

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

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K.B., Appellant)	
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and)	Docket No. 22-1330
)	Issued: June 14, 2023
U.S. POSTAL SERVICE, HAMMOND POST OFFICE, Hammond, IN, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 19, 2022 appellant filed a timely appeal from an August 31, 2022 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 determined that appellant received an overpayment of compensation in the amount of \$28,710.22 for the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019, because she forfeited her entitlement to compensation for these periods; and (2) whether appellant was at fault in the creation of the \$28,710.22 overpayment of compensation, thereby precluding waiver of recovery .

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 21, 2015 appellant, then a 30-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 19, 2015 she sustained a back injury when she bent over a gurney to pick up a parcel while in the performance of duty. She stopped work on December 19, 2015 and returned to work on February 4, 2016 in a part-time, limited-duty position. Appellant returned to full-time work on December 14, 2016. OWCP accepted her claim for lumbar strain and paid her wage-loss compensation.

Appellant filed claims for compensation (Form CA-7) for disability from work due to her December 19, 2015 employment injury. On these forms, she checked boxes marked "No" to indicate that she was not employed during periods covered by the forms. On June 2, 2020 OWCP received an August 27, 2019 investigative report from the employing establishment's Office of the Inspector General. The evidence described in the report revealed that appellant had a business called Krystale's Tastefull Sensationz during periods covered by her claims for compensation.

By decision dated November 4, 2020, OWCP determined that appellant forfeited her right to compensation from November 19, 2016 through June 7, 2019, because she knowingly failed to report employment and earnings on Form CA-7 claims covering this period.

By decision dated December 9, 2020, OWCP finalized a November 4, 2020 preliminary overpayment determination, finding that appellant received a \$28,710.22 overpayment of compensation for the period November 19, 2016 through June 7, 2019. It further determined that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

By decision dated January 19, 2021, OWCP denied appellant's request for a hearing regarding its November 4, 2020 forfeiture decision. It found that her request was untimely filed. By separate decision dated January 19, 2021, OWCP denied appellant's request for a prerecoumpment hearing, finding that it was untimely filed.

Appellant appealed the November 4 and December 9, 2020 decisions to the Board. By decision dated January 14, 2022,³ the Board found that OWCP properly determined that she forfeited her right to compensation for the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019, pursuant to section 8106(b)(2), because she knowingly failed to report her self-employment activities and earnings. However, it also found that OWCP improperly determined that appellant forfeited her right to compensation for the period January 7 through June 23, 2017. The Board further found that OWCP improperly determined that she received an overpayment of compensation for the period January 7 through June 23, 2017. It also found that OWCP properly determined that appellant received an overpayment of compensation

² Docket No. 21-0604 (issued January 14, 2022).

³ *Id.*

for the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019. The Board further found that OWCP properly determined that she was at fault in the creation of the overpayment for the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019, thereby precluding waiver of recovery of the overpayment. OWCP determined that the case was not in posture for decision with regard to the amount of the overpayment for the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019. The Board directed OWCP, upon remand, to recalculate the amount of the overpayment and provide appellant with a clear statement explaining its calculations, followed by anew preliminary overpayment determination and a *de novo* decision.

On July 28, 2022 OWCP notified appellant of its preliminary overpayment determination that she received an overpayment of compensation in the amount of \$28,710.22 for the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019 due to the fact that she forfeited her compensation.⁴ It explained the calculation of the \$28,710.22 overpayment by noting that it consisted of a \$197.92 overpayment for the period November 19 through 25, 2016; a \$1,335.66 overpayment for the period November 26, 2016 through January 6, 2017; and a \$27,176.64 overpayment for the period August 16, 2017 through June 7, 2019. OWCP also made a preliminary determination that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. It advised her that she could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. OWCP provided appellant with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). 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. OWCP provided payment records and worksheets supporting its conclusion that appellant received \$28,710.22 for the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019.

By decision dated August 31, 2022, OWCP finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$28,710.22 for the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019 due to the fact that she forfeited her compensation. It also found that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP also noted that, on March 29, 2022, the U.S. Department of the Treasury recouped a payment of \$7,041.54 from appellant. It indicated that this amount had been deducted from the overpayment total of \$28,710.22 and, therefore, she was responsible for repaying the remaining \$21,668.68.

⁴ On March 14, 2022 OWCP had previously advised appellant of its preliminary overpayment determination that she received an overpayment of compensation in the amount of \$28,710.22 due to the fact that she forfeited her compensation. It improperly identified the forfeiture periods as “November 19, 2016 through January 7, 2017 and June 24, 2017 through January 6, 2017.” Appellant submitted an overpayment recovery questionnaire and requested a precoupment hearing before a representative of OWCP’s Branch of Hearings and Review. Prior to the hearing, OWCP’s hearing representative set aside the March 14, 2022 preliminary overpayment determination and remanded the case to OWCP for further development, including issuance of a new preliminary overpayment determination. It noted deficiencies in the March 14, 2022 preliminary overpayment determination, including an improper listing of the periods of the overpayment.

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.⁵ 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.”⁶

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

“(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

“(b) Where the right to compensation is forfeited, [OWCP] shall recover any compensation already paid for the period of forfeiture pursuant to 5 USC [§] 8129 [recovery of overpayments] and other relevant statutes.”⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$28,710.22 for the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019 because she forfeited her compensation for these periods.

OWCP explained the calculation of the \$28,710.22 overpayment by noting that it consisted of a \$197.92 overpayment for the period November 19 through 25, 2016; a \$1,335.66 overpayment for the period November 26, 2016 through January 6, 2017; and a \$27,176.64 overpayment for the period August 16, 2017 through June 7, 2019. It provided payment records and worksheets supporting its conclusion that appellant received a \$28,710.22 overpayment for the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019.

The Board notes that appellant was not entitled to compensation for the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019 because, as determined by the Board in its January 14, 2022 decision, she forfeited her compensation for these

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ 20 C.F.R. § 10.529. *See also Harold F. Franklin*, 57 ECAB 387 (2006).

periods. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.⁸

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received an overpayment of compensation in the amount of \$28,710.22 for the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019.

LEGAL PRECEDENT -- ISSUE 2

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.⁹ 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."¹⁰ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.¹¹

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:

"An individual is with fault in the creation of an overpayment who--

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect...."¹²

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in the creation of the \$28,710.22 overpayment of compensation, thereby precluding waiver of recovery.

As the Board explained in its January 14, 2022 decision, appellant was at fault in the creation of the overpayment because she failed to provide information that she knew or should

⁸ *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *B.W.*, Docket No. 17-0366 (issued June 7, 2017); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

⁹ 5 U.S.C. § 8129(a).

¹⁰ *Id.* at § 8129(b).

¹¹ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹² 20 C.F.R. § 10.433(a).

have known to be material on Form CA-7 claims covering the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019. The Board found in its January 14, 2022 decision that the record supported that she had earnings and employment activity when she was self-employed with her own business for these periods covered by Form CA-7 claims signed by her, but she failed to report the relevant earnings/employment activities on these forms. As noted above, findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.¹³

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$28,710.22 for the periods November 19, 2016 through January 6, 2017 and June 24, 2017 through June 7, 2019 because she forfeited her compensation for these periods. The Board further finds that she was at fault in the creation of the \$28,710.22 overpayment of compensation, thereby precluding waiver of recovery.

ORDER

IT IS HEREBY ORDERED THAT the August 31, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 14, 2023
Washington, DC

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

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

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

¹³ See *supra* note 10.