

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

G.U., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 14-1705
Issued: June 5, 2015**

Appearances:

*Geraldine Manzo, for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 4, 2014 appellant filed a timely appeal from the January 16, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly found that appellant forfeited her right to compensation for the period November 30, 2009 to August 15, 2011 because she knowingly

¹ 5 U.S.C. §§ 8101-8193.

² Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. 501.3(e)-(f). One hundred and eighty days from January 16, 2014, the date of OWCP's last decision, was July 15, 2014. Since using August 4, 2014, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is July 4, 2014, rendering the appeal timely filed. See 20 C.F.R. 501.3(f)(1).

failed to report her employment activities for this period; and (2) whether it properly found an overpayment in the amount of \$72,782.49.

FACTUAL HISTORY

On October 5, 1999 appellant, then a 28-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained an injury due to the repetitive work duties she performed. OWCP accepted that appellant sustained a right wrist strain, bilateral tendinitis, and an aggravation of bilateral Keinbock's disease.

On January 30, 2002 appellant underwent a left lunate graft and carpectomy and, on April 28, 2003, she underwent a left proximal carpectomy. On December 5, 2003 appellant underwent a lunate graft on the right. These procedures were authorized by OWCP. Appellant stopped work on April 28, 2003 and returned to work on a part-time basis on June 9, 2003. She stopped working completely on December 4, 2003 and received total disability compensation on the periodic rolls beginning December 28, 2003.

On February 1, 2005 OWCP granted appellant a schedule award for 10 percent permanent impairment of her right arm and 33 percent permanent impairment of her left arm. The award ran for 134.16 weeks from October 31, 2004 to May 28, 2007. After the schedule award stopped running, appellant received disability compensation on the daily rolls beginning November 30, 2009. She later returned to the periodic rolls.

By decision dated February 24, 2012, OWCP determined that, after failing to participate in vocational rehabilitation efforts, appellant had the wage-earning capacity of a customer complaint clerk and it reduced her compensation to reflect this wage-earning capacity. In a September 20, 2012 decision, an OWCP hearing representative affirmed OWCP's February 24, 2012 decision.

Appellant completed and signed EN1032 forms on May 24, 2010 and August 15, 2011. She signed the forms and marked "no" to attest that she had not worked for any employer and was not self-employed or involved in any business enterprise for the 15 months prior to the date that she signed each form.³ The EN1032 forms required appellant to report all self-employment or involvement in business enterprises. These included but were not limited to farming, sales work, operating a business, including a store or a restaurant, and providing services in exchange for money, goods, or other services. The kinds of services appellant was required to report included keeping books and records, or managing and/or overseeing a business of any kind, including a family business.

The EN1032 forms further provided that, even if appellant's activities were part time or intermittent, she was required to report them. Appellant had to report as her "rate of pay" what she was paid, including the value of such things as housing, meals, clothing, and reimbursed expenses, if they were received as part of her employment. She was required 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 any business

³ Appellant also responded "no" on both to the question about whether she was performing volunteer work.

enterprise for which she was not paid, she was required to show as rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties she did, even if her work was for herself or a family member or relative.

In a September 21, 2012 report, the Office of Inspector General (OIG) for the employing establishment found after an investigation in August 2011 that appellant was actively involved in a business. The report contained evidence showing that appellant worked at a Quiznos sandwich restaurant in Antioch, CA, ostensibly as a manager, from the time of the opening through around the time that the report was completed. Internet advertisements from May and June 2008 stated that the Quiznos restaurant was a family-owned franchise run by appellant and her sister. Appellant's sister was interviewed by an OIG agent in May 2012 and indicated that appellant worked as a manager at the Quiznos restaurant and would work a few hours, five to six times per week. An employee at the Quiznos restaurant was questioned by an OIG agent in May 2012 and reported that appellant tended to come in on a daily basis at 11:00 a.m. to check on the operation, fill out forms, and work on the computer. Appellant occasionally delivered party trays. The employee, who had worked at the restaurant for five years, stated that she considered appellant to be the daytime manager of the restaurant and appellant's sister to be the night manager.

The September 21, 2012 investigative report of the OIG includes a business card which listed appellant as "owner/manager" of the restaurant. It also contains records of surveillance of appellant between late 2011 and early 2012. Appellant was observed entering through the employee's entrance of the restaurant, engaging with customers from behind the counter, and leaving the premises with trays of food for the purpose of delivery to customers. The OIG report also notes that on February 16, 2011 appellant signed a City of Antioch Business License Renewal. In a May 2012 interview, appellant stated to an OIG agent that she watched the Quiznos restaurant to make sure everything was going okay and oversaw the employees. She indicated that she had been at the Quiznos restaurant since it opened in 2007. Appellant stated that it was a family business owned by her parents, but that she did not have a title or receive pay. She stated that she sometimes handed customers their orders and delivered sandwiches two or three times a day when she was at the Quiznos restaurant.

By decision dated June 20, 2013, OWCP determined that appellant's entitlement to compensation paid during the period November 30, 2009 to August 15, 2011, which totaled \$72,782.49, was forfeited. It determined that appellant knowingly failed to report her work activities at a Quiznos restaurant on the two EN1032 forms that she signed on May 24, 2010 and August 15, 2011. Each form covered a reporting period of 15 months prior to the signing of each form.⁴ An investigative memorandum produced by the OIG for the employing establishment showed that appellant had engaged in work activity during this period which she should have reported.

In a June 20, 2013 letter, OWCP advised appellant that it had made a preliminary determination that she was overpaid \$72,782.49 for the period November 30, 2009 to August 15, 2011 and was at fault in the creation of the overpayment because she knowingly accepted

⁴ OWCP noted that the May 24, 2010 Form EN1032 actually covered a period that began prior to November 30, 2009, but that the period of forfeiture was declared to November 30, 2009 to August 15, 2011 because appellant did not begin to receive disability compensation from OWCP until November 30, 2009.

compensation to which she was not entitled. Appellant disagreed with the preliminary overpayment decision and requested a conference with OWCP which was held on August 13, 2013.

By decision dated September 12, 2013, OWCP finalized the overpayment determination and determined that \$300.00 should be deducted from appellant's continuing periodic compensation payments.

Appellant disagreed with the June 20, 2013 forfeiture decision and requested a hearing with an OWCP hearing representative. At the November 13, 2013 hearing, it was argued that appellant had not made an incorrect statement on a Form EN1032 because appellant did not know that she had made an incorrect statement until after speaking with a claims examiner. Appellant did not own the restaurant where she was alleged to have worked. Regarding the business license which reflected her as the owner, she explained that she only signed the documents for her sister. Appellant stated that appellant's father was the owner of the restaurant and that she often interpreted for him. It was explained that the Form EN1032 requested that all employment activities be reported even if pay was not received. It was argued that appellant had legitimately answered "no" on the EN1032 forms with respect to work for an employer, self-employment, and involvement in any business enterprise. Appellant believed, given the manner in which the forms were written, that she did not have to report work activity if, as in her case, she did not earn any income while working. She allegedly completed the EN1032 forms in an appropriate manner based on the way the EN1032 forms were written.

In a decision dated January 16, 2014, an OWCP hearing representative finalized the June 20, 2013 preliminary finding that she had forfeited her right to compensation for the period November 30, 2009 to August 15, 2011. He found that appellant knowingly failed to report work activities as required by the EN1032 forms she completed which covered the period of forfeiture.

LEGAL PRECEDENT

Section 8106(b) of FECA⁵ 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

⁵ 5 U.S.C. § 8106(b).

compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”⁶

An employee can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she “knowingly” omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. OWCP procedures recognize that forfeiture is a penalty,⁷ and, as a penalty provision, it must be narrowly construed.⁸ In its regulations, “knowingly” is defined as: “with knowledge, consciously, willfully or intentionally.”⁹ To meet this burden, OWCP is required to examine closely appellant’s activities and statements. It may meet this burden without an admission by an employee if the circumstances of the case establish that he or she failed to reveal fully and truthfully the full extent of his or her employment activities and earnings.¹⁰

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

“(1) Gross earnings or wages before any deductions 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.”¹¹

ANALYSIS

The Board finds that OWCP properly found that appellant forfeited her right to compensation from November 30, 2009 to August 15, 2011. In the present case, the record establishes that appellant knowingly omitted employment activities on EN1032 forms covering the period November 30, 2009 to August 15, 2011. In these forms, signed on May 24, 2010 and August 15, 2011, OWCP notified appellant of her responsibility to complete the forms and

⁶ 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 she 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.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

⁸ *Christine P. Burgess*, 43 ECAB 449 (1992).

⁹ 20 C.F.R. § 10.5(n); see *Anthony A. Nobile*, 44 ECAB 268 (1992).

¹⁰ *Terry A. Geer*, 51 ECAB 168 (1999).

¹¹ 20 C.F.R. § 10.5(g); see *Monroe E. Hartzog*, 40 ECAB 329 (1988).

provide relevant information concerning her employment status and earnings during the periods covered by the forms.

The record reflects that appellant performed substantial unreported work activity during the period of the forfeiture. In a September 21, 2012 report, the OIG for the employing establishment indicated that an investigation established that appellant was actively involved in a business. The report contained substantial evidence showing that appellant worked at a Quiznos sandwich restaurant in Antioch, CA, ostensibly as a manager, from the time of the opening through around the time that the report was completed. In a May 2012 interview, appellant stated to an OIG agent that she watched the Quiznos restaurant to make sure everything was going okay and that she oversaw the employees. She indicated that she had been at the Quiznos restaurant since the place opened in 2007. Appellant stated that she sometimes handed customers their orders and delivered sandwiches two or three times a day when she was at the Quiznos restaurant.

The EN1032 forms signed by appellant used such terms as “business” and “enterprise” to explain the obligation for reporting all forms of employment, self-employment, and earnings. They noted that she was required to report involvement in a business enterprise including working in a store or a restaurant. The explicit language of the EN1032 forms advised appellant that the nature of her work at Quiznos would require her to report such employment activities on the forms. Appellant’s signing of strongly-worded certification clauses on the EN1032 forms further shows that she was aware of the materiality of the failure to report her employment.

Under these circumstances, the Board concludes that appellant “knowingly” omitted her earnings under section 8106(b)(2) of FECA by failing to report her employment activities at the Quiznos restaurant on the applicable EN1032 forms covering the period November 30, 2009 to August 15, 2011.¹² At a hearing with an OWCP hearing representative, appellant’s representative argued that appellant legitimately answered “no” on the EN1032 forms with respect to work for an employer, self-employment, and involvement in any business enterprise because she believed, given the manner in which the forms were written, that she did not have to report work activity if, as in her case, she did not earn any income while working. On appeal, appellant offered a similar argument for not reporting her work activity. However, the forms require that, if she was not paid, appellant was required to show as rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties she did. Appellant did not report her work activities despite the unambiguous requirement that she report them even if she was not paid or the activities were intermittent or sporadic. Accordingly, the Board finds that OWCP properly determined that appellant forfeited her right to compensation from November 30, 2009 to August 15, 2011.

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.

¹² See *supra* notes 6 through 10.

CONCLUSION

The Board finds that OWCP properly found that appellant forfeited her right to compensation for the period November 30, 2009 to August 15, 2011 because she knowingly failed to report her employment activities for this period.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 5, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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