

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

K.W., Appellant)	
)	
and)	Docket No. 22-1088
)	Issued: December 7, 2022
U.S. POSTAL SERVICE, NOBLES STATION, Pensacola, FL, Employer)	
)	

Appearances:
Jason S. Lomax, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 19, 2022 appellant, through counsel, filed a timely appeal from a June 21, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal

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 The record also contains an April 26, 2022 decision denying appellant's claim for wage-loss compensation due to disability from employment July 17 to 30, 2021 and an April 27, 2022 decision denying her claim for wage-loss compensation due to disability from employment for the period June 5 to 18, 2021. Counsel did not appeal from those decisions and, thus, they are not before the Board at this time. *See* 20 C.F.R. § 501.3.

Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether OWCP properly determined that appellant forfeited her right to compensation for the period August 1, 2019 to December 31, 2020, pursuant 5 U.S.C. § 8106(b)(2), because she knowingly failed to report her employment activities and earnings.

FACTUAL HISTORY

On August 9, 2018 appellant, then a 25-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her right knee when stepping from her vehicle onto the grass while in the performance of duty. OWCP accepted the claim for a dislocation of the patella of the right knee. It subsequently expanded its acceptance of the claim to include infrapatellar bursitis of the right knee.

Appellant submitted claims for compensation (Form CA-7) for disability beginning September 25, 2018. Each Form CA-7 included a section for the injured worker to make an affidavit regarding employment activity. The forms requested information regarding all earnings from employment, including any employment for which a salary, wages, income, sales commissions, or payment of any kind was received during the period claimed, including from self-employment, odd jobs, involvement in business enterprises, as well as service with the military. The forms advised that fraudulently concealing employment, or failing to report income, may result in forfeiture of compensation benefits and/or criminal prosecution. The forms also contained certification clauses as to the truthfulness of the statements made under penalty of criminal prosecution for false or misleading statements.

OWCP paid appellant wage-loss compensation on the supplemental rolls, effective September 25, 2018, and on the periodic rolls, effective March 29, 2020.

In CA-7 forms dated August 6 and 29, 2019, and September 3 and 17, 2019, appellant requested wage-loss compensation from July 20 to September 13, 2019. She indicated that she did not have any outside earnings from employment or self-employment, including from odd jobs and business enterprises.

On October 17, 2020 appellant signed a Form EN-1032, which contained language advising her of the type of employment activities, earnings, and volunteer activities that she was required to report for the preceding 15-month period. The EN-1032 form instructed her to report all employment for which she received a salary, wages, income, sales commissions, piecework, or

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the June 21, 2022 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.*

payment of any kind. Appellant was directed to report all self-employment or involvement in business enterprises, including (but not limited to) farming, sales work, operating a business, and providing services in exchange for money, goods, or other services. The form contained a certification clause advising her of the consequences of not accurately reporting her employment activities, such as being subjected to criminal penalties and losing the right to receive workers' compensation. Regarding the question of whether she was unemployed for all periods on the form, appellant responded in the affirmative. The Form EN-1032 appellant submitted was missing the page that contained the first two questions on the form regarding employment.

On December 2, 2020 OWCP advised that the October 17, 2020 Form EN-1032 was incomplete as she had not included answers to the first two questions regarding employment. It provided another form for her completion.

On December 8, 2020 appellant signed a Form EN-1032 providing her employment and earnings history for the previous 15-month period. She related that she had worked 20 hours per week for the employing establishment from January 2019 to February 2020. Appellant advised that she did not otherwise engage in employment activities or receive earnings from employment, did not participate in self-employment, and did not perform volunteer work.

In a report of investigation dated January 28, 2021, K.H., a special agent with the employing establishment's Office of Inspector General (OIG), advised that appellant had not reported her self-employment with her company, on the October and December 2020 EN-1032 forms. She related that on April 8, 2019 appellant had posted her K.K.D. page on Facebook. On April 10, 2019 appellant posted design options and prices for tumblers. K.H. advised that appellant continued to post on Facebook about K.K.D. from May through July 2019 and in August, October, November, and December 2019, and January and February 2020.

K.H. related that she and L.S., another agent, interviewed appellant on January 11, 2021. At the agent's request, she reviewed her CA-7 forms and the October 17, and December 8, 2021 EN-1032 forms for accuracy and initialed that both were correct. When subsequently asked about K.K.D., appellant related that she made vinyl decals for cars and designs on tumblers, mostly for friends and family. She advised that she did not report it on the Form EN-1032 because she had taken down the Facebook page before her February 2020 surgery. K.H. asked why she had not reported it on her CA-7 forms, which were completed while appellant posted about K.K.D. on Facebook, but she did not answer. Appellant advised that she had earned approximately \$300.00 by selling the cups during the time she received compensation from OWCP. K.H. requested that appellant submit information about how she received payment, but she did not provide the information.

The OIG provided photographs of Facebook posts for K.K.D. dated April 8, 10, 12, 19, and 22, 2019. The April 10, 2019 post provided prices for designs depending on the size of the tumbler. April 12, 2019 post indicated that five cups were underway, and a post on April 19, 2019 showed a picture of a tumbler and the words, "Hopefully another happy customer!" Appellant also posted photographs of tumblers with different designs on April 22 and May 6, 12, 24, and 25, 2019, June 9 and 22, 2019, and July 1, 2019. In an August 19, 2019 post, appellant apologized for the delay and noted that she would soon be having surgery on her knee. She advised that she had completed a couple of orders and that payment was required prior to creation. Appellant posted additional photographs on October 14 and 18, November 10, 12, 16, 27, and 29, December 12, 16,

and 26, 2019, and January 5, 2020. In the November 27, 2019 post, she advised that individuals who liked and commented on her page had the opportunity to win a decorated tumbler valued at \$42.00. On December 16, 2019 appellant posted a raffle for an animal print tumbler and provided the cost of entries into the raffle. On January 7, 2020 appellant posted that she was no longer taking orders because she was on vacation and then undergoing surgery on her right knee. In a February 10, 2020 update, she related that her surgery had been rescheduled for the coming week. On February 21, 2020 appellant advised that she would take minimal orders once she was able to bear weight on her knee in a few weeks.

The OIG submitted CA-7 forms and the October 17 and December 8, 2021 EN-1032 forms reviewed and initialed by appellant as accurate. The OIG further submitted a page showing Facebook posts with dates contemporaneous with appellant's signing of CA-7 forms.

In a sworn statement dated January 11, 2021, appellant related that on that date K.H. had interviewed her and asked why she had not reported her work for K.K.D. designs on her EN-1032 and CA-7 forms. She related that she thought of her activities as a hobby and that she had forgotten about the activity because she had stopped making cups and decals a few weeks prior to her initial surgery. Appellant advised that she received payments through apps including PayPal, Facebook Pay, and Venmo. She indicated that she had earned approximately \$300.00 and that most of her orders "were out of pocket for friends and family. I have been doing decals on and off since 2015." Appellant advised that she could not access her account to see her payment history. She asserted that she believed that the activity constituted a hobby, not a business, and noted that she did not file income taxes.

On March 2, 2021 the employing establishment indicated that appellant had resumed work on March 1, 2021 without restrictions.

By decision dated March 24, 2021, OWCP found that appellant had forfeited her entitlement to compensation from August 2019 to December 2020 under 5 U.S.C. § 8106(b) as she knowingly failed to report earnings from employment and employment/volunteer activities. It advised that she had forfeited her entitlement to compensation for the entire period of August 2019 to December 2020.

In a preliminary overpayment determination dated March 24, 2021, OWCP advised appellant that she had received a \$35,221.61 overpayment of compensation for the period August 1, 2019 through December 31, 2020 as she had forfeited her entitlement to compensation. It further notified her its preliminary finding that she was at fault in the creation of the overpayment. OWCP provided appellant with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, OWCP notified appellant that, within 30 days of the date of the letter, she could request a final decision based on the written evidence, or a precoupment hearing. No response was received.

By decision dated May 13, 2021, OWCP finalized its preliminary overpayment determination, finding that appellant received an overpayment of wage-loss compensation in the amount of \$35,221.61 for the period August 1, 2019 through December 31, 2020 as she had forfeited her entitlement to compensation. It further finalized its finding that she was at fault in the creation of the overpayment and, thus, not entitled to waiver of recovery. OWCP determined that appellant should forward the entire amount of the overpayment as recovery.

On March 23, 2022 appellant, through counsel, requested reconsideration. Counsel contended that she had not engaged in self-employment activities that would require reporting earnings, but instead performed crafting “primarily for therapeutic reasons.” He asserted that it constituted a hobby instead of a business enterprise and did not meet the threshold for business or self-employment according to the Internal Revenue Service (IRS). Counsel asserted that appellant’s total income from crafting was \$1,135.00 and her supplies had cost \$1,561.29. He maintained that her intent was not to earn money, but was rather a means to cope with her pain and disability. Counsel maintained that appellant did not believe that she had engaged in business activities.

In support of the request for reconsideration, appellant submitted a March 15, 2022 letter wherein a tax attorney advised that appellant’s creation of tumblers was an activity not engaged in for profit within the meaning of 26 U.S.C. § 183. He discussed the factors considered in determining whether an activity was engaged in for profit and concluded that appellant’s activity was a hobby within the meaning of section 183(c) and not business activity within the interpretation of the IRS.

In a certified statement dated March 17, 2022, appellant related that she had become depressed and anxious during the first five months that she was off work after her injury and prior to OWCP’s acceptance of her claim. In 2015, she had made decals that she occasionally sold to friends. Appellant told her supervisor about this after her injury, and her supervisor suggested that she make cups. She began making tumblers to lessen her depression and anxiety. Appellant’s family and friends suggested that she use social media to keep busy. On April 8, 2019 she set up a social medial page for K.K.D. Appellant noted that she referred to orders, customers, and prices on her Facebook page as she “was selling some of her tumblers.” She did not consider that she was engaging in business and noted that in one post she referred to her mother as a customer even though she had made her the cup at cost. Appellant made 59 tumblers from April 2019 to around January 2020. She sold 26 tumblers, used 1 tumbler in a raffle, kept 8 tumblers for personal use, and gave 24 tumblers as gifts. Appellant had gross income from the sales of \$1,135.00 and expenses of \$1,561.29 for a net loss of \$426.39. She advised that it took two hours of activity to craft each tumbler. Appellant considered her activities a hobby and did not open a separate bank account or try to make a profit. She did not believe that she was engaged in a business of self-employment and thus did not report her activities to OWCP.

By decision dated June 21, 2022, OWCP denied modification of its March 24, 2021 forfeiture decision.

LEGAL PRECEDENT

Section 8106(b) of FECA⁵ provides that an employee who “fails to make an affidavit or report when required or knowingly omits or understates any part of his earnings, forfeits his right to compensation with respect to any period for which the affidavit or report was required.”⁶

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. The Board has recognized that forfeiture is a penalty, and, as

⁵ See *supra* note 3.

⁶ 5 U.S.C. § 8106(b).

a penalty provision, it must be narrowly construed.⁷ The term knowingly is defined within OWCP's regulations as with knowledge, consciously, willfully, or intentionally.⁸

OWCP's 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 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.⁹ 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.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant forfeited her right to compensation for the period August 1, 2019 through December 8, 2020, pursuant 5 U.S.C. § 8106(b)(2), because she knowingly failed to report her employment activities and earnings.

OWCP found that appellant forfeited her compensation from August 1, 2019 through December 8, 2020 as she failed to report employment activities on EN-1032 forms covering this period.

The EN-1032 forms sent by OWCP to appellant advised her of her responsibility to complete the forms, and provide all relevant information concerning her employment status and earnings during the 15-month period covered by the forms. The forms she signed noted that she must report all employment, self-employment, or involvement in business enterprises. This included such activities as overseeing a business of any kind, including involvement in any enterprise she owned. The forms further requested that appellant indicate whether she had performed volunteer work for any form of monetary or in-kind compensation.

Appellant signed a Form EN-1032 on October 17, 2020, covering the period July 17, 2019 to October 17, 2020. While the Form EN-1032 was missing a page that contained two questions regarding employment, she provided an affirmative response to the question of whether she was unemployed for the covered period. Further, on CA-7 forms covering the period August 2 to September 13, 2019, appellant indicated that she had no earnings from employment or self-employment. On a Form EN-1032 signed December 8, 2020, covering the period September 13, 2019 to December 8, 2020, she responded that she had not engaged in any employment, self-employment, engaged in any business enterprise, or performed volunteer work for any form of compensation during the 15-month period covered by the form.

In an investigative report dated January 29, 2021, K.H. related that appellant had self-employment with K.K.D. She noted that appellant initially posted on Facebook about the company

⁷ *J.T.*, Docket No. 20-1563 (issued April 9, 2021); *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

⁸ 20 C.F.R. § 10.5(n); *R.A.*, Docket No. 18-0406 (issued January 28, 2019).

⁹ *Id.* at § 10.5(g).

¹⁰ *Id.*

in April 2019 and that on April 10, 2019 she had provided a list of prices for designs depending on the tumbler size. On August 19, 2019 appellant apologized for the delay in completing tumblers and noted that she had completed a couple of orders. She posted photographs of her tumbler designs on October 14 and 18, November 10, 12, 16, 27, and 29, December 12, 16, and 26, 2019, and January 5, 2020. On December 16, 2019 she created a raffle for an animal print tumbler and provided the cost of entries into the raffle. K.H. submitted copies of appellant's posts about K.K.D. on Facebook from April 2019 through February 2020.

In a sworn statement dated March 17, 2022, appellant related that she had made tumblers from April 2019 to approximately January 2020. She advised that she had gross income from sales of \$1,135.00 and expenses of \$1,561.29, which yielded a net loss of \$426.39. Based on appellant's Facebook posts and her statement, the record supports that she had unreported earnings from employment during the periods covered by the October 17 and December 8, 2020 EN-1032 forms. If a Form EN-1032 is improperly completed resulting in a finding of forfeiture, the period of forfeiture is the entire 15-month period covered by the form in question even if the claimant had no earnings during a portion of the period.¹¹

Appellant can be subject to the forfeiture provision of section 8106(b) only if she knowingly failed to report earnings or employment. OWCP has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.¹² The Board finds that appellant's sales of tumblers online to individuals referred to as customers constitutes persuasive evidence that she knew that she had income from employment and performed work activities which she failed to disclose on the Form EN-1032. The explicit language of the forms advised that all employment activities and earnings, including from self-employment, must be reported. Appellant's signing of a strongly worded certification clause on the EN-1032 forms demonstrates that she was aware of the materiality of her failure to report her employment activity.¹³ Therefore, she knowingly failed to comply with the reporting requirements from August 1, 2019 through December 8, 2020. OWCP, consequently, properly found that she forfeited her entitlement to compensation for this period.

However, the Board further finds that OWCP improperly determined that appellant forfeited her entitlement to compensation for the period December 9 through 31, 2020 as the evidence is insufficient to support that appellant forfeited her entitlement to wage-loss compensation for that period. The record contains no Form EN-1032 or other documents covering this period. As the case record does not establish that appellant made omissions or misrepresentations on such forms regarding earnings/employment activities for the period December 9 to 31, 2020, the Board finds that OWCP improperly found forfeiture of entitlement to compensation for that period.¹⁴

¹¹ *R.M.*, Docket No. 19-1508 (issued July 6, 2022); *J.C.*, Docket No. 16-1058 (issued July 10, 2017); *R.B.*, Docket No. 15-1946 (issued September 2, 2016); *Martin James Sullivan*, 50 ECAB 158 (1998).

¹² *See S.M.*, Docket No. 16-1612 (issued April 11, 2018).

¹³ *C.W.*, Docket No. 18-1557 (issued June 25, 2019); *M.O.*, Docket No. 18-0686 (issued January 25, 2019).

¹⁴ *See K.B.*, Docket No. 21-0604 (issued January 14, 2022); *see also J.S.*, Docket No. 09-1640 (issued April 1, 2010).

CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited her right to compensation for the period August 1, 2019 through December 8, 2020, pursuant 5 U.S.C. § 8106(b)(2), because she knowingly failed to report her employment activities and earnings. The Board further finds, however, that OWCP improperly determined that she forfeited her entitlement to compensation for the period December 9 through 31, 2020.

ORDER

IT IS HEREBY ORDERED THAT the June 21, 2022 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part.

Issued: December 7, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board