

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

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**T.P., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NAVAL  
SHIPYARD, Philadelphia, PA, Employer**

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**Docket No. 20-0791  
Issued: June 23, 2021**

*Appearances:*

*Peter Bryant, Esq.*, for the appellant<sup>1</sup>

*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 27, 2020 appellant filed a timely appeal from a September 3, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP properly calculated that appellant received a \$134,768.70 overpayment due to his forfeiture of compensation for the periods October 15, 1993 through October 21, 1997 and January 1, 1998 through February 12, 2012.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 22, 1966 appellant, then a 20-year-old machinist, filed an occupational disease claim (Form CA-2) alleging that he fractured a vertebra on that same date when he tripped over an air hose and fell down an inclined ladder. OWCP accepted the claim for a closed C1 fracture. Appellant returned to limited-duty work on March 22, 1967, but claimed a recurrence of disability (Form CA-2a) as of September 25, 1967. It thereafter paid appellant wage-loss compensation for total disability. Appellant did not return to work.

By decision dated August 18, 2016, OWCP determined that appellant had forfeited his right to compensation for the period January 15, 1993 through February 12, 2012 because he knowingly failed to report self-employment activities and also understated the amount of his weekly earnings on EN1032 forms. By decision dated September 27, 2016, it determined that he received an overpayment of compensation in the amount of \$139,848.73 because he forfeited his compensation from January 15, 1993 through February 12, 2012. OWCP found that appellant was at fault in the creation of the overpayment because he knowingly accepted payments that he knew he was not entitled to and he failed to furnish information, which he should have known to be material. It further determined that, therefore, the overpayment was not subject to waiver of recovery.

Appellant appealed to the Board and, by decision dated April 11, 2018,<sup>4</sup> the Board affirmed OWCP's August 18 and September 27, 2016 decisions in part and set them aside in part. The Board remanded the case to OWCP for further proceedings. The Board found that the 16 EN-1032 forms signed by appellant established a forfeiture of compensation for the period October 15, 1993 through October 21, 1997 and January 1, 1998 through February 12, 2012. Based upon these findings, the Board concluded that he "knowingly" omitted his earnings under section 8106(b)(2) of FECA (5 U.S.C. § 8106(b)(2)) by failing to report his self-employment activities and earnings, as well as understating his earnings, for the periods October 15, 1993 through October 21, 1997 and January 1, 1998 through February 12, 2012, *i.e.*, the portion of the forfeiture period covered by the 16 EN1032 forms submitted. The Board also found that OWCP failed to establish a forfeiture of compensation from January 15 through October 14, 1993. The Board further determined that there was no form or document in the record on which appellant knowingly failed

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<sup>3</sup> Docket No. 17-0717 (issued April 11, 2018), *petition for recon. denied*, Docket No. 17-0717 (issued February 15, 2019).

<sup>4</sup> *See id.*

to report employment activities or earnings for the period October 22 through December 31, 1997. The Board found that OWCP failed to establish that it provided him an EN1032 form covering this period and he did not address this period of employment on any of the submitted EN1032 forms. Therefore, the Board set aside OWCP's finding with respect to forfeiture for the period January 15 through October 14, 1993 and October 22 through December 31, 1997. The Board found that appellant forfeited his right to compensation for the periods October 15, 1993 through October 21, 1997 and January 1, 1998 through February 12, 2012.

With respect to OWCP's finding that, an overpayment of compensation was created, the Board found that OWCP properly determined that appellant was at fault in the creation of the overpayment, which occurred due to his forfeiture of compensation. The Board noted that the explicit language of the EN1032 forms clearly showed that he knew or should have known that the nature of his activities would require him to report such employment activities on the forms. The Board found that appellant's failure to accurately report his earnings and employment activities on the EN1032 forms similarly constituted a failure to provide information, which he knew or should have known to be material. The Board found that, consequently, appellant was not eligible for waiver of recovery of the overpayment, which OWCP had calculated to total \$139,848.73 based on its forfeiture determination. The Board determined that, given its modification of OWCP's forfeiture finding, the case had to be remanded to OWCP to recalculate the overpayment based on the forfeiture of compensation for the proper period as found by the Board.

In an April 12, 2019 letter, which it characterized as a *de novo* preliminary finding, OWCP advised appellant that, pursuant to the Board's April 11, 2018 decision, it had recalculated the overpayment to total \$134,768.70. It provided detailed calculations showing that he received \$4,020.25 in FECA compensation for the period January 15 through October 14, 1993 and \$1,059.78 in FECA compensation for the period October 22 through December 31, 1997, *i.e.*, the periods that the Board found that he did not forfeit compensation.<sup>5</sup> OWCP noted that it subtracted \$5,080.03 (\$4,020.25 plus \$1,059.78) from its previous overpayment amount of \$139,848.73 to derive the new overpayment amount of \$134,768.70. It further advised that the Board had affirmed its prior finding of fault in the creation of the overpayment, which precluded waiver of recovery of the overpayment, but also noted that it had made a preliminary determination that appellant was at fault in the creation of the overpayment. OWCP provided appellant 30 days to respond to its letter, no response was received within the afforded time period.

By decision dated September 3, 2019, OWCP determined that appellant received a \$134,768.70 overpayment of compensation due to his forfeiture of compensation for the periods October 15, 1993 through October 21, 1997 and January 1, 1998 through February 12, 2012.

### **LEGAL PRECEDENT**

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

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<sup>5</sup> OWCP attached payment records in support of its recalculation of the overpayment.

performance of his or her duty.<sup>6</sup> Section 8129(a) of FECA provides, in pertinent part, “When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”<sup>7</sup>

### ANALYSIS

The Board finds that OWCP properly calculated that appellant received a \$134,768.70 overpayment of compensation due to his forfeiture of compensation for the periods October 15, 1993 through October 21, 1997 and January 1, 1998 through February 12, 2012.

The Board notes that, in its April 11, 2018 decision, it remanded the case to OWCP for recalculation of the overpayment, previously determined to total \$139,848.73, given that it had modified the basis for the overpayment when it determined that OWCP had only established appellant’s forfeiture of compensation for the periods October 15, 1993 through October 21, 1997 and January 1, 1998 through February 12, 2012. In its April 11, 2018 decision, the Board not only modified the period of forfeiture, which served as the basis for the overpayment, but also determined that he received an overpayment and was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

The Board has final authority to determine questions of law and fact. The Board’s determinations are binding upon OWCP and must, of necessity, be so accepted and acted upon by the Director of OWCP.<sup>8</sup> A decision of the Board is final upon the expiration of 30 days following the date of its order and, in the absence of new review by the Director, the subject matter is *res judicata* and not subject to further consideration by the Board.<sup>9</sup> Therefore, the determinations the Board made in its April 11, 2018 decision regarding the forfeiture periods, the fact of the overpayment and the finding of fault precluding waiver of recovery of the overpayment are *res judicata* and not subject to further consideration by the Board.<sup>10</sup> The only matter currently before the Board is whether OWCP, in its September 3, 2019 decision, properly recalculated the amount of the overpayment as instructed by the Board in its April 11, 2018 decision.

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<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Id.* at § 8129(a).

<sup>8</sup> See *Paul Raymond Kuyoth*, 27 ECAB 498, 503-04 (1976); *Anthony Greco*, 3 ECAB 84 (1949). See also *Frank W. White*, 42 ECAB 693 (1991) (Board’s order in a prior appeal imposed an obligation on the Director to take particular actions as directed). See *L.C.*, Docket No. 09-1816 (issued March 17, 2010) (OWCP did not follow the Board’s instructions in ascertaining the information necessary to determine pay rate).

<sup>9</sup> *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998). See 20 C.F.R. § 501.6(d). The Board notes that the Board denied appellant’s petition for reconsideration of the April 11, 2018 decision. See *supra* note 3.

<sup>10</sup> In an April 12, 2019 letter produced after the Board’s April 11, 2018 decision, OWCP noted that it had made a preliminary determination that appellant was at fault in the creation of the overpayment. Given the Board’s finding that, on this issue, OWCP did not explain its basis for ostensibly revisiting the issue of fault. On appeal counsel argues that appellant was not at fault in the creation of the overpayment. However, the Board notes that, for the above-stated reasons, the issue of fault in the creation of the overpayment is not currently before the Board.

The Board finds that OWCP conducted a proper recalculation to determine that appellant received a \$134,768.70 overpayment of compensation. As noted, the overpayment was created by appellant's forfeiture of compensation for the periods October 15, 1993 through October 21, 1997 and January 1, 1998 through February 12, 2012 and is not subject to waiver. In connection with its recalculation, OWCP presented payment documents, which demonstrate that it properly recalculated the overpayment. It provided detailed calculations showing that appellant received \$4,020.25 in FECA compensation for the period January 15 through October 14, 1993 and \$1,059.78 in FECA compensation for the period October 22 through December 31, 1997, *i.e.*, the periods that the Board found he did not forfeit compensation. OWCP noted that it subtracted \$5,080.03 (\$4,020.25 plus \$1,059.78) from its previous overpayment figure of \$139,848.73 to derive the new overpayment amount of \$134,768.70. The Board has reviewed the payment documents of record and notes that they show that appellant received \$134,768.70 in FECA compensation during the periods that he forfeited compensation, *i.e.*, October 15, 1993 through October 21, 1997 and January 1, 1998 through February 12, 2012. Therefore, the Board finds that the case record supports the finding that OWCP properly calculated the overpayment in the amount of \$134,768.70.

### **CONCLUSION**

The Board finds that OWCP properly calculated that appellant received a \$134,768.70 overpayment of compensation due to his forfeiture of compensation for the periods October 15, 1993 through October 21, 1997, and January 1, 1998 through February 12, 2012.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 3, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 23, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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