United States Department of Labor
Employees' Compensation Appeals Board

B.P., Appellant	)	
and	)	**Docket No. 18-1427**
	)	**Issued: July 29, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Green River, WY, Employer	)	

Appearances:
Kayla Spencer, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 18, 2018 appellant, through counsel, filed a timely appeal from a June 20, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[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.*

ISSUE

The issue is whether OWCP properly found that appellant had forfeited her wage-loss compensation for the period December 19, 2013 through March 19, 2015 because she knowingly failed to report her employment activities and earnings.

FACTUAL HISTORY

On July 25, 2008 appellant, then a 49-year-old city carrier, filed a traumatic injury claim (Form CA-1) for a right foot injury allegedly sustained on July 21, 2008 when stepping out of her work vehicle while in the performance of duty. OWCP initially accepted her claim for right foot sprain and ruptured/torn ligament, and right foot tendinitis. It later expanded the accepted conditions to include right ankle peroneal tendon tear and right lower limb complex regional pain syndrome. OWCP paid wage-loss compensation for periods of disability.

On January 22, 2013 appellant underwent authorized right foot surgery. OWCP paid her wage-loss compensation for temporary total disability beginning January 22, 2013, and placed her on the periodic compensation rolls effective April 7, 2013.[3]

On March 17, 2015 OWCP requested that appellant complete and return an enclosed EN1032 form. The EN1032 form contained language advising her of what type of employment activities, earnings, and volunteer activities that she was required to report for the 15-month period prior to the time she signed each form. Appellant was instructed to report all employment for which she received a salary, wage, income, sales commissions, piecework, or payment of any kind. The EN1032 form also directed appellant to report all self-employment or involvement in business enterprises, including (but not limited to) farming; sales work; operating a business, including a store or a restaurant; and providing services in exchange for money, goods, or other services. The kinds of services that she was required to report include such activities as carpentry, mechanical work, painting, contracting, child care, odd job, *etc*. The activities appellant was to report included keeping books and records, or managing and overseeing a business of any kind, including a family business. She was informed that even activities that were part time or intermittent must be reported. The EN1032 form contained a certification clause informing appellant of the consequences of not accurately reporting her employment activities, such as being subjected to criminal penalties and losing the right to receive workers' compensation benefits.

In an EN1032 form signed on March 19, 2015, appellant responded "No" indicating that she had not worked for an employer and had not been self-employed or involved in a business enterprise in the past 15 months.

OWCP received an August 5, 2015 investigative memorandum from the employing establishment's Office of Inspector General (OIG) advising of its belief that appellant had participated in various activities outside of her medical restrictions for the period February 4, 2014 to August 5, 2015. The OIG agent who completed the report indicated that the investigation

[3] Appellant continued to receive wage-loss compensation for temporary total disability through August 31, 2015. Effective September 1, 2015, appellant elected to receive retirement benefits from the Office of Personnel Management in lieu of FECA wage-loss compensation.

revealed that appellant routinely babysat her granddaughter during school hours while her son and daughter-in-law taught at local schools. He related that the babysitting activities occurred for between 8 to 10 hours a day during school days and that the school district had 175 school days between August 18, 2014 and May 22, 2015. The OIG specifically conducted surveillance of appellant from September 12 through November 6, 2014. According to the memorandum, OIG agents witnessed appellant babysitting her granddaughter during the day for approximately eight to nine hours a day on intermittent dates from September through November 2014.[4]

The OIG reported that on June 24, 2015 OIG agents interviewed appellant about her work-related injury and the surveillance activities conducted. When they questioned her about babysitting her granddaughter during the school year, appellant acknowledged that she had babysat her granddaughter a lot this year because the other baby sitter was unavailable. She also confirmed that she had signed her March 19, 2015 EN1032 form. The investigative report revealed that appellant "never directly answered the question posed by [a Special Agent] about babysitting."

By decision dated August 9, 2017, OWCP found that appellant had forfeited her wage-loss compensation benefits for the period December 19, 2013 through March 19, 2015, pursuant to 5 U.S.C. § 8106(b), for failure to report her earnings and employment activities or earnings on a Form EN1032. It found that she had knowingly omitted information about self-employment and employment activities that occurred during that period.[5] The forfeiture period covered the 15 months preceding the March 19, 2015 EN1032 form.[6]

On September 15, 2017 appellant, through counsel, requested reconsideration.

In a narrative statement, appellant related that she continued to experience pain and swelling in her right foot, which required constant pain medication. She acknowledged that she watched her grandchildren "off and on for a short time." Appellant reported that she had not received any money or gifts for watching her grandchildren and that she was only spending time with them. She indicated that when she filled out the EN1032 form she only glanced at it without reading the whole thing. Appellant asserted that she informed the employing establishment's

[4] The memorandum indicated that surveillance showed that appellant babysat her granddaughter on September 11, 12, 15, 19, 22, 23, 24, 25, 26, 29, 30; October 1, 2, 3, 6, 7, 9, 10, 13, 14, 15, 16, 21, 22, 23, 28, 29, 30, and 30; and November 3 and 5, 2014.

[5] OWCP determined that appellant had not reported having a garage sale at her residence on August 9, 2013, returning to work briefly for light duty and sedentary work on January 25, 2014, and babysitting children on February 7 and 8, 2014.

[6] By separate decision, OWCP issued a preliminary determination that appellant had received an overpayment of compensation in the amount of $39,187.84 for the period December 19, 2013 through March 19, 2015 as a result of the forfeiture. It found that she was at fault in the creation of the overpayment. OWCP finalized the overpayment of compensation by decision dated September 11, 2017.

representative that she watched her grandchildren occasionally, and the representative did not instruct her to report the occasional babysitting.[7]

OWCP received several letters regarding appellant's babysitting activities. In an August 30, 2017 letter, A.D., who identified herself as the woman who babysat for appellant's grandchildren, acknowledged that appellant helped her take care of the children from "time to time" when she had other obligations. She also reported that appellant helped with the grandchildren for a week or so that her daughter-in-law went back to work before Christmas break. In an undated letter, B.P., appellant's husband, asserted that during the period December 19, 2013 through March 19, 2015 appellant had not performed work for which she had received compensation. He alleged that appellant spent time with her grandchildren when they needed her to do so, but that she had not received money or payments. In a September 4, 2017 letter, appellant's son and daughter-in-law reported that appellant watched their child while they sought child care after the daughter-in-law returned to work. They also related that appellant "filled in" on days when their child care provider had other obligations.

In a brief dated September 18, 2017, counsel alleged that none of the activities mentioned in the August 9, 2017 decision should result in a forfeiture of benefits. She contended that appellant had not earned money from employment or participated in volunteer work, but only participated in activities of daily living, including walking around her home, spending time with her family, cleaning out the car, picking up a box, and taking care of her husband. Counsel noted that appellant was never employed as a babysitter and had not received wages. She further alleged that the forfeiture provision did not apply in this case because appellant had not "knowingly" omitted or understated any of her earnings. Counsel related that appellant informed the employing establishment's representative that she occasionally babysat her grandchildren, and the representative did not instruct her to report her babysitting activities.

By decision dated January 3, 2018, an OWCP hearing representative set aside the August 9, 2017 decision. She determined that OWCP's decision did not contain a detailed explanation or clear finding of facts with regard to its forfeiture finding. The case was remanded for OWCP to provide factual findings and a detailed explanation supporting its forfeiture determination.[8]

OWCP subsequently provided appellant with a copy of the video evidence referenced in the August 5, 2015 OIG investigation report.

In a May 25, 2018 letter, appellant, through counsel, provided comments on the video surveillance and OIG report. She asserted that appellant had not knowingly misrepresented any earnings or employment because appellant attempted to fill out the EN1032 form completely and accurately with a representative from the employing establishment. Counsel also alleged that spending time with grandchildren was not employment and reiterated that appellant had not

[7] Appellant also addressed other activities noted in the OIG investigative report, including hosting a garage sale, use of her walking buggy, yard work, lifting boxes and a cooler, hanging Christmas lights, working light duty, driving, washing her vehicle, and prolonged standing on floor pads in her kitchen.

[8] The hearing representative also indicated that OWCP should not have issued its September 11, 2017 final overpayment decision because appellant's counsel had requested a prerecoupment hearing. The hearing representative further noted that issue of overpayment was premature as the underlying forfeiture issue had yet to be resolved.

received money or gifts for babysitting. She further contended that the according to *Vernon Booth*[9] and *Matter of Sipe*,[10] activities that would not be available in the open labor market should not be considered employment-type activities. Counsel also asserted that appellant's "babysitting" activity was not the type that would be considered as running a childcare business under state law and was not representative of her wage-earning capacity.

By decision dated June 20, 2018, OWCP determined that appellant forfeited her entitlement to compensation for the period December 19, 2013 through March 19, 2015 because she knowingly failed to report her outside employment and earnings. It found that she had not reported her work activities of providing occasional babysitting services to her grandchildren. OWCP determined that appellant worked intermittently as a babysitter during the school year and that these activities were the type specifically identified on the EN1032 form as the kinds of services that must be reported.

LEGAL PRECEDENT

Section 8106(b) of FECA provides in pertinent part:

> "The Secretary of Labor may require a partially disabled employee to report his or her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies…. An employee who--
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> (1) fails to make an affidavit or report when required; or
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> (2) knowingly omits or understates any part of his or her earnings;
>
> "forfeits his or her right to compensation with respect to any period for which the affidavit or report was required."[11]

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.[12]

[9] 7 ECAB 209 (1954).

[10] 43 ECAB 773 (1992).

[11] 5 U.S.C. § 8106(b); *see F.C.*, 59 ECAB 666 (2007).

[12] 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. *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.

Section 10.529 of OWCP's implementing regulations also provides that if an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required.[13]

OWCP's procedures recognize that forfeiture is a penalty,[14] and, as a penalty provision, it must be narrowly construed.[15] In its regulations, knowingly is defined as: with knowledge, consciously, willfully, or intentionally.[16] To meet this burden, OWCP is required to examine closely the employee's activities and statements. It may meet this burden without an admission by an employee if the circumstances of the case establish that she failed to reveal fully and truthfully the full extent of her employment activities and earnings.[17]

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 include 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."[18]

ANALYSIS

The Board finds that OWCP improperly determined that appellant forfeited her compensation for the period December 19, 2013 through March 19, 2015.

OWCP based its finding of forfeiture for the period December 19, 2013 through March 19, 2015 on the fact that appellant failed to report her employment activities in the preceding 15 months on the Form EN1032 signed and dated March 19, 2015. Appellant reported "No" in response to questions of whether she worked for an employer, was self-employed, or was involved in a business enterprise for the past 15 months. OWCP found that appellant had forfeited her right to compensation because she did not report that she occasionally babysat her grandchild during the period September 11 to November 5, 2014.

[13] 20 C.F.R. § 10.529.

[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] *Id.* at § 10.5(g); *see Monroe E. Hartzog*, 40 ECAB 329 (1988).

[18] *Id.* at § 10.5(g).

The Board, however, finds that in this case the time appellant spent at her home caring for her grandchild during the claimed forfeiture period is not the type of activity (self-employment) that required reporting pursuant to 20 C.F.R. § 10.529. While the evidence of record demonstrates that appellant occasionally looked after her grandchild from September 11 to November 5, 2014, she did not receive any earnings for this particular activity, and thus, was not required to report her the activity on the March 19, 2015 EN1032 form. The Board further finds that a grandparent performing a familial act of watching a grandchild is not a qualifying activity for which benefits may be forfeited under FECA pursuant to federal regulations for reporting activity while in receipt of wage-loss compensation benefits. Such a familial act cannot equate to babysitting or child care contemplated under the reporting forms as well as 5 U.S.C. § 8106(b) and its implementing regulations.

The EN1032 instructed appellant to report all self-employment or involvement in business enterprises, which included: "farming; sales work; operating a business, including a store or a restaurant; and providing services *in exchange for money, goods, or other services* [emphasis added]." The following sentence then describes the kinds of services she was required to report, including child care. Although the EN1032 form lists child care, it is listed as an activity that relates back to "the kind of services" for which she had performed "in exchange for money, goods, or other services." Thus, while appellant intermittently cared for her grandchild and arguably provided "child care" services, the specific language of the EN1032 form demonstrates that child care is a service that must be reported only if appellant has received compensation, goods, or other services in exchange for such services.

In previous forfeiture cases involving babysitting and child care, the Board has consistently held that providing child care services must be reported on an EN1032 form only when the evidence of record has documentation of earnings. For example, in *R.B.*,[19] a claimant reported that she earned $2,160.00 for providing child care for a military friend's family during a specific time period. In *Julia M. Andrews*,[20] a claimant had listed on her application for federal employment (SF-171) that her previous employment included providing child care services for $240.00 per week.

In this case, the record is devoid of any evidence indicating that appellant provided child care services in exchange for money, goods, or other services. To the contrary, appellant has repeatedly asserted that she had not received any money or payment in exchange for occasionally watching her grandchild when the usual child care provider was unavailable. OWCP received additional letters from appellant's husband, son, and daughter-in-law, who confirmed that appellant had not received any compensation when she occasionally looked after her grandchild. The Board thus finds that appellant did not fail to comply with the reporting requirements fully explained on the EN1032 form that she signed on March 19, 2015.

[19] Docket No. 15-1946 (issued September 2, 2016).

[20] Docket No. 04-1444 (issued February 16, 2005).

OWCP has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report employment earnings or work activity.[21] Its procedures recognize that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.[22] The Board finds that, in this case, appellant did not knowingly omit employment activities under section 8106(b)(2) of FECA by failing to report that she occasionally cared for her grandchild without remuneration. OWCP, therefore, improperly determined that she forfeited her entitlement to compensation from December 19, 2013 through March 19, 2015.

CONCLUSION

The Board finds that OWCP improperly determined that appellant forfeited her wage-loss compensation for the period December 19, 2013 through March 19, 2015.

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 29, 2019
Washington, DC

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

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

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

[21] *L.B.*, Docket No. 15-1648 (issued September 18, 2017).

[22] *Supra* notes 14 and 15.