

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

M.G., Appellant)	
)	
and)	Docket No. 22-1079
)	Issued: November 25, 2024
U.S. POSTAL SERVICE, STOCKYARD POST)	
OFFICE, Chicago, IL, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 13, 2022 appellant, through counsel, filed a timely appeal from a June 22, 2022 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 received an overpayment of compensation in the amount of \$13,779.34 for the period June 11, 2016 through

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.*

January 20, 2017 as she forfeited her entitlement to compensation for this period; and (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery.

FACTUAL HISTORY

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

On January 22, 2016 appellant, then a 53-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on December 23, 2015 she sustained an injury when a shelf from an automated postal center (APC) fell on her left foot while in the performance of duty. She stopped work on January 23, 2016 and returned to modified duty on February 3, 2016. OWCP accepted appellant's claim for displaced fracture of the second metatarsal bone of the left foot and paid her wage-loss compensation on the supplemental rolls, effective May 4, 2016.

On July 5, 2016 appellant filed a claim for compensation (Form CA-7) for intermittent disability from work commencing May 4, 2016. Section 3 of the Form CA-7 advised her that she must report any and all earnings from employment, self-employment, or involvement in a business enterprise for which she received a salary, wages, income, commissions, or payment of any kind during the period(s) claimed. Appellant checked a box marked "No" indicating that she had not performed work outside of her federal job for the period claimed and signed the form. The Form CA-7 also contains a warning that fraudulent concealment of employment or failure to report income may result in forfeiture of compensation benefits and/or criminal prosecution.

Appellant submitted additional CA-7 forms requesting wage-loss compensation for intermittent periods of partial and total disability for the period June 30, 2016 through January 20, 2017. She indicated on the forms that she was in a leave without pay status and, thus, had not worked during the periods claimed.

OWCP paid appellant wage-loss compensation on the supplemental rolls for intermittent disability from work during the period May 4, 2016 through January 20, 2017. On January 25, 2017 she accepted a part-time job offer as a limited-duty carrier.

In a July 13, 2018 memorandum, a special agent for the employing establishment's Office of the Inspector General (OIG) advised that appellant had failed to disclose her earnings as a rideshare driver, and benefits from the Supplemental Nutrition Assistance Program (SNAP). The employing establishment's OIG provided several reports, which detailed the employing establishment's OIG's investigation of appellant, along with attachments that documented surveillance, internet research, and findings, an April 4, 2017 statement by appellant, and an April 6, 2017 memorandum of interview.

³ *Order Remanding Case*, Docket No. 21-0926 (issued December 7, 2021); Docket No. 20-0735 (issued October 23, 2020).

OWCP received a February 27, 2017 letter from the rideshare company in response to a subpoena. It noted that appellant's rideshare driver account began on May 26, 2016 and that she drove for that company from June 11 through October 23, 2016.

OWCP also received a May 2, 2017 letter from another rideshare company, which indicated that appellant was approved as a driver on June 19, 2016 and was paid as a driver for that company from July 6, 2016 through February 1, 2017.

By decision dated March 28, 2019, OWCP found that appellant forfeited her right to compensation from May 26, 2016 through January 20, 2017, pursuant to 5 U.S.C. § 8106(b), because she knowingly failed to disclose her outside earnings and employment on her CA-7 forms covering this period. It noted that she had earnings as a driver for rideshare companies, but failed to report these earnings on her completed CA-7 forms.

On April 2, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In an April 2, 2019 preliminary overpayment determination, OWCP advised appellant that she received an overpayment of compensation in the amount of \$13,963.50 because she forfeited her compensation for the period May 26, 2016 through January 20, 2017. It also determined that she was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known to be incorrect. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable recovery method, provided an overpayment action request form, and advised her that she could request waiver of recovery of the overpayment. Additionally, it further notified her that, within 30 days of the date of the letter, she could request a final decision based on the written evidence or a precoupment hearing.

A hearing was held on July 17, 2019, regarding the March 28, 2019 forfeiture decision.

By decision dated July 26, 2019, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$13,963.50 for the period May 26, 2016 through January 20, 2017, as she had forfeited her entitlement to wage-loss compensation. It further finalized that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

By decision dated September 24, 2019, OWCP's hearing representative affirmed the March 28, 2019 forfeiture decision.

Appellant appealed the September 24, 2019 decision to the Board. By decision dated October 23, 2020, the Board affirmed, in part, and reversed, in part, the September 24, 2019 decision. The Board found that OWCP had properly determined that appellant forfeited her entitlement to compensation for the period June 11, 2016 through January 20, 2017, pursuant to 5 U.S.C. § 8106(b), as she had failed to report earnings from employment during the claimed period. The Board further found, however, that OWCP had improperly determined that appellant had forfeited her entitlement to compensation for the period May 26 through June 10, 2016 because the evidence of record was insufficient to establish that she was engaged in employment activity or received earnings during that period.

By decision dated February 18, 2021, OWCP issued an amended final overpayment determination that appellant had received an overpayment of compensation in the amount of \$13,779.34 for the period June 11, 2016 through January 20, 2017 because she forfeited her entitlement to compensation pursuant to 5 U.S.C. § 8106(b). It further found that appellant was at fault in the creation of the overpayment because she knowingly accepted payments that she knew she was not entitled to.

Appellant appealed to the Board. By order dated December 7, 2021, the Board set aside the February 18, 2021 decision and remanded the case for OWCP to issue a new preliminary overpayment determination explaining its findings following the new period of forfeiture from June 11, 2016 through January 20, 2017.

In a preliminary overpayment determination dated January 19, 2022, OWCP notified appellant of its preliminary finding that she had received an overpayment of compensation in the amount of \$13,779.34 because she forfeited her compensation for the period June 11, 2016 through January 20, 2017. It explained that appellant was issued payments for continued total disability *via* electronic funds transfer (EFT) for the period August 2 through November 25, 2016. The compensation payments issued during this period demonstrate that appellant received the following amounts of compensation: \$289.98 from August 2 through 5, 2016; \$1,109.40 from August 6 through 19, 2016; \$816.27 from August 20 through September 1, 2016; \$1,028.43 from September 5 through 16, 2016; \$1,028.43 from September 19 through 30, 2016; \$1,028.43 from October 3 through 14, 2016; \$1,028.43 from October 17 through 28, 2016; \$1,028.43 from October 31 through November 11, 2016; and \$1,028.43 from November 14 through 25, 2016 for a total of \$8,386.23. OWCP also determined that she was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known to be incorrect. It indicated that Section 3 of the CA-7 forms completed by appellant clearly advised her of her obligation to report any earnings from employment outside of her federal job. OWCP requested that appellant submit a completed Form OWCP-20 to determine a reasonable recovery method, provided an overpayment action request form, and advised her that she could request waiver of recovery of the overpayment. It further requested that she provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, OWCP further notified her that, within 30 days of the date of the letter, appellant could request a final decision based on the written evidence or a prerecoupment hearing.

On January 31, 2022 OWCP received an overpayment action request form, in which appellant requested a prerecoupment hearing and challenged the fact and amount of the overpayment, as well as the fault determination.

A hearing was held on May 4, 2022. Counsel argued that appellant was without fault in the creation of the overpayment because she did not know that she could not have earnings outside of her federal employment. He explained that appellant previously worked as a rideshare driver, and did not know that she could not continue to do so.

By decision dated June 22, 2022, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$13,779.34 for the period June 11, 2016 through January 20, 2017, and that she was

at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. The hearing representative directed that appellant pay back the overpayment amount in full.

LEGAL PRECEDENT -- ISSUE 1

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.⁴ 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.”⁵

Under 5 U.S.C. § 8106(b), compensation forfeited under this subsection, if already paid, shall be recovered under section 8129 of this title, unless recovery is waived under that section.⁶

Section 10.529 of OWCP’s implementing regulations provides as follows:

“(a) 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.

“(b) Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the forfeiture pursuant to 5 U.S.C. § 8129 [recovery of overpayments] and other relevant statutes.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period June 11, 2016 through January 20, 2017 as she forfeited her entitlement to compensation for this period.

OWCP’s regulations provide that OWCP must declare an overpayment of compensation for any compensation already paid for the period of a given forfeiture of compensation.⁸ If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by a Form EN-1032 which he or she fails to report, the claimant is not

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ 5 U.S.C. § 8106(b).

⁷ 20 C.F.R. § 10.529.

⁸ *Id.*

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.⁹

In its October 23, 2020 decision, the Board found that appellant forfeited her entitlement to wage-loss compensation for the period June 11, 2016 through January 20, 2017 because she knowingly failed to report employment activities and earnings, pursuant to 5 U.S.C. § 8106(b). Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.¹⁰ As appellant received compensation during the period of the forfeiture, the Board finds that an overpayment of compensation for that period was created.

The Board further finds, however, that OWCP improperly calculated the amount of the overpayment for the claimed period.

OWCP determined, in its January 19, 2022 preliminary overpayment determination, that appellant received an overpayment of \$9,079.23 for the period August 2 through November 25, 2016 because she was not entitled to wage-loss compensation during this period. The Board finds, however, that the evidence of record demonstrates that appellant received wage-loss compensation in the amount of \$8,386.23 for this period. Appellant was issued payments for continued total disability *via* EFT for the period August 2 through November 25, 2016. The compensation payments issued during this period demonstrate that appellant received the following amounts of compensation: \$289.98 from August 2 through 5, 2016; \$1,109.40 from August 6 through 19, 2016; \$816.27 from August 20 through September 1, 2016; \$1,028.43 from September 5 through 16, 2016; \$1,028.43 from September 19 through 30, 2016; \$1,028.43 from October 3 through 14, 2016; \$1,028.43 from October 17 through 28, 2016; \$1,028.43 from October 31 through November 11, 2016; and \$1,028.43 from November 14 through 25, 2016 for a total of \$8,386.23. Accordingly, the Board finds that OWCP improperly determined that the overpayment amount totaled \$13, 779.34.

On remand OWCP shall determine the exact and proper amount of the overpayment of compensation for the period June 11, 2016 through January 20, 2017.¹¹ After this and other such further development as deemed necessary, it shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

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.”¹²

⁹ *Id.*

¹⁰ A.A., Docket No. 20-1399 (issued March 10, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

¹¹ *See T.M.*, Docket No. 20-1332 (issued February 19, 2021).

¹² 5 U.S.C. § 8129; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017); *Linda E. Padilla*, 45 ECAB 768 (1994).

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 entitlement to or the number of benefits. A recipient who has done any of the following will be found to be at fault in creating 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).”¹³

To determine if an individual was at fault with respect to 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.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment which occurred due to her forfeiture of compensation, thereby precluding waiver of recovery of the overpayment.

As discussed above, the record supports that appellant had employment activity for the period June 11, 2016 through January 20, 2017. The case record establishes that appellant signed an EN-1032 form indicating that she had no earnings from employment or self-employment.

The specific language of the EN-1032 forms demonstrate that appellant knew or should have known that the nature of her work activity and her self-employment as a rideshare driver would require her to report such employment activities and earnings on the forms.¹⁵ Her failure to accurately report her earnings and employment activities on the EN-1032 form constitutes a failure to provide information which she knew or should have known to be material in the creation

¹³ 20 C.F.R. § 10.433(a); *see K.F.*, Docket No. 19-1016 (issued February 14, 2020); *Sinclair L. Taylor*, 52 ECAB 227 (2001).

¹⁴ *Id.* at § 10.433(b); *J.C.*, Docket No. 19-0911 (issued March 25, 2021); *Duane C. Rawlings*, 55 ECAB 366 (2004).

¹⁵ *S.H.*, Docket No. 21-1349 (issued February 17, 2023); *M.O.*, Docket No. 18-0686 (issued January 25, 2019); *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

of the overpayment.¹⁶ Consequently, appellant is not eligible for a waiver of recovery of the overpayment.¹⁷

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period June 11, 2016 through January 20, 2017 as she forfeited her entitlement to compensation for this period. The Board further finds, however, that this case is not in posture for decision with regard to the amount of the overpayment. The Board also finds that appellant was at fault in the creation of the overpayment due to her forfeiture of compensation thereby precluding waiver of recovery.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2022 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 25, 2024
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ *B.K.*, Docket No. 17-0406 (issued December 12, 2017); *C.W.*, Docket No. 18-1557 (issued June 25, 2019).

¹⁷ *B.K.*, *id.*; *see also S.H.*, *supra* note 15.