

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

G.B., Appellant)	
)	
and)	Docket No. 20-0536
)	Issued: January 20, 2023
DEPARTMENT OF DEFENSE, DEFENSE)	
LOGISTICS AGENCY, SHARPE ARMY)	
DEPOT, Lathrop, CA, Employer)	
)	

Appearances:
James Wright, for the appellant¹
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 January 10, 2020 appellant, through her representative, filed a timely appeal from two October 22, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

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 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the October 22, 2019 decisions, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant forfeited her entitlement to wage-loss compensation for the period August 7, 2004 through September 24, 2018, as she knowingly failed to report employment activities and volunteer work pursuant to 5 U.S.C. § 8106(b)(2); (2) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$370,431.46 for the period August 7, 2004 through September 24, 2018; and (3) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On March 19, 1993 appellant, then a 41-year-old production controller, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a left knee injury when she slid out of a booth and heard a pop in her left leg while in the performance of duty. She stopped work on March 22, 1993.⁴ OWCP accepted appellant's claim for left knee sprain and bilateral knee chondromalacia patella. Appellant had multiple surgeries on both knees and was on and off work. She stopped work on December 16, 1998 and retired from federal service due to disability in 1999.⁵ OWCP paid appellant wage-loss compensation on the periodic rolls, as of June 16, 2002.

Beginning in December 2002, OWCP sent appellant letters requesting that she complete an enclosed financial reporting form (Form EN-1032), which solicited information about her employment, volunteer work, dependent(s) status, receipt of other federal benefits and/or payments, and third-party settlements. The EN-1032 forms in effect at that time contained language advising her of what type of employment activities, earnings, and volunteer activities she was required to report for the 15-month period prior to the time she signed each form. It instructed appellant 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. OWCP also advised her to report any volunteer work that she performed and the duration and frequency that she performed such work. The EN-1032 forms also contained a certification clause informing appellant of the consequences of not accurately reporting her activities, such as being subjected to criminal penalties and losing the right to receive workers' compensation benefits.

Appellant subsequently submitted a series of EN-1023 forms, each covering the preceding 15 months from the date of her signature. The case record contains forms signed on: November 7, 2005, covering the period August 7, 2004 through November 7, 2005; July 5, 2007, covering the period April 5, 2006 through July 5, 2007; October 20, 2007, covering the period July 20, 2006 through October 20, 2007; October 26, 2008, covering the period July 26, 2007 through

⁴ The present claim was assigned OWCP File No. xxxxxx117. Under OWCP File No. xxxxxx323, OWCP accepted that on April 4, 1983 appellant sustained a right knee contusion and right knee chondromalacia when she slipped and fell while in the performance of duty. Under OWCP File No. xxxxxx229, it accepted that on September 1, 1983 she twisted her right knee and ankle when she tripped on an uneven floor while in the performance of duty. OWCP accepted appellant's claim for a aggravation of right knee chondromalacia. It has administratively combined OWCP File Nos. xxxxxx117, xxxxxx323, and xxxxxx229, with the present claim serving as the master file.

⁵ The record reveals that appellant elected to receive FECA benefits in lieu of Office of Personnel Management (OPM) retirement benefits.

October 26, 2008; September 28, 2009, covering the period June 28, 2008 through September 28, 2009; October 25, 2010, covering the period July 25, 2009 through October 25, 2010; November 11, 2011, covering the period August 11, 2010 through November 11, 2011; October 29, 2012, covering the period July 29, 2011 through October 29, 2012; September 21, 2013, covering the period June 21, 2012 through September 21, 2013; September 29, 2014, covering the period June 29, 2013 through September 29, 2014; September 30, 2015, covering the period June 30, 2014 through September 30, 2015; September 25, 2016, covering the period June 25, 2015 through September 25, 2016; October 1, 2017, covering the period July 1, 2016 through October 1, 2017; and September 24, 2018, covering the period June 24, 2017 through September 24, 2018. Appellant responded “No” indicating that for the preceding 15 months covered by each EN-1032 form she was not self-employed or involved in any business enterprise and did not perform any volunteer work⁶ for which any form of monetary or in-kind compensation was received.

On March 15, 2019 OWCP received a January 18, 2019 investigative report from the Department of Labor, Office of Inspector General (OIG) advising that it had received information that appellant had failed to report employment or volunteer work on her EN-1032 forms. The investigation revealed that, from 2005 through 2010, she served as the Director of Operations for a nonprofit organization named Quilts of Valor. It noted that, in April 2010, appellant founded a nonprofit named Quilts of Honor and served as the Executive Director. According to the report, the investigation also revealed that she served as a quilt artist for All Together Family Quilting. It indicated that appellant had not reported her volunteer work or employment activities on her EN-1032 forms.

The investigative report included copies of Quilts of Valor newsletters dated November 2008 and July 2009, which listed appellant as the Operations Officer, and a printout from the All Together Family Quilting website that noted her as a quilt artist. OWCP also received a copy of her webpage, which indicated that she had served as Executive Director/Founder of Quilts of Honor since March 2010. A printout of the Quilts of Honor webpage also reported that in April 2010 appellant founded Quilts of Honor, which was described as a nonprofit organization that provided handmade quilts to veterans and active military members. It also included a list of the organization’s board members, which included her as the Executive Director.

OWCP also received Internal Revenue Service (IRS) Forms 990-EZ dated 2013 through 2016 for the organization Quilts of Honor. The IRS forms listed appellant as an Executive Director. They also indicated that she worked an average of 60 hours per week in her position and received no compensation.

In a November 26, 2018 interview report, OIG agents noted interviewing appellant on November 16, 2018 regarding her employment activities and volunteer work. They showed her copies of an EN-1032 form from 2013 and reviewed her response of “No” indicating that she did not perform any volunteer work. Appellant acknowledged that she had completed and signed the

⁶ Regarding volunteer work, the EN-1032 forms that appellant signed on November 7, 2005 through October 25, 2010 inquired about whether she performed “any volunteer work for which ANY FORM of monetary or in-kind compensation was received.” The question on the EN-1032 forms regarding volunteer work changed as of the form that appellant signed on November 11, 2011. On the EN-1032 forms signed on November 11, 2011 through September 24, 2018, the question regarding volunteer work inquired about whether appellant performed “any volunteer work, including volunteer work for which ANY FORM of monetary or in-kind compensation was received.”

form. She explained that she believed that the question regarding volunteer work was intended to ask whether she received money for volunteering. After the agents explained that her response to that, question should have included time spent at Quilts of Honor, she acknowledged that she performed volunteer work. Appellant asserted, however, that Quilts of Honor was a nonprofit organization that made quilts for veterans and those touched by war. She noted that people who volunteered at Quilts of Honor were unpaid and that she did not know what the nonprofit organization's annual budget was.

By decision dated March 22, 2019, OWCP determined that appellant forfeited her entitlement to compensation from August 7, 2004 through September 24, 2018 because she knowingly failed to report her outside employment, involvement in a business enterprise, and volunteer work. It found that she had not reported her employment with All Together Family Quilting or for Quilts of Valor from 2005 through 2010 or her self-employment as Executive Director of Quilts of Honor commencing in 2010. OWCP referenced EN-1032 forms dated November 7, 2005 through September 24, 2018, in which appellant certified that she did not perform any employment activities or volunteer work during the 15 months preceding each EN-1032 form.

On March 26, 2019 OWCP issued a preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$370,431.46 because she forfeited her entitlement to wage-loss compensation for the period August 7, 2004 through September 24, 2018. It further found that she was at fault in the creation of the overpayment because she made an incorrect statement as to a material fact, which she knew or should have known, to be incorrect. OWCP provided appellant with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, it notified her that within 30 days of the date of the letter she could request a final decision based on the written evidence or a prerecoupment hearing.

On April 10, 2019 appellant, through her representative, requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review regarding OWCP's March 22, 2019 forfeiture decision and the issues of fault and waiver of recovery of the proposed overpayment of compensation. Appellant disagreed that an overpayment occurred and that she was at fault in the creation of the overpayment.⁷

On August 9, 2019 a telephonic hearing was held regarding OWCP's forfeiture decision and preliminary overpayment determination. Appellant testified that no one advised her on how to complete the EN-1032 forms and that she thought that she only had to report volunteer work if she got paid for the work. She also clarified that she served as Director of Operations for Quilts of Valor from 2009 through 2010 and as the Executive Director for Quilts of Honor commencing in 2010. Appellant also acknowledged that she was a volunteer and made quilts for Quilts of Valor and her mother's business called All Together Family Quilting. She noted that she was not employed, did not sell any of the quilts, and did not get paid for making quilts. Regarding the overpayment issue, appellant listed her monthly income and expenses. Appellant's representative argued that, once all of these financial figures were added up, it would show that appellant was either near bankruptcy or that appellant's expenses nearly exceeded her income. Appellant

⁷ On May 19, 2019 appellant elected to receive OPM retirement benefits in lieu of FECA benefits, effective May 26, 2019. OWCP subsequently terminated her wage-loss compensation benefits.

submitted various letters of appreciation and awards given to her from local, state, and Federal Government officials and organizations regarding her volunteer work and military service. She also provided several letters of recommendation from her family and friends they explained that she started Quilts of Honor in order to help fellow veterans and that she had never been paid for her role in the organization.

In an August 27, 2019 letter, the employing establishment asserted that the evidence of record established that appellant knowingly failed to report her employment and volunteer work on the EN-1032 forms. It requested that the March 22, 2019 forfeiture decision and the March 26, 2019 preliminary overpayment determination be affirmed.

In a September 3, 2019 letter, appellant listed her monthly income and expenses. She also provided supporting financial documentation, including disability benefit and annuity statements, utility bills, health insurance bills, credit card statements, loan documents, and bank statements.

By decision dated October 22, 2019, the hearing representative affirmed the March 22, 2018 forfeiture decision.

By separate decision dated October 22, 2019, OWCP finalized the March 26, 2019 preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$370,431.46 because she knowingly failed to report employment activity and volunteer work for the period August 9, 2004 through September 24, 2018. It further found that she was at fault in the creation of the overpayment and thereby precluded from waiver of recovery of the overpayment.

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 his or her earnings, forfeits his or her right to compensation with respect to any period for which the affidavit or report was required.⁸

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.⁹ OWCP procedures recognize that, forfeiture is a penalty,¹⁰ and, as a penalty provision, it must be narrowly construed.¹¹ The term “knowingly” is defined within OWCP’s regulations as with knowledge, consciously, willfully, or intentionally.¹² OWCP has the burden of proof to establish that a claimant either with knowledge, consciously, willfully

⁸ 5 U.S.C. § 8106(b); *see F.C.*, 59 ECAB 666 (2007).

⁹ *T.G.*, Docket No. 19-0051 (issued August 20, 2019); *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (September 2020).

¹¹ *Christine P. Burgess*, 43 ECAB 449 (1992).

¹² 20 C.F.R. § 10.5(n); *R.A.*, Docket No. 18-0406 (issued January 28, 2019); *Anthony A. Nobile*, 44 ECAB 268 (1992).

or intentionally, failed to report earnings or employment activities.¹³ To meet its burden of proof to establish forfeiture, it is required to examine closely the employee's activities and statements. OWCP can meet this burden of proof in several ways, including by appellant's own admission to OWCP that he or she failed to report employment or earnings which he or she knew to report.¹⁴

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.¹⁵ 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.¹⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant had forfeited her entitlement to compensation from August 7, 2004 through August 10, 2010 because the evidence of record is insufficient to establish that she knowingly failed to report her volunteer work during this period.

Regarding volunteer work, the EN-1032 forms that appellant signed on November 7, 2005 through October 25, 2010 inquired about whether she performed "any volunteer work for which ANY FORM of monetary or in-kind compensation was received." The question on the EN-1032 forms regarding volunteer work, however, changed as of the form that she signed on November 11, 2011. On the EN-1032 forms signed on November 11, 2011 through September 24, 2018, the question regarding volunteer work inquired about whether appellant performed "any volunteer work, including volunteer work for which ANY FORM of monetary or in-kind compensation was received." The Board finds that the language in the EN-1032 forms signed by her prior to November 11, 2011 did not clearly require her to report her volunteer work as a quilt artist as the evidence of record does not establish that she received any form of compensation for her volunteer work.

As noted above, OWCP has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully or intentionally, fail to report employment earnings or work activity.¹⁷ Its procedures recognize that, forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.¹⁸ The Board thus finds that appellant did not knowingly omit or understate any part of her earnings on the EN-1032 forms that she signed prior to November 11, 2011.¹⁹

¹³ *Billy J. McCamey*, Docket No. 00-2725 (issued June 11, 2002).

¹⁴ *B.P.*, Docket No. 18-1427 (issued July 29, 2019); *Harold F. Franklin*, 57 ECAB 387 (2006).

¹⁵ 20 C.F.R. § 10.5(g).

¹⁶ *Id.*

¹⁷ *Supra* note 14.

¹⁸ *Supra* note 12.

¹⁹ *See B.P.*, Docket No. 18-1427 (issued July 29, 2019).

OWCP, therefore, improperly determined that she forfeited her entitlement to compensation from August 7, 2004 through August 10, 2010.²⁰

The Board further finds, however, that OWCP properly determined that appellant forfeited her entitlement to wage-loss compensation for the period August 11, 2010 through September 24, 2018, as she knowingly failed to report employment activities and volunteer work pursuant to 5 U.S.C. § 8106(b)(2).

Appellant signed EN-1032 forms on November 11, 2011 through September 24, 2018 that advised her to report any self-employment, involvement in any business enterprise, or volunteer work, including volunteer work for which she received any form monetary or in-kind compensation for the prior 15 months. She indicated that, during this period, she did not perform any employment or self-employment and did not perform volunteer work.

The evidence of record demonstrates, however, that appellant performed work activity as Executive Director and Founder of a nonprofit organization called Quilts of Honor. The OIG investigative report indicated that she founded Quilts of Honor and has served as Executive Director. During the April 9, 2019 hearing, appellant acknowledged performing employment activities and volunteer work for Quilts of Honor.²¹ IRS forms dated from 2013 through 2016 for the organization Quilts of Honor also listed her as Executive Director and indicated that she worked an average of 60 hours per week in her position. Additional documentation confirming appellant's role as Executive Director for the nonprofit organization includes the Quilts of Honor webpage.

Thus, the Board finds that OWCP properly determined that appellant forfeited her entitlement to wage-loss compensation for the period August 11, 2010 through September 24, 2018, as she knowingly failed to report employment activities and volunteer work pursuant to 5 U.S.C. § 8106(b)(2).

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of OWCP's implementing regulations provide, in part, 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.

“(b) Where the right to compensation is forfeited, OWCP shall recovery any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. §8129 and other relevant statutes.”²²

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

²¹ See *L.B.*, Docket No. 16-1385 (issued October 3, 2017); see also *M.D.*, Docket No.11-1751 (issued April 20, 2012).

²² 20 C.F.R. § 10.529.

ANALYSIS -- ISSUE 2

OWCP determined that appellant received an overpayment of compensation in the amount of \$370,431.46 based on its finding that she forfeited her entitlement to compensation from August 7, 2004 through September 24, 2018. For the reasons described above, it did not meet its burden of proof to establish that she forfeited her entitlement to compensation for the period August 7, 2004 through August 10, 2010. Because OWCP had not established that appellant forfeited her entitlement to wage-loss compensation for the period August 7, 2004 through August 10, 2010, the Board finds that there is no overpayment for this period. Therefore, this period should not have been included in the overpayment calculation.

However, for the reasons described above, OWCP did meet its burden of proof to establish a finding of forfeiture of compensation for the period August 11, 2010 through September 24, 2018. Due to the fact that appellant is not entitled to compensation for the period August 11, 2010 through September 24, 2018, the amount of compensation she actually received during this period properly serves as the basis for an overpayment of compensation. Thus, the Board finds that OWCP has established an overpayment of compensation for the period August 11, 2010 through September 24, 2018.

The case shall, therefore, be remanded to OWCP for recalculation of the amount of the established overpayment. It shall then issue a *de novo* preliminary overpayment determination, with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide supporting financial documentation.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.²³ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment 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.”²⁴ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.²⁵

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part that an individual is with fault in the creation of an overpayment if he or she made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; failed to provide

²³ 5 U.S.C. § 8129(a).

²⁴ *Id.* at § 8129(b).

²⁵ *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

information which he or she knew or should have known to be material; or accepted a payment which he or she knew or should have known to be incorrect.²⁶

Section 10.433(c) of OWCP's regulations provides that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on 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.²⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP improperly found that appellant was at fault in the creation of the overpayment for the period August 7, 2004 through August 10, 2010.

As found above, OWCP improperly forfeited appellant's entitlement to compensation for the period August 7, 2004 through August 10, 2010. Thus, as there is no forfeiture, there is no overpayment for which she can be deemed at fault.²⁸

The Board further finds, however, that OWCP properly found that appellant was at fault in the creation of the overpayment for the period August 11, 2010 through September 24, 2018, thereby precluding waiver of recovery of the overpayment.

OWCP properly determined that appellant was at fault in the creation of the overpayment because she failed to provide information that she knew or should have known to be material on EN-1032 forms signed by her on November 11, 2011 through September 24, 2018. The language of these EN-1032 forms demonstrates that she knew or should have known that the nature of her employment activities would require her to report them on the forms.²⁹ Appellant signed a certification clause on the EN-1032 forms that advised her that she might be subject to penalties if she knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing these forms, she is deemed to have acknowledged her duty to complete the forms properly, including the duty to report any earnings, employment, self-employment, or involvement in a business enterprise. As appellant indicated that she had no employment activity during the covered periods, she failed to furnish information which she knew or should have known to be material to OWCP. Therefore, the Board finds that she is at fault in the creation of the overpayment for the period August 11, 2010 through September 24, 2018, she is precluded from waiver of recovery of the overpayment.³⁰

²⁶ 20 C.F.R. § 10.433(a).

²⁷ *Id.* at § 10.433(c).

²⁸ *Supra* note 24.

²⁹ *See J.A.*, Docket No. 14-1863 (issued July 7, 2015).

³⁰ *A.T.*, Docket No. 17-0953 (issued December 20, 2017); *Harold F. Franklin*, 57 ECAB 387 (2006).

CONCLUSION

The Board finds that OWCP improperly determined that appellant forfeited her entitlement to wage-loss compensation for the period August 7, 2004 through August 10, 2010, but properly determined that she forfeited her entitlement to wage-loss compensation for the period August 11 through September 24, 2018. The Board further finds that OWCP improperly determined that she received an overpayment of compensation for the period August 7, 2004 through August 10, 2010, but properly determined that she received an overpayment of compensation for the period August 11, 2010 through September 24, 2018. The case is not in posture for decision, however, with regard to the amount of the overpayment. The Board also finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment for the period August 7, 2004 through August 10, 2010, but properly determined that she was at fault in the creation of the overpayment for the period August 11, 2010 through September 24, 2018.

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2019 decision of the Office of Workers' Compensation Programs regarding forfeiture is reversed in part and affirmed in part. The October 22, 2019 decision of the Office of Workers' Compensation Programs regarding the overpayment is reversed in part, affirmed in part, and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 20, 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