period June 11, 2016 through January 20, 2017 as she failed to report earnings from employment on the CA-7 forms covering this period.<sup>10</sup>

The Board further finds, however, that OWCP improperly determined that appellant had forfeited her entitlement to compensation for the period May 26 through June 10, 2016 because the evidence of record does not support that appellant was engaged in employment activity or received earnings during this period.<sup>11</sup> The February 27, 2017 letter from UBER demonstrates that the earliest record of appellant working as a driver was on June 11, 2016. Although the letter indicates that appellant's UBER account began on May 26, 2016, there is no evidence of record that appellant had any earnings or actually worked as a driver beginning May 26, 2016. 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 has had unreported earnings from employment, which were knowingly not reported.<sup>12</sup> Because the evidence of record fails to establish that appellant had any earnings from May 26 through June 10, 2016, there can be no finding that she "knowingly" failed to report earnings or employment activities during that period. Therefore, OWCP did not properly invoke the penalty provision under 5 U.S.C. § 8106(b) to find forfeiture of appellant's entitlement to compensation for the period May 26 through June 10, 2016.

### CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited her entitlement to wage-loss compensation for the period June 11, 2016 through January 20, 2017, pursuant to 5 U.S.C. § 8106(b). The Board also finds, however, that OWCP improperly determined that appellant forfeited her entitlement to wage-loss compensation for the period May 26 through June 10, 2016.

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<sup>10</sup> See *G.Z.*, Docket No. 16-0892 (issued May 19, 2017); see also *E.V.*, Docket No. 15-0803 (issued October 15, 2015).

<sup>11</sup> See *L.B.*, Docket No. 15-1648 (issued September 18, 2017).

<sup>12</sup> *R.M.*, Docket No. 13-2169 (issued August 26, 2014); *B.Y.*, Docket No. 11-1798 (issued July 24, 2012); *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 24, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part.

Issued: October 23, 2020  
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board