

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

D.L., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Martinez, CA, Employer**

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**Docket No. 06-431
Issued: September 25, 2006**

Appearances:
Darrell C. Lewis, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On September 19, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated June 16, 2005 reducing appellant's compensation. In a separate merit decision dated June 16, 2005, the Office found that appellant had forfeited her right to compensation benefits during the period September 6, 2003 through December 4, 2004, because she knowingly failed to report earnings and had received an overpayment in the amount of \$33,810.98 as a result of said forfeiture. Finding appellant at fault in the creation of the overpayment, the Office ordered appellant to repay the overpayment in full, at the rate of \$300.00 per month. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation effective June 16, 2005 based on its determination that the constructed position of medical billing clerk represented her wage-earning capacity; (2) whether appellant forfeited her right to compensation for the period September 6, 2003 through December 4, 2004 because she knowingly failed to report earnings, thereby, creating an overpayment of benefits in the amount

of \$33,810.98 due to the forfeiture; (3) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thereby, precluding waiver; and (4) whether the Office properly determined that the overpayment should be repaid by deducting \$300.00 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

On June 16, 1993 appellant, a 36-year-old nurse, filed an occupational injury claim that was accepted for prolonged depressive reaction. Appellant was placed on the periodic rolls.

In an August 15, 2000 work capacity evaluation and an August 9, 2000 report, Dr. J.A. Montero, a Board-certified psychiatrist, opined that appellant was unable to work full time. He opined, however, that she would be able to work eight hours per day in approximately two years if she could complete a vocational rehabilitation program.

On March 28, 2001 appellant was referred to vocational rehabilitation. On June 13, 2003 appellant signed a rehabilitation plan and award for training as a medical billing clerk, with an estimated annual income of \$16,640.00. In a vocational rehabilitation report dated June 11, 2004, Margaret Kelly, appellant's rehabilitation counselor, stated that appellant had the necessary vocational and physical skills to perform the job of medical billing clerk, and that this job was performed in sufficient numbers so as to make it reasonably available within her commuting area. She noted that appellant had refused to complete the final course in the series in medical office administration (medical insurance coding), but that she could be placed in the field based on her training, which included courses in keyboarding; introduction to and managing Windows; Word basic and intermediate; Excel basic and intermediate; Access basic and intermediate; Power Point basic, intermediate and advanced; medical terminology basic and advanced; medical office procedures and computerized billing.

In a vocational rehabilitation report dated October 27, 2004, Ms. Kelly stated that, although appellant had signed the 90-day job search agreement on July 15, 2004, she had informed her counselor that she did not want to participate in the job search. Appellant told Ms. Kelly that she had been approved by the state of Oklahoma as a day care provider and was working out of her home.

In a November 16, 2004 report, Dr. Montero stated that appellant had a full-functioning day care program that was recently inspected and approved by the Oklahoma Department of Human Services. He noted that the department had referred nine children to appellant and that she expected to earn enough money to offset the amount that would be cut from her workers' compensation benefits.

In a letter dated December 6, 2004, the Office informed appellant's representative that it was enclosing copies of materials sent to appellant on that date. Copies of documents included an authorization to obtain earnings data from the Social Security Administration for the period January 1, 2002 through December 31, 2003; a December 6, 2004 letter to appellant requesting information regarding wages earned from January 1, 2002 through December 31, 2003; and

Form EN1032 (with cover letter dated December 6, 2004) requesting information concerning income for the previous 15 months.

On December 17, 2004 the Office asked Dr. Montero to review job descriptions for medical billing clerk, medical transcriber and day care worker, and to opine from a medical perspective whether appellant was capable of performing the duties of any of those positions based on vocational rehabilitation. By letter dated December 17, 2004, Dr. Montero opined that appellant was capable of working either full or part time as a day care worker and probably as a medical billing clerk. In a December 17, 2004 work capacity evaluation, Dr. Montero indicated that appellant was competent to work eight hours per day, pursuant to his August 15, 2000 report, stating that she had completed a vocational rehabilitation program.

On December 29, 2004 the Office issued a notice of proposed reduction of compensation, on the grounds that appellant was no longer totally disabled and had the capacity to earn the wages of a medical billing clerk at the rate of \$400.00 per week.

As a benefit recipient, the Office periodically required appellant to submit updated information (Form EN1032) regarding her employment, volunteer work, dependents, other federal benefits or payments received and any third-party settlements. The reports required that she provide information covering the 15-month period preceding the date of the request. The record contains a Form EN1032 signed by appellant on January 5, 2005. In response to the question, "Did you work for any employer during the past 15 months?" appellant answered, "No." In response to the question, "Were you self-employed or involved in any business enterprise in the past 15 months?" appellant responded, "No." Appellant answered "Yes" when asked to state whether she was unemployed for all periods during the past 15 months.

The record contains a statement from the Oklahoma Department of Human Services reflecting payments to appellant for child care services pursuant to contract No. 56052 from October 1 through December 12, 2004.

The record contains a note from appellant, dated January 25, 2005, stating that she was enclosing copies of payments received for "the past few months."

On January 24, 2005 appellant objected to the proposed reduction of compensation on the grounds that the Office had failed to notify her representative of the proposed reduction.¹ Appellant also contended that she had never completed training and was therefore not qualified to perform the duties of medical billing clerk.

The record contains a wage-earning capacity computation reflecting a weekly pay rate when injured of \$552.44; current pay rate for job when injured of \$864.48 (December 29, 2004); earning capacity of \$400.00 per week; percentage of new wage-earning capacity of 46 percent; adjusted wage-earning capacity amount per week of \$254.12; loss in wage-earning capacity of \$298.32; gross weekly compensation rate of \$281.00; and new compensation rate every four weeks of \$1,124.00.

¹ The record reflects that appellant's representative, Darrell Lewis, is her ex-husband.

By letter dated January 26, 2005, appellant's representative contended that there was no way of knowing whether or not appellant was capable of working successfully as a medical billing clerk, since she did not complete her course and since Dr. Montero did not state that she could work eight hours per day. On February 25, 2005 the representative objected to the proposed reduction, alleging that appellant was not fully aware of what she was signing when she agreed to 90-day job placement services.

On January 28, 2005 the Office rescinded its notice of proposed reduction, sending a copy to appellant and to her representative. On January 28, 2005 the Office reissued the notice of proposed reduction, on the grounds that appellant was no longer totally disabled and had the capacity to earn the wages of a medical billing clerk at the rate of \$400.00 per week. A copy of the January 28, 2005 proposed reduction was sent to appellant and her representative. Noting the rehabilitation counselor's conclusion that, based upon her experience, education, medical restrictions and a labor market survey, appellant was qualified for the position, and that sufficient positions are reasonably available in her commuting area, and that appellant's psychiatrist had released her to work eight hours per day, the Office found that the position of medical billing clerk was medically and vocationally suitable, and fairly and reasonably represented her wage-earning capacity. The Office determined that appellant's compensation would be reduced to \$1,124.00 every four weeks. The Office indicated that her salary on June 14, 1993, the date of her injury, was \$552.44 per week; that the current adjusted pay rate for her job on the date of injury was \$864.48 per week; and that she was currently capable of earning \$400.00 per week, the pay rate of a medical billing clerk. The Office determined that she had a 46 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$254.12 per week. The Office then determined that appellant had a loss of wage-earning capacity of \$298.32. The Office concluded that, based upon a 75 percent rate, appellant's new compensation rate was \$281.00 per week. The Office requested that appellant submit additional evidence or argument within 30 days if she disagreed with the proposed action.

By letter dated January 31, 2005, the Office informed appellant's representative that he had 30 days to submit additional evidence or argument in support of any objection to the proposed reduction.

By decision dated March 7, 2005, the Office finalized the reduction of appellant's compensation benefits effective that date.

On April 6, 2005 the Office issued a preliminary finding of overpayment in the amount of \$33,810.98, due to appellant's failure to notify the Office of earnings from her day care business from September 6, 2003 through December 4, 2004. Finding that appellant was at fault in the creation of the overpayment by knowingly omitting information she knew was pertinent to her case and would result in a reduction of monetary benefits, the Office concluded that she had forfeited her right to compensation during that period of time.

On April 6, 2005 the Office rescinded its March 7, 2005 decision to reduce compensation. On that date, the Office reissued its proposal to reduce compensation, on the grounds that appellant was no longer totally disabled and had the capacity to earn the wages of a

medical billing clerk at the rate of \$400.00 per week. The Office provided the same calculations in support of its conclusion as those provided in its January 28, 2005 proposal.

On April 6, 2005 the Office issued a proposal to declare a forfeiture of compensation benefits due to appellant's failure to timely report earnings from February 2003 through December 2004. The Office found that appellant knowingly omitted information on Form EN1032 that she knew would be pertinent to her case and would result in a reduction of her monetary benefits, and that she therefore forfeited her right to compensation for the period September 6, 2003 through December 4, 2004 in the amount of \$33,810.98.

In a letter dated April 29, 2005, appellant's representative contended that the Office should "moot" Form EN1032 signed by appellant on January 5, 2005, because he had not received a copy of the form prior to its completion.

In an overpayment recovery questionnaire dated May 2, 2005, appellant's representative indicated that appellant thought the incorrect payment was due her, because she did not understand fully the question on the form. He further stated that appellant had not reported the change in circumstances which affected her monthly payment. The representative listed appellant's monthly income as "\$0.00." Monthly expenses totaled \$1,499.00.

A January 25, 2005 Department of Human Services EBT Day Care Facility Claim Audit substantiated allegations that appellant was claiming days and hours that children were not in her care.

On May 2, 2005 appellant's representative requested a telephone conference regarding the issue of fault in creating the overpayment. He stated that recovery of the overpayment would create serious hardship; that appellant really did not understand the questions on the form; that she was not self-employed in the eyes of the state, because the state of Oklahoma had not given her a license during the period in question; and that she should be given a waiver because she was not at fault in the creation of the overpayment. The representative claimed that appellant "reasonably believes she did not knowingly falsify documentation in order to gain."

The record contains a "memorandum of telephone conference" between appellant's representative, a claims examiner and a senior claims examiner that was conducted on May 16, 2005. The representative claimed that appellant was not fully aware what she was answering on the EN1032 form, and that, if the form had been provided to him, he could have assisted her to answer appropriately.

In a decision dated June 16, 2005, the Office found that appellant forfeited her compensation for the period September 6, 2003 through December 4, 2004, in the amount of \$33,810.98, for failing to report earnings for the designated period and knowingly omitting information from the EN1032 form dated January 5, 2005 that she knew would be pertinent to her case and would result in a reduction of benefits. The Office noted that appellant continued to be at fault because she had not revealed income received directly from children's parents for services rendered.

By decision dated June 16, 2005, the Office finalized the reduction in appellant's compensation, effective that date, based on appellant's ability to earn wages as a medical billing clerk in the amount of \$400.00 per week.

By decision dated June 16, 2005, the Office finalized its proposed finding of overpayment of compensation for the period September 6, 2003 through December 4, 2004 in the amount of \$33,810.98. The Office further found that appellant was at fault and, therefore, was not entitled to a waiver of recovery. The Office ordered recovery in the amount of \$300.00 per month from appellant's continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.² Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.³

Section 8115(a) of the Federal Employees' Compensation Act⁴ provides that, if actual earnings of the employee do not fairly and reasonably represent her wage-earning capacity, or if the employee has no actual earnings, the wage-earning capacity as appears reasonable under the circumstances is determined with due regard to: (1) the nature of the injury; (2) the degree of physical impairment; (3) her usual employment; (4) age; (5) her qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.⁵

ANALYSIS -- ISSUE 1

The Office determined that the selected position of medical billing clerk represented appellant's wage-earning capacity based upon Dr. Montero's December 17, 2004 report and work capacity evaluation, demonstrating that appellant could work eight hours per day in that capacity. The Board finds that the Office properly reduced appellant's compensation based on her ability to perform the duties of a medical billing clerk.

In his August 5, 2000 work capacity evaluation and August 19, 2000 report, Dr. Montero opined that appellant would be able to work full time in approximately two years if she completed a vocational rehabilitation program. The Office asked Dr. Montero to review the job description for medical billing clerk and to opine whether appellant was capable from a medical

² See 20 C.F.R. §§ 10.403, 10.520.

³ *Id.*; see *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

⁴ 5 U.S.C. § 8115(a).

⁵ 5 U.S.C. § 8115(a); *Sherman Preston*, 56 ECAB ____ (Docket No. 05-721, issued June 20, 2005); *Loni J. Cleveland*, 52 ECAB 171 (2000).

perspective of performing the required duties. On December 17, 2004 noting that appellant had completed the vocational rehabilitation program, Dr. Montero opined that she was competent to work eight hours per day pursuant to his August 15, 2000 report. He gave no reason why appellant could not perform the duties of medical billing clerk and suggested no restrictions.

Appellant's vocational rehabilitation counselor determined that she was able to perform the position of medical billing clerk and that the position was available in sufficient numbers so as to make it reasonably available within her commuting area. The Office rehabilitation specialist advised that her prior work experience and her educational background qualified appellant for position of medical billing clerk.

The Office considered the proper factors, such as availability of employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the medical billing clerk position represented her wage-earning capacity.⁶ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties of medical billing clerk and that such a position was reasonably available within the general labor market of her commuting area.

Under section 8115(a) of the Act, wage-earning capacity is determined by actual wages if the earnings fairly and reasonably represent a claimant's wage-earning capacity.⁷ However, if actual earnings do not fairly and reasonably represent his wage-earning capacity, then the wage-earning capacity shall be determined with due regard to other factors, including the nature of his injury; the degree of physical impairment; the employee's usual employment; his age; qualifications for other employment; and the availability of suitable employment.⁸ The Board has held that the Office may proceed to a wage-earning capacity determination based upon a selected position if it has established that appellant, without good cause, failed to participate in or cooperate with vocational rehabilitation.⁹

In this case, the record reflects that appellant received some income from her day care business. The Office properly determined that appellant's reported actual income did not fairly and reasonably represent her wage-earning capacity. First, appellant did not submit sufficient information for the Office to determine the amount of her actual income. Her representative indicated in the overpayment recovery questionnaire that appellant's monthly income was \$0.00. Although the remaining evidence of record contradicts that representation, it includes only a portion of her actual income. A statement from the Oklahoma Department of Human Services reflects some payments to appellant from the state for child care services from October 1 through December 12, 2004. Appellant also provided some evidence of payment from the state for services rendered pursuant to its contract with her. However, she did not provide evidence as to income received directly from the parents of the children in her care. Appellant admitted to both

⁶ *Loni J. Cleveland, supra* note 5.

⁷ *See Daniel Renard, 51 ECAB 466 (2000).*

⁸ *See William J. Lamontagne, 18 ECAB 324 (1967).*

⁹ *See Daniel Renard, supra* note 7.

her psychiatrist and the vocational counselor that she had a full-functioning day care program in her home. Yet she failed to submit the evidence necessary to ascertain her actual income. On the other hand, appellant signed a vocational rehabilitation plan for training as a medical billing clerk with an estimated annual income of \$16,640.00, and the Office expended considerable time and money on her training. After the vocational rehabilitation counselor concluded that she was qualified to perform the duties of a medical billing clerk, appellant refused to participate in the job search, explaining that she wanted to work as a day care provider. The Board finds that appellant refused to submit evidence of her actual earnings, the Office properly found that her actual earnings did not fairly and reasonably represent her wage-earning capacity.¹⁰ The Board further finds that the position of medical billing clerk thus represents appellant's wage-earning capacity.

Finally, the Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Albert C. Shadrick*¹¹ and codified at section 10.403 of the Office's regulations.¹² In this regard, the Office indicated that her salary on June 14, 1993, the date of her injury, was \$552.44 per week; that the current adjusted pay rate for her job on the date of injury was \$864.48 per week; and that she was currently capable of earning \$400.00 per week, the pay rate of a medical billing clerk. The Office then determined that appellant had a 46 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$254.12 per week. The Office concluded that, based upon a 75 percent rate, appellant's new compensation rate was \$281.00 per week, and that her net compensation for each four-week period would be \$1,151.50. The Board finds that the Office correctly applied the *Shadrick* formula and, therefore, properly found that the position of medical billing clerk reflected appellant's wage-earning capacity effective June 16, 2005.¹³

Appellant contends that, because she failed to complete training, she is not qualified to perform the duties of medical billing clerk. The Board disagrees. The record reflects that appellant completed all but one of the courses in the medical office administration series and that her failure to complete the course was due to her refusal to do so. Moreover, the vocational rehabilitation counselor concluded that appellant could be placed in the field without having completed the final course, based upon her training, which included courses in keyboarding; introduction to and managing Windows; Word basic and intermediate; Excel basic and intermediate; Access basic and intermediate; Power Point basic, intermediate, and advanced; medical terminology basic and advanced; medical office procedures; and computerized billing. The Board finds that appellant has the necessary vocational skills to perform the duties of medical billing clerk.

¹⁰ See *William J. Lamontagne*, *supra* note 8 (where the Board determined that appellant's actual earnings as a babysitter for his grandchildren did not represent his wage-earning capacity).

¹¹ 5 ECAB 376 (1953).

¹² 20 C.F.R. § 10.403 (2006).

¹³ *Elsie L. Price*, 54 ECAB 734 (2003); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

LEGAL PRECEDENT -- ISSUE 2

Pursuant to 20 C.F.R. § 10.525 an employee who is receiving compensation for partial or total disability will periodically be required to submit a report of earnings from employment or self-employment, either part time or full time.¹⁴ Failure to report income may result in forfeiture of all benefits paid during the reporting period.¹⁵ The regulations further 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.¹⁶ Where the right to compensation is forfeited, the Office shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. § 8129.¹⁷

Section 8106(b) of the Federal Employees' Compensation Act 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 her right to compensation with respect to any period for which the affidavit or report was required."¹⁸

The Board has held that it is not enough for the Office to merely establish that a claimant had employment or earnings. A claimant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b)(2) if she "knowingly" failed to report employment or earnings.¹⁹ The term "knowingly" as defined in the Office's implementing regulation, means "with knowledge, consciously, willfully or intentionally."²⁰

The Office has the burden of proof in establishing that appellant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from self-employment. To meet this burden of proof, the Office is required to closely examine appellant's activities and statements in reporting employment earnings.²¹ The Office may meet this burden in several ways. The Office may meet this burden by appellant's own subsequent admission to the Office that she failed to report employment or earnings which she knew she should report. Similarly, the Office may meet this burden by appellant's own subsequent admission to the Office that she failed to report employment or earnings which she knew she should report. Furthermore, the Office may meet this standard without an admission by appellant, if appellant failed to fully and

¹⁴ 20 C.F.R. § 10.525 (2006).

¹⁵ 5 U.S.C. § 8106(b); 20 C.F.R. § 10.525(b) (2006).

¹⁶ 20 C.F.R. § 10.529(a) (2006).

¹⁷ 20 C.F.R. § 10.529(b) (2006).

¹⁸ 5 U.S.C. § 8106(b).

¹⁹ *Barbara L. Kanter*, 46 ECAB 165 (1994).

²⁰ 20 C.F.R. § 10.5(n); *see Donald L. Overstreet*, 54 ECAB 678 (2003).

²¹ *See Michael D. Mathews*, 51 ECAB 247 (1999).

truthfully complete the EN1032 forms and the circumstances of the case establish that appellant failed to fully and truthfully reveal the full extent of her employment activities and earnings. The Office may also meet this burden if it establishes through the totality of the factual circumstances that appellant's certification in the EN1032 form that she was not employed or self-employed, was false.²²

ANALYSIS -- ISSUE 2

The record indicates that appellant failed to report her earnings for the period September 6, 2003 through December 4, 2004. Although she and her representative alleged that she didn't fully understand the questions posed on Form EN1032, appellant did not deny that she falsely stated her income or that she failed to report her self-employment during the period in question. The issue to be resolved is whether appellant knowingly omitted or understated any part of her earnings for the period September 6, 2003 through December 4, 2004.²³ The Office regulations define "knowingly" as with knowledge, consciously, willfully or intentionally.²⁴ Absent an admission by appellant, a knowing omission or understatement of income can be established where circumstances indicate that appellant did not fully and truthfully complete Form EN1032 and thus, failed to reveal the full extent of her employment activities and earnings.²⁵

On January 5, 2005 appellant signed Form EN1032, stating that she was unemployed and earned no income from September 6, 2003 through December 4, 2004. The record, however, contains clear evidence to the contrary. A statement from the Oklahoma Department of Human Services reflects payments made to appellant for child care services from October 1 through December 12, 2004. The vocational rehabilitation counselor's October 27, 2004 report reflected that appellant did not want to participate in a job search because she had been approved by the state of Oklahoma as a day care provider and was working out of her home. On November 16, 2004 Dr. Montero reported that appellant had a full-functioning day care program that had been inspected and approved by the Oklahoma Department of Human Services, and that she expected to earn enough money to offset the amount that would be cut from her workers' compensation benefits.

The explanation appellant provided for her failure to report her earnings was that she did not understand the questions posed to her. However, appellant has routinely completed EN1032 forms ever since she was entered onto the periodic rolls in 1993. Moreover, appellant was aware that she had an affirmative obligation to report any and all income received. Therefore, the Board finds appellant's claim of ignorance to be without merit and unreasonable. Appellant has not provided any information that would mitigate against a finding that she knowingly failed to

²² See *Donald Overstreet*, *supra* note 20; see also *Terryl A. Geer*, 51 ECAB 168 (1999).

²³ 5 U.S.C. § 8106(b)(2).

²⁴ 20 C.F.R. § 10.5(n) (2006).

²⁵ *Donald L. Overstreet*, *supra* note 20.

report earnings. Statements from the Oklahoma Department of Human Services, as well as statements provided by appellant, show that she had earnings from her day care business. Admissions by appellant to the vocational counselor and her psychiatrist establish that she ran a full-time business out of her home. As such, the Board finds that appellant knowingly understated her earnings to the Office in the Form EN1032 dated January 5, 2005, and thus forfeited her wage-loss compensation for the period September 6, 2003 through December 4, 2004.

Appellant's representative argues that appellant should not be held accountable for her misrepresentations because the Form EN1032 was not sent to him. The Office's procedure manual states that any letter intended for a claimant, either directly or as the recipient of a copy, should be sent to the authorized attorney or other legal representative.²⁶ Although this provision is intended as a protection for a claimant, it does not give her an unrestricted license to lie. Appellant was not denied any benefits due to the Office's failure to send a copy of the form to her representative. Appellant had received and completed the form on numerous occasions, presumably with the assistance of her representative, her ex-husband. Moreover, the record reflects that on December 6, 2004 the Office sent a letter to appellant's representative, indicating that it was enclosing copies of materials sent to appellant, including Form EN1032 requesting income information for the previous 15-month period. The Board finds that appellant's misrepresentations did not result from lack of assistance in completion of the form. On the contrary, the Board finds that appellant intentionally failed to report her earnings from her day care business.

During the forfeiture period, appellant received wage-loss compensation in the amount of \$33,810.98. The regulations provide that compensation paid for the period of the forfeiture shall be recovered in accordance with the Federal Employees' Compensation Act's provisions concerning recovery of overpayments.²⁷ The Board notes that appellant did not dispute the amount of the compensation received during the forfeiture period. Accordingly, the Office properly declared the forfeited compensation an overpayment of benefits in the amount of \$33,810.98.

LEGAL PRECEDENT -- ISSUE 3

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.²⁸ Section 10.433 of the implementing regulations specifically provides that the Office may consider waiving an overpayment only if the individual to whom it was made was

²⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.12 (October 1998).

²⁷ 20 C.F.R. § 10.529(b) (2006).

²⁸ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (2006).

not at fault in accepting or creating the overpayment.²⁹ A recipient will be found at fault in creating 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.³⁰ Fault will also be found where a recipient failed to provide information he or she knew or should have known to be material.³¹ Lastly, fault exists where the overpaid individual accepted a payment which he or she knew or should have known to be incorrect.³²

ANALYSIS -- ISSUE 3

The Board finds that appellant was at fault in creating the overpayment. As previously discussed, she knowingly failed to report earnings to the Office. Accurate earnings information is material to the question of appellant's entitlement to continuing wage-loss compensation. Because she made incorrect statements as to material facts which she knew or should have known to be incorrect, appellant is at fault in creating the overpayment.³³ Therefore, appellant is not entitled to waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 4

Section 10.441 of the Office's regulations provides that whenever an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship.³⁴

ANALYSIS -- ISSUE 4

Appellant did not provide detailed information regarding her current financial circumstances. It is her responsibility to provide information about income, expenses and assets.³⁵ Although appellant's overpayment recovery questionnaire reflected monthly expenses of \$1,499.00, it did not contain supporting documentation or a breakdown of expenses. Appellant also stated that her monthly income was \$0.00. The Board finds that appellant did not

²⁹ 20 C.F.R. § 10.433(a) (2006).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ 20 C.F.R. § 10.433(a) (2006).

³⁴ 20 C.F.R. § 10.441(a) (2006).

³⁵ 20 C.F.R. § 10.438(a) (2006).

accurately reflect her income. On June 16, 2005 the Office reduced appellant's compensation benefits to \$281.00 per week, or \$1,217.00 per month, based upon a wage-earning capacity of \$400.00 per week, or \$1,733 per month. Accordingly, appellant has an imputed income of \$2,950.00 per month. The Board notes that this imputed income figure does not include any additional income that appellant may be receiving from her day care business. The Office ordered recovery in the amount of \$300.00 per month. There is no evidence that recovery of the overpayment from appellant's continuing compensation would cause her undue financial hardship. Thus, the Board finds that the Office properly imposed repayment from continuing compensation at the rate of \$300.00 every 28 days pursuant to its recovery procedures.³⁶

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective June 16, 2005 based on its determination that the constructed position of medical billing clerk represented her wage-earning capacity. The Board also finds that appellant forfeited her entitlement to compensation from September 6, 2003 through December 4, 2004 because she knowingly failed to report earnings from her self-employment during this period, thereby creating an overpayment in the amount of \$33,810.98. The Board finds that the Office properly found that appellant was at fault in the creation of the overpayment, thereby precluding waiver, and did not abuse its discretion in setting the rate of recovery from continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2005 decision of the Office of Workers' Compensation Programs reducing appellant's compensation benefits is affirmed. It is further ordered that the Office's June 16, 2005 decisions finding that appellant had forfeited her compensation for the period September 6, 2003 through December 6, 2004, thereby, creating an overpayment in the amount of \$33,810.98, are affirmed.

Issued: September 25, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

³⁶ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.8 (May 2004).