

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

L.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Babylon, NY, Employer**

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**Docket No. 15-1648
Issued: September 18, 2017**

Appearances:
Kevin Card, for the appellant¹
Office of Solicitor, for the Director

Oral Argument June 14, 2016

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 12, 2015 appellant, through his representative, filed a timely appeal from an August 22, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ 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 August 22, 2014, the date of OWCP's last decision, was February 18, 2015. Since using February 26, 2015, 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 or other carrier's date marking is considered the date of filing. The date of the U.S. Postal Service carrier's date marking is February 12, 2015, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

ISSUES

The issues are: (1) whether OWCP met its burden of proof to establish that appellant forfeited his right to compensation for the period September 30 to November 22, 2013; (2) whether appellant received a \$6,287.29 overpayment of compensation due to the forfeiture of his right to compensation for the period September 30 to November 22, 2013; and (3) whether appellant was at fault in the creation of the \$6,287.29 overpayment of compensation, thereby precluding waiver of recovery of the overpayment of compensation.

FACTUAL HISTORY

On August 9, 2013 appellant, then a 48-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on July 29, 2013, he sustained an injury to his right shoulder when lifting a heavy package. OWCP accepted his claim for a right biceps tendon rupture. Appellant stopped work on August 16, 2013 and was paid continuation of pay for the period August 16 to September 29, 2013.⁴ OWCP paid appellant disability compensation on the daily rolls beginning September 30, 2013.

On August 22, 2013 OWCP assigned appellant a field nurse to provide medical case management services designed to facilitate his return to work. In an undated report covering the period August 23 to September 23, 2013, the field nurse noted that appellant reported that since 2005, in addition to his federal job, he had worked four hours per day for five days per week as a custodian for the school district of North Babylon, NY.

In an August 27, 2013 e-mail to an OWCP claims examiner, the field nurse advised that appellant had a part-time job working four hours per day, five days per week as a custodian for the school district of North Babylon, NY. The field nurse noted that she advised appellant to report this information to the claims examiner.

Appellant telephoned OWCP's claims examiner on September 13, 2013 and advised her that he wanted to report his "second job and income" to OWCP. He reported that the field nurse told him that he had to report his second job to OWCP and that "he is doing so *via* this call." During a September 17, 2013 telephone call, appellant told the same OWCP claims examiner that he had lost income from his part-time nonfederal job due to his July 29, 2013 employment injury. The claims examiner informed appellant that OWCP would only cover his wage loss up to 40 hours if his date-of-injury job had a 40-hour per week schedule and advised that he could contact the U.S. Department of Labor to inquire whether he is eligible to claim unemployment or disability for the part of his wage loss related to his part-time nonfederal job. She also advised appellant that on a Form CA-7 "he must provide his other employment information and pay stub if he had done any work for the period claimed." Appellant told the claims examiner that he was temporarily totally disabled due to his July 29, 2013 employment injury and that he did not work in his part-time nonfederal job after his July 29, 2013 injury.

On October 11, 2013 appellant filed a claim for compensation (Form CA-7) for wage loss due to his July 29, 2013 employment injury. In Section 2 of the Form CA-7, he indicated that he was claiming such compensation for the period September 30 to October 11, 2013. Section 3 of

⁴ On August 22, 2013 appellant underwent OWCP-authorized repair surgery for his right biceps tendon rupture.

the Form CA-7 contains the statement, “You must report all earnings from employment (outside your federal job); include any employment for which you received a salary, wages, income, sales commissions, piecework, or payment of any kind during the period(s) claimed in Section 2.” The Form CA-7 also indicates, “Include self-employment, involvement in business enterprises, as well as service with the military forces.” Section 3 contains a question, “Have you worked outside your federal job for the period(s) claimed in Section 2?” Next to this question is a “Yes” box and a place to provide the name, address, dates worked, and type of work if a claimant has, in fact, worked outside his or her federal job for the period claimed in Section 2. Section 3 also provides the option of checking a “No” box if the answer is negative to this question and an instruction to “Go to Section 4” if the “No” box is checked.⁵ The Form CA-7 contains a warning that fraudulent concealment of employment or failure to report income may result in forfeiture of compensation benefits and/or criminal prosecution. On the Form CA-7 he filed on October 11, 2013 (covering the period September 30 to October 11, 2013), appellant answered “No” to the question in Section 3, “Have you worked outside your federal job for the period(s) claimed in Section 2?”

Appellant filed a Form CA-7 on October 25, 2013 claiming compensation for the period October 12 to 25, 2013 in Section 2. This Form CA-7 contains the same language as the Form CA-7 he filed on October 11, 2013. On this Form CA-7, appellant again answered “No” to the question, “Have you worked outside your federal job for the period(s) claimed in Section 2?”

In an undated letter received by OWCP on October 30, 2013, appellant noted:

“As you are aware, I am out on compensation due to a biceps tendon repair. This injury has caused [me] to be unable to work at the Postal Service, in which I am compensated. Currently, I’m not being compensated for my lost wages at the North Babylon Union Free School District, in which I’ve been employed since 2005. I contacted New York State Compensation and was told that the U.S. Department of Labor is responsible for my lost wages at this job, due to the fact that I was injured at the Postal Service.... Will I be compensated for my lost wages of my second job? Please reply in writing to my home address.”

Appellant also filed CA-7 forms on November 8, 2013 claiming compensation for the period October 26 to November 8, 2013 in Section 2, and November 22, 2013 claiming compensation for the period November 9 to 22, 2013 in Section 2. These CA-7 forms contain the same language as the Form CA-7 he filed on October 11, 2013. On each of these CA-7 forms, appellant again answered “No” to the question, “Have you worked outside your federal job for the period(s) claimed in Section 2?”

The record contains documents showing that OWCP paid gross compensation benefits in the amount of \$6,287.29 for the period September 30 to November 22, 2013.⁶ On November 25, 2013 appellant returned to regular work on a full-time basis with the employing establishment.

⁵ Section 4 requests information about various matters such as whether there has been a change in the claimant’s dependents and whether the claimant’s direct deposit information has changed.

⁶ After deductions for insurance premiums, appellant received \$5,807.19 in net compensation for the period September 30 to November 22, 2013.

He also returned to his part-time job as a custodian with the North Babylon Union Free School District on that date.⁷

In a “Case Summary Report” dated January 29, 2014, a special agent for the employing establishment’s Office of the Inspector General (OIG) discussed appellant’s employment as a part-time custodian in a school in North Babylon Union Free School District. The report includes several payroll and attendance records from the school district to which the special agent referred in the body of the report. The special agent reported that the school district records entitled “After Payroll Transactions for Checks dated between July 29 [to] December 27, 2013” revealed that appellant received several “paid sick leave” payments related to his work as a custodian through direct deposits of \$53.90 on September 20, 2013, \$551.16 on October 4, 2013, \$551.16 on October 18, 2013, and \$488.26 on November 1, 2013.⁸ He also noted that a payment record of the school district showed that appellant had received \$3,555.20 in gross pay for the period July 29 to December 27, 2013. A school district document entitled “Attendance Detail Report for the Period of July 1, 2013 to June 30, 2014” shows that appellant was on “Sick” status for intermittent dates between September 3 and October 16, 2013 and on “No Pay” status for intermittent dates between October 17 and November 22, 2013.

In a March 19, 2014 decision, OWCP found that appellant had forfeited his right to compensation in the amount of \$6,287.29 for the period September 30 to November 22, 2013 because he failed to report employment and earnings on CA-7 forms covering this period. It indicated that appellant had earnings as a custodian during the periods listed on the CA-7 forms and noted that the wording of the CA-7 forms covering the period September 30 to November 22, 2013 advised him of the need to report such earnings. OWCP discussed the content of the CA-7 forms completed by appellant and noted:

“We received a Report of Investigation from the [OIG]. This report provided evidence of your earnings from the North Babylon Union Free School District for the period July 29 through December 27, 2013 in the gross amount of \$3,555.20.

“The Form CA-7 clearly states ‘Fraudulent concealment of employment or failure to report income may result in forfeiture of compensation benefits and/or criminal prosecution.’ The evidence supports that on the Form CA-7 covering the period of September 30 through November 22, 2013, that you knowingly omitted your earnings from employment with the North Babylon Union Free School District.

“The evidence of record does not show that you are suffering from any defects and/or impediments relative to your ability to fully understand the reporting requirements of the CA-7 forms. You were paid a total of \$6,287.29 in gross compensation for wage loss for the period September 30 through November 22, 2013. As you knowingly misrepresented your employment and earnings on the Form CA-7, this compensation must be found to be forfeit.”

⁷ The field nurse closed the case with appellant in late December 2013.

⁸ The document also shows a sick leave payment in the form of a direct deposit of \$173.75 on December 13, 2013.

In a March 19, 2014 letter, OWCP advised appellant of its preliminary determination of an overpayment of compensation in the amount of \$6,287.29 because he forfeited his right to compensation for the period September 30 to November 22, 2013 after failing to report earnings on CA-7 forms covering that period. It also made a preliminary determination that he was at fault in the creation of the overpayment because he was aware or should have reasonably been aware that he had failed to report earnings on the CA-7 forms, thereby precluding waiver of recovery of the overpayment. OWCP advised appellant that he could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It informed him that he could submit additional evidence in writing or at a prerecoupment hearing with OWCP's Branch of Hearings and Review, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of recovery of the overpayment.

Appellant completed a Form OWCP-20 on March 29, 2014 in which he challenged the fact and amount of the overpayment, and fault findings of OWCP's March 19, 2014 preliminary overpayment letter and requested a prerecoupment hearing. He listed figures for monthly income, monthly expenses, and assets and submitted documents further detailing his monthly expenses. Regarding appellant's reasons for contesting the overpayment of compensation, he noted:

“Section 3 of CA-7 asked ‘have you worked.’ I did not. I was not employed. I was out on workers’ comp from Post Office injury. I was not compensated for lost earnings at North Babylon school district. I received previously accrued sick leave. I disclosed my relationship with North Babylon schools to DOL by telephone. I was told to file unemployment for lost work. I did not receive unemployment, so I replied to DOL by certified mail hoping for a lost leave buy back. I was not contacted.”

In a March 25, 2014 letter, received by OWCP on April 4, 2014, an assistant superintendent for educational services at the North Babylon Union Free School District indicated that, as a part-time custodian, appellant worked for four hours per day, five days per week from September through June. She reported that, during the summer months of July and August, part-time custodians such as appellant worked a total of approximately 20 days and were only paid for the days they worked. The assistant superintendent noted that appellant worked sixteen days during July and August 2013, with his last date of work being August 13, 2013. She noted that, per the report entitled “Attendance Detail Report for the period July 1, 2013 [to] June 30, 2014,”⁹ Appellant was granted sick leave effective July 1, 2013, but that school district policy provides that sick leave is not charged against part-time custodians until September 3, 2013, the date which is considered the beginning of their “work year.” The assistant superintendent indicated that appellant was paid sick leave for his absences between September 3 and October 16, 2013. She noted that, effective October 17, 2013, appellant had run out of sick leave and that he went on “no pay” status from October 17, 2013 until he returned to work on November 25, 2013. The assistant superintendent indicated that appellant was placed back on the payroll upon his return to work on November 25, 2013.

⁹ The assistant superintendent attached a copy of this document to her letter.

During the prerecoument hearing, held on July 9, 2014, appellant testified that he contacted OWCP on two occasions in September 2013 to inquire as to how he could be compensated for wages he lost from his part-time custodian job for the North Babylon Union Free School District due to the effects of his July 29, 2013 work injury. He noted that he began being paid sick leave by the school district for his absences from the custodian job, but that he sent OWCP a letter requesting reimbursement for lost wages from the custodian job because he did not want to use this sick leave. Appellant testified that he “was not concealing [his] second job” as a custodian and that he also reported his work as a custodian to an OWCP-sponsored field nurse. He provided additional testimony regarding his monthly income, monthly expenses, and assets.¹⁰ Counsel argued that the evidence of record revealed that appellant made no effort to hide his private employment as a custodian and that he answered the questions on the CA-7 forms in a manner that he believed to be consistent with two telephone conversations he had with OWCP officials in mid-September 2013. He asserted that these telephone conversations and the fact that the CA-7 forms required reporting of income from work led appellant to believe that, because he did not work during the periods covered by the CA-7 forms, he was not required to report any other income that was not from work.

By decision dated August 22, 2014, an OWCP hearing representative affirmed OWCP’s March 19, 2014 determination that appellant forfeited his right to compensation in the amount of \$6,287.29 for the period September 30 to November 22, 2013 because he failed to report earnings and employment activities on CA-7 forms covering this period. The hearing representative further found that appellant received a \$6,287.29 overpayment of compensation for the period September 30 to November 22, 2013, and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.¹¹ Regarding his affirmance of OWCP’s forfeiture action, OWCP’s hearing representative noted:

“The record establishes that the claimant knowingly failed to report employment earnings. The [Board] has held that ‘earnings from employment’ includes payment for vacation leave. Clearly ‘earnings from employment’ also encompasses payment for sick leave. The claimant was paid sick leave referable to his nonfederal position with the school district for the same period in which he was paid compensation for total disability under FECA. However, the claimant did not report such sick leave income to OWCP. The claimant’s letter received October 30, 2013 made no reference to sick leave. Consequently the claimant knowingly failed to report employment earnings.”

¹⁰ Appellant testified that he had been removed from the employing establishment due to the manner in which he completed the Forms CA-2 covering the period September 30 to November 22, 2013 and that the termination action was in the process of being appealed. The record contains a copy of an April 15, 2014 notice of removal from the employing establishment.

¹¹ OWCP indicated that appellant was at fault in the creation of the overpayment of compensation because he “knowingly failed to report income from sick leave paid to him in connection with his nonfederal job.”

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA¹² 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.”¹³

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,¹⁴ and, as a penalty provision, it must be narrowly construed.¹⁵ In OWCP’s regulations, “knowingly” is defined as: “with knowledge, consciously, willfully, or intentionally.”¹⁶ OWCP has the burden of proof to establish that a claimant, either with knowledge, consciously, willfully, or intentionally, failed to report earnings or employment activities.¹⁷ OWCP procedures provide that an OWCP forfeiture decision should specifically discuss the evidence which supports that the claimant knowingly failed to report earnings or employment.¹⁸ To meet its burden of proof to establish forfeiture, OWCP is required to examine closely the employee’s activities and statements. OWCP may meet this burden without an admission by an employee if the

¹² 5 U.S.C. § 8106(b).

¹³ 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 or she received compensation for that period for total or partial loss of wage-earning capacity. 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. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

¹⁵ *Christine P. Burgess*, 43 ECAB 449 (1992).

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

¹⁷ *Billy J. McCamey*, Docket No. 00-2725 (issued June 11, 2002).

¹⁸ *See supra* note 14 at Chapter 2.1402.8d.

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.¹⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a work-related right biceps tendon rupture on July 29, 2013. He stopped work on August 16, 2013 and received disability compensation on the daily rolls beginning September 30, 2013.

On October 11, 2013 appellant filed a Form CA-7 claim for wage-loss compensation due to his July 29, 2013 employment injury. Appellant filed additional CA-7 forms on October 25, 2013 (covering the period October 12 to 25, 2013), November 8, 2013 (covering the period October 26 to November 8, 2013), and November 22, 2013 (covering the period November 9 to 22, 2013). On each of these CA-7 forms, appellant answered “No” to the question, “Have you worked outside your federal job for the period(s) claimed in Section 2?”

On November 25, 2013 appellant returned to regular work on a full-time basis with the employing establishment and he was taken off the compensation rolls. He also returned to his part-time job as a custodian with the North Babylon Union Free School District on that date. Appellant had been working in this nonfederal job since 2005 and also stopped working in this position after he suffered his federal work injury on July 29, 2013. He did not work in the custodian position on any dates covered by the CA-7 forms he completed, *i.e.*, the period September 30 to November 22, 2013.

By decision dated March 19, 2014, OWCP found that appellant had forfeited his right to compensation because he failed to report employment and earnings on the CA-7 forms covering this period. It notified him by letter of the same date that it had preliminarily determined that this forfeiture resulted in an overpayment of compensation in the amount of \$6,287.29 for the period September 30 to November 22, 2013. Appellant requested a prerecoupment hearing, held on July 9, 2014.

By decision dated August 22, 2014, OWCP’s hearing representative affirmed and finalized OWCP’s March 19, 2014 forfeiture and overpayment decisions.

The Board finds that OWCP properly determined that appellant received earnings during the period September 30 to October 11, 2013 (the period covered by the Form CA-7 filed on October 11, 2013) because he received a sick leave payment in the form of a direct deposit of \$551.16 on October 4, 2013. In addition, OWCP properly determined that appellant received earnings during the period October 12 to 25, 2013 (the period covered by the Form CA-7 filed on October 25, 2013) because he received a direct deposit sick leave payment of \$551.16 on October 18, 2013. It also properly determined that appellant received earnings during the period October 26 to November 8, 2013 (covered by the Form CA-7 filed on November 8, 2013) because he received a direct deposit sick leave payment of \$488.26 on November 1, 2013.

The Board finds, however, that OWCP improperly determined that appellant had forfeited his compensation for the period September 30 to November 22, 2013 because appellant

¹⁹ *Terry A. Geer*, 51 ECAB 168 (1999).

“knowingly” failed to report those earnings or employment activities on his CA-7 forms which collectively covered this period.²⁰

OWCP did not adequately explain the basis for its determination that appellant “knowingly” failed to report earnings or employment activities on the CA-7 forms covering the period September 30 to November 22, 2013. As noted above, OWCP has the burden of proof to establish that a claimant “knowingly” failed to report earnings or employment within the meaning of section 8106(b) of FECA, and an OWCP forfeiture decision should specifically discuss the evidence which supports such a determination.²¹

OWCP failed to consider appellant’s communications with the claims examiner prior to completing the CA-7 forms or consider how, under the specific facts of the present case, such communications might have impacted his understanding of what was required to be included on the CA-7 forms. Appellant telephoned the OWCP claims examiner on September 13, 2013 and advised her that he wanted to report his “second job and income” to OWCP. Appellant reported that the assigned field nurse told him that he had to “report his second job” to OWCP and that “he is doing so *via* this call.”²² During a September 17, 2013 telephone call, appellant told the same OWCP claims examiner that he had lost income from his part-time nonfederal job as a custodian due to his July 29, 2013 employment injury. The claims examiner advised appellant that on a Form CA-7 “he must provide his other employment information and pay stub if he had done any work for the period claimed.”²³ The record establishes that appellant did not perform any work during the period covered by the CA-7 forms he completed and OWCP did not address how this statement by its claims examiner might have affected appellant’s understanding of what information had to be included on the CA-7 forms.

Appellant consistently expressed his belief that he made no attempt to conceal his part-time nonfederal employment as a custodian and that he properly completed the CA-7 forms. In a Form OWCP-20 signed on March 29, 2014, he noted, “Section 3 of CA-7 asked ‘have you worked.’ I did not. I was not employed. I was out on workers’ comp from Post Office injury... I disclosed my relationship with North Babylon schools to DOL by telephone.” During the hearing held on July 9, 2014 before an OWCP hearing representative, appellant testified that he contacted OWCP on two occasions in September 2013 to inquire as to how he could be compensated for wages he lost from his part-time custodian job for the North Babylon Union Free School District due to the effects of his July 29, 2013 work injury. He noted that he began being paid sick leave by the school district for his absences from the custodian job, but that he sent OWCP a letter requesting reimbursement for lost wages from the custodian job because he did not want to use this sick leave. Appellant testified that he “was not concealing second job”

²⁰ See *supra* notes 12 through 19.

²¹ See *supra* notes 18 and 19.

²² In a report covering the period August 23 to September 23, 2013, a field nurse assigned to appellant’s case related that, since 2005, appellant worked four hours per day, five days per week as a custodian for the North Babylon Union Free School District in addition to his federal job.

²³ In an undated letter received by OWCP on October 30, 2013, appellant again advised OWCP of his work as a custodian for a nonfederal employer.

as a custodian and that he also reported his work as a custodian to an OWCP-sponsored field nurse.

Furthermore, appellant did not actually work during the periods covered by the CA-7 forms he completed. Section 3 of the CA-7 forms asks, “Have you worked outside your federal job for the period(s) claimed in Section 2?” Section 3 also provides the option of checking a “No” box if the answer is negative to this question. Appellant truthfully checked the “No” box and the form instructs the employee to “Go to Section 4” if the “No” box is checked. The Board notes that there was no specific space in Section 3 of the CA-7 forms for appellant to report the sick leave payments he received from his part-time nonfederal employer. Section 3 of the CA-7 forms completed by appellant only contained spaces for providing the name, address, dates worked, and type of work if a claimant has, in fact, worked outside his or her federal job for the period claimed in Section 2.

The Board further notes that there is no evidence of record that appellant had any earnings, sick leave or otherwise, from his nonfederal job during the period November 9 to 22, 2013. Appellant received a sick leave payment through a direct deposit of \$488.26 on November 1, 2013 and a sick leave payment through a direct deposit of \$173.75 on December 13, 2013. He did not receive a sick leave payment or any other form of employment-related payment between November 9 and 22, 2013. Because appellant did not have any earnings during the period November 9 to 22, 2013, there can be no finding that he “knowingly” failed to report earnings or employment activities during that period. Therefore, OWCP did not properly invoke the penalty provision under 5 U.S.C. § 8106(b) to find forfeiture of appellant’s right to compensation for the period November 9 to 22, 2013.²⁴

Given the particular circumstances of appellant’s work situation, the particular wording of the CA-7 forms, and the various attempts appellant made to inform OWCP of his other job, the Board finds that OWCP failed to adequately establish that appellant knowingly failed to report earnings or employment activity.

The facts of the present case are distinguished from cases such as *N.D.*²⁵ Where the Board has found that the employee had “knowingly” failed to report earnings and/or employment activities on CA-7 forms. In the present case, appellant received sick leave payments from his part-time nonfederal second job for the same periods claimed on the CA-7 forms, but he did not actually work during the claimed periods covered by the CA-7 forms. Second, the present case involves communications between appellant and OWCP regarding his second job that were not present in *N.D.* and similar cases. These communications negate an intent to omit or knowingly understate any part of his earnings.²⁶

²⁴ *B.S.*, Docket No. 09-0741 (issued May 14, 2010).

²⁵ *N.D.*, Docket No. 13-0108 (issued September 17, 2014).

²⁶ On appeal before the Board, counsel submitted a brief in which he asserts that appellant did not report the sick leave payments on the CA-7 forms because the combination of his lack of work during the periods covered by the CA-7 forms, the communications he had with OWCP officials, and the manner in which the CA-7 forms were worded led him to believe that he did not have to report such sick leave payments in Section 3 of the CA-7 forms.

Because OWCP did not establish that appellant “knowingly” failed to report earnings or employment activities on CA-7 forms covering the period September 30 to November 22, 2013, OWCP has failed to meet its burden of proof to forfeit his right to compensation for that period.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to establish that appellant forfeited his right to compensation for the period September 30 to November 22, 2013.²⁷

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2014 decision of the Office of Workers’ Compensation Programs is reversed.

Issued: September 18, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees’ Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

²⁷ Because OWCP’s findings of an overpayment was based on the findings of forfeiture, the overpayment of compensation is moot.