

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

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J.D., Appellant)	
)	
and)	Docket No. 21-0058
)	Issued: April 3, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
South Lyon, MI, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 13, 2020 appellant filed a timely appeal from a July 30, 2020 merit decision 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 found that appellant received an overpayment of compensation in the amount of \$111,585.55 for the period May 16, 2015 through October 13, 2018 due to forfeiture of compensation benefits; and (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 17, 2015 appellant, then a 31-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on February 14, 2015, she sustained injuries to her hands and knees when she slipped and fell on ice while in the performance of duty. She stopped work on April 23, 2015. By decision dated December 7, 2015, OWCP accepted the claim for tendinitis of the right hand, tendinitis of the right thumb, and tendinitis of the right wrist. On December 14, 2015 appellant filed a claim for compensation (Form CA-7), for disability from work from May 16 through December 5, 2015. OWCP paid her wage-loss compensation on the supplemental rolls effective May 16, 2015 and on the periodic rolls effective December 13, 2015 through October 13, 2018.

On December 17, 2016, October 15, 2017, and January 5, 2018 appellant signed EN-1032 forms which contained language advising her what type of employment activities, earnings, and volunteer activities that she was required to report for each 15-month period prior to the time she signed each form. The EN-1032 forms instructed her to report all employment for which she received a salary, wages, income, sales commissions, piecework, or 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. This included activities such as keeping books and records, or managing and/or overseeing a business of any kind, including a family business, even if the activities were part time or intermittent. Appellant was further directed to report any work or ownership interest in any business enterprise, including reporting the rate of pay that it would have cost to hire someone to perform the work or duties she performed in a business enterprise for which she was not paid, even if the work was for herself or a family member or relative. The forms contained certification clauses informing 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. On the December 17, 2016 EN-1032 form, appellant indicated that from August 13 through December 11, 2016, she sold kitchenware products and received \$266.13. She also noted that she was 50 percent partner in People of the Woods, Limited Liability Company (LLC) (D/B/A The Forest Lodge) and had no actual earnings. On the October 15, 2017 EN-1032 form, appellant indicated that from August through December 2016 she earned approximately \$400.00 selling kitchenware products. On the January 5, 2018 EN-1032 form, she did not report any earnings. Appellant did not report her involvement in The Forest Lodge business enterprise on her October 15, 2017 and January 5, 2018 EN-1032 forms.

On October 9, 2018 appellant pled guilty and was convicted of one count of Title 18 U.S.C. § 1920 -- false statement or fraud to obtain federal employees' compensation as she knowingly and willfully falsified, concealed, and covered up a material fact, and made false, fictitious, and fraudulent statements and representations about a material fact in connection with the application for compensation or other benefits and payments under FECA. The factual basis of guilt was premised on the fact that appellant had indicated on a Form CA-7, in support of her application for FECA benefits, that she had not worked outside of her federal job during the period April 17 to December 8, 2015. However, she owned and operated The Forest Lodge, and she hosted paying customers at The Forest Lodge in October and November of 2015. Appellant also represented to the State of Michigan that she was the General Manager of The Forest Lodge when she filed an LLC annual statement. The court determined that she knowingly and willfully concealed this information on the Form CA-7 because she knew it would affect her workers' compensation

benefits and, as a result of her failure to identify her work for The Forest Lodge, she improperly received workers' compensation benefits, including a payment for \$471.23 on April 30, 2016.

By decision dated October 24, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective October 9, 2018, the date of appellant's fraud conviction.²

OWCP subsequently received a copy of a January 30, 2018 report of an investigation conducted by the employing establishment's Office of Inspector General (OIG).³ The OIG also provided evidence and attached exhibits which showed that appellant advised the State of Michigan that she was employed as the General Manager of The Forest Lodge in 2016 and 2017, she had a commercial license for the business with an expiration of 2021, and she posted information on social media indicating that she ran the business of the lodge. Appellant's social media posts contained information regarding their bookings, various sales promotions, and operations at The Forest Lodge.

By decision dated December 16, 2019, OWCP determined that appellant forfeited her right to compensation under 5 U.S.C. § 8106(b) of FECA for the period May 16, 2015 to October 13, 2018. It found that she knowingly failed to report her self-employment as an owner/operator of The Forest Lodge Motel in Wellston, Michigan for that period on applicable OWCP Forms CA-7 and CA-1032. OWCP noted that all compensation paid during the period May 16, 2015 through October 13, 2018 was considered an overpayment subject to recovery under 5 U.S.C. § 8129.

Also on December 16, 2019 OWCP advised appellant of its preliminary overpayment determination that she had received a \$111,585.55 overpayment of compensation for the period May 16, 2015 through October 13, 2018 because she had provided false information on her December 14, 2015 Form CA-7, and December 17, 2016, October 15, 2017, and January 5, 2018 EN-1032 forms. It provided its calculations of the amount of compensation paid during the applicable periods and attached a payment history.⁴ OWCP further notified appellant of its

² On November 2, 2018 OWCP advised appellant of its preliminary overpayment determination that she had received a \$454.67 overpayment of compensation for the period October 9 through 13, 2018 as she was not entitled to compensation benefits on or after October 9, 2018, the date of her conviction. It provided its calculations of the amount of compensation paid during the period and a compensation termination work sheet. OWCP further notified appellant of its preliminary finding that she was with at fault in the creation of the overpayment. It provided her with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) and notified her of her appeal rights. On November 7, 2018 appellant made out a personal money order in the amount of \$454.67 to OWCP. On January 15, 2019 OWCP acknowledged that the overpayment of compensation in the amount of \$454.67 had been repaid in full.

³ Appellant indicated that a couple lives in one of lodge/cabin rooms, but she does not receive rent as they help out her husband in fixing the property and shoveling snow. She stated that she never rented out any rooms, the main building with the restaurant was unlivable as the previous owners had gutted the restaurant and kitchen, and the property was for sale as the bank was foreclosing on the property on March 31, 2018. The investigation noted that appellant was physically active.

⁴ Appellant received a net payment of \$19,245.76 for the period May 16 through December 12, 2015; \$7,043.94 for the period December 13, 2015 to February 28, 2016; \$32,125.66 for the period March 1, 2016 through February 28, 2017; \$32,530.53 for the period March 1, 2017 through February 28, 2018; and \$20,639.66 for the period March 1 through October 13, 2018 for a total overpayment of \$111,585.55.

preliminary finding that she was at fault in the creation of the overpayment. It provided her 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 prerecoumment hearing. No response was received within the time allotted.

By decision dated January 16, 2020, OWCP finalized its preliminary overpayment determination. It found that the total gross calculation for the period May 16, 2015 through October 13, 2018 was \$126,610.41, which did not reflect the repayment of the prior overpayment declared in its November 2, 2018 decision for the amount of \$454.67 for the period October 9 through 13, 2018, which appellant had paid in full. OWCP also noted that the preliminary overpayment of \$111,585.55 did not include compensation paid for the day of February 29, 2016 in its calculations. Because appellant had repaid the prior overpayment for the period October 9 through 13, 2018, OWCP adjusted the period of the overpayment to May 16, 2015 through October 8, 2018. It provided its calculations for the adjusted period and found that appellant had received a net overpayment of compensation in the amount of \$111,255.62 for the period May 16, 2015 through October 8, 2018. OWCP further finalized its finding that she was at fault in the creation of the overpayment. It instructed that appellant submit repayment of the \$111,255.62 overpayment in full.

Also on January 16, 2020 OWCP received appellant's January 12, 2020 overpayment action request form, postmarked January 14, 2020, requesting a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review.⁵ She disagreed that the overpayment occurred and with the amount of the overpayment. Appellant requested waiver as she believed that the overpayment occurred through no fault of her own as she did not make any money in her self-employment, which she had noted on her forms to OWCP. She advised that half of her property was in disrepair and unusable and her family lived in the other half. Appellant denied intentionally omitting information on the forms. She indicated that she continued to suffer from her injuries, that she was in a depression spiral, and that she had been diagnosed with an emotional condition. Appellant also indicated that recovery would be against equity and good conscience as her family would suffer severe financial hardship. She attached a Form OWCP-20 signed January 12, 2020 which listed her monthly income and expenses and approximately \$300.00 in available funds.

A telephonic hearing was held on May 15, 2020, during which appellant testified that she received unemployment insurance. Appellant submitted a June 10, 2020 Form OWCP-20 on which she asserted that she remained injured and that her then-counsel had advised her during the plea deal that she would not have to pay back OWCP's money as she was injured on the job. She listed her monthly income as \$757.00, which included "cash assistance" and unemployment insurance benefits. Monthly expenses totaled \$2,043.00, which included the restitution appellant was required to pay for her fraud conviction as well as child support. Appellant noted \$125.00 in available funds. Documentation of expenses, including delinquent tax bills through 2019 for the lodge property was provided.

⁵ Appellant had 30 days from OWCP's December 16, 2019 preliminary overpayment determination or until Wednesday, January 15, 2020 to request a prerecoumment hearing. As her request for a prerecoumment hearing was postmarked January 14, 2020, it was timely filed.

By decision dated July 30, 2020, the hearing representative finalized OWCP's December 16, 2019 preliminary overpayment determination, finding that an overpayment of compensation had been created in the amount of \$111,585.55, for the period May 16, 2015 through October 13, 2018, for which appellant was at fault.

LEGAL PRECEDENT -- ISSUE 1

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.⁶ 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."⁷

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."⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation due to forfeiture of compensation.

OWCP's regulations provide that OWCP must declare an overpayment of compensation for any compensation already paid during the period of forfeiture of compensation.⁹ In its December 16, 2019 decision, it found that appellant had forfeited her entitlement to compensation for the period May 16, 2015 through October 13, 2018. While the Board lacks jurisdiction over the December 16, 2019 decision as more than 180 days have elapsed to the filing of the appeal on October 13, 2020, the Board has previously explained that if forfeiture is the underlying issue in an overpayment decision, to support a finding of overpayment, the forfeiture findings must be reviewed anew.¹⁰

In order to establish that a compensationner should forfeit compensation received, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.¹¹ The term knowingly as defined in OWCP's implementing regulations, means with knowledge, consciously, willfully or intentionally.¹² The Board has found that OWCP can meet

⁶ 5 U.S.C. § 8102(b).

⁷ *Id.* at § 8129(a).

⁸ 20 C.F.R. § 10.529.

⁹ *Id.*, *K.P.*, Docket No. 20-0127 (issued August 10, 2021).

¹⁰ *M.O.*, Docket No. 16-1843 (issued September 14, 2017).

¹¹ 20 C.F.R. § 10.5(n).

¹² *Id.*

this burden of proof in several ways, including by the compensationers' understating earnings and or employment information on CA-1032 or CA-7 forms,¹³ the compensationers' admission to OWCP regarding failed to report employment or earnings, or by the compensationers' guilty plea to violating applicable federal statutes by falsely completing EN-1032 and CA-7 forms.¹⁴

Appellant completed EN-1032 forms which advised her that she must report both all employment and all earnings from employment and self-employment. The Board has previously noted that the language in the EN-1032 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.¹⁵ The forms further emphasize that severe penalties may be applied for failure to report all work activities.¹⁶

The record reflects that appellant knowingly failed to report her employment activities for the period May 15, 2015 through January 5, 2018, when she signed her last EN-1032 form. Evidence from the employing establishment's OIG established appellant's employment activities. This evidence substantiated that appellant continued to advise the State of Michigan that she was employed as the General Manager of The Forest Lodge in 2016 and 2017 and she had a commercial license for the business with an expiration of 2021. Appellant's social media posts contained information regarding their bookings, various sales promotions, and operations at The Forest Lodge. The Board notes that while appellant's December 17, 2016 EN-1032 form indicated that she was a 50 percent partner, in The Forest Lodge, she failed to report any pay or earnings from the lodge, and did not acknowledge the full extent of her employment activities. The Board finds that the foregoing facts constitute persuasive evidence that appellant knew she had income from employment and performed additional work activities which she failed to disclose on the EN-1032 form.¹⁷ On her October 15, 2017 and January 5, 2018 EN-1032 forms, appellant failed to list any employment activity with regard to The Forest Lodge. As noted, the evidence of record establishes that she was actively engaged in operating the business of The Forest Lodge.¹⁸ Thus, it is factually established that appellant engaged in employment activities during periods covered by EN-1032 forms dated December 17, 2016, October 15, 2017, and January 5, 2018 and had forfeited her entitlement to wage-loss compensation. As appellant has forfeited her entitlement to wage-loss compensation for the period May 16, 2015 through January 5, 2018, she received an overpayment in compensation for that period.¹⁹

The Board finds, however, there is no evidence of record substantiating that appellant failed to report employment or earnings during the period January 6 through October 13, 2018. The record contains no Form EN-1032 or other document covering this period. Without such a form

¹³ *A.T.*, Docket No. 17-0953 (issued December 20, 2017); *see G.R.*, Docket No. 15-1047 (issued July 8, 2016).

¹⁴ *G.G.*, Docket No. 14-1848 (issued August 4, 2019); *Harold F. Franklin*, 57 ECAB 387 (2006).

¹⁵ *See A.T.*, *supra* note 13.

¹⁶ *Id.*

¹⁷ *See K.W.*, Docket No. 22-1088 (issued December 7, 2022); *Monroe E. Hartzog*, 40 ECAB 329 (1988).

¹⁸ *Id.*

¹⁹ 20 C.F.R. §§ 501.2(c) and 501.3. *See K.P.*, *supra* note 9.

or document, the period of forfeiture must be limited to the period in which it is established that the claimant actually worked and did not report/underreported earnings, or failed to disclose any self-employment or involvement in a business enterprise. OWCP must match actual unreported earnings with a corresponding period of compensation received. It had not undertaken such analysis for this period. Accordingly, the Board will modify the forfeiture period to May 16, 2015 through January 5, 2018.

As the case record establishes that appellant forfeited her entitlement to compensation for the period May 16, 2015 through January 5, 2018, the Board finds that fact of overpayment has been established. As the period of the forfeiture is modified, the case must be remanded for OWCP to recalculate the overpayment based on the modified period of her forfeiture of compensation as found by the Board.²⁰

LEGAL PRECEDENT -- ISSUE 2

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.”²¹

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).”²²

²⁰ See *K.P.*, *supra* note 9; *T.P.*, Docket No. 17-717 (issued April 11, 2018); *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

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

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

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.²³

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment which occurred due to her forfeiture of compensation, thereby precluding waiver of recovery of the overpayment.

As found above, appellant signed EN-1032 forms which made an incorrect statement as to a material fact which she knew or should have known to be incorrect. The specific language of the EN-1032 forms demonstrates that appellant knew or should have known that the nature of her work activity would require her to report such employment activities and earnings on the forms.²⁴ Her failure to accurately report her earnings and employment activities on the EN-1032 forms constitutes a failure to provide information which she knew or should have known to be material in the creation of the overpayment.²⁵ Consequently, appellant is not eligible for a waiver of recovery of the overpayment.²⁶

CONCLUSION

The Board finds that appellant received an overpayment of compensation for the period May 16, 2015 through January 5, 2018 due to forfeiture of compensation; however, the case is not in posture for decision with regard to the amount of the overpayment. The Board further finds

²³ *Id.* at § 10.433(b); *J.C.*, Docket No. 19-0911 (issued March 25, 2021); *Duane C. Rawlings*, 55 ECAB 366 (2004).

²⁴ *M.O.*, Docket No. 18-0686 (issued January 25, 2019); *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

²⁵ *B.K.*, Docket No. 17-0406 (issued December 12, 2017); *C.W.*, Docket No. 18-1557 (issued June 25, 2019).

²⁶ *B.K.*, *id.*

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

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 3, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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