

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

J.O., Appellant

and

**DEPARTMENT OF COMMERCE, CENSUS
BUREAU, Philadelphia, PA, Employer**

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**Docket No. 20-0792
Issued: September 24, 2020**

Appearances:
Capp P. Taylor, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 12, 2019 appellant, through counsel, filed a timely appeal from a March 8, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from OWCP's last merit decision, dated September 18, 2018, to the filing of

¹ 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.

² Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated September 15, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-1554 (issued September 15, 2020).

this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 14, 2010 appellant, then a 33-year-old regional technician, filed a traumatic injury claim (Form CA-1) alleging that on January 6, 2010 he experienced neck, right upper arm, and right shoulder soreness when a flagpole hit him while in the performance of duty. On May 26, 2010 appellant underwent cervical discectomy surgery and stopped work. He returned to part-time limited-duty work on July 18, 2010. OWCP accepted his claim for intervertebral disc disorder with myelopathy and cervical region herniated disc at the C4-5 level.

On October 26, 2010 appellant stopped work because the employing establishment could no longer accommodate his work restrictions. OWCP paid him wage-loss compensation for total disability and placed him on the periodic rolls, effective February 13, 2011.

On November 6, 2013 OWCP received a copy of a September 30, 2013 job offer for a part-time private sector manager position with Baltimore Residential. In a handwritten notation, appellant indicated that he had accepted the position and that he would start on November 17, 2013.

On January 13, 2014 appellant completed and signed an EN1032 form.⁴ In response to the question of whether he had worked for an employer for the past 15 months, he reported "Yes." Appellant indicated that he began working for the private sector employer as of November 17, 2013 and described his work as providing "miscellaneous administrative support." He also responded "Yes" to the question of whether he was self-employed or involved in any business or enterprise in the past 15 months. Appellant explained that he had owned rental houses since 2006 and described his work or business involvement as depositing rent, paying mortgage, and arranging for repairs, if needed. He noted his rate of pay and earnings as zero dollars.

The certification clause for the EN1032 form included the following warning: "I know that fraudulently concealing or failing to report income or other information in claiming payment or benefit under FECA may result in the forfeiture of compensation for the period covered by this

³ 5 U.S.C. § 8101 *et seq.*

⁴ The EN1032 form indicated that a claimant was to report all self-employment or involvement in business enterprises, even if the activity was part-time or intermittent, or was performed for a family business and report any work or ownership interest in any business enterprise, even if the business lost money, or if profits or income were reinvested or paid to others.

form and may also result in a civil action against me for damages under the False Claims Act or other applicable laws.”⁵

On January 30, 2015 OWCP received an investigative report from the U.S. Department of Labor’s Office of Inspector General (OIG), which indicated that an investigation had revealed that appellant was involved in unreported business activity as the owner of Elle Remodeling, LLC and had unreported income associated with these activities. The report detailed that Elle Remodeling, LLC was performing construction work on private homes and that appellant had supervised that work. It related that in a November 25, 2013 interview with appellant, he explained that Elle Remodeling, LLC was “doing business as” Baltimore Residential and that he was on site twice a day until the project was completed.

By decision dated August 19, 2016, OWCP found that appellant had forfeited his wage-loss compensation for the period January 16, 2013 through January 13, 2014 because he knowingly failed to report his employment activity with Elle Remodeling, LLC on an EN1032 form. It noted that the forfeiture period covered the 15 months preceding the January 13, 2014 EN1032 form. OWCP determined that because appellant had knowingly failed to report earnings and employment activities with Elle Remodeling, LLC on the January 13, 2014 EN1032, he had forfeited his right to monetary compensation for the claimed period pursuant to 5 U.S.C. § 8106(b). It also determined that all compensation paid during the period would be considered an overpayment subject to recovery in accordance with 5 U.S.C. § 8129.⁶ On August 20, 2017 appellant, through counsel, requested reconsideration of the August 19, 2016 forfeiture decision. In a letter dated August 18, 2017, counsel argued that appellant was not the owner of Elle Remodeling and that appellant’s designation as a “resident agent” was not indicative of ownership or employment activities. He further argued that, in the EN1032 form, appellant reported his income from Baltimore Residential and indicated that he was a self-employed owner of residential houses. Counsel asserted that all income from Elle Remodeling was transferred to Baltimore Residential pursuant to their Operating Agreement. He contended that OWCP erroneously based its forfeiture decision purely on the OIG report even though there was no documentation that appellant received any earnings or wages.

By decision dated August 8, 2018, OWCP denied modification of the August 19, 2016 forfeiture decision.

⁵ By decision dated September 10, 2014, OWCP finalized the termination of appellant’s wage-loss compensation benefits, effective September 21, 2014, because the medical evidence of record established that appellant was no longer partially disabled due to his accepted January 6, 2010 work-related injury. Appellant filed multiple requests for reconsideration of that decision and OWCP subsequently upheld the termination of his wage-loss compensation in decisions dated January 5, 2015, April 1, 2016, January 18, 2017, and September 18, 2018. On March 11, 2019 he filed a timely appeal of the most recent September 18, 2018 decision before the Board, which is currently pending. The Clerk of the Appellate Boards assigned Docket No. 19-0850.

⁶ On August 19, 2016 OWCP issued a preliminary determination finding that appellant had received an overpayment of compensation in the amount of \$60,291.00 because he forfeited his right to compensation under 5 U.S.C. § 8106(b) for the period January 16, 2013 through January 13, 2014. It also found that he was with fault in the creation of the overpayment because he was aware or reasonably should have been aware that he was accepting compensation to which he was not entitled. By decision dated September 20, 2016, OWCP finalized the overpayment of compensation in the amount of \$60,291.00 for the period January 16, 2013 through January 13, 2014. It also found that appellant was at fault in the creation of the overpayment.

On December 11, 2018 appellant, through his representative, requested reconsideration. In a statement dated December 5, 2018, he described documents which he contends establishes that all of Elle Remodeling, LLC's income passed through to Baltimore Residential, that appellant had no ownership interest in Elle Remodeling, LLC, and that any work he performed was through Baltimore Residential, not Elle Remodeling, LLC, which he properly disclosed.

In a signed affidavit dated December 4, 2018, appellant described the contents of the attached exhibits. A document labeled "Exhibit A" indicated that Baltimore Residential was formed in 2004 to manage rental properties and oversee the purchase, renovation, and sale of investment properties. It reported that in 2008 Baltimore Residential decided to offer repair services to third parties under the name Baltimore Residential Construction. In 2009 the company name was changed to Elle Remodeling, LLC. It noted that appellant "began receiving a formal check in the amount of \$1,320.00 from Baltimore Residential for his involvement in their business." The document indicated that appellant sent OWCP a copy of his official job offer, which detailed that part of his duties for Baltimore Residential was to help with Baltimore Residential's "Elle Remodeling" dealings.

OWCP received a document titled "Operating Agreement: Elle Remodeling, LLC." Article I described that Elle Remodeling, LLC was being established for the purpose of allowing Baltimore Residential, LLC to provide repairs for residential homes. Article IV indicated that Elle Remodeling, LLC would be managed by its sole member, Y.O. It also related that Elle Remodeling, LLC would not directly employ staff and that all labor would be performed by subcontractors. Article IV further noted that Baltimore Residential, LLC would handle any and all administrative duties related to Elle Remodeling LLC and that any and all funds paid to Elle Remodeling, LLC would be transferred into the bank account for Baltimore Residential, LLC.

Appellant also resubmitted a printout from the Maryland Department of Assessments and Taxation, the September 30, 2013 job offer for Baltimore Residential Construction, LLC, and Part A of the EN1032 form wherein appellant indicated that he had worked for Baltimore Residential, LLC since November 17, 2013.

In a March 8, 2019 decision, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁷

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by

⁷ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁰ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹¹

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

Appellant's December 5, 2018 reconsideration request did not show that OWCP erroneously applied or interpreted a specific point of law. However, the Board finds that it did advance a new and relevant legal argument not previously considered. One of the arguments made by appellant's representative in the December 11, 2018 reconsideration request was that the work that appellant allegedly performed for Elle Remodeling, LLC was actually for Baltimore Residential, which he accurately reported in the January 13, 2014 EN1032 form. In an attached affidavit, appellant alleged that part of his duties for Baltimore Residential was to assist with Elle Remodeling, LLC's dealings. The Board finds that this argument relates to the underlying issue of whether OWCP properly forfeited his entitlement to wage-loss compensation because he knowingly failed to report employment activities and earnings. This is a relevant legal argument made for the first time on reconsideration. As appellant has advanced a legal argument relevant to his claim and not previously considered by OWCP, such argument warrants further merit review based on the second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹²

The Board finds that in support of his December 11, 2018 reconsideration request, appellant also submitted pertinent new and relevant evidence that was not previously considered. Appellant submitted the Operating Agreement for Elle Remodeling, LLC, which related under Article IV that Elle Remodeling, LLC would not directly employ staff and that Baltimore Residential, LLC would handle any and all administrative duties related to Elle Remodeling, LLC.

⁸ 20 C.F.R. § 10.606(b)(3); *see J.W.*, Docket No. 19-1795 (issued March 13, 2010); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁹ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). Chapter 2.1602.4b.

¹⁰ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹¹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹² *Supra* note 7; *see C.B.*, Docket No. 19-0866 (issued September 17, 2019); *see also D.M.*, Docket No. 16-1754 (issued January 10, 2018).

The Board finds that this document constitutes new evidence not previously considered by OWCP that addresses the relevant underlying merit issue of forfeiture. Consequently, the Board finds that OWCP improperly denied further review of the merits of the underlying forfeiture since appellant has submitted relevant and pertinent new evidence not previously considered.¹³

Accordingly, the Board finds that appellant has met the second and third above-noted requirements under 20 C.F.R. § 10.606(b)(3). Consequently, the Board finds that OWCP improperly denied merit review pursuant to 20 C.F.R. § 10.608.¹⁴ The case shall therefore be remanded to OWCP for further consideration of the merits of appellant's claim to be followed by an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 24, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

¹³ *Supra* note 7; *K.S.*, Docket No. 18-1022 (issued October 24, 2018).

¹⁴ *M.E.*, Docket No. 19-1298 (issued March 18, 2020)