

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

A.A., Appellant)	
)	
and)	Docket No. 22-1313
)	Issued: June 5, 2023
U.S. POSTAL SERVICE, LOS ANGELES)	
INTERNATIONAL SERVICE CENTER,)	
Carson, CA, Employer)	
)	

Appearances:
Lisa Varughese, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 1, 2022 appellant, through counsel, filed a timely appeal from February 7 and March 10, 2022 merit decisions of the Office of Workers' Compensation Programs (OWCP).²

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The Board notes that the record also contains April 21 and April 25, 2022 merit decisions, which modified a loss of wage-earning capacity (LWEC) determination. As counsel did not appeal from those decisions, the Board will not consider that issue in this appeal. *See* 20 C.F.R. § 501.3(c)(4).

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

ISSUES

The issues are: (1) whether OWCP properly determined that appellant forfeited her entitlement to compensation for the period July 17, 2018 through September 30, 2021, pursuant to 5 U.S.C. § 8106(b)(2), because she knowingly failed to report her employment activities and earnings; (2) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$47,827.35 from July 17, 2018 through September 30, 2021 as she forfeited her entitlement to compensation for this period; (3) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (4) whether OWCP properly required recovery of the \$47,827.35 overpayment by deducting \$290.35 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On March 9, 2007 appellant, then a 35-year-old customer complaint clerk, filed an occupational disease claim (Form CA-2) alleging that she developed inflammation of the heel due to factors of her federal employment. She noted that she first became aware of her condition and realized its relation to her federal employment on March 8, 2007. OWCP accepted the claim for right plantar fasciitis. Appellant stopped work on March 5, 2007. OWCP paid her wage-loss compensation on the supplemental rolls effective March 11, 2008, on the periodic rolls effective June 8, 2008. Appellant was separated from employment on September 11, 2008.

On October 17, 2019,⁵ September 19, 2020, and September 30, 2021 appellant signed Form EN-1032's regarding her earnings and employment activity for the preceding 15-month period. 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 amended Form EN-1032⁶ dated October 17, 2019 she marked "Yes" to the question of whether she worked for an employer during the past 15 months, noting that she worked as a paralegal at LogistiCare Solutions, LLC from 2017 through September 20, 2018, and

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the March 10, 2022 decision, appellant submitted additional evidence. However, the Board's *Rules of Procedures* 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.

⁵ On October 24, 2019 OWCP acknowledged receipt of the Form EN-1032 signed on October 17, 2019; however, indicated that it was not completed properly as she failed to answer all the questions in Part D and Part E of the form. It provided appellant an additional 30 days to submit the completed form. In an amended Form EN-1032 received on November 6, 2019 appellant responded to all questions.

⁶ *Id.*

responded “No” to questions regarding whether she was self-employed or involved in a business enterprise during the previous 15-month period. On the Form EN-1032 dated September 19, 2020 she marked “No” to the question of whether she worked for an employer during the past 15 months, and responded “Yes” to questions regarding whether she was self-employed or involved in a business enterprise during the previous 15-month period, noting that she worked for Instacart from 2019 through March 2020. On the Form EN-1032 dated September 30, 2021 she did not respond to the question of whether she worked for an employer during the past 15 months, and responded “Yes” to questions regarding whether she was self-employed or involved in a business enterprise during the previous 15-month period, noting that she worked as a freelance paralegal from February 2021 to the present.

In a December 27, 2021 investigative report, an employing establishment Office of the Inspector General (OIG) agent, K.H. noted that a search of the Georgia Secretary of State business directory revealed three active and compliant businesses in appellant’s name and not disclosed on the Form EN-1032 forms, specifically, StayClean, LLC, Helping All People Evolve (H.A.P.E.), and Pearl Coke Foundation, Inc. K.H. noted that H.A.P.E. was formed and registered October 17, 2018, The Pearl Coke Foundation was formed and registered February 5, 2019, and StayClean, LLC was formed and registered on October 8, 2019. She indicated that according to StayClean, LLC’s Facebook website, active since October 3, 2019, there were entire months where appellant posted she was “booked.” During the interview, K.H. produced three Form CA-1032s for 2019, 2020, and 2021 and requested appellant review the forms for accuracy. Appellant reported that H.A.P.E., and Pearl Coke Foundation were considered self-employment, noting that she had been a paralegal since 2012. She stated: “I just wasn’t thinking at the time I filled it out.” Appellant stated that she should have provided more accurate information to OWCP in 2019, 2020, and 2021 and admitted that “my yearly income was not reported accurately.” She indicated that her actual earnings fluctuated between \$30,000.00 to \$60,000.00 in 2019, 2020, and 2021. Appellant further stated that she received Paycheck Protection Program (PPP) funding and two small business administration loans.

The OIG concluded that appellant was operating a successful cleaning business and paralegal business ventures that she did not report on Form EN-1032 although this disclosure was required when in receipt of FECA benefits. In EN-1032 forms dated October 17, 2019, September 19, 2020, and September 30, 2021, appellant made false statements by failing to disclose and accurately report her earnings from various self-employment ventures to continue to receive worker’s compensation benefits. The evidence included a Georgia Secretary of State business search, which revealed appellant was associated with three active and compliant businesses established in 2018 and 2019 and not disclosed in the EN-1032 forms dated October 17, 2019, September 19, 2020, and September 30, 2021. The employing establishment’s OIG provided several reports, which detailed the employing establishment’s OIG’s investigative activities, along with exhibits.

In a letter dated January 12, 2022, OWCP notified appellant that it had received information that she had earnings from self-employment in excess of that which was reported on the EN-1032 forms dated October 17, 2019, September 19, 2020, and September 30, 2021. It requested that she discuss any work performed during this period. In a separate letter of even date, OWCP indicated that it was notified that she had returned to alternate work with LogistiCare

Solutions, LLC and requested additional information regarding the alternate work to calculate entitlement to compensation.

By decision dated February 7, 2022, OWCP found that appellant had forfeited her entitlement to compensation for the period July 17, 2018 through September 30, 2021 under 5 U.S.C. § 8106(b) because she knowingly failed to disclose her outside earnings and employment activities. It explained that she had knowingly failed to report earnings and employment activities when submitting Form EN-1032's dated October 17, 2019, September 19, 2020, and September 30, 2021.

In a preliminary overpayment determination dated February 7, 2022, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$47,827.35, for the period July 17, 2018 through September 30, 2021, as she forfeited entitlement to compensation. In a payment history worksheet dated February 7, 2022, that accompanied the preliminary overpayment determination, OWCP provided a payment history for the period July 22, 2018 through September 11, 2021 for a total overpayment of \$46,368.54. It further notified 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 requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) and supporting financial documentation. 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 precoupment hearing.

In a letter dated February 13, 2022, appellant contended that the overpayment determination was premature and she was not provided adequate time to respond. She noted that information reported regarding her employment with LogistiCare Solutions, LLC was incorrect as she was terminated from employment, and that noted this change on the Form EN-1032 submitted on October 17, 2019. Appellant noted that she worked as an independent contractor in 2019. She indicated that at the time of the December 15, 2021 OIG interview she was still grieving the loss of her son, she was on antidepressants, and she did not remember any aspect of the conversation. Appellant further noted that she was not shown or provided copies of documents that were used during the investigation, and she was never told about yearly income limitations. She requested reconsideration of the February 7, 2022 forfeiture decision and recalculation of the overpayment amount. Appellant submitted the notice of her separation from employment with LogistiCare Solutions, LLC dated September 20, 2018.

In a completed overpayment action request form dated March 7, 2022, appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review. She disagreed with the overpayment, contended that it occurred through no fault of her own, and requested waiver of recovery.

In a March 7, 2022 Form OWCP-20, appellant reported that her total monthly income was \$5,650.00. She reported expenses totaling \$5,583.00. Appellant indicated monthly expenses of \$2,400.00 for rent or mortgage, \$325.00 for food, \$125.00 for clothing, \$635.00 for utilities, and \$985.00 for other expenses. She noted monthly installment debt of \$563.00, and \$550.00 for credit cards. Appellant further noted cash on hand of zero and a savings account, stocks, bonds, and personal property, all valued at zero. She asserted that the overpayment occurred through no fault of her own, and was rather due to OWCP's failure to note the change in her employment status

with LogistiCare Solutions, LLC. Appellant indicated that she was never informed by OWCP regarding the policies and procedures for reporting income and income limits and believed she would receive lifetime benefits. She submitted supporting financial information including a lease, credit card statement, insurance statement, car payment notice, and utility bill.

On March 8, 2022 appellant through counsel responded to the preliminary overpayment determination and asserted that she was without fault because she did not understand OWCP policies regarding receiving other income. She advised that adjustment or recovery would defeat the purpose of FECA because she needs substantially all her income to meet her living expenses, she has very few assets, her assets do not exceed the resource base, she is still supporting her living son, and her cleaning business is imminently closing.

By decision dated March 10, 2022, OWCP finalized its preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$47,827.35 for the period July 17, 2018 through September 30, 2021, because she forfeited her entitlement to wage-loss compensation for that period. It found that appellant 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, thereby precluding waiver of recovery of the overpayment. OWCP required recovery of the overpayment by deducting \$290.35 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 right to compensation with respect to any period for which the affidavit or report was required.⁷

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.⁸ OWCP procedures recognize that forfeiture is a penalty,⁹ and, as a penalty provision, it must be narrowly construed.¹⁰ The term “knowingly” is defined within OWCP's regulations as with knowledge, consciously, willfully, or intentionally.¹¹

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

⁷ 5 U.S.C. § 8106(b)(1) and (2), respectively.

⁸ *T.G.*, Docket No. 19-0051 (issued August 20, 2019); *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

¹⁰ *Christine P. Burgess*, 43 ECAB 449 (1992).

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

accepts no remuneration.¹² 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.¹³

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant forfeited her entitlement to wage-loss compensation for the period July 17, 2018 through September 30, 2021 as she knowingly failed to report employment activities and earnings, pursuant to 5 U.S.C. § 8106(b)(2).

OWCP found that appellant forfeited her entitlement to compensation from July 17, 2018 through September 30, 2021 because she failed to report earnings from employment activities on EN-1032 forms signed on October 17, 2019, September 19, 2020, and September 30, 2021.

The EN-1032 forms sent by OWCP to appellant 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 her that fraudulently concealing or failing to report income could subject her to criminal prosecution.

On the Form EN-1032 dated October 17, 2019 appellant marked "Yes" to the question of whether she worked for an employer during the past 15 months, noting that she worked as a paralegal at LogistiCare Solutions, LLC from 2017 through September 20, 2018, and responded "No" to questions regarding whether she was self-employed or involved in a business enterprise during the previous 15-month period. On the Form EN-1032 dated September 19, 2020 she marked "No" to the question of whether she worked for an employer during the past 15 months, and responded "Yes" to questions regarding whether she was self-employed or involved in a business enterprise during the previous 15-month period, noting that she worked for Instacart from 2019 through March 2020. On the Form EN-1032 dated September 30, 2021 appellant did not respond to the question of whether she worked for an employer during the past 15 months, and responded "Yes" to questions regarding whether she was self-employed or involved in a business enterprise during the previous 15-month period, noting that she worked as a freelance paralegal from February 2021 to the present.

On December 27, 2021 an investigator with the employing establishment's OIG related that appellant was operating a successful cleaning business, StayClean, LLC, and paralegal business ventures that she did not report on Form EN-1032s although this disclosure was required when in receipt of FECA benefits. In EN-1032 forms dated October 17, 2019, September 19, 2020, and September 30, 2021, appellant made false statements by failing to disclose and accurately report her earnings from various self-employment ventures to continue to receive worker's compensation benefits. The report included Georgia Secretary of State business search, which revealed appellant was associated with three active and compliant businesses established in 2018 and 2019 and not disclosed on the EN-1032 form. The OIG investigator interviewed

¹² *Id.* at § 10.5(g).

¹³ *Id.*

appellant on December 15, 2021 and appellant reported that H.A.P.E., and Pearl Coke Foundation were considered self-employment, noting that she had been a paralegal since 2012. She stated: “I just wasn’t thinking at the time I filled it out.” Appellant stated that she should have provided more accurate information to OWCP in 2019, 2020, and 2021 and admitted that “[m]y yearly income was not reported accurately” and that her actual earnings fluctuated between \$30,000.00 to \$60,000.00 in 2019, 2020, and 2021. She further stated that she received PPP funding and two small business administration loans.

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.¹⁴

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.¹⁵ Appellant completed EN-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 EN-1032, provide persuasive evidence that she “knowingly” omitted her employment information.¹⁶ The Board thus finds that appellant misrepresented her employment activity and, therefore, forfeited her right to all compensation for the period July 17, 2018 through September 30, 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.¹⁷

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.”

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

¹⁵ *Id.* at § 10.5(n).

¹⁶ *See G.R.*, Docket No. 15-1047 (issued July 8, 2016).

¹⁷ 5 U.S.C. § 8106(b).

“(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 [recovery of overpayments] and other relevant statutes.”¹⁸

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly found that appellant received an overpayment of compensation as she knowingly failed to report her employment activities and earnings, pursuant to 5 U.S.C. § 8106(b)(2).

Appellant forfeited her right to compensation. As noted above, OWCP may declare an overpayment of compensation for any compensation already paid for the period of a forfeiture of compensation. 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, 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.¹⁹ The Board, accordingly, finds that an overpayment of compensation has been established.²⁰

The Board further finds, however, that this case is not in posture for decision regarding the period and amount of the overpayment.

On December 27, 2021 an investigator with the employing establishment’s OIG related that appellant was operating a successful cleaning business, StayClean, LLC, and paralegal business ventures that she did not report on EN-1032 forms although this disclosure was required when in receipt of worker’s compensation benefits under FECA. In EN-1032 forms dated October 17, 2019, September 19, 2020, and September 30, 2021, appellant made false statements by failing to disclose and accurately report her earnings from various self-employment ventures while continuing to receive worker’s compensation benefits. Based on the December 27, 2021 report from the OIG, OWCP calculated the overpayment of compensation by determining the periods from EN-1032 forms dated October 17, 2019, September 19, 2020, and September 30, 2021 that appellant failed to disclose and accurately report her earnings and continued to receive worker’s compensation benefits. In the overpayment memorandum section of the preliminary determination dated February 7, 2022, it calculated the amount and period of the overpayment and concluded that she had received an overpayment of \$47,827.35 for the period July 17, 2018 through September 30, 2021.

OWCP then noted in a payment history worksheet that accompanied the preliminary overpayment determination, however, that the overpayment period was from July 22, 2018 through September 11, 2021 and the overpayment amount was \$46,368.54.

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

¹⁹ *See Louis P. McKenna, Jr.*, 46 ECAB 428 (1994).

²⁰ *See J.N.*, Docket No. 13-1761 (issued July 1, 2014).

However, in the final overpayment decision of March 10, 2022, OWCP noted an overpayment period from July 17, 2018 through September 30, 2021 and an overpayment amount of \$47,827.35. It did not, however, address the issue of why it had determined that the overpayment period in the accompanying payment history worksheet noted an overpayment period from July 22, 2018 through September 11, 2021 with an overpayment amount of \$46,368.54. Although OWCP provided a prorated calculation for different periods of time, the source for the compensation figures for each period was not identified. A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.²¹ The Board will, therefore, remand the case for OWCP to further explain its calculation of the period and amount of the overpayment.

On remand OWCP shall determine the exact period and amount of the overpayment of compensation. It shall then issue a new preliminary overpayment determination, with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide supporting financial information.²² After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.²³

CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited her entitlement to wage-loss compensation for the period July 17, 2018 through September 30, 2021 as she knowingly failed to report employment activities and earnings, pursuant to 5 U.S.C. § 8106(b)(2). The Board further finds that she received an overpayment of compensation; however, the case is not in posture for decision regarding the period and amount of the overpayment.

²¹ *R.B.*, Docket No. 20-0022 (issued October 28, 2020); *O.R.*, 59 ECAB 432 (2008).

²² *See L.K.*, Docket No. 20-0416 (issued November 12, 2020).

²³ In light of the Board's disposition regarding the period and amount of the overpayment, the issues of waiver of recovery of the overpayment are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2022 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 5, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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