

<sup>2</sup> The Board notes that OWCP received additional evidence following the July 9, 2021 decision. 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.*

amount of \$20,248.94 from March 21, 2017 through June 20, 2018 as he forfeited his entitlement to compensation for this period; (3) whether OWCP properly found appellant at fault in the creation of the \$20,248.94 overpayment, thereby precluding waiver of recovery of the overpayment; and (4) whether OWCP properly required recovery of the \$20,248.94 overpayment by deducting \$100.00 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On October 28, 2016 appellant, then a 51-year-old city carrier associate, filed a traumatic injury claim (Form CA-1) alleging that, on October 23, 2016, he suffered a low back strain when he lost his balance ascending stairs while in the performance of duty. He stopped work on October 28, 2016. Appellant returned to limited-duty work on November 5, 2016 and to full-duty work on November 24, 2016. He again stopped work on February 16, 2017 and filed a notice of recurrence (Form CA-2a) on February 21, 2017.

In a February 17, 2017 memorandum of telephone call (Form CA-110), appellant asked questions regarding "all the jobs he works" including for a ride-sharing company, another company, and possible resumption of light-duty work.

On March 9, 2017 OWCP accepted the traumatic injury claim for a lumbar muscle strain and accepted appellant's claim for recurrence of disability.<sup>3</sup> It paid him wage-loss compensation on the supplemental rolls commencing October 3, 2017.

On October 24, 2017 appellant filed a claim for compensation (Form CA-7) for disability for the period October 3 through 13, 2017. He noted that on October 7, 8, 9, 12, and 13, 2017, he was self-employed for a ride-sharing company and earned \$23.00.

Appellant filed additional Form CA-7 claims for compensation on November 2, 16, 29, December 12, 26, 2017, January 5, and 22, 2018 for the period October 14, 2017 through January 19, 2018. He did not indicate that he was employed or self-employed on any of these forms.

OWCP paid appellant wage-loss compensation on the periodic rolls commencing January 7, 2018.

In a June 19, 2018 Form CA-110, appellant inquired about how to list his work for the ride-sharing company on a Form CA-1032. OWCP informed him that the ride-sharing company is a job and he must put it on the Form CA-1032.

On June 20, 2018 OWCP received a completed Form EN-1032 signed by appellant on an unspecified date in June 2018. The form contained language advising him what type of employment activities, earnings, and volunteer activities that he was required to report for each 15-month period prior to the time he signed each form. The EN-1032 form instructed appellant to report all employment for which he received a salary, wages, income, sales commissions, piecework, or payment of any kind. Appellant was directed to report all self-employment or

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<sup>3</sup> On October 16, 2020 OWCP expanded its acceptance of the claim to include a sprain of the lumbar ligaments and lumbar spondylosis. On July 7, 2021 it expanded its acceptance of the claim to include cervical disc degeneration.

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 forms contained certification clauses informing him of the consequences of not accurately reporting his employment activities, such as being subjected to criminal penalties and losing the right to receive workers compensation. Appellant answered a question “Yes” indicating that he had been self-employed during the 15-month period prior to June 30, 2018 driving for a ride-sharing company.

In an August 13, 2018 statement, appellant acknowledged that he drove “for [a ride-sharing company] occasionally” during the previous two-and-a-half years but had stopped as his condition had worsened. He contended that he had not fully reported his employment to OWCP as he believed he was obligated to report only net earnings and the costs of maintaining his vehicle and purchasing gasoline exceeded his fares. Appellant commented that driving was “different from working prolonged hours at [the employing establishment] or [other retail company].” Alternatively, he argued that working for the ride-sharing company was “not a job” but a way to earn extra money. Appellant submitted vehicle expense receipts dated from February through August 2018. He also provided payment records demonstrating \$814.74 in earnings from January through June 2018.

In a Form EN-1032 signed July 17, 2019, appellant acknowledged that from January 1 through June 17, 2018, he worked as a driver for a ride-sharing company, with an estimated \$350.00 in total earnings. In an accompanying July 17, 2019 statement, he acknowledged his employment with the ride-sharing company and that he had earned income. Appellant submitted a 2018 Payment Card and Third Party Network Transactions (Form 1099-K) from the ride-sharing company demonstrating that he earned \$1,123.65 from January through June 2018.

On October 17, 2019 OWCP received an investigative report dated April 9, 2019 by K.W., a special agent with the Office of Inspector General (OIG) for the employing establishment. K.W. advised that an investigation revealed that appellant “knowingly and willfully provided false information” to OWCP regarding his earnings and employment as a rideshare driver and floor associate. On his initial Form CA-7, appellant reported \$23.00 in income, whereas the ride-sharing company pay records documented \$97.65 in earnings during that period. K.W. attached payroll records demonstrating that appellant earned an additional \$866.86 through January 2018, and a total of \$2,376.90 through March 18, 2018. However, appellant did not report this income on CA-7 forms for those periods. K.W. also provided work schedules and pay records from another company documenting \$1,325.71 in earnings during approximately 240 hours of employment from September 24, 2016 through May 31, 2017. Appellant worked at the retail company for 18 days from March 26 through May 31, 2017. He failed to report these earnings and employment to OWCP.

K.W. provided appellant’s August 1, 2018 sworn statement, in which he contended that he properly reported his earnings and employment as a rideshare driver but unintentionally omitted his earnings and employment with the retail company. Appellant explained that he had not realized that each Form EN-1032 covered a period of 15 months. Additionally, he believed he was obligated to report only business profits and so he did not report his rideshare earnings unless they were greater than his expenses.

In a November 7, 2019 letter, appellant acknowledged that he had worked as a cashier at another company for 12 to 20 hours a week ending in May or June 2017, with wages of \$11.56 an hour. He also disclosed his self-employment as a rideshare driver from 2014 through 2018.

In a Form EN-1032 signed on June 29, 2020, appellant indicated that he had been involved in a business enterprise commencing June 1, 2020 utilizing a software application to trade cryptocurrency. He reported a business loss of \$5.00.

On December 8, 2020 OWCP calculated that from October 3, 2017, the date appellant began receiving wage-loss compensation, through May 26, 2018, he received \$18,270.41 in compensation. For the period May 27 through June 20, 2018, appellant received \$1,978.53 in compensation. OWCP added the amounts to equal \$20,248.94.

By decision dated December 8, 2020, OWCP found that appellant had forfeited his entitlement to compensation from March 21, 2017 through June 20, 2018 pursuant to 5 U.S.C. § 8106(b) as he knowingly failed to report earnings from employment.

On December 21, 2020 OWCP advised appellant of its preliminary overpayment determination that he had received a \$20,248.94 overpayment of compensation for the period March 21, 2017 through June 20, 2018 as he had forfeited his entitlement to compensation. It provided its calculations of the amount of compensation paid during the period and attached a payment history. OWCP further notified appellant of its preliminary finding that he was at fault in the creation of the overpayment. It provided him 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, he could request a final decision based on the written evidence, or a prerecoument hearing.

On December 21, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding the December 8, 2020 forfeiture decision.

On January 6, 2021 appellant requested a prerecoument hearing before a representative of OWCP's Branch of Hearings and Review. He contended that OWCP advised him to report only his net earnings from the ride-sharing company and not all wages received. Appellant submitted calculations regarding his earnings.

On January 12, 2021 appellant submitted preliminary financial information. He also submitted his January 15, 17, and November 8, 2019 e-mails to the human resources department at the company where he worked as a cashier requesting that they provide information to OWCP about his employment. The company responded in a November 13, 2019 e-mail that appellant had worked as a cashier from March 7, 2014 through May 31, 2017 averaging 10.35 hours a week with hourly wages of \$11.56. Appellant also provided documents regarding his financial activities using the stock-purchasing application.

During the hearing, conducted telephonically on April 6, 2021 for both the forfeiture and overpayment decisions, appellant asserted that OWCP should not consider his gross income as a rideshare driver as he made little net income due to substantial automotive and personal expenses. He contended that he received misleading or unclear advice from OWCP and the employing establishment regarding his obligation to report any income, employment, or work activities while

on compensation. The hearing representative requested that appellant submit current financial information regarding his income, assets, and expenses.

Following the hearing, appellant submitted several statements dated April 6, 2021 asserting that he had complied with the earnings reporting requirements or that he unintentionally failed to comply as he had misunderstood the requirements.

Appellant also provided a completed Form OWCP-20 dated May 7, 2021, and documentation of his income, assets, and expenses. He listed monthly household income of \$4,885.34. Appellant noted monthly expenses of \$2,199.02 for rent or mortgage, \$1,485.62 for food, \$120.00 for clothing, \$625.00 for utilities, \$480.00 for credit card payments, and \$2,300.00 in miscellaneous expenses. He submitted receipts and bills documenting his itemized expenses. Appellant listed assets of \$8,000.00 in cash on hand and \$1,833.00 in a checking account. He also indicated that he owned stocks and bonds with an unspecified value.

On September 21, 2021 OWCP received additional financial information from appellant, including documentation of the miscellaneous expenses noted on the May 7, 2021 Form OWCP-20. Appellant listed \$2,113.63 a month in miscellaneous expenses, as follows: out-of-pocket medical, \$114.29; home needs and supplies, \$98.79; textbooks for his son, \$470.97; charitable support to his family, \$54.99; charitable donation, \$10.20; gas and vehicle expenses, \$404.53; college supplies for son, \$195.61; internet streaming services, \$22.97; security camera, \$1.07; school expenses, \$132.25; food club recurring payments, \$8.75; transportation, \$87.98; hotel stays for medical needs for a family member with disabilities, \$74.10; vehicle and rental insurance, \$104.41; credit card interest charges, \$64.18; and miscellaneous, \$268.64. He submitted documentation for all but the miscellaneous expenses.

By decision dated June 21, 2021 and reissued July 9, 2021, OWCP's hearing representative finalized OWCP's preliminary overpayment determination that appellant had received a \$20,248.94 overpayment of compensation as he had forfeited his entitlement to compensation for the period March 21, 2017 through June 20, 2018. He further finalized its finding that appellant was at fault in creation of the overpayment. The hearing representative reviewed the financial information appellant provided and determined that recovery of the overpayment would not defeat the purpose of FECA as his current monthly income exceeded his documented monthly expenses by more than \$50.00. He noted that although appellant listed monthly household income of \$4,885.34 and monthly expenses of \$7,499.02, he had not submitted evidence substantiating the \$2,300.00 in miscellaneous expenses, and had miscalculated his credit card payments and interest. The hearing representative determined that it would recover the overpayment by deducting \$100.00 every 28 days from appellant's continuing compensation payments.

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

Section 8106(b) of FECA<sup>4</sup> 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.”<sup>5</sup>

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 a penalty provision, it must be narrowly construed.<sup>6</sup> The term knowingly is defined within OWCP’s regulations as with knowledge, consciously, willfully, or intentionally.<sup>7</sup>

OWCP 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.<sup>8</sup> Neither lack of profits nor the characterization of the duties as a hobby removes an unremunerated individual’s responsibility to report the estimated cost to have someone else perform his or her duties.<sup>9</sup>

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

The Board finds that OWCP properly determined that appellant forfeited his right to compensation for the period March 21, 2017 through June 20, 2018, pursuant 5 U.S.C. § 8106(b)(2), because he knowingly failed to report his employment activities and earnings.

The EN-1032 forms sent by OWCP to appellant advised him of his responsibility to complete the forms and provide all relevant information concerning his employment status and earnings during the 15-month period covered by the forms. The forms he signed noted that he 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 he owned. The forms further requested that appellant indicate whether he had performed volunteer work for any form of monetary or in-kind compensation.

In an EN-1032 form signed on an unspecified date in June 2018 and received by OWCP on June 20, 2018, appellant responded that he had been self-employed as a rideshare driver during

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> 5 U.S.C. § 8106(b).

<sup>6</sup> *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

<sup>7</sup> 20 C.F.R. § 10.5(n); *K.P.*, Docket No. 20-0127 (issued August 10, 2021); *R.A.*, Docket No. 18-0406 (issued January 28, 2019).

<sup>8</sup> *Id.* at § 10.5(g).

<sup>9</sup> *Id.*

the 15-month period covered by the form. However, he did not disclose the full extent of his earnings from self-employment, nor did he report his employment with another company.

In an investigative report dated April 9, 2019, the employing establishment's OIG advised that appellant had earned a total of \$2,376.90 from self-employment as a rideshare driver and had earnings at another company during the period at issue. Appellant failed to report this income to OWCP.

The Board finds that appellant forfeited entitlement to wage-loss compensation from March 21, 2017 through June 20, 2018. The evidence, consequently, establishes that appellant had performed work. However, he signed an EN-1032 form in June 2018, received by OWCP on June 20, 2018, covering the period March 21, 2017 through June 20, 2018. On the form appellant indicated only that he worked occasionally as a rideshare driver. 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.<sup>10</sup> Appellant, consequently, forfeited his entitlement to compensation from March 21, 2017 through June 20, 2018.

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

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.<sup>11</sup> Section 8129(a) of FECA provides, in pertinent part, "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."<sup>12</sup>

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

"(b) Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. § 8129 and other relevant statutes."<sup>13</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$20,248.94 for the period March 21, 2017 through June 20, 2018.

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<sup>10</sup> *K.P.*, *supra* note 7; *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).

<sup>11</sup> 5 U.S.C. § 8102(b).

<sup>12</sup> *Id.* at § 8129(a).

<sup>13</sup> 20 C.F.R. § 10.529.

OWCP regulations provide that OWCP must declare an overpayment of compensation for any compensation already paid for the period of a given forfeiture of compensation.<sup>14</sup> If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by a Form EN-1032 which he or she fails to report, the claimant is not entitled to compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.<sup>15</sup> Appellant engaged in self-employment as a rideshare driver and was employed as a cashier at another company from March 21, 2017 through June 20, 2018, the period covered by the EN-1032 form received by OWCP on June, 20, 2018. He, thus, received an overpayment of compensation.

As discussed above, OWCP properly found that appellant forfeited entitlement to compensation for the period March 21, 2017 through June 20, 2018 in the amount of \$20,248.94. The Board therefore finds that the \$20,248.94 amount constitutes an overpayment of compensation.<sup>16</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”<sup>17</sup>

Section 10.433(a) of OWCP’s regulations provides that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or

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

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

<sup>16</sup> *T.P.*, Docket No. 17-0717 (issued April 11, 2018); *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

<sup>17</sup> 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. (This provision applies only to the overpaid individual).”<sup>18</sup>

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.<sup>19</sup>

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

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

As discussed above, the record supports that appellant had employment activity for the period March 21, 2017 through June 20, 2018. Appellant signed an EN-1032 form in June 2018, received by OWCP on June 20, 2018, advising that he answered a question “Yes” indicating that he had been self-employed as a rideshare driver during the 15-month period prior to June 30, 2018.

The specific language of the EN-1032 forms demonstrate that appellant knew or should have known that the nature of his work activity at retail company and his self-employment as a rideshare driver would require him to report such employment activities and earnings on the forms.<sup>20</sup> His failure to accurately report his earnings and employment activities on the EN-1032 form constitutes a failure to provide information which he knew or should have known to be material in the creation of the overpayment.<sup>21</sup> Consequently, appellant is not eligible for a waiver of recovery of the overpayment.<sup>22</sup>

### **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.<sup>23</sup> Section 10.441 of Title 20 of the Code of Federal Regulations provides that if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent payments of compensation, “taking into account the probable extent of future

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<sup>18</sup> 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).

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

<sup>20</sup> *M.O.*, Docket No. 18-0686 (issued January 25, 2019); *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

<sup>21</sup> *B.K.*, Docket No. 17-0406 (issued December 12, 2017); *C.W.*, Docket No. 18-1557 (issued June 25, 2019).

<sup>22</sup> *B.K.*, *id.*

<sup>23</sup> *R.W.*, Docket No. 19-0451 (issued August 7, 2019); *C.A.*, Docket No. 18-1284 (issued April 15, 2019); *Albert Pinero*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”<sup>24</sup>

#### **ANALYSIS -- ISSUE 4**

The Board finds that OWCP properly required recovery of the overpayment by deducting \$100.00 from appellant’s continuing compensation payments every 28 days.

The record supports that, in requiring recovery of the overpayment by deducting \$100.00 from appellant’s continuing compensation payments every 28 days, OWCP took into consideration the financial information submitted by him, as well as the factors set forth in section 10.441, and found that this method of recovery would minimize any resulting hardship on him. Therefore, the Board finds that OWCP properly required recovery of the overpayment by deducting \$100.00 from his continuing compensation payments every 28 days.

#### **CONCLUSION**

The Board finds that OWCP properly determined that appellant forfeited his right to compensation for the period March 21, 2017 through June 20, 2018, pursuant 5 U.S.C. § 8106(b)(2), because he knowingly failed to report his employment activities and earnings. The Board further finds that OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. The Board also finds that OWCP properly required recovery of the overpayment by deducting \$100.00 from appellant’s continuing compensation payments every 28 days.

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<sup>24</sup> 20 C.F.R. § 10.441; *see A.F.*, Docket No. 19-0054 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 9, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 17, 2023  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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