

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

D.N., Appellant

and

**U.S. POSTAL SERVICE, RICHMOND POST
OFFICE, Philadelphia, PA, Employer**

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**Docket No. 24-0767
Issued: October 15, 2024**

Appearances:
Russell T. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 17, 2024 appellant, through counsel, filed a timely appeal from a January 26, 2024 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 entitlement to compensation for the period September 15, 2018 through December 15, 2019,

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.*

pursuant to 5 U.S.C. § 8106(b)(2), because she knowingly failed to report her employment activities and earnings; (2) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$52,631.72 for the period September 15, 2018 through December 15, 2019 as she forfeited her entitlement to compensation for this period; and (3) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On August 2, 2016 appellant, then a 44-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained posterior tibial tendinitis, plantar fasciitis, and acquired flat feet due to factors of her federal employment including the walking required by her job. She noted that she first became aware of her conditions, and first realized their relationship to her federal employment on September 22, 2011. Appellant did not stop work. OWCP accepted the claim for the following bilateral conditions: posterior tibial tendinitis, plantar fascial fibromatosis (resolved), anterior tibial syndrome, ankle instability, ankle ligament sprains, ankle/foot calcific tendinitis, tibia stress fractures, and ankle/foot bone disorders. Appellant later stopped work and OWCP paid her wage-loss compensation on the supplemental rolls, effective May 19, 2015, and on the periodic rolls, effective December 9, 2018.

On December 9, 2019 OWCP provided appellant an EN-1032 form, which contained language advising her what types of employment activities and earnings that she was required to report for the 15-month period prior to the time she signed the form. The EN-1032 form instructed her to report all employment for which she received a salary, wages, income, sales commissions, piecework, or payment of any kind. The form included instructions for 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 restaurant), and providing services in exchange for money, goods or other services. The kinds of services that she was required to report included such activities as carpentry, mechanical work, painting, contracting, childcare, odd jobs, keeping books/records, and managing/overseeing a business of any kind, including a family business. Such activities had to be reported even if they were part-time or intermittent. The EN-1032 form contained a certification clause, which informed appellant of the consequences of not accurately reporting her earnings and employment activities, such as being subjected to criminal prosecution.

On December 15, 2019 appellant signed the EN-1032 form provided by OWCP. She responded “No” to a question asking her whether she had worked for any employer during the prior 15 months before signing the form. Appellant responded “No” to a question asking whether she had been self-employed or involved in a business enterprise in the prior 15 months. She did not list any earnings or employment activities.

In a January 17, 2020 investigative memorandum, a special agent from the employing establishment’s Office of Inspector General (OIG) indicated that on multiple occasions in late-2019 appellant was observed performing activities inconsistent with her total disability status, including lifting/carrying heavy items. Appellant was taken off the periodic rolls when she returned to full-duty work on February 4, 2020, but she later was removed from the employing

establishment and returned to the periodic rolls to receive disability and schedule award compensation.³

In a statement signed on February 4, 2020, appellant attested that she had been interviewed by an agent from the employing establishment's OIG, and desired to make a statement that she had earned \$1,590.50 in income from an online resale site,⁴ and \$200.00 in income from another online resale site.

On February 2, 2021 OWCP received a package of documents, which included screenshots of clothing items that appellant offered for sale on the internet between July 2018 and October 2019. One of the screenshots revealed that \$1,590.50 worth of items were sold *via* an online resale site. On March 5, 2021 OWCP received a February 2, 2021 report by a special agent from the employing establishment's OIG, who indicated that appellant was interviewed on February 4, 2020, and admitted that she earned approximately \$1,790.50 in income, which she earned by selling items on the internet *via* two online resale sites. During the interview, appellant also acknowledged that she did not report her receipt of the income on an EN-1032 form she completed. On March 5, 2021 OWCP also received a February 6, 2020 memorandum of interview memorializing the February 4, 2020 interview wherein appellant stated that she sold items *via* online resale sites, including "clothing, shoes and other items." The interviewing agent noted that appellant looked on her telephone and confirmed that her earnings from the online resale sites were \$1,790.50 since 2018. Appellant also admitted that she met up with people in connection with the online resale websites.

The record contains payment plates revealing that OWCP paid appellant FECA wage-loss compensation from September 24, 2011 through February 3, 2020. On September 3, 2021 OWCP received screenshot documents from one of the online resale sites, obtained through a subpoena requested by the employing establishment's OIG, which indicated that appellant listed over \$15,000.00 worth of items for sale between June and October 2019.

OWCP completed worksheets on August 23, 2023, based on payment documents of record, which demonstrate that it paid appellant \$52,631.72 in wage-loss compensation during the period September 15, 2018 through December 15, 2019.

By decision dated August 24, 2023, OWCP determined that appellant forfeited her entitlement to compensation from September 15, 2018 through December 15, 2019 under 5 U.S.C. § 8106(b), because she failed to report employment activities and earnings on the EN-1032 form covering this period. It indicated that appellant worked by selling items on the internet, and discussed the investigative memoranda and supporting documents of record which revealed that she had unreported earnings during the period September 15, 2018 through December 15, 2019. OWCP noted that the wording of the EN-1032 form advised her of the need to report such employment and earnings, and indicated that she "knowingly" failed to report such employment and earnings to OWCP.

³ Appellant last received compensation from OWCP on August 1, 2022.

⁴ The document actually lists the figure \$15,590.50 but other documents of record, including a later statement from appellant, reveal that this was an inadvertent error and the figure should have been written as \$1,590.50.

In a preliminary overpayment determination dated August 24, 2023, OWCP notified appellant that she received an overpayment of compensation in the amount of \$52,631.72, for the period September 15, 2018 through December 15, 2019, as she forfeited her entitlement to compensation. It also made a preliminary overpayment determination that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP indicated that the EN-1032 form completed on December 15, 2019, advised appellant of the type of employment activities and earnings that needed to be reported, but that she knowingly failed to report such activities and earnings. It requested that she complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20), and submit documentation including copies of income tax returns, bank account statements, bills, cancelled checks, pay slips, and other records that support income and expenses. Additionally, OWCP advised her that, within 30 days of the date of the letter, she could request a final decision based on the written evidence or a prerecoumpment hearing. It also advised appellant that she could submit evidence challenging the fact, amount, or finding of fault, and request waiver of the overpayment. OWCP requested that she complete and return a financial information questionnaire (Form OWCP-20) and supporting documentation within 30 days.

On September 7, 2023 appellant, through counsel, requested a telephonic hearing, regarding the forfeiture and overpayment determinations, before a representative of OWCP's Branch of Hearings and Review.

On September 22, 2023 OWCP received an overpayment action request form and a financial information questionnaire, which appellant signed on September 20, 2023. Appellant reported that she received \$9,143.50 in monthly income and had \$2,461.00 in monthly expenses. With respect to assets, she indicated that she had \$35.00 in cash on hand and a negative balance of \$158.95 in her checking account. Appellant asserted that she was not at fault in the creation of the overpayment, as she was not aware that selling goods online had to be reported to OWCP. She submitted documents, including copies of earnings statements, billing statements, tax forms, and credit card statements.

On December 4, 2023 OWCP received screenshot documents submitted by appellant, through counsel, which showed that she earned \$1,463.70 by selling items through an online resale website between July 20 and December 9, 2019.

During a telephonic hearing held on December 4, 2023, regarding both the forfeiture and overpayment matters, counsel indicated that screenshot documents had been submitted, which showed the amount that appellant had earned during the period of forfeiture. He also indicated that appellant advised him that she earned \$200.00 during this period, but that the sales records could not be retrieved. Counsel indicated that appellant advised him that she failed to read the language of the EN-1032 form and argued that she did not knowingly omit earnings.

On December 12, 2023 OWCP received a December 1, 2023 statement in which appellant alleged that she signed the EN-1032 form without fully comprehending the rules associated with it, and that she did not intend to omit earnings. It also received a screenshot document indicating that she earned \$18.20 from one online resale site on October 7, 2019.

By decision dated January 26, 2024, OWCP's hearing representative affirmed the August 24, 2023 decision regarding forfeiture of compensation. He also finalized the August 24, 2023 preliminary overpayment determination finding that appellant received an overpayment of compensation in the amount of \$52,631.72 for the period September 15, 2018 through December 15, 2019, because she forfeited her entitlement to wage-loss compensation for that period. The hearing representative found that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. He directed appellant to commence payments of \$1,000.00 per month.⁵

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA provides that an employee who fails to make an affidavit or report when required or 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.⁶ An employee, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she knowingly failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings.⁷ OWCP's procedures recognize that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.⁸ The term knowingly is defined within OWCP's regulations as with knowledge, consciously, willfully, or intentionally.⁹

OWCP's regulations define earnings from employment or self-employment as: (1) gross earnings or wages before any deductions 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."¹⁰ 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."¹¹ The language on OWCP's EN-1032 form is clear and unambiguous in requiring a claimant to report earnings for the previous 15 months from any

⁵ With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *A.B.*, Docket No. 18-0915 (issued October 24, 2018); *Miguel A. Muniz*, 54 ECAB 217 (2002). As appellant was not in receipt of continuing compensation at the time of OWCP's overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

⁶ 5 U.S.C. § 8106(b).

⁷ *T.G.*, Docket No. 19-0051 (issued August 20, 2019); *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.5, 8 (May 2012). *See also M.G.*, Docket No. 20-0735 (issued October 23, 2020); *T.P.*, Docket No. 17-0717 (issued April 11, 2018); *Christine P. Burgess*, 43 ECAB 449 (1992).

⁹ 20 C.F.R. § 10.5(n). *See also R.A.*, Docket No. 18-0406 (issued January 28, 2019); *I.S.*, Docket No. 17-0897 (issued April 9, 2018); *Anthony A. Nobile*, 44 ECAB 268 (1992).

¹⁰ *Id.* at § 10.5(g).

¹¹ *Id.*

employer, self-employment, or a business enterprise in which he or she worked. The forms further emphasize that severe penalties may be applied for failure to report all work activities thoroughly and completely.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant forfeited her right to compensation for the period September 15, 2018 through December 15, 2019, pursuant to 5 U.S.C. § 8106(b)(2), because she knowingly failed to report her employment activities and earnings.

The case record establishes that appellant earned at least \$1,500.00 during the period September 15, 2018 through December 15, 2019 from her self-employment, which involved selling items through online resale sites. However, she did not report such employment activities and earnings on the EN-1032 form that she signed on December 15, 2019, which covered the 15-month period September 15, 2018 through December 15, 2019.

The record contains extensive evidence of appellant's employment activities and earnings during the period September 15, 2018 through December 15, 2019. In a statement signed on February 4, 2020, she attested that she had earned \$1,790.50 in income from online resale sites. On February 2, 2021 OWCP received a package of documents, which included screenshots of clothing items that appellant offered for sale on the internet between July 2018 and October 2019. One of the screenshots revealed that \$1,590.50 worth of items were sold. On March 5, 2021 OWCP received a February 2, 2021 report by a special agent from the employing establishment's OIG who indicated that appellant was interviewed on February 4, 2020 and admitted that she earned approximately \$1,790.50 in income by selling items on the internet. On March 5, 2021 it also received a February 6, 2020 memorandum of interview in which the interviewing agent noted that she looked on her telephone, and confirmed that her earnings were \$1,790.50 since 2018. Appellant also admitted that she met up with people in connection with the online resale site. On September 3, 2021 OWCP received screenshot documents which indicated that she listed over \$15,000.00 worth of items for sale between June and October 2019. In December 2023 it received screenshot documents submitted by appellant, which showed that she earned \$1,482.35 by selling items between July 20 and December 9, 2019.

As noted above, an employee can only be subjected to the forfeiture penalty provision of 5 U.S.C. § 8106(b) if he or she knowingly failed to report employment or earnings, and the term knowingly is defined within OWCP's regulations as with knowledge, consciously, willfully, or intentionally.¹³

The EN-1032 form signed by appellant used such terms as "business," "enterprise," and "service" to explain the obligation for reporting all forms of employment, self-employment and

¹² *B.K.*, Docket No. 17-0406 (issued December 12, 2017).

¹³ *See supra* notes 7 through 9.

earnings.¹⁴ The language of the EN-1032 form advised appellant that the nature of her work selling items on the internet would require her to report such employment activities on the form. Appellant's signing of a strongly worded certification clause on the EN-1032 form further shows that she was aware of the materiality of her failure to report her employment.

As the EN-1032 form signed by appellant on December 15, 2019 informed her that she must report all employment, self-employment, and involvement in a business enterprise, even if the business lost money, this evidence, including appellant's signing of the strongly worded certification clause on the EN-1032 form, is persuasive evidence that she knowingly omitted her earnings and employment information.¹⁵

Under these circumstances, the Board concludes that appellant "knowingly" omitted her earnings under section 8106(b)(2) of FECA by failing to report her employment activities and earnings related to selling items on the internet on the applicable EN-1032 form covering the period September 15, 2018 through December 15, 2019. Accordingly, the Board finds that OWCP properly determined that she forfeited her right to compensation from September 15, 2018 through December 15, 2019.

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.¹⁶ 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."¹⁷

Section 10.529 of OWCP's implementing regulation 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.

¹⁴ The EN-1032 form instructed appellant to report all employment for which she received a salary, wages, income, sales commissions, piecework, or payment of any kind. Appellant was directed to report all self-employment or involvement in business enterprises, including (but not limited to) operating a business, and providing services in exchange for money, goods or other services. The kinds of services that appellant was required to report included such activities as carpentry, mechanical work, painting, contracting, keeping books and records, odd jobs, and managing and overseeing a business of any kind, including a family business.

¹⁵ See *I.S.*, *supra* note 9.

¹⁶ 5 U.S.C. § 8102(a).

¹⁷ *Id.* at § 8129(a).

“(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.”¹⁸

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of \$52,631.72 for the period September 15, 2018 through December 15, 2019 as she forfeited her entitlement to compensation for this period.

For the reasons explained above, appellant forfeited her entitlement to compensation from September 15, 2018 through December 15, 2019. The evidence of record includes payment documents and worksheets, which show that she received \$52,631.72 in compensation during this period. Due to the forfeiture of compensation, appellant is not entitled to this compensation and, therefore, she received a \$52,631.72 overpayment of compensation.¹⁹

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.²⁰ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”²¹ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.²²

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (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

¹⁸ 20 C.F.R. § 10.529.

¹⁹ *See id.*

²⁰ 5 U.S.C. § 8129(a).

²¹ *Id.* at § 8129(b).

²² *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

(3) Accepted a payment which he or she knew or should have known to be incorrect....”²³

Section 10.433(c) of OWCP’s regulations provides:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on 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.”²⁴

ANALYSIS -- ISSUE 3

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

OWCP properly determined that appellant was at fault in the creation of the overpayment because she failed to provide information, which she knew or should have known to be material on the EN-1032 form covering the period September 15, 2018 through December 15, 2019. As discussed above, the record supports that appellant had earnings and employment activity selling items on the internet for the 15-month periods covered by the EN-1032 form signed by her on December 15, 2019, but she failed to fully report these earnings/employment activities.

The language of the EN-1032 form demonstrates that appellant knew or should have known that the nature of her work selling items on the internet would have required her to report the associated earnings/employment activities during the period covered by the form, *i.e.*, September 15, 2018 through December 15, 2019.²⁵ Since appellant had unreported earnings/employment activities during this period, she knowingly failed to furnish this material information to OWCP. On December 15, 2019 she signed a certification clause on the EN-1032 form, which advised her that she might be subject to penalties if she knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing this form, appellant is deemed to have acknowledged her duty to complete the forms properly, including the duty to report any employment, self-employment, or involvement in a business enterprise. As she represented that she had no earnings from employment during the covered period, the Board finds that she failed to furnish information, which she knew or should have known to be material to OWCP. As appellant is at fault in creating the overpayment, it is not subject to waiver of recovery.²⁶

²³ 20 C.F.R. § 10.433(a).

²⁴ *Id.* at § 10.433(c).

²⁵ *See J.A.*, Docket No. 14-1863 (issued July 7, 2015).

²⁶ *A.T.*, Docket No. 17-0953 (issued December 20, 2017); *Harold F. Franklin*, 57 ECAB 387 (2006).

CONCLUSION

The Board finds that OWCP properly found that appellant forfeited her entitlement to compensation from September 15, 2018 through December 15, 2019, pursuant to 5 U.S.C. § 8106(b)(2), because she knowingly failed to report her employment activities and earnings. The Board further finds that OWCP properly found that she received an overpayment of compensation in the amount of \$52,631.72 for the period September 15, 2018 through December 15, 2019 as she forfeited her entitlement to compensation for this period. The Board also finds that OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 15, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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