

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 22, 2021, appellant, then a 26-year-old mail handler assistant, filed a traumatic injury claim (Form CA-1) alleging that on January 19, 2021 she injured her left shoulder when reaching and pulling mail and boxes toward her while in the performance of duty. She stopped work on May 22, 2021. On June 24, 2021, OWCP accepted the claim for left shoulder sprain, laceration of left biceps, and other left shoulder lesions. It paid appellant wage-loss compensation on the supplemental rolls beginning May 11, 2021, and on the periodic rolls beginning August 15, 2021.

On February 16, 2023, OWCP referred appellant, along with the case record, a series of questions, and a statement of accepted facts (SOAF), to Dr. Daniel Schlatterer, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her employment-related conditions and disability.²

On May 8, 2023, OWCP received a report and work capacity evaluation (Form OWCP-5c) from Dr. Schlatterer, which indicated that appellant was disabled from her preinjury position as a mail handler assistant, but was capable of performing full-time sedentary-duty work with no reaching above shoulder height.

On August 18, 2023, OWCP referred appellant to vocational rehabilitation services to assist with her return to gainful employment, based on Dr. Schlatterer's findings.

On January 11, 2024, OWCP provided appellant an EN-1032 form, which contained language advising her what types of employment activities and earnings that she was required to report for the 15-month period prior to the time she signed the form. The EN-1032 form instructed her to report all employment for which she received a salary, wages, income, sales commissions, piecework, or payment of any kind. The form included instructions for appellant to report all self-employment or involvement in business enterprises, including (but not limited to) farming, sales work, operating a business (including a store or restaurant), and providing services in exchange for money, goods or other services. The kinds of services that she was required to report included such activities as carpentry, mechanical work, painting, contracting, childcare, odd jobs, keeping books/records, and managing/overseeing a business of any kind, including a family business. Such activities had to be reported even if they were part time or intermittent. The EN-1032 form contained a certification clause, which informed appellant of the consequences of not accurately reporting her earnings and employment activities, such as being subjected to criminal prosecution.

On February 7, 2024, appellant signed the EN-1032 form provided by OWCP. She responded "No" to a question asking her whether she had worked for any employer during the prior 15 months before signing the form. Appellant did not list any earnings or employment activities.

In a March 11, 2024 investigative memorandum covering the period December 7, 2023 through March 8, 2024, a special agent from the employing establishment's Office of Inspector General (OIG) indicated that appellant had worked as an insurance adjuster for Alacrity Solutions while receiving wage-loss compensation, had failed to disclose her earnings on the EN-1032 form,

² Dr. Schlatterer examined appellant on March 15, 2023 and recommended a functional capacity evaluation (FCE), which took place on April 19, 2023.

and was observed performing activities which seemed to contradict her subjective complaints. The OIG agent spoke with her on March 5, 2024, and indicated that she claimed she did not report the income on her EN-1032 form because she did not know she needed to list the employment and/or she was distracted when completing the form. Enclosed with the March 11, 2024 investigative report was a package of documents, which included: (1) an e-mail to appellant dated September 14, 2023 from M.H., an executive coordinator of human resources for Alacrity Solutions, which indicated that appellant had been hired “for a 90-day deployment” as a property desk adjuster, six days per week, 10 hours per day, beginning September 25, 2023; (2) an acceptance of a 90-day designated assignment position with Alacrity Solutions signed by appellant on September 25, 2023, which noted a pay rate of \$32.50 per hour, subject to overtime after 40 hours; (3) a job description for a staff desk adjuster with Alacrity Solutions; and (4) payroll records showing gross year-to-date earnings through December 31, 2023 with Alacrity Solutions totaling \$19,450.93.

Following the OWCP-directed vocational rehabilitation, on March 11, 2024, appellant began working in a full-time position as an injury claims specialist for State Farm, earning \$66,041.85 per year. An offer letter noted that the position included investigating claims and assisting customers with applying for coverage and questions about coverage and pending claims.³

In correspondence to the vocational specialist dated April 18, 2024, appellant described her position with State Farm as “office job desk work.” On May 15, 2024, OWCP received a job description for an injury claims specialist with State Farm.

By decision dated June 5, 2024, OWCP found that appellant forfeited her right to compensation from November 7, 2022 through February 7, 2024, pursuant to 5 U.S.C. § 8106(b), because she knowingly failed to disclose her outside earnings and employment with Alacrity Solutions on a Form EN-1032 covering this period.

In a preliminary overpayment determination dated June 5, 2024, OWCP advised appellant that she had received an overpayment of compensation in the amount of \$36,600.85 because she forfeited her compensation for the period November 7, 2022 through February 7, 2024. The determination included an overpayment calculation worksheet reflecting an overpayment of \$36,600.85 for that period. OWCP also determined that appellant was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known to be incorrect. It requested that she submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable recovery method, it provided an overpayment action request form and advised her that she could request waiver of recovery of the overpayment. Additionally, OWCP further notified appellant that, within 30 days of the date of the letter, she could request a final decision based on the written evidence or a prerecoument hearing.

In a letter dated June 17, 2024, OWCP requested that the employing establishment provide information regarding the current pay rate for appellant’s date-of-injury position as of March 11, 2024. In a June 18, 2024 response, the employing establishment noted that the current pay rate for the position was \$46,009.00 per year.

³ OWCP removed appellant from the periodic rolls. She last received compensation from OWCP on March 10, 2024.

On July 5, 2024, appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review, regarding the overpayment indicating that she disagreed that the overpayment occurred and with the amount of the overpayment. She also asserted that she was without fault in creating the overpayment and requested waiver of recovery. In a completed Form OWCP-20 of even date, appellant reported monthly income of \$4,000.00 from State Farm, monthly expenses totaling \$4,270.00, and no assets. She also submitted a statement.

By decision dated September 9, 2024, OWCP found that appellant was recently employed as a claims specialist with State Farm, working full time, with wages of \$1,270.04 per week. It explained that the employment was effective March 11, 2024, and the position fairly and reasonably represented her wage-earning capacity. OWCP noted that the physical requirements did not exceed her physical limitations. It found that, as appellant had demonstrated the ability to perform the duties of the position for 60 days or more, the position was considered suitable to her partially disabling condition. OWCP further found that her actual earnings met or exceeded the current wages of the job held when injured, her entitlement to compensation ended on the date she was reemployed with no loss of earning capacity, and her compensation payments were terminated. It noted that the decision did not affect her medical benefits.

A computation of compensation work sheet established a zero loss of wage-earning capacity (LWEC). It revealed that the weekly pay rate when the disability occurred was \$712.28, effective May 11, 2021. The current weekly pay rate for the job and step when injured was \$928.44, effective March 11, 2024. OWCP determined that appellant had current actual earnings of \$1,270.04 and found the current rate of pay was equal to or greater than the current pay of the job held at the time of injury, \$928.44; therefore, there was no loss in earning capacity.

A prerecoupment hearing regarding the overpayment was held on November 6, 2024.

By decision dated December 20, 2024, OWCP's hearing representative finalized the June 5, 2024 preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$36,600.85 for the period November 7, 2022 through February 7, 2024, as she had forfeited her entitlement to wage-loss compensation. He further finalized that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP's hearing representative required recovery of the overpayment by payment of \$285.40 per month.⁴

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁵

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn

⁴ With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *A.B.*, Docket No. 18-0915 (issued October 24, 2018); *Miguel A. Muniz*, 54 ECAB 217 (2002). As appellant was not in receipt of continuing compensation at the time of OWCP's overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

⁵ *See R.L.*, Docket No. 19-1786 (issued July 6, 2020); *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

wages.⁶ Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.⁷

Under section 8115(a) of FECA wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity.⁸ If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect the wage-earning capacity in his or her disabled condition.⁹ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. OWCP applies the principles set forth in *Albert C. Shadrick*¹⁰ as codified in section 10.403 of its implementing regulations,¹¹ to determine the percentage of the employee's LWEC.¹²

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.¹³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined appellant's LWEC, effective March 11, 2024, based on her actual earnings as a claims specialist.

By decision dated September 9, 2024, OWCP found that appellant had the capacity to earn wages as a claims specialist with State Farm with wages of \$1,270.04 per week, effective March 11, 2024.¹⁵ Appellant successfully performed the duties as a claims specialist from

⁶ 5 U.S.C. § 8115(a); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁷ See *M.F.*, Docket No. 18-0323 (issued June 25, 2019).

⁸ 5 U.S.C. § 8115(a).

⁹ *Id.*; see also *Z.W.*, Docket No. 18-1000 (issued June 24, 2019).

¹⁰ 5 ECAB 376 (1953).

¹¹ 20 C.F.R. § 10.403.

¹² See *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

¹³ See *S.C.*, Docket No. 18-0517 (issued February 25, 2020); *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹⁴ See *S.C., id.*; *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

¹⁵ The position had an annual salary of \$66,041.85.

March 11 to May 11, 2024, and continuing. As such, she successfully performed the claims specialist position for at least 60 days.¹⁶

The wages appellant earned beginning March 11, 2024 were greater than the current wages of her date-of-injury job which supports that the position fairly and reasonably represented her wage-earning capacity.¹⁷ OWCP noted the current wages of the job she held when injured and provided a computation of compensation work sheet which established a zero LWEC. It explained that the weekly pay rate when the disability occurred was \$712.28, effective May 11, 2021. The current pay rate for the job and step when injured was \$928.44, effective March 11, 2024. OWCP determined that appellant had actual earnings of \$1,270.04 and found the current rate of pay was equal to or greater than the current pay of the job held at the time of injury, therefore, there was no loss in earning capacity.

Accordingly, the Board finds that OWCP properly determined that appellant's earnings as a claims specialist fairly and reasonably represented her wage-earning capacity, as they met or exceeded the current wages of the job she held when injured.¹⁸

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

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.¹⁹ 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."²⁰

Section 10.529 of OWCP's implementing regulation 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.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

¹⁷ See *R.L.*, *supra* note 5; *S.C.*, *supra* note 13; *J.A.*, *supra* note 13.

¹⁸ See *D.L.*, Docket No. 20-1522 (issued July 27, 2023).

¹⁹ 5 U.S.C. § 8102(a).

²⁰ *Id.* at § 8129(a).

“(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.”²¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$36,600.85 for the period November 7, 2022 through February 7, 2024 as she forfeited her entitlement to compensation for this period.

In its June 5, 2024 forfeiture decision, OWCP found that appellant forfeited her entitlement to wage-loss compensation for the period November 7, 2022 through February 7, 2024 because she knowingly failed to report employment activities and earnings, pursuant to 5 U.S.C. § 8106(b). OWCP’s regulations provide that OWCP must declare an overpayment of compensation for any compensation already paid for the period of a given forfeiture of compensation.²² 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.²³

The evidence of record includes payment documents and worksheets, which show that appellant received \$36,600.85 in compensation during the period November 7, 2022 through February 7, 2024. Due to the forfeiture of compensation, appellant is not entitled to this compensation and, therefore, she received a \$36,600.85 overpayment of compensation.²⁴

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.”²⁵

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

²¹ 20 C.F.R. § 10.529.

²² *Id.*

²³ *Id.*

²⁴ *Id.*; *see also D.N.*, Docket No. 24-0767 (issued October 15, 2024).

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

entitlement to or the number of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).²⁶

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.²⁷

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 her forfeiture of compensation, thereby precluding waiver of recovery of the overpayment.

As discussed above, the record supports that appellant had employment activity during the period November 7, 2022 through February 7, 2024. The case record establishes that she signed an EN-1032 form indicating that she had no earnings from employment or self-employment.

The specific language of the EN-1032 forms demonstrated that appellant knew or should have known that the nature of her work activity would require her to report such employment activities and earnings on the forms.²⁸ Her failure to accurately report her earnings and employment activities on the EN-1032 form constitutes a failure to provide information which she knew or should have known to be material in the creation of the overpayment.²⁹ Consequently, appellant is not eligible for a waiver of recovery of the overpayment.³⁰

CONCLUSION

The Board finds that OWCP properly reduced appellant's wage-loss compensation benefits, effective March 11, 2024, based on her actual earnings as a claims specialist. The Board further finds that OWCP properly determined that appellant received an overpayment of

²⁶ 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).

²⁷ *Id.* at § 10.433(b); *J.C.*, Docket No. 19-0911 (issued March 25, 2021); *Duane C. Rawlings*, 55 ECAB 366 (2004).

²⁸ *S.H.*, Docket No. 21-1349 (issued February 17, 2023); *M.O.*, Docket No. 18-0686 (issued January 25, 2019); *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

²⁹ *B.K.*, Docket No. 17-0406 (issued December 12, 2017); *C.W.*, Docket No. 18-1557 (issued June 25, 2019).

³⁰ *B.K.*, *id.*; *see also S.H.*, *supra* note 28.

compensation in the amount of \$36,600.85 for the period November 7, 2022 through February 7, 2024 as she forfeited her entitlement to compensation for this period. The Board also finds that appellant was at fault in the creation of the overpayment which occurred due to her forfeiture of compensation thereby precluding waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the September 9 and December 20, 2024 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 20, 2025
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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