



## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant forfeited his right to compensation for the period September 9, 2013 through October 2, 2015, pursuant to 5 U.S.C. § 8106(b)(2), because he knowingly failed to report his employment activities and earnings; (2) whether appellant received an overpayment of compensation in the amount of \$43,758.67 for the period September 9, 2013 through October 2, 2015 because he failed to provide information, which he knew or should have known to be material; and (3) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

## **FACTUAL HISTORY**

On February 25, 2013 appellant, then a 49-year-old letter carrier in transitional status, filed a traumatic injury claim (Form CA-1) alleging that on February 16, 2013 he sustained a low back strain when he slipped down a snowbank while in the performance of duty. He stopped work on February 18, 2013 and did not return. On April 18, 2013 OWCP accepted the claim for left-sided L4-5 disc bulge and lumbar radiculopathy. It paid appellant wage-loss compensation on the supplemental rolls, effective April 3, 2013, and on the periodic rolls, effective June 2, 2013.<sup>4</sup>

Appellant was required to submit information with respect to any outside employment activity on EN1032 forms. The forms instructed that he was to report any work for an employer, self-employment, or involvement in any business enterprise during the past 15 months. The certification clause on the Form EN1032 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 form and may also result in a civil action against me for damages under the False Claims Act or other applicable laws.”

Appellant completed yearly EN1032 forms from September 8, 2013 through September 26, 2017. On a Form EN1032 signed December 8, 2014, in response to the question of whether he had worked for an employer or been self-employed during the past 15 months, appellant reported “No.”

In a letter dated May 1, 2015, OWCP advised appellant that it proposed to suspend his wage-loss compensation and medical benefits as he failed to attend a scheduled medical examination on April 28, 2015. It subsequently determined that appellant had not attended the examination as the appointment notification had been mailed to an old address. OWCP continued to pay appellant wage-loss compensation benefits without interruption.

On a Form EN1032 signed October 2, 2015, in response to the question of whether he had worked for an employer or been self-employed during the past 15 months, he reported “No.”

On January 8, 2018 K.O. and B.M., special agents from the employing establishment’s Office of the Inspector General (OIG), interviewed appellant at a restaurant. Appellant informed them that, during the summer of 2015, he worked at a market in the Cape Cod area of

---

<sup>4</sup> Appellant was separated from the employing establishment on or before July 3, 2013.

Massachusetts, as he believed his wage-loss compensation had been suspended. He had also worked as a private investigator. Appellant asserted that he did not realize that he was required to report these periods of employment on EN1032 forms. He explained that at the time he completed the EN1032 forms, he had been “dealing with alcoholism and that his paperwork was in ‘real disarray.’” Appellant declined to provide a voluntary sworn statement.

On January 10, 2018 Assistant Special Agent, R.K., of the employing establishment’s OIG reported that appellant had worked as a private investigator for Central Connecticut Investigative Services from October 3 through 8, 2013, with earnings of \$1,974.00. From May 11 through July 12, 2015, appellant worked as a seafood clerk for Smithfield Market of Yarmouth Port, earning \$12.50 an hour, for total earnings of \$3,711.22. He had not reported this employment and earnings on EN1032 forms signed in 2014 and 2015. Appended to the investigative report are hiring documents and a November 4, 2013 paycheck in the amount of \$1,974.00 from Central Connecticut Investigative Services and 2015 federal W-2 forms and payroll records demonstrating that appellant earned \$3,711.22 at Smithfield Market.

By notice dated April 24, 2018 and finalized May 31, 2018, OWCP terminated appellant’s wage-loss compensation and medical benefits, effective June 24, 2018, based on April 5 and 20, 2018 reports by Dr. Christopher Rynne, a Board-certified orthopedic surgeon and second opinion examiner, who found that the accepted injury had ceased without residuals.

By decision dated December 27, 2018, OWCP found that appellant forfeited his compensation from September 9, 2013 through October 2, 2015. It found that he failed to report earnings from his employment at Central Connecticut Investigative Services on the Form EN1032 he had signed on December 8, 2014 and earnings from Smithfield Market on the Form EN1032 he had signed on October 2, 2015. OWCP further found that, as appellant “knowingly” failed to report his earnings, his wage-loss compensation was forfeited for the 15-month period prior to the date he signed the forms. It calculated that it had paid appellant \$43,758.67 in wage-loss compensation for the period September 9, 2013 through October 2, 2015.

OWCP issued a preliminary overpayment determination dated December 28, 2018, finding an overpayment of compensation in the amount of \$43,758.67 for which he was at fault, as it was created due to appellant’s failure to disclose earnings from his work as an investigator on the EN1032 form signed on December 8, 2014 and his earnings as a seafood clerk on the EN1032 form he had signed on October 2, 2015. It provided him with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a precouplement hearing.

In response, appellant, through counsel, submitted a January 24, 2019 letter, contending that he was without fault in creation of the overpayment as alcoholism and post-traumatic stress disorder (PTSD) prevented him from understanding his obligation to report outside earnings. He completed an overpayment action request on January 23, 2019, requesting that he make a decision on the issues of fault and waiver based on the written evidence of record. Appellant also submitted a completed Form OWCP-20 signed on January 23, 2019, and supporting documentation regarding his income, expenses, and assets. He listed: \$5,908.31 in monthly income; assets of \$25,586.14 in a checking account and \$20.00 in cash; monthly expenses of \$2,200.00 for rent; \$400.00 for food; \$250.00 for clothing; \$555.00 for utilities; \$2,085.30 for credit card repayment and attorney

fees, and \$2,529.33 for other expenses. Appellant reiterated that he did not understand the income reporting requirements at the time he completed the EN1032 forms due to alcoholism and PTSD.

By decision dated July 1, 2019, OWCP finalized its determination that an overpayment of compensation was created in the amount of \$43,758.67 for the period September 9, 2013 through October 2, 2015 because appellant failed to provide information, which he knew or should have known to be material. It further found him at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment, and required recovery of the overpayment in installments at the rate of \$500.00 a 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.”<sup>5</sup>

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 responsibility to report the estimated cost to have someone else perform his or her duties.”<sup>6</sup>

The Board has further explained that in order to establish that a compensationner 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.<sup>7</sup> As forfeiture is a penalty, it is not enough merely to establish that there were underreported earnings from employment.

---

<sup>5</sup> 5 U.S.C. § 8106(b); *C.W.*, Docket No. 18-1557 (issued June 25, 2019); *see also F.C.*, 59 ECAB 666 (2007).

<sup>6</sup> 20 C.F.R. § 10.5(g).

<sup>7</sup> *C.W.*, *supra* note 5; *Robert R. Holmes*, 49 ECAB 161 (1995); *id.* at § 10.5(n).

The term “knowingly” as defined in OWCP’s implementing regulations and Board precedent means “with knowledge, consciously, intelligently, willfully, and intentionally.”<sup>8</sup> 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.”<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant forfeited his right to compensation for the period September 9, 2013 through October 2, 2015 because he knowingly failed to report his employment activities and earnings.

The EN1032 forms sent by OWCP to appellant advised him of his responsibility to complete the forms and provide relevant information concerning his employment status and earnings during the 15-month period covered by the forms. These forms he signed noted that he must report all employment, self-employment, or involvement in business enterprises. The specific language of the EN1032 forms clearly advised appellant that the nature of his remunerated work as an investigator and seafood clerk required him to report such earnings and employment. Additionally, appellant’s signing of a certification clause on the EN1032 forms signed on December 8, 2014 and October 2, 2015 demonstrates that he was aware of the materiality of his failure to report his earnings and employment.<sup>10</sup>

Information forwarded by the employing establishment includes a January 8, 2018 OIG investigative interview in which appellant admitted working at a market and as a private investigator, and a January 10, 2018 investigative report with supporting documentation of appellant’s earnings and employment with Central Connecticut Investigative Services from October 3 through 8, 2013 and at Smithfield Market from May 11 through July 12, 2015.

Regarding the forfeiture period of September 9, 2013 through October 2, 2015, on the Form EN1032 appellant signed on December 4, 2018, he reported no employment activities or earnings during the prior 15 months. However, as noted above, appellant had earned \$1,974.00 as a private investigator working for Central Connecticut Investigative Services from October 3 through 8, 2013. On the Form EN1032 appellant signed on October 2, 2015, he also reported no employment activities or earnings during the prior 15 months. However, payroll records and federal tax forms obtained in the OIG investigation demonstrate that appellant earned \$3,711.22 from May 11 through July 12, 2015 as a seafood clerk for Smithfield Market. The Board, therefore, finds that, based on his omissions of employment on EN1032 forms for the period September 9, 2013 through October 2, 2015, he knowingly failed to report employment activity

---

<sup>8</sup> *C.W.*, *supra* note 5; *B.K.*, Docket No. 17-0406 (issued December 12, 2017).

<sup>9</sup> 20 C.F.R. § 10.529.

<sup>10</sup> *C.W.*, *supra* note 5.

and forfeited his right to compensation for the period September 9, 2013 through October 2, 2015.<sup>11</sup>

On appeal counsel contends that appellant's psychiatric and medical issues, as well as personal difficulties, prevented him from reporting his outside employment. The Board notes that appellant has not submitted evidence establishing that he was mentally incapacitated or otherwise incompetent to handle his affairs at the time that he signed the EN1032 form on December 8, 2014 and October 2, 2015.

### **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.<sup>12</sup> 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."<sup>13</sup>

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."<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant received an overpayment of compensation in the amount of \$43,758.67.

As noted above, OWCP's regulations provide that OWCP must declare an overpayment of compensation for any compensation already paid for the period of a given forfeiture of compensation.<sup>15</sup> If a claimant has any employment activity, including self-employment or involvement in a business enterprise, during a period covered by an Form 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.<sup>16</sup>

The record includes a compensation payment log and calculation from OWCP showing that appellant received an overpayment of compensation in the amount of \$43,758.67 for the period September 9, 2013 through October 2, 2015. The Board has reviewed the calculations

---

<sup>11</sup> *C.W.*, *supra* note 5.

<sup>12</sup> 5 U.S.C. § 8102(a).

<sup>13</sup> *Id.* at § 8129(a).

<sup>14</sup> 20 C.F.R. § 10.529.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

performed by OWCP and, thus, finds that the overpayment was properly calculated and that he received an overpayment of compensation in the amount of \$43,758.67.<sup>17</sup>

### **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.”<sup>18</sup>

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
- (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).”<sup>19</sup>

To determine if an individual was at fault in 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.<sup>20</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly found appellant 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 he had signed on December 8, 2014 and October 2, 2015. The specific language of the EN1032 forms demonstrate that appellant knew or should have known

---

<sup>17</sup> C.W., *supra* note 5.

<sup>18</sup> 5 U.S.C. § 8129; C.W., *id.*; see *Linda E. Padilla*, 45 ECAB 768 (1994).

<sup>19</sup> 20 C.F.R. § 10.433; C.W., *id.*; see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

<sup>20</sup> *Id.* at § 10.433(b); C.W., *id.*; *Duane C. Rawlings*, 55 ECAB 366 (2004).

that the nature of his work activity at Central Connecticut Investigative Services and Smithfield Market of Yarmouth Port would require him to report such employment activities and earnings on the forms.<sup>21</sup> Appellant's failure to accurately report his earnings and employment activities on the EN1032 forms also constitutes a failure to provide information, which he knew or should have known to be material in the creation of the overpayment.<sup>22</sup> Consequently, he is precluded from waiver of recovery of the overpayment.

On appeal counsel requests waiver of recovery of the overpayment, or an alternate repayment plan. As explained above, appellant is precluded from waiver of recovery of the overpayment as he was at fault in the creation of the overpayment. Also, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation payments under FECA. As appellant is no longer in receipt of wage-loss compensation payments, the Board lacks jurisdiction over OWCP's recovery of the overpayment.<sup>23</sup>

### CONCLUSION

The Board finds that appellant forfeited his right to compensation for the period September 9, 2013 through October 2, 2015, pursuant to 5 U.S.C. § 8106(b)(2) of FECA, because he knowingly failed to report his employment activities and earnings. The Board further finds that he received an overpayment of compensation in the amount of \$43,758.67 for the period September 9, 2013 through October 2, 2015 because he failed to provide information, which he knew or should have known to be material. The Board also finds that OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

---

<sup>21</sup> *C.W., id.; J.A.*, Docket No. 14-1863 (issued July 7, 2015).

<sup>22</sup> *C.W., id.; B.K., supra* note 8.

<sup>23</sup> *L.C.*, Docket No. 19-1094 (issued February 25, 2020); *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).



**ORDER**

**IT IS HEREBY ORDERED THAT** the July 1, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 8, 2021  
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