

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

M.S., Appellant)	
)	
and)	Docket No. 22-0505
)	Issued: October 18, 2022
)	
U.S. POSTAL SERVICE, JOHN F. KENNEDY)	
STATION, Boston, MA, Employer)	
)	

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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 7, 2022 appellant filed a timely appeal from November 29, 2021 and January 14, 2022 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant forfeited her entitlement to compensation for the period December 29, 2016 through March 22, 2021 as she knowingly failed to report her employment activities and earnings, pursuant to 5 U.S.C. § 8106(b)(2); (2) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$157,249.06 as she forfeited her compensation for the period February 18, 2017 through March 22, 2021; (3) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery

¹ 5 U.S.C. § 8101 *et seq.*

of the overpayment; and (4) whether OWCP properly required recovery of the overpayment by deducting \$776.29 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board.² 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 October 21, 2003 appellant, then a 31-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 17, 2003 she fractured her right foot when she stepped down from a truck while in the performance of duty. She stopped work on October 18, 2003. On February 9, 2004 OWCP accepted appellant's claim for right ankle sprain and fracture of the right talas and navicular bone. It paid her wage-loss compensation on the periodic rolls for total disability for the period April 22 through October 30, 2004 and on the supplemental rolls for intermittent disability for the period October 31 through December 3, 2004. By decision dated December 14, 2005, OWCP granted appellant a schedule award for 10 percent loss of use of her right upper extremity. In a December 20, 2005 decision, it reduced her wage-earning capacity to zero as her actual earnings as a modified letter carrier, effective December 20, 2004, fairly and reasonably represented her wage-earning capacity. The Board, by decision dated June 8, 2006, affirmed the December 15 and 20, 2005 decisions.³ By decision dated November 12, 2015, OWCP denied appellant's claim for a recurrence of disability beginning April 4, 2015. In a May 26, 2017 decision, it accepted her claim for a recurrence of disability effective February 16, 2017. OWCP thereafter paid appellant wage-loss compensation on the supplemental rolls commencing February 18, 2017.

On March 29, 2018, March 14, 2019, March 17, 2020, and March 22, 2021 appellant signed CA-1032 forms regarding her earnings and employment activity for the preceding 15-month periods. The form advised that she must report all employment for which she received a salary, wages, income, sales commissions, piecework, or any payment of any kind, and that she must also report self-employment or involvement in any business enterprise in the past 15 months. It further informed appellant that fraudulently concealing or failing to report income could subject her to criminal prosecution. On the forms, she marked "No" in response to questions regarding whether she worked for an employer or was self-employed or involved in a business enterprise during the previous 15-month period.

In a September 16, 2021 report, an employing establishment Office of the Inspector General (OIG) agent, A.V., summarized his investigation of appellant. He noted that appellant began to receive total disability compensation effective February 18, 2017 and continued to receive such benefits at the time of his report following OWCP's acceptance of her recurrence of disability claim. Appellant became an adult foster care provider for AG Adult Foster Care, LLC, effective March 9, 2018 through October 2019 and was paid \$20,500.00 for her services. She also

² Docket No. 06-620 (issued June 8, 2006).

³ *Id.*

became an adult foster care provider with Vitra Health, Inc. on September 25, 2019, completed training on November 15, 2019, and began providing adult foster care services from December 19, 2019 through April 2021. Appellant was paid \$18,614.00 for her services. She received a total of \$39,114.00 in wages as an adult foster care provider. Appellant did not disclose any employment, self-employment, involvement in a business enterprise, and/or volunteer work on the Form CA-1032 she completed in 2018, 2019, 2020, or 2021. The OIG agent submitted attachments that documented appellant's employment and earnings as an adult foster care provider and OWCP's wage-loss compensation payments.

OWCP, by decision dated November 29, 2021, found that appellant forfeited her entitlement to compensation for the period December 29, 2016 through March 22, 2021 because she knowingly failed to disclose her outside earnings and employment, pursuant to section 8106(b)(2) of FECA.⁴ It explained that she had knowingly failed to report earnings and employment activities when submitting the March 29, 2018, March 14, 2019, March 17, 2020, and March 22, 2021 CA-1032 forms, which covered the prior 15 months of activity.

On November 29, 2021 OWCP notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$157,249.06 as she forfeited entitlement to compensation from February 18, 2017 through March 22, 2021. It further advised her of its preliminary determination that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP also forwarded an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) and requested that appellant submit supporting financial documentation, including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support her reported income and expenses. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoumpment hearing.

In a December 29, 2021 overpayment action request form, appellant requested waiver of recovery of the overpayment, contending that she was unaware that it was against the law to take care of her mother.

OWCP, by decision dated January 14, 2022, finalized its preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$157,249.06 because she forfeited her compensation from February 18, 2017 through March 22, 2021. It found that she was at fault in the creation of the overpayment because she failed to report earnings from her employment activities, thereby precluding waiver of recovery of the overpayment. OWCP required recovery of the overpayment by deducting \$776.29 every 28 days from appellant's continuing compensation payments.

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

⁴ *Supra* note 1 at § 8106(b)(2).

right to compensation with respect to any period for which the affidavit or report was required.⁵ 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.⁶ OWCP's procedures recognize that forfeiture is a penalty,⁷ and, as a penalty provision, it must be narrowly construed.⁸ The term "knowingly" is defined within OWCP's regulations as with knowledge, consciously, willfully, or intentionally.⁹

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 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.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant forfeited her entitlement to compensation for the period December 29, 2016 through March 22, 2021 as she knowingly failed to report her employment activities and earnings, pursuant to 5 U.S.C. § 8106(b)(2).

OWCP found that appellant forfeited her entitlement to compensation from December 29, 2016 through March 22, 2021 because she failed to report earnings from employment on CA-1032 forms signed on March 29, 2018, March 14, 2019, March 17, 2020, and March 22, 2021. On the forms appellant indicated that she did not perform any work for an employer and was not self-employed. She listed no earnings from employment or self-employment.

On September 16, 2021 an investigator with the employing establishment's OIG related that appellant was an adult foster care provider for AG Adult Foster Care, LLC, and Vitra Health, Inc., during the periods covered by the March 29, 2018, March 14, 2019, March 17, 2020, and March 22, 2021 CA-1032 forms. The evidence indicated that appellant was paid \$20,500.00 for

⁵ *Id.* at § 8106(b).

⁶ *T.G.*, Docket No. 19-0051 (issued August 20, 2019); *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012). *See also M.G.*, Docket No. 20-0735 (issued October 23, 2020); *T.P.*, Docket No. 17-0717 (issued April 11, 2018); *Christine P. Burgess*, 43 ECAB 449 (1992).

⁸ *Christine P. Burgess, id.*

⁹ 20 C.F.R. § 10.5(n); *R.A.*, Docket No. 18-0406 (issued January 28, 2019); *I.S.*, Docket No. 17-0897 (issued April 9, 2018); *Anthony A. Nobile*, 44 ECAB 268 (1992).

¹⁰ *Id.* at § 10.5(g).

¹¹ *Id.*

her services rendered at AG Adult Foster Care LLC and \$18,614.00 for her services rendered at Vitra Health, Inc., totaling \$39,114.00.

OWCP's regulations provide that, if an employee knowingly omits or understates 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.¹²

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.¹³ Appellant completed CA-1032 forms, which advised her that she must report both all employment and all earnings from employment and self-employment. The form provided that she could be subject to criminal prosecution for false or evasive answers or omissions. The factual circumstances of record, including appellant's signature on the Form CA-1032, provide persuasive evidence that she "knowingly" omitted her employment information.¹⁴

The Board, thus, finds that appellant misrepresented her employment activity and, therefore, forfeited her right to all compensation for the period February 18, 2017 through March 22, 2021.

LEGAL PRECEDENT -- ISSUE 2

Under 5 U.S.C. § 8106(b), compensation forfeited under this subsection, if already paid, shall be recovered under section 8129 of this title, unless recovery is waived under that section.¹⁵

Section 10.529 of OWCP's implementing regulations provides as follows:

"(a) 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.

"(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."¹⁶

¹² 20 C.F.R. § 10.529(b); *Harold F. Franklin*, 57 ECAB 287 (2006).

¹³ *Id.* at § 10.5(n).

¹⁴ *See J.H.*, Docket No. 20-1588 (issued June 16, 2021); *G.R.*, Docket No. 15-1047 (issued July 8, 2016).

¹⁵ *Supra* note 9.

¹⁶ 20 C.F.R. § 10.529; *see also J.H.*, *supra* note 14; *G.G.*, Docket No. 14-1848 (issued August 4, 2016).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$157,249.06 for the period February 18, 2017 through March 22, 2021, resulting from the forfeiture.

Appellant forfeited her right to compensation for the period February 18, 2017 through March 22, 2021. As noted above, OWCP may declare an overpayment of compensation for any compensation already paid for the period of a forfeiture of compensation.¹⁷ If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by a Form CA-1032, which he or she fails to report, a 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.¹⁸ OWCP determined that it paid appellant net compensation in the amount of \$157,249.06 during the period in question. The Board, accordingly, finds that an overpayment of compensation in the amount of \$157,249.06 has been established.¹⁹

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of FECA provides that, “[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”²⁰

Section 10.433 of OWCP’s implementing regulations provides that in determining whether a claimant is at fault, it will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(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

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *J.H.*, *supra* note 14; *J.N.*, Docket No. 13-1761 (issued July 1, 2014).

²⁰ 5 U.S.C. § 8129; see *A.S.*, Docket No. 17-0606 (issued December 21, 2017); *Linda E. Padilla*, 45 ECAB 768 (1994).

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”²¹

To determine if an individual was at fault with respect to 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.²²

ANALYSIS -- ISSUE 3

OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

The record establishes that appellant forfeited her entitlement to compensation benefits because she had unreported employment activity during the period February 18, 2017 through March 22, 2021 and knowingly failed to furnish this material information to OWCP. Appellant acknowledged a certification clause on the Form CA-1032, which advised her that she might be subject to civil, administrative, or criminal penalties if she knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing this form, she is deemed to have acknowledged her duty to report any employment, self-employment, or involvement in a business enterprise. Appellant indicated that she had no employment or earnings from employment during the covered periods and, thus, failed to furnish information, which she knew or should have known to be material to OWCP.²³ The Board, thus, finds that she is at fault in the creation of the overpayment and is, thereby, precluded from waiver of recovery.

LEGAL PRECEDENT -- ISSUE 4

The Board’s jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²⁴

Section 10.411 of OWCP’s regulations provides in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial

²¹ 20 C.F.R. § 10.433(a); *see J.H.*, *supra* note 14; *K.F.*, Docket No. 19-1016 (issued February 14, 2020); *Sinclair L. Taylor*, 52 ECAB 227 (2001).

²² *Id.* at § 10.433(b); *J.C.*, Docket No. 19-0911 (issued March 25, 2021); *Duane C. Rawlings*, 55 ECAB 366 (2004).

²³ *See J.H.*, *supra* note 14; *G.Z.*, Docket No. 16-0892 (issued May 19, 2017).

²⁴ 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”²⁵

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly required recovery of the overpayment by deducting \$776.29 from appellant’s continuing compensation payments every 28 days.

Appellant did not complete a Form OWCP-20 or provide the necessary financial information to support her income and expenses. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.²⁶ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²⁷ OWCP’s procedures provide that, in these instances, OWCP should set the rate of recovery at 25 percent of the 28-day net compensation amount until the balance of the overpayment is paid in full.²⁸

The record reflects that appellant’s continuing 28-day wage-loss compensation as of March 22, 2021 was \$3,104.90. Therefore, deducting \$776.29 every 28 days from her continuing compensation does not exceed the 25 percent repayment rate.²⁹

CONCLUSION

OWCP properly determined that appellant forfeited her entitlement to compensation for the period February 18, 2017 through March 22, 2021 as she knowingly failed to report her employment activities and earnings, pursuant to 5 U.S.C. § 8106(b)(2). The Board further finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$157,249.06 as she forfeited her entitlement to compensation for this period and that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. Lastly, OWCP properly required recovery of the overpayment by deducting \$776.29 from appellant’s continuing compensation payments every 28 days.³⁰

²⁵ *Id.* at § 10.441(a).

²⁶ 20 C.F.R. § 10.438; *see C.W.*, Docket No. 18-1557 (issued June 25, 2019); *E.K.*, Docket No. 18-0587 (issued October 1, 2018).

²⁷ *C.W.* and *E.K.*, *id.*; *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.500.2 (September 2018).

²⁸ *Supra* note 27 at Chapter 6.500.8(c)(1) (September 2018); *D.H.*, Docket No. 20-1064 (issued December 14, 2020).

²⁹ *See S.M.*, Docket No. 21-0772 (issued November 30, 2021).

³⁰ Appellant also filed a motion requesting relief due to financial hardship. The Board notes, however, that this request is not properly before the Board and should be addressed to OWCP.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2021 and January 14, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 18, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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