

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

	)	
<b>E.J., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0376</b>
	)	<b>Issued: May 11, 2021</b>
<b>U.S. POSTAL SERVICE, MORRISANIA</b>	)	
<b>STATION, Bronx, NY, Employer</b>	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On December 6, 2019 appellant filed a timely appeal from a November 5, 2019 merit decision and a July 19, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> 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 the case.<sup>3</sup>

---

<sup>1</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). However by letter dated January 28, 2020, appellant withdrew his request for an oral argument.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the November 5, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant forfeited his entitlement to wage-loss compensation for the period July 3, 2008 through October 19, 2011 as he knowingly failed to report employment activities and earnings pursuant to 5 U.S.C. § 8106(b); and (2) whether OWCP properly determined that appellant abandoned his request for an oral hearing with respect to his termination of wage-loss compensation and schedule award benefits pursuant to section 8106(c) of FECA, effective March 6, 2019.

## **FACTUAL HISTORY**

This case has previously been before the Board on a different issue.<sup>4</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 13, 2004 appellant, then a 32-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 27, 2004 he injured his left knee while delivering mail in the performance of duty. He stopped work on the date of injury. On October 6, 2004 OWCP accepted the claim for left patella dislocation. It subsequently expanded the acceptance of the claim to include left closed patella fracture and tear of medial meniscus of left knee. OWCP paid appellant wage-loss compensation on the periodic rolls as of December 26, 2004.

Appellant was required to submit information with respect to any outside employment on EN1032 forms. The language on the forms clearly explained appellant's obligation to report to OWCP his outside employment and earnings during the period in which he also received compensation benefits and that he could be subject to civil and criminal penalties, as well as forfeiture of compensation for the period covered by the form, if he failed to do so. The first Form EN1032 was signed by appellant on March 30, 2007 and covered all employment activities and earnings for the period 15 months prior to the date appellant signed the form. On EN1032 forms signed January 12, 2009, October 2, 2009, October 19, 2010, and October 19, 2011, appellant responded "no" under Part A (employment), Question 1 as to whether he worked for any employer during the past 15 months. The remaining sections of Question 1 were left blank. Appellant also indicated "yes" or left blank Question 3 that he was unemployed for all periods during the past 15 months.<sup>5</sup>

By report dated November 6, 2017, Dr. Goldman noted the history of injury and his review of the medical record and statement of accepted facts. He indicated that appellant was using a cane and described examination findings of decreased left knee range of motion and quadriceps

---

<sup>4</sup> Docket No. 18-1428 (issued March 5, 2019).

<sup>5</sup> OWCP referred appellant for a June 5, 2017 second opinion examination with Dr. Arnold Goldman, a Board-certified orthopedic surgeon. Appellant did not attend the scheduled examination. By decision dated July 20, 2017, OWCP suspended his compensation benefits, effective July 23, 2017, pursuant to 5 U.S.C. § 8123(d) for failure to attend the appointment with Dr. Goldman. Its decision was affirmed by an OWCP hearing representative on April 24, 2018. Appellant subsequently filed a timely appeal with the Board which was affirmed by decision dated March 5, 2019 in Docket No. 18-1428. He attended the medical examination, and his periodic roll compensation was reinstated, effective October 4, 2017.

and calf atrophy on the left. Dr. Goldman diagnosed status-post left knee internal derangement, which was causally related to the employment injury. He advised that appellant's complaints corresponded to his objective findings and that he could not return to a letter carrier position, but could perform light duty. In an attached work capacity evaluation (Form OWCP-5c), Dr. Goldman advised that appellant had permanent restrictions limiting walking, twisting, bending, stooping, operating a motor vehicle, and squatting to four hours daily, standing, and kneeling to two hours daily, with no climbing, and he was to have 15- to 20-minute breaks one to two times daily, with a 15-pound restriction on pushing, pulling, lifting, squatting, and kneeling.

During the pendency of appellant's appeal on June 8, 2018 the employing establishment informed OWCP that on May 16, 2018 it had offered appellant a permanent position as a sales and service distribution associate that was within Dr. Goldman's restrictions. It informed OWCP that appellant had refused the position.

OWCP also received an August 22, 2018 investigative report from the employing establishment's Office of Inspector General (OIG), which related its findings regarding appellant's work activities while using a social security number of another individual and while in receipt of workers' compensation. It found that: in the first quarter of 2009, while off work receiving workers' compensation benefits, appellant received approximately \$103.13 in wages from Global Security Services, Mineola, NY and approximately \$1,305.00 in wages from Newton County School System, Newton County, GA. In the second quarter of 2009, appellant received \$165.00 in wages from Global Security services and \$2,600.00 from Newton County School System. In the third and fourth quarters of 2009, he received approximately \$3,455.00 in wages from Newton County School System. In the first quarter of 2010, appellant received approximately \$1,922.50 and \$1,831.78 in wages from Newton and Groome Transportation, respectively. In the second quarter of 2010, he received approximately \$1,593.35 in wages from Groome Transportation. In the third and fourth quarters of 2010, appellant received \$2,122.00 in wages from Groome Transportation. In 2010, he filed for unemployment benefits with the State of Georgia's Department of Labor. Appellant received approximately \$1,968 in unemployment benefits. In the first and second quarters of 2011, he received approximately \$3,745.00 in wages from Newton. From August 2010 until February 2012, appellant received approximately \$4,093 in unemployment benefits from the State of Georgia. Copies of the pay records noting his above wages received under another individual's social security number were attached.

By letter dated August 28, 2018, OWCP advised appellant that the position offered was suitable. It notified him that, if he failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, his right to compensation for wage loss or a schedule award would be terminated. OWCP afforded appellant 30 days to respond. In an undated letter, received by OWCP on September 27, 2018, appellant maintained that he could not fulfill the duties of the offered position, based on the opinion of his treating physician, whom he saw annually. By letter dated October 2, 2018, OWCP informed him that he should provide a detailed medical report within the next 30 days. The letter included a set of questions that the physician should complete. A November 2, 2018 memorandum of telephone call (Form CA-110) indicated that the employing establishment informed OWCP that the offered position remained available. In a November 5, 2018 report, Dr. Jonathan J. Silver, a Board-certified orthopedic surgeon, noted seeing appellant for yearly follow up. He described physical examination findings including mild left knee tenderness and patellofemoral crepitus. Dr. Silver diagnosed bilateral

knee arthritis, worse on the left, and advised that appellant should avoid prolonged periods of impact-loading activity. He concluded that appellant was totally disabled. On December 20, 2018 OWCP advised him that his reasons for refusing the offered position were not valid. It afforded appellant an additional 15 days to accept the position. On January 14, 2019 the employing establishment informed OWCP that he had not returned to work, and on January 31, 2019 advised that the offered position remained available. By decision dated March 5, 2019, OWCP terminated appellant's wage-loss compensation and schedule award benefits pursuant to section 8106(c) of FECA, effective March 6, 2019.

In correspondence dated March 15, 2018, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding the March 5, 2019 termination decision.

By decision dated April 12, 2019, OWCP found that appellant forfeited his compensation from July 21, 2008 through October 19, 2011. It found that he failed to report earnings from his outside employment in the EN1032 forms he had signed on October 2, 2009, October 19, 2010 and October 19, 2011 which covered the period listed. OWCP further found that as appellant "knowingly" failed to report his outside earnings on his EN1032 forms, signed October 2, 2009, October 19, 2010 and October 19, 2011, his wage-loss compensation was forfeited for the 15-month period prior to the date he signed the EN1032 forms. It calculated that it had paid appellant \$112,260.05 in wage-loss compensation for the period July 21, 2008 through October 19, 2011. OWCP additionally noted that the forfeiture would be declared an overpayment of benefits subject to recovery under 5 U.S.C. § 8129.

By decision April 12, 2019, OWCP issued a preliminary determination that an overpayment of \$112,260.05 was created for the period July 21, 2008 through October 19, 2011 due to appellant's failure to disclose earnings from outside employment on the EN1032 forms signed on October 2, 2009, October 19, 2010, and October 19, 2011. It found him at fault in the creation of the overpayment as he failed to provide information he knew, or should have known, to be material. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Additionally, it notified him 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 preresoupment hearing.

In an amended forfeiture decision dated April 16, 2019, OWCP found that appellant knowingly failed to report his earnings from outside employment for the period July 3, 2008 through October 19, 2011, as evidenced on the Form EN1032 he signed on October 2, 2009, October 19, 2010, and October 19, 2011.

Also, on April 16, 2019, OWCP issued an amended preliminary overpayment determination solely with respect to adjustment of the overpayment period and amount. It made the preliminary finding that an overpayment of \$114,004.15 had been created for the period July 3, 2008 through October 19, 2011 as he had forfeited compensation benefits which were paid to him during that period. OWCP further found appellant at fault in creation of the overpayment as he knowingly failed to report his earnings from outside employment on the Form EN1032 signed on October 2, 2009, October 19, 2010, and October 19, 2011 while in receipt of compensation benefits. It requested that he complete the enclosed overpayment recovery questionnaire (Form

OWCP-20) and submit supporting financial documents. Additionally, 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 precoupment hearing.

On May 10, 2019 appellant requested an oral hearing on OWCP's April 16, 2019 forfeiture decision and a precoupment hearing on OWCP's April 16, 2019 preliminary overpayment determination before a representative of OWCP's Branch of Hearings and Review. A completed Form OWCP-20 was submitted.

On May 20, 2019 OWCP informed appellant of the time and location of his oral hearing scheduled for July 8, 2019 at 9:45 a.m. Eastern Standard Time (EST) regarding OWCP's March 5, 2019 termination decision. It mailed the notice to appellant's last known address of record and provided instructions on how to participate. Appellant did not appear at the hearing or request postponement of the hearing.

In a July 16, 2019 notice, OWCP's hearing representative informed appellant of the time and location of his oral hearing scheduled for August 23, 2019 at 11:00 a.m. The subject of the hearing was OWCP's April 16, 2019 forfeiture decision.

By decision dated July 19, 2019, OWCP found that appellant had received written notice 30 days in advance of the hearing scheduled for July 8, 2019 regarding OWCP's March 5, 2019 termination decision, and that he failed to appear for the oral hearing. It further found that there was no indication in the record that appellant had contacted the Branch of Hearings and Review either prior to or subsequent to the scheduled hearing to explain his failure to appear. OWCP determined that he had therefore abandoned his hearing request.

On August 22, 2019 appellant requested a review of the written record in lieu of an oral hearing with regard to OWCP's April 16, 2019 forfeiture decision.

By decision dated November 5, 2019, an OWCP hearing representative affirmed OWCP's April 16, 2019 forfeiture decision that appellant knowingly failed to report earnings from employment for the period July 3, 2008 through October 19, 2011 which resulted in forfeiture of compensation benefits for that period.<sup>6</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

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>7</sup>

---

<sup>6</sup> However, the hearing representative vacated the April 12, 2019 preliminary overpayment determination finding that a new preliminary determination must be issued to reflect the corrected forfeiture period July 3, 2008 through October 19, 2011. The case was remanded to OWCP for the issuance of a preliminary determination and recalculation of the amount of overpaid compensation for the period July 3, 2008 through October 19, 2011.

<sup>7</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>8</sup> OWCP procedures recognize that forfeiture is a penalty,<sup>9</sup> and, as a penalty provision, it must be narrowly construed.<sup>10</sup> The term knowingly is defined within OWCP's regulations as with knowledge, consciously, willfully, or intentionally.<sup>11</sup>

OWCP can, in several ways, meet its burden of proof in establishing that a claimant "knowingly" failed to report employment or earnings. This includes the claimant's own admission to OWCP that he or she failed to report employment or earnings which he or she knew should be reported, or establishing that the claimant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the EN1032 form.<sup>12</sup> The inquiry is whether appellant knowingly omitted or understated her earnings from employment for the periods covered by the EN1032 forms. The term "knowingly" as defined in OWCP's implementing regulations and Board precedent means "with knowledge, consciously, intelligently, willfully, and intentionally."<sup>13</sup> The language on OWCP EN1032 forms is clear and unambiguous in requiring a claimant to report earnings for the previous 15 months from any employer, 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.<sup>14</sup>

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

The Board finds that OWCP properly determined that appellant forfeited his entitlement to wage-loss compensation for the period July 3, 2008 through October 19, 2011 as he knowingly failed to report employment activities and earnings pursuant to 5 U.S.C. § 8106(b).

On EN1032 forms signed on October 2, 2009, October 19, 2010, and October 19, 2011, which covered the 15-month period prior to the date of signature, appellant denied working, provided no information regarding his work activity, and made no mention of his earnings from any such outside work activity. Appellant's signing of a strongly worded certification clause on each of the EN1032 forms demonstrates that he was aware of the materiality of his failure to report his employment.<sup>15</sup>

---

<sup>8</sup> *T.G.*, Docket No. 19-0051 (issued August 20, 2019); *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

<sup>10</sup> *See M.G.*, Docket No. 20-0735 (issued October 23, 2020); *Christine P. Burgess*, 43 ECAB 449 (1992).

<sup>11</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>12</sup> *I.S.*, Docket No. 17-0897 (issued April 9, 2018); *Robert Ringo*, 53 ECAB 258 (2001).

<sup>13</sup> *I.S.*, *id.*; *see also Joan Ross*, 57 ECAB 694 (2006).

<sup>14</sup> *Id.*

<sup>15</sup> *See B.K.*, Docket No. 17-0406 (issued December 12, 2017).

In an August 20, 2018 investigative report by the employing establishment's OIG, the evidence revealed that appellant worked and earned money or collected unemployment during the period July 3, 2008 through October 19, 2011 by using a social security number of another individual. The investigative report found, and the related exhibits substantiated, that from the first quarter of 2009 until February 2012, appellant earned wages while using another individual's social security number from Global Security Services, Newton County School System and Groome Transportation. Appellant additionally received unemployment benefits from the State of Georgia's Department of Labor also under another individual's social security number in 2010, the first and second quarters of 2011, and from August 2010 until February 2012. He, however, failed to disclose such outside employment earnings to OWCP, as evidenced by his EN1032 forms dated October 2, 2009, October 19, 2010, and October 19, 2011, which cover the relevant period of July 3, 2008 through October 19, 2011.

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>16</sup>

In this case, the Board finds that the evidence of record establishes that appellant failed to report outside employment and unemployment benefits on EN1032 forms he signed on October 2, 2009, October 19, 2010, and October 19, 2011 which covered the 15-month period prior to the date he signed the EN1032 forms and cover the period listed. The Board thus finds that OWCP properly invoked the penalty provision under 5 U.S.C. § 8106(b) to find forfeiture of appellant's entitlement to compensation for the period July 3, 2008 through October 19, 2011.<sup>17</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

A claimant who has received a final adverse decision by OWCP may obtain a hearing by writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.<sup>18</sup> Unless otherwise directed in writing by the claimant, OWCP's hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.<sup>19</sup> OWCP has the burden of proof to establish that it properly mailed to a claimant and any representative of record a notice of a scheduled hearing.<sup>20</sup>

---

<sup>16</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).

<sup>17</sup> *M.G.*, Docket No. 20-0735 (issued October 23, 2020); *see G.Z.*, Docket No. 16-0892 (issued May 19, 2017); *see also E.V.*, Docket No. 15-0803 (issued October 15, 2015).

<sup>18</sup> 20 C.F.R. § 10.616(a).

<sup>19</sup> *Id.* at § 10.616(b).

<sup>20</sup> *J.H.*, Docket No. 20-0023 (issued September 16, 2020); *T.R.*, Docket No. 19-1952 (issued April 24, 2020); *R.C.*, 59 ECAB 521 (2008).

A claimant who fails to appear at a scheduled hearing may request in writing, within 10 days after the date set for the hearing, that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.<sup>21</sup>

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

The Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing before an OWCP hearing representative with respect to his termination of wage-loss compensation and schedule award benefits pursuant to section 8106(c) of FECA, effective March 6, 2019.

The record establishes that appellant filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review following its March 5, 2019 termination decision. On May 20, 2019 a hearing representative notified appellant that it had scheduled a hearing to be held on July 8, 2019 at 9:45 a.m. EST. The hearing representative properly mailed the hearing notice to appellant's last known address of record and provided instructions on how to participate.<sup>22</sup> Appellant failed to appear at the hearing scheduled for July 8, 2019. He did not request a postponement or provide an explanation to OWCP for his failure to attend the hearing within 10 days of the scheduled hearing. The Board thus finds that OWCP properly determined that appellant abandoned his request for an oral hearing.<sup>23</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant forfeited his entitlement to wage-loss compensation for the period July 3, 2008 through October 19, 2011 as he knowingly failed to report employment activities and earnings pursuant to 5 U.S.C. § 8106(b). The Board further finds that OWCP properly determined that appellant abandoned his request for an oral hearing before an OWCP hearing representative with respect to OWCP's termination of his wage-loss compensation and schedule award benefits pursuant to section 8106(c) of FECA, effective March 6, 2019.

---

<sup>21</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(g) (September 2020); *J.H.*, *id.*

<sup>22</sup> *See D.T.*, Docket No. 20-0234 (issued January 8, 2021); *K.J.*, Docket No. 10-0414 (issued July 30, 2020).

<sup>23</sup> *Id.*



**ORDER**

**IT IS HEREBY ORDERED THAT** the July 19 and November 5, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 11, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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