



## **FACTUAL HISTORY**

OWCP accepted that on October 19, 1981 appellant, then a 33-year-old pipe fitter, sustained a herniated lumbar disc at L3-4 and ventral hernia due to lifting heavy objects at work. Appellant underwent several OWCP-authorized surgeries, including a laminectomy at L3-4 on February 17, 1982, hernia repair on July 21, 1992 and fusion at L4-5 on September 5, 1996. He intermittently stopped work following his October 19, 1981 injury. Appellant last worked for the employing establishment in 1993.

Between August 7, 1994 and August 16, 2010, appellant completed CA-1032 forms containing extensive language advising him of what types of employment activities and earnings he was required to report for each 15-month period prior to the time he signed each form.<sup>2</sup> On the CA-1032 forms he completed between September 3, 1995 and April 1, 2002, appellant listed rental monies that he received from a duplex building at 8/10 Salada Avenue in Pacifica, CA, a property which he and his wife owned. He did not list any other employment activities or earnings on the forms.

The CA-1032 forms instructed appellant to report all employment for which he received a salary, wages, income, sales commissions, piecework or payment of any kind. Appellant was directed to report all self-employment or involvement in business enterprises, including (but not limited to) farming, sales work, operating a business, and providing services in exchange for money, goods or other services. The kinds of services that appellant was required to report included such activities as carpentry, mechanical work, painting, contracting, child care, keeping books and records, odd jobs, and managing and 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 CA-1032 forms also instructed appellant to report any work or ownership interest in any business enterprise, even if the business lost money or if profits or income were reinvested or paid to others. If appellant performed any duties in a business enterprise for which he was not paid, he had to show as the rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties he did, even if the work was for him or a family member or relative. The forms contained certification clauses which informed appellant of the consequences of not accurately reporting his employment activities, such as being subjected to criminal penalties and losing the right to receive workers' compensation.

In October 1994, appellant was assigned, an OWCP-sponsored nurse, Jeanne Hartlaub, to help him return to work. In a December 31, 1994 report memorializing the first meeting on November 16, 1994, Nurse Hartlaub stated that appellant reported that he lived in an apartment building owned by his father and that "he manages the building for his father." Appellant indicated that, with respect to maintenance work, his son had done some work and he had hired out some work. He did not return to work and the services of Nurse Hartlaub were discontinued.

In an April 5, 2002 letter, OWCP indicated that appellant had listed on the EN1032 form he completed on April 1, 2002 self-employment from renting a house. It requested additional

---

<sup>2</sup> Given the 15-month period covered by each completed form, the forms collectively covered the following periods: May 7, 1993 to August 3, 1996, September 23, 1997 to September 26, 2000 and January 1, 2001 to August 16, 2010.

information by stating, "Please advise if you are in the business of rental housing or is this just one house you happen to own and rent. If it is a business, please submit a copy of your income tax return. Who performs maintenance? If it is yourself, please describe type of maintenance performed and average weekly hours spent on maintenance." On April 15, 2002 appellant responded by stating, "In regards to your letter dated April 5, 2002 about the completed CA-1032. The rental house is just one house my wife and me own and rent. Thank you straitening (sic) out this area of that form for me."

In late 2010, the Naval Criminal Investigation Service (NCIS), the investigative branch of the employing establishment, investigated appellant's employment activities since the early 1990s. After evaluating the results of the investigation, including testimony transcripts and documents regarding the rental of properties, it concluded in November 8, 2010 reports that appellant had worked as an apartment manager since at least January 1983.

The record contains a recording of an October 5, 2010 interview of appellant conducted by two NCIS investigators. Appellant testified that at some point between November 1982 and January 1983 he moved into an apartment (No. 1) of a five-apartment building at 15 Santa Maria Avenue in Pacifica, CA, which was owned by his father. He responded in the affirmative to questions about whether, since he moved to 15 Santa Maria Avenue, he had engaged in various activities with respect to managing the rental of the building's apartments (*i.e.*, the four apartments other than his own) such as placing advertisements of empty apartments in newspapers and online, placing signs outside to attract potential renters, answering telephone calls from prospective renters and signing his name to inventory checklists and rental agreements. Appellant indicated that he collected rent payments for the apartment noting that usually payments would be placed in a "manager's box" and that sometimes he would sign the checks and deposit them into his father's bank accounts.<sup>3</sup> He stated that he made repairs on the apartments at 15 Santa Maria Avenue if he "felt capable of doing it," but indicated that mostly his son performed the repairs or he hired others to do them. When the lead investigator asked appellant if he ever changed any faucets, he responded that he had not done so in a long time and that his son usually handled such tasks. When the investigator indicated that appellant's activities with respect to the building at 15 Santa Maria Avenue appeared to be those of an apartment manager, appellant asserted that his activities were part of what family members do to help each other and stated, "Maybe under the law this considered me as that [sic]. I could pretty much consider [my son] as a manager." When told that the renters at 15 Santa Maria Avenue considered him to be the apartment manager, appellant indicated, "OK, well, I'm the apartment manager, I guess ... so whatever that means." He noted that he lived at 15 Santa Maria Avenue on a rent-free basis and indicated that he believed he might be able to rent the apartment he lived in for \$1,400.00 per month. Appellant stated that someone from OWCP told him that if he happened to own a particular apartment, then it was not a business and that he did not have to report it on his CA-1032 forms.

Appellant further claimed that because he "happened to live" at 15 Santa Maria Avenue he believed that his activities with respect to the building did not constitute a business. When told by the lead investigator that he should have reported his activities at 15 Santa Maria Avenue because he did not own the building, appellant asserted that he should have been told that he had

---

<sup>3</sup> Appellant stated that some of these tasks would also be performed by others, including his son and his father.

to report such activities and also stated, "I'm probably liable for that..." Appellant discussed the actions of Nurse Hartlaub in 1994, including visiting him at 15 Santa Maria Avenue, and suggested that she was aware of his activities with respect to the building. Regarding his completion of OWCP forms, appellant stated, "It seems like I read in that thing that if you think you're doing it right ... you're not breaking the law exactly." When the lead investigator advised him that he filled out the CA-1032 forms improperly, appellant indicated, "I know I'm still wrong and that I have to pay probably, but that doesn't necessarily mean that I had malice or that I was trying to cheat anybody...."

In a November 8, 2010 memorandum, NCIS investigators detailed an interview that was held with appellant's father on October 5, 2010. Appellant's father testified that he purchased the building located at 15 Santa Maria Avenue in 1966 and paid it off in 1982.<sup>4</sup> He indicated that appellant moved into his apartment (No. 1) at 15 Santa Maria Avenue in 1982 after he moved to Clearlake, CA, and that, upon moving in, appellant took over as apartment manager. Appellant's father stated that he did not pay appellant a salary for working as an apartment manager, but noted that appellant lived at 15 Santa Maria Avenue on a rent-free basis because he worked for him as an apartment manager. Appellant's father indicated that appellant went to the bank and deposited the rent checks for him with respect to 15 Santa Maria Avenue and estimated that he could get \$1,300.00 to \$1,500.00 per month if he rented the apartment. On August 25, 2010 NCIS investigators interviewed a current renter at 15 Santa Maria Avenue who indicated that appellant stated that he served as the apartment manager for the building and that his father owned the building. The renter indicated that appellant showed him the apartment and signed the inventory checklist and rental agreement.<sup>5</sup> He noted that he paid his rent each month by giving appellant the amount in cash.

In a December 21, 2010 decision, OWCP reduced appellant's compensation effective December 21, 2010, finding that his work as an apartment manager fairly and reasonably represented his wage-earning capacity. It noted that appellant was not paid a salary as apartment manager but was supplied with a rent-free apartment, a benefit with a value of \$1,400.00.

In a December 29, 2010 decision, OWCP determined that appellant forfeited his right to compensation for the periods May 7, 1993 to August 3, 1996, September 23, 1997 to September 26, 2000 and January 1, 2001 to August 16, 2010 because he failed to report employment and earnings on CA-1032 forms covering these periods. It indicated that appellant worked as an apartment manager at a building owned by his father (located at 15 Santa Maria Avenue in Pacifica, CA) for which he received a rent-free apartment valued at \$1,400.00. OWCP noted that the wording of the CA-1032 forms advised appellant of the need to report such employment and earnings.<sup>6</sup>

---

<sup>4</sup> The investigators added documents to the record which supported the results of their interviews, including property records showing that appellant's father owned the building at 15 Santa Maria Avenue.

<sup>5</sup> The record contains an inventory checklist and rental agreement signed by appellant in July 2010 for the renter's apartment (No. 3) at 15 Santa Maria Avenue.

<sup>6</sup> OWCP indicated that appellant's rental income from a property that he and his wife owned (8/10 Salada Avenue in Pacifica, CA) was considered passive income and was not deemed earnings under FECA.

In a December 30, 2010 letter, OWCP advised appellant of its preliminary finding that he received a \$659,755.65 overpayment of compensation because he forfeited his compensation for periods between May 7, 1993 and August 16, 2010.<sup>7</sup> It also preliminarily found that appellant was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP indicated that the CA-1032 forms completed by appellant clearly advised him of the type of employment activities and earnings that needed to be reported. It asked that appellant return a completed financial information questionnaire (Form OWCP-20).

Appellant completed a Form OWCP-20 on May 4, 2011 in which he challenged OWCP's overpayment findings and asserted that he did not fail to report his employment. He indicated that he reported rental income from 1994 to 2002 but was advised by OWCP that he did not have to report such income. Appellant listed figures for monthly income, monthly expenses and assets and submitted documents further detailing his monthly expenses.

Appellant requested a hearing with an OWCP hearing representative in connection with OWCP's wage-earning capacity, forfeiture and overpayment findings. At the April 27, 2011 hearing, he testified that in 1982 he moved to an apartment at 15 Santa Maria Avenue in Pacifica, CA, a building which was owned by his father.<sup>8</sup> Appellant stated that he recalled telling Nurse Hartlaub in 1994 that his father owned the building at 15 Santa Maria Avenue and that he managed the building for his father. He indicated that between 1994 and 2002 he reported his rental income from 8/10 Salada Avenue in Pacifica, CA, on CA-1032 forms that OWCP directed him to complete, but that he stopped reporting this income after OWCP told him he did not need to report it.<sup>9</sup> Appellant stated that Nurse Hartlaub did not tell him that he should report income that he received from managing the building at 15 Santa Maria Avenue. Appellant's counsel testified at the hearing and asserted that appellant did not attempt to hide any employment activities. Appellant indicated that Nurse Hartlaub was aware of his activities in 1994 and stated that OWCP told him in 2002 that his reporting on the CA-1032 forms was proper. Counsel argued that appellant's activities regarding 15 Santa Maria Avenue were minimal and asserted that his rent-free status was not due to these activities.<sup>10</sup>

In a July 25, 2011 decision, OWCP's hearing representative affirmed OWCP's December 21, 2010 decision regarding appellant's wage-earning capacity.

In another July 25, 2011 decision, OWCP's hearing representative affirmed OWCP's December 29, 2010 decision regarding the forfeiture of compensation.

---

<sup>7</sup> The record contains payment records and worksheets showing that appellant received \$659,755.65 in compensation for the periods May 7, 1993 to August 3, 1996, September 23, 1997 to September 26, 2000 and January 1, 2001 to August 16, 2010.

<sup>8</sup> Appellant testified that the building contained five apartments, including the one in which he lived.

<sup>9</sup> Appellant stated that he thought he talked to someone at OWCP about reporting his management at 15 Santa Maria Avenue but he was told that he did not have to report it because he did not receive a salary.

<sup>10</sup> Counsel submitted an April 26, 2011 memorandum which contained similar arguments.

In another July 25, 2011 decision, OWCP's hearing representative found that appellant received a \$659,755.65 overpayment of compensation and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

In a July 28, 2011 decision, OWCP affirmed its July 25, 2011 decision regarding appellant's overpayment of compensation.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8106(b) of FECA<sup>11</sup> provides in pertinent part:

“The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.... An employee who --

(1) fails to make an affidavit or report when required; or

(2) knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”<sup>12</sup>

An employee can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he “knowingly” omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. OWCP procedure manual recognizes that forfeiture is a penalty,<sup>13</sup> and, as a penalty provision, it must be narrowly construed.<sup>14</sup> In OWCP's regulations, “knowingly” is defined as: “with knowledge, consciously, willfully or intentionally.”<sup>15</sup> To meet this burden, OWCP is required to examine closely appellant's activities and statements. OWCP may meet this burden without an admission by an employee if the circumstances of the case establish that he failed to reveal fully and truthfully the full extent of his employment activities and earnings.<sup>16</sup>

---

<sup>11</sup> 5 U.S.C. § 8106(b).

<sup>12</sup> While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled, and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and therefore a statutory provision about such earnings would be meaningless. *Id.* at 260.

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

<sup>14</sup> See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

<sup>15</sup> 20 C.F.R. § 10.5(n); see *Anthony A. Nobile*, 44 ECAB 268, 271-73 (1992).

<sup>16</sup> *Terry A. Geer*, 51 ECAB 168 (1999).

Section 10.5(g) of OWCP's regulations define earnings from employment or self-employment as follows:

“(1) Gross earnings or wages before any deduction and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or

“(2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. 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.”<sup>17</sup>

The Board has distinguished between income received from investment and earnings received by performing work. The former is not considered to be evidence of a claimant's ability to work and earn wages but rather is considered to be a return on investment. The latter is considered to be wages if the source of income can be established to be the product of the claimant's work.<sup>18</sup>

### ANALYSIS -- ISSUE 1

The Board finds that OWCP properly found that appellant forfeited his right to compensation for periods between May 7, 1993 and August 16, 2010. The record establishes that appellant knowingly omitted employment activities and earnings on CA-1032 forms completed for periods between May 7, 1993 and August 16, 2010. In these forms, OWCP notified appellant of his responsibility to complete the forms and provide relevant information concerning his employment status and earnings during the periods covered by the forms. The record reveals that appellant had employment and earnings during the periods covered by these forms in that he was employed as an apartment manager and had earnings from this employment. However, appellant did not report such employment activities and earnings on the forms submitted to OWCP.

The evidence shows that, since moving into a building owned by his father no later than January 1983,<sup>19</sup> appellant worked as an apartment manager for his father with respect to that building. In an investigative interview conducted by the NCIS, appellant acknowledged that, with respect to the apartments in the building owned by his father, he performed activities that could be characterized as the activities of an apartment manager. He acknowledged that he placed advertisements of empty apartments in newspapers and online, placed signs outside to attract potential renters, answered telephone calls from prospective renters and signed his name to inventory checklists and rental agreements. Appellant also acknowledged that at times he

---

<sup>17</sup> 20 C.F.R. § 10.5(g); see *Monroe E. Hartzog*, 40 ECAB 322, 329 (1988).

<sup>18</sup> *Anthony V. Knox*, 50 ECAB 402 (1999); *Burnett Terry*, 46 ECAB 457 (1995).

<sup>19</sup> The five-apartment building was located at 15 Santa Maria Avenue in Pacifica, CA. Appellant lived in one apartment and the other four apartments were rented. Appellant owned a duplex building with his wife at 8/10 Salada Avenue in Pacifica, CA. OWCP found that appellant was not required to report earnings from this building to OWCP as it constituted a passive investment. See *supra* note 18.

collected rent payments, deposited rent payments in his father's bank accounts, performed repairs on rental apartments and arranged for workmen to make repairs on rental apartments. Appellant's activities as an apartment manager for the periods between May 7, 1993 and August 16, 2010 covered by the CA-1032 forms were also documented by investigative interviews with appellant's father and a renter at 15 Santa Maria Avenue.<sup>20</sup>

Although appellant was not paid a salary for his employment activities, he received earnings in the form of free rent for the apartment he lived in which was owned by his father.<sup>21</sup> The CA-1032 forms signed by appellant used such terms as "business," "enterprise," and "service" to explain the obligation for reporting all forms of employment, self-employment and earnings.<sup>22</sup> The explicit language of the CA-1032 forms clearly advised appellant that the nature of his work as an apartment manager would require him to report such employment activities on the forms. Appellant's signing of strongly-worded certification clauses on the CA-1032 forms further shows that he was aware of materiality of his failure to report his employment.

Before OWCP and on appeal, appellant and his counsel indicated that between 1994 and 2002 appellant reported his rental income from 8/10 Salada Avenue on the CA-1032 forms that OWCP directed him to complete, but that he stopped reporting this income after OWCP told him he did not need to report it. Appellant suggested that this circumstance absolved him of the need to report his activities with respect to his father's building at 15 Santa Maria Avenue. As previously noted, appellant and his wife owned the building at 8/10 Salada Avenue and he would not have been required to report the income from this passive investment. Appellant did not explain his apparent belief that not needing to report his income related to 8/10 Salada Avenue meant that he did not have to report his income related to 15 Santa Maria Avenue. He also suggested that because Nurse Hartlaub knew of his apartment manager activities in 1994, he did not have a responsibility to report these activities on his CA-1032 forms. Appellant did not provide any support for this erroneous belief.

Under these circumstances, the Board concludes that appellant "knowingly" omitted his earnings under section 8106(b)(2) of FECA by failing to report his employment activities and earnings as an apartment manager on the applicable CA-1032 forms for the relevant periods between May 7, 1993 and August 16, 2010.<sup>23</sup> Accordingly, the Board finds that OWCP properly

---

<sup>20</sup> Moreover, appellant acknowledged in an April 27, 2011 hearing with an OWCP hearing representative that in 1994 he had told Nurse Hartlaub, who was assigned to his case by OWCP, that he worked as an apartment manager for his father. In a December 31, 1994 report, Nurse Hartlaub stated that appellant reported in November 1994 that he lived in an apartment building owned by his father and that "he manages the building for his father."

<sup>21</sup> See *Christine P. Burgess*, *supra* note 14. Appellant later alleged that the fact that he lived in his father's apartment on a rent-free basis was not due to his work activities for his father. However, appellant's own testimony and other evidence of record shows that he received free rent due to his management of his father's building.

<sup>22</sup> The CA-1032 forms instructed appellant to report all employment for which he received a salary, wages, income, sales commissions, piecework or payment of any kind. Appellant was directed to report all self-employment or involvement in business enterprises, including (but not limited to) operating a business, and providing services in exchange for money, goods or other services. The kinds of services that appellant was required to report included such activities as carpentry, mechanical work, painting, contracting, keeping books and records, odd jobs, and managing and overseeing a business of any kind, including a family business.

<sup>23</sup> See generally *Lewis George*, 45 ECAB 144 (1993).



determined that appellant forfeited his right to compensation for the periods May 7, 1993 to August 3, 1996, September 23, 1997 to September 26, 2000 and January 1, 2001 to August 16, 2010.

### **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 duty.<sup>24</sup> 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.”<sup>25</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant received a \$659,755.65 overpayment of compensation. For the reasons explained above, appellant forfeited his compensation for the periods May 7, 1993 to August 3, 1996, September 23, 1997 to September 26, 2000 and January 1, 2001 to August 16, 2010. The evidence of record includes payment documents and worksheets which show that he received \$659,755.65 in compensation during these periods. Due to the forfeiture of compensation, appellant would not be entitled to this compensation and, therefore, he received a \$659,755.65 overpayment of compensation.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8129(a) of FECA provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.<sup>26</sup> 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.”<sup>27</sup> No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.<sup>28</sup>

---

<sup>24</sup> 5 U.S.C. § 8102(a).

<sup>25</sup> *Id.* at § 8129(a).

<sup>26</sup> *Id.* at § 8129(a).

<sup>27</sup> *Id.* at § 8129(b).

<sup>28</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

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 provide 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....”<sup>29</sup>

Section 10.433(c) of OWCP’s regulations provide:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”<sup>30</sup>

### **ANALYSIS -- ISSUE 3**

In the present case, appellant was at fault in the creation of the \$659,755.65 overpayment of compensation because he failed to provide information which he knew or should have known to be material on CA-1032 forms covering periods between May 7, 1993 and August 16, 2010.<sup>31</sup> As discussed in the forfeiture portion of this decision, appellant had employment and earnings during the periods covered by these forms in that he was employed as an apartment manager and had earnings from this employment, but he did not report such employment activities and earnings on the forms submitted to OWCP. The explicit language of the CA-1032 forms clearly show that appellant knew or should have known that the nature of his work as an apartment manager would require him to report such employment activities on the forms and appellant’s signing of strongly-worded certification clauses on the CA-1032 forms further shows that he was aware of the materiality of his failure to report his employment. Because appellant was at fault in the creation of the overpayment, OWCP properly determined that he was not entitled to waiver of recovery of the overpayment.<sup>32</sup>

---

<sup>29</sup> 20 C.F.R. § 10.433(a).

<sup>30</sup> *Id.* at § 10.433(c).

<sup>31</sup> *See supra* note 29.

<sup>32</sup> *See supra* notes 27 and 28.

### **LEGAL PRECEDENT -- ISSUE 4**

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.<sup>33</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>34</sup>

Section 8115(a) of FECA provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."<sup>35</sup> The Board has stated, "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."<sup>36</sup>

Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.<sup>37</sup> OWCP procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.<sup>38</sup>

### **ANALYSIS -- ISSUE 4**

In determining appellant's wage-earning capacity, OWCP properly found that he had received actual earnings as an apartment manager for more than 60 days in that he had been working in the position since at least January 1983 when OWCP issued its December 21, 2010 wage-earning capacity decision.<sup>39</sup> It also properly found that appellant's actual wages fairly and reasonably represented his wage-earning capacity.<sup>40</sup> The record does not establish that the apartment manager position was a make-shift position designed for appellant's particular

---

<sup>33</sup> *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

<sup>34</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>35</sup> 5 U.S.C. § 8115(a).

<sup>36</sup> *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as "the incapacity, because of an employment injury, to earn the wages the employee was receiving *at the time of injury*." (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent an employee's wage-earning capacity, OWCP applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee's compensation.

<sup>37</sup> *See James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7a(1), (2) (July 1997).

<sup>38</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

<sup>39</sup> *See supra* note 38.

<sup>40</sup> *See supra* notes 35 and 36. OWCP properly determined that appellant's earnings as an apartment manager were represented by the value of the rent-free apartment (\$1,400.00 per month) he received for working in this position. *See supra* note 17.

needs.<sup>41</sup> For these reasons, OWCP properly found that appellant's actual wages as an apartment manager fairly and reasonably represented his wage-earning capacity.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant forfeited his right to compensation for periods between May 7, 1993 and August 16, 2010, that he received a \$659,755.65 overpayment of compensation and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. The Board further finds that OWCP properly reduced appellant's compensation effective December 21, 2010 based on its determination that his actual wages as an apartment manager fairly and reasonably represented his wage-earning capacity.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 28 and 25, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 8, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

---

<sup>41</sup> See *supra* note 37.