

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

<hr/>		
C.W., Appellant)	
)	
and)	
)	Docket No. 18-1557
)	Issued: June 25, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Philadelphia, PA, Employer)	
<hr/>)	

Appearances: *Case Submitted on the Record*
Aaron B. Aumiller, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 10, 2018 appellant, through counsel, filed a timely appeal from a February 28, 2018 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.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant forfeited her right to compensation for the period December 12, 2014 to March 12, 2016, pursuant to section

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.*

8106(b)(2) of FECA, because she knowingly failed to report her employment activities and earnings; (2) whether she received an overpayment of compensation in the amount of \$45,889.41; (3) whether OWCP properly determined that appellant was at fault in creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (4) whether OWCP properly required recovery of the overpayment by deducting \$310.00 every 28 days from her continuing compensation payments.

FACTUAL HISTORY

On October 24, 2009 appellant, then a 24-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 23, 2009, while kneeling to place mail in her mail bag, she experienced a sharp pain in her low back while in the performance of duty. She stopped work on October 23, 2009 and returned to modified duty on December 7, 2009. On January 14, 2010 OWCP accepted that appellant had sustained a lumbar strain/sprain. On March 21, 2011 it expanded its acceptance of the claim to include an L4-5 disc herniation.

From May 14, 2011 to February 10, 2012 appellant performed part-time, light-duty work. OWCP paid her wage-loss compensation for the remaining hours. It accepted a recurrence of total disability commencing February 11, 2012 and paid appellant wage-loss compensation. Following a period of intermittent work absences, OWCP accepted that appellant sustained a recurrence of disability commencing May 21, 2012. It paid appellant wage-loss compensation commencing June 16, 2012.

Appellant was required to submit information with respect to any outside employment on EN1032 forms. The forms instructed that, if appellant had performed any duties in any business enterprise for which she was not paid, she must “show as rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties you did, even if the work was for yourself or a family member or relative.” On a Form EN1032 signed November 11, 2013, appellant indicated that during the past 15 months, she was self-employed or involved in a business enterprise. She noted that she had “created a website for fun” and had received a total of \$5.84 in advertisement payments. Appellant operated the website from her residence. On a Form EN1032 signed on May 1, 2015, appellant indicated that she was not employed, self-employed, or involved in any business enterprise during the past 15 months.

On a Form EN1032 signed on March 12, 2016, appellant indicated that during the past 15 months, she was involved in a business enterprise as creator of the website “All Eyes on the 215” with actual earnings of \$140.00 and a loss of \$2,652.00. She operated the website from her residence.

On April 18, 2016 an investigator from the employing establishment's Office of the Inspector General (OIG) interviewed appellant at the employing establishment. OWCP terminated her wage-loss compensation, effective April 18, 2016.³

Special Agent M.O. of the OIG submitted an investigative report dated April 20, 2016. M.O. reported that from October 23, 2015 to April 6, 2016, appellant had operated "Jean Marie Creations," a photography business, and a second enterprise, "All Eyes on the 215" to promote fashion and music. Appellant was observed carrying photography equipment for location shoots on November 11, 2015 and February 10, 2016. She had recently contracted with an undercover OIG agent as "Jean Marie Creations a company under All Eyes on the 215" for photography services at a June 6, 2016 wedding for a fee of \$3,200.00 plus \$256.00 in taxes. The detailed, multi-page contract describes a 14-hour package of photography and video services. An undercover OIG agent had also written a check to appellant dated February 3, 2016 for \$150.00 for "photography services" rendered. The report also notes an additional \$70.00 payment on an unspecified date.

Appended to the investigative report is appellant's statement signed on April 18, 2016, in which she acknowledged that she did not report in-kind compensation from Jean Marie Creations. Appellant asserted that she had declared \$140.00 of the \$220.00 received from the OIG undercover agent as she mistakenly thought she was required to list income only from 2016. She explained that her duties in maintaining the "All Eyes on the 215" website included editing videos and hosting a radio show. From 2012 through 2016, appellant had conducted 14 interviews and three photo shoots, for which she received \$4,100.00 in in-kind compensation. In an investigative interview conducted on April 18, 2016, appellant acknowledged that she had performed photographic services valued at \$200.00 for a wedding in early 2015 and \$3,000.00 for a wedding in August 2015. She provided these services in exchange for publicity for her business. Appellant noted that she also provided photography services to family members.

Appellant resigned from the employing establishment effective September 12, 2016.

By decision dated June 23, 2017, OWCP found that appellant forfeited her compensation from December 12, 2014 to March 12, 2016. It found that she failed to report earnings from her freelance photography business in the EN1032 form she had signed on March 12, 2016. OWCP further found that as appellant "knowingly" failed to report her earnings on the EN1032 form signed on March 12, 2016, her wage-loss compensation was forfeited for the 15-month period prior to the date she signed the form. It calculated that it had paid appellant \$45,889.41 in wage-loss compensation from December 12, 2014 to March 12, 2016.

OWCP issued a preliminary determination dated June 23, 2017, finding that an overpayment of \$45,889.41 was created due to appellant's failure to disclose earnings from her

³ OWCP predicated the termination of appellant's wage-loss compensation on reports of a referral physician and an attending physician after viewing OIG surveillance videos. On May 24, 2016 appellant claimed compensation (Form CA-7) for the period April 16, 2016 and continuing. By decision dated September 12, 2016, OWCP denied the claim based on a lack of medical evidence. On September 15, 2016 appellant, through counsel, requested a telephonic oral hearing before a representative of OWCP's Branch of Hearings and Review. At the hearing, held April 5, 2017, counsel asserted that appellant had reported to the employing establishment on April 18 and May 2, 2016 for investigative interviews, but performed no work duties.

freelance photography business on the Form EN1032 signed on March 12, 2016. It informed appellant of her review rights and instructed her to complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting documentation within 30 days.

On June 27, 2017 OWCP retroactively reinstated appellant's compensation effective April 18, 2016 and paid compensation through June 24, 2017. It placed appellant on the periodic compensation rolls effective June 27, 2017, with ongoing payments of \$3,237.00 every 28 days.

On July 20, 2017 appellant, through counsel, requested a telephonic oral hearing before an OWCP hearing representative with regard to the June 23, 2017 forfeiture decision.

On July 27, 2017 appellant, through counsel, requested a telephonic prerecoupment hearing before an OWCP hearing representative regarding the issues of fault and waiver of the proposed overpayment of compensation. Appellant contended that her photography was a hobby and not a business, and that the \$220.00 in photography services she performed at the request of an undercover OIG agent did not include child care and other expenses incurred. She asserted that the two photography projects she contracted with the OIG agent were the only projects for which she had asked for money, and that all of her other photography activities were only as a hobby or for family members. Appellant submitted a partially completed Form OWCP-20 signed on June 20, 2017 with no information about her income, assets, or expenses.

During the telephonic hearing, held January 16, 2018, an OWCP hearing representative addressed both the forfeiture and overpayment issues. Appellant contended that Jean Marie Creations and All Eyes on the 215 were hobbies and not businesses. She acknowledged receiving \$220.00 in payment from an undercover OIG inspector for photography services, including location shoots at a park and an art museum. Appellant contended that she reported the \$220.00 received on a Form EN1032, but first subtracted her expenses.

By decision dated February 28, 2018, an OWCP hearing representative found that appellant had forfeited her right to compensation for the period December 12, 2014 to March 12, 2016, finding that the evidence of record supported that appellant failed to report all of her earnings on the Form EN1032 dated March 12, 2016. He found that although appellant reported earning \$140.00, she associated it with All Eyes on the 215, but did not disclose her photography business. Moreover, appellant did not substantiate expenses of \$80.00. The hearing representative further found that there was no provision under FECA that allowed for "any deduction of expenses when reporting earnings." He further found that as appellant did not submit financial information as requested, it was reasonable to require repayment of the \$45,889.41 overpayment of compensation at the rate of \$310.00 a month, equal to 10 percent of her continuing compensation payments.⁴

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA provides that the Secretary of Labor may require a partially disabled employee to report his or her earnings from employment or self-employment, by affidavit

⁴ As of February 27, 2018, OWCP paid appellant \$2,854.24 in compensation every 28 days, equal to \$102.08 a day or \$37,259.20 a year. Dividing the annual result of \$37,259.20 by 12 equaled \$3,104.93 a month.

or otherwise, in the manner and at the times the Secretary specifies. It states that an employee who:

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

“(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.”⁵

Section 10.5(g) of OWCP’S regulations defines 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.”⁶

The Board has further explained that in order to establish that a compensationner should forfeit the compensation received for the periods covered by completed OWCP EN1032 forms, the evidence must establish that he or she knowingly omitted or understated his or her employment or earnings.⁷ As forfeiture is a penalty, it is not enough merely to establish that there were underreported earnings from employment.

The term “knowingly” as defined in OWCP’s implementing regulations and Board precedent means “with knowledge; consciously; intelligently; willfully; and intentionally.”⁸ OWCP’s implementing regulations provide:

“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. A false or evasive statement, omission, concealment, or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.”⁹

⁵ 5 U.S.C. § 8106(b); *M.O.*, Docket No. 18-0686 (issued January 25, 2019); *see also F.C.*, 59 ECAB 666 (2007).

⁶ 20 C.F.R. § 10.5(g).

⁷ *M.O.*, *supra* note 5; *Robert R. Holmes*, 49 ECAB 161 (1995); *Id.* at § 10.5(n).

⁸ *M.O.*, *supra* note 5; *B.K.*, Docket No. 17-0406 (issued December 12, 2017).

⁹ 20 C.F.R. § 10.529.

ANALYSIS -- ISSUE 1

The Board finds that appellant forfeited her right to compensation for the period December 12, 2014 to March 12, 2016, because she knowingly failed to report her employment activities and earnings.

The EN1032 forms sent by OWCP to appellant advised her of her responsibility to complete the forms and provide all relevant information concerning her employment status and earnings during the 15-month period covered by the forms. The forms she signed noted that she must report all self-employment or involvement in business enterprises. This included such activities as overseeing a business of any kind, including involvement in any enterprise she owned. The explicit language of the EN1032 forms clearly advised appellant that the nature of her photography business¹⁰ and artistic promotion radio show and website¹¹ required her to report such activities.

An EN1032 form signed by appellant on March 12, 2016, indicated that for the previous 15 months she was involved in a business as creator of the website “All Eyes on the 215,” with actual earnings of \$140.00. Appellant maintained that operating the enterprise had resulted in a \$2,652.00 loss.

Appellant’s signing of a certification clause on the EN1032 form demonstrates that she was aware of the materiality of her failure to report her employment activity.¹²

Information forwarded by the employing establishment includes an April 20, 2016 OIG investigative report in which appellant admitted operating the photography business “Jean Marie Creations” as well as the “All Eyes on the 215” website and online radio program. She admitted receiving \$4,100.00 in in-kind compensation from 2012 through 2016, performing \$3,200.00 in photography services for two weddings in 2015 in exchange for business publicity, that she received \$220.00 for photography services rendered to an OIG undercover agent, and had contracted with another OIG undercover agent to photograph a wedding for \$3,200.00.

Regarding the forfeiture period December 12, 2014 to March 12, 2016, on the EN1032 form appellant signed on March 12, 2016, she reported \$140.00 in earnings from her website “All Eyes on the 215,” but did not disclose that she also owned and operated the photography enterprise Jean Marie Creations. However, as noted above, her April 18, 2018 statements acknowledge that her photography business had generated in-kind business income by photographing two weddings in 2015. Appellant also failed to report the complete \$220.00 payment from the OIG agent for photography services in February 2015 and shortly thereafter. She asserted in the April 18, 2016 sworn statement that she mistakenly believed that she only had to report income earned in 2016,

¹⁰ *M.O.*, *supra* note 5. See also *Donald L. Overstreet*, 54 ECAB 678 (2003) (where the Board held that the claimant’s operation of a photography enterprise which received revenue was a business and not a hobby as alleged).

¹¹ *M.O.*, *supra* note 5; *A.C.*, Docket No. 11-1760 (issued April 13, 2012) (where the Board held that the claimant’s unpaid activities as an online radio disc jockey for a company he co-owned with a family member constituted reportable employment).

¹² *M.O.*, *supra* note 5; *B.K.*, *supra* note 8.

but at the January 16, 2018 telephonic hearing that she reported only \$140.00 as she deducted her expenses. These conflicting explanations cast doubt on the veracity of her statements. Appellant also prepared a detailed, multi-page professional contract as proprietor of Jean Marie Creations, solicited by an OIG agent, to perform photography services at a June 2016 wedding. She failed to report her ownership and operation of Jean Marie Creations photography business and her in-kind earnings on the EN1032 form she signed on March 12, 2016.

In a similar case, *I.S.*,¹³ the Board explained that the evidence of record included documentation of the claimant's activities in owning and operating a jewelry business. Appellant's misrepresentation of her earnings and activities on EN1032 forms required forfeiture of compensation.

The EN1032 forms require reporting employment activities even if no wages are earned. Appellant's activities included taking photographs at weddings and other events and arranging photo shoots. Thus, as appellant misrepresented her employment activity, the Board finds that based on her omissions of employment on Form EN1032 for the period December 12, 2014 to March 12, 2016, she knowingly failed to report employment activity and forfeited her right to compensation for the period December 12, 2014 to March 12, 2016.¹⁴

On appeal, counsel contends that it is inequitable for OWCP to predicate the forfeiture on an \$80.00 discrepancy between the \$220.00 appellant earned by performing photography services for the OIG agent and the \$140.00 she reported on Form EN1032. He asserts that the difference was "simply a lack of knowledge of what portion of the rather limited earnings had to be reported." As noted above, the forfeiture was not based solely on the \$80.00 discrepancy. Rather, appellant failed to report her employment activities and earnings during the reporting period December 12, 2014 to March 12, 2016. As such, OWCP did not err in determining that appellant forfeited her right to compensation.

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 or her duty.¹⁵ 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."¹⁶

¹³ Docket No. 17-0897 (issued April 9, 2018). See also *Donald L. Overstreet*, *supra* note 10.

¹⁴ *M.O.*, *supra* note 5.

¹⁵ 5 U.S.C. § 8102(a).

¹⁶ *Id.* at § 8129(a).

Section 10.529 (b) of OWCP's implementing regulations provides as follows:

“(b) Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. § 8129 and other relevant statutes.”¹⁷

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of \$45,889.41.

As noted above, OWCP regulations provide that OWCP must declare an overpayment of compensation for any compensation already paid for the period of a given forfeiture of compensation.¹⁸ If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by a EN1032 form which he or she fails to report, the claimant is not entitled to compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.¹⁹

The record includes a compensation payment log and calculation from OWCP showing that appellant received an overpayment of compensation in the amount of \$45,889.41 for the period December 12, 2014 to March 12, 2016. The Board has reviewed the calculations performed by OWCP and finds that OWCP properly determined that she received an overpayment of compensation in the amount of \$45,889.41.²⁰

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”²¹

Section 10.433(a) of OWCP's regulations provides that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect

¹⁷ 20 C.F.R. § 10.529.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *M.O.*, *supra* note 5.

²¹ 5 U.S.C. § 8129; *M.O.*, *supra* note 5; *see Linda E. Padilla*, 45 ECAB 768 (1994).

entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in the creation of an overpayment:

- (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. (This provision applies only to the overpaid individual).²²

To determine if an individual was at fault in the creation of an overpayment, OWCP examines 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.²³

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

As discussed above, the record supports that appellant had employment activity for the periods covered by the EN1032 form she signed on March 12, 2016.

The explicit language of the EN1032 form demonstrates that appellant knew or should have known that the nature of her work activity in operating Jean Marie Creations would require her to report such employment activities and earnings on the forms.²⁴ Appellant's failure to accurately report her earnings and employment activities on the EN1032 form also constitutes a failure to provide information which she knew or should have known to be material in the creation of the overpayment.²⁵ Consequently, she is not eligible for a waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 4

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²⁶

²² 20 C.F.R. § 10.433; *M.O.*, *supra* note 5; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

²³ *Id.* at § 10.433(b); *M.O.*, *supra* note 5; *Duane C. Rawlings*, 55 ECAB 366 (2004).

²⁴ *M.O.*, *supra* note 5; *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

²⁵ *M.O.*, *supra* note 5; *B.K.*, *supra* note 8.

²⁶ 20 C.F.R. § 10.411; *see E.K.*, Docket No. 18-0587 (issued October 1, 2018) (where the Board affirmed recovery of an overpayment from continuing compensation payments where the claimant did not submit requested financial information).

Section 10.441 of OWCP's regulations provides that when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship.²⁷

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly required recovery of the overpayment of compensation at \$310.00 a month from appellant's continuing compensation.

As noted, appellant did not submit financial information corroborating her income, assets, and expenses. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.²⁸ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²⁹ As appellant did not submit the financial information to OWCP as requested, the Board finds that OWCP did not abuse its discretion in requiring recovery of the \$45,889.41 overpayment by deducting \$310.00 every 28 days from appellant's continuing compensation.³⁰

CONCLUSION

The Board finds that appellant forfeited her right to compensation for the period December 12, 2014 to March 12, 2016, pursuant to section 8106(b)(2) of FECA, because she knowingly failed to report her employment activities and earnings. The Board further finds that she received an overpayment of compensation in the amount of \$45,889.41. The Board also finds that appellant was at fault in creation of the overpayment, thereby precluding waiver of recovery of the overpayment. The Board further finds that OWCP properly required recovery of the overpayment by deducting \$310.00 every 28 days from her continuing compensation payments.

²⁷ *Id.*

²⁸ 20 C.F.R. § 10.438; *see E.K., supra* note 26.

²⁹ *E.K., supra* note 26; *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (May 2004). The May 2004 procedures were in effect as of the February 18, 2018 OWCP decision under consideration in this case. The Board notes that OWCP subsequently updated its overpayment collection procedures in FECA Transmittal 18-04, effective September 2018.

³⁰ *E.K., supra* note 26.

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 25, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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