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D.C., Appellant)	
)	
and)	Docket No. 22-1272
)	Issued: January 15, 2025
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Boston, MA, Employer)	
)	

Richard Heavey, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:

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

JURISDICTION

On August 29, 2022 appellant, through counsel, filed a timely appeal from March 24, 2022 merit decisions 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.³

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 an 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.*

³ The Board notes that, following the March 24, 2022 decisions, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant forfeited her right to compensation for the period November 11, 2018 through November 12, 2020, pursuant 5 U.S.C. § 8106(b)(2) of FECA, because she knowingly failed to report her employment activities and/or earnings; (2) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$91,543.07 for the period November 11, 2018 through November 12, 2020 as she forfeited her entitlement to compensation for this period; (3) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (4) whether OWCP properly required recovery of the overpayment by deducting \$650.00 from appellant's continuing compensation payments, every 28 days.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. On December 21, 2014, appellant, then a 59-year-old building equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her right shoulder, right upper arm, the right side of her head, and her left wrist when she slipped and fell on an escalator landing while in the performance of duty. OWCP accepted the claim for a contusion of the right humerus and elbow, right shoulder sprain, and right rotator cuff tendinitis. It subsequently expanded its acceptance of the claim to include cervicalgia; lateral epicondylitis of the right elbow; carpal tunnel syndrome, right upper limb; lesion of the ulnar nerve, right upper limb, and contracture, left hand. OWCP paid appellant wage-loss compensation.

Beginning November 11, 2015, appellant completed and signed financial disclosure statements (Forms EN1032) setting forth her employment and earnings history for the preceding 15-month period.

In a report of investigation dated June 17, 2019, covering the period November 3, 2017 to June 14, 2019, A.V., a special agent with the employing establishment's Office of Inspector General (OIG), advised that appellant owed a dog rescue, Donna Doggy Rescue (DDR), which appellant had registered with the state on January 1, 2014. Appellant also belonged to the New England English Springer Spaniel Rescue (NEESSR) beginning in March 2013 and the Eastern English Springer Spaniel Club (EESSC) beginning in November 2015. She appeared in a photograph taken at an NEESSR event held in another state on June 22 and 23, 2017. A.V. related that appellant had submitted a charity registration form to the state for DDR in 2013. He advised that she had submitted annual charity filing public charity forms for DDR each year advising that the organization's mission was to rescue animals, take them to a veterinarian and rehome them.

A.V. related that he had interviewed E.H., the president of NEESSR, on December 14, 2018. E.H. advised that beginning in 2013 appellant fostered dogs. Appellant was also on a fundraising committee, participated in adoption of events that, were out of state, transported dogs, conducted home visits, made dog beds, and took fostered dogs to the veterinarian. A.V. further indicated that he had additionally interviewed F.R. and A.F., who work

⁴ Docket No. 21-0913 (issued December 8, 2023).

at a local animal hospital. F.R. and A.F. related that appellant was a member of NEESSR and found her name associated with five dogs who had received veterinary care. A person at another animal hospital indicated that she thought that appellant had brought a dog that she was fostering to her residence around February 2016.

In a memorandum dated December 14, 2018, A.V. noted that he interviewed E.H., the recently elected president of NEESSR, who asserted that appellant had joined the organization in 2013 and also volunteered with another fostering group. E.H. advised that she had frequently fostered dogs over the past few years. Appellant currently had three dogs of her own, but no foster dogs. NEESSR sold merchandise on its website to raise money, and appellant was on a committee that focused on the merchandise sold to the public. It attended two events sponsored by the EESSC that lasted three days. Appellant sold merchandise at tables at these events and spoke to adoptive families. She also helped NEESSR transport dogs and had organized a rescue parade. E.H. provided the names of six dogs fostered by appellant. She identified appellant sitting with people on the ground in a photograph taken at an NEESSR event held in June 2017.

In another December 14, 2018 memorandum, A.V. noted that he had interviewed A.F. and F.R. at a local animal hospital. F.R. related that appellant belonged to NEESSR and provided the names of five dogs who had appellant's name associated with them. He noted that the NEESSR paid for the veterinary treatment. F.R. provided the printed veterinary records for the five dogs.

The records indicated that dogs fostered by appellant received veterinary care on various dates from 2014 to August 2018. On August 29 and 30, September 29, and October 17, 2018, an individual from the animal hospital spoke with appellant about a foster dog's medical condition.

In a January 2, 2019 memorandum of interview, A.V. advised that he had interviewed J.R. and N.C. at a local animal hospital. J.R. related that in February 2016 appellant brought a dog that she was fostering to her residence.

A November 2015 newsletter for the EESSC indicated that appellant had joined the organization as a new member. A printout from the NEESSR website contained a photograph from an event held on June 22 to 23, 2017 with one of the members circled. Another page from the website requested that members email appellant if they are attending the June 23, 2017 rescue parade.

On November 23, 2019, appellant signed an EN1032 form, reporting. The EN1032 form instructed her 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) farming, sales work, operating a business, and providing services in exchange for money, goods, or other services. The form contained a certification clause informing her 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. Appellant reported on the form that she had not performed any employment activity, engaged in self-employment, or performed volunteer work.

A charity registration form for DDR provides that appellant formed the organization on January 1, 2013. The organization's purpose was to rescue animals, provide veterinary care, and

rehome the animals after a home visit. The record also contains the bylaws of DDR. On June 5, 2015, the Internal Revenue Service (IRS) granted DDR tax exempt status.

In an annual state public charity form covering the period January 1 through December 31, 2018, signed on January 17, 2019, appellant specified that DDR had received contributions of \$194.62 and had expenses of \$154.62. She indicated on the form that she had asked her family and friends to donate money for veterinary bills. Appellant listed her husband as an unpaid volunteer. In a Schedule Veterans Charitable Organization (Schedule VCO) of even date, she filed an application for designation as a Schedule VCO.

On an EN1032 form signed November 12, 2020, appellant indicated that she had not performed any employment activities, engaged in self-employment, or performed volunteer work.

In a case summary report dated February 24, 2021, A.V. advised that on February 18, 2021 he had conducted additional research online which showed that appellant “continued to be involved with dog rescue organizations on a volunteer basis.” He related that Springer Tails, a newsletter for the Mid-Atlantic English Springer Spaniel Rescue (MAESSR), listed her as a new volunteer in its fourth quarter newsletter. A.V. also noted that in September 2019 the EESSC, an organization that provided activities such as agility and obedience trials, thanked individuals including appellant for their efforts in a June 2019 two-day event. A November 2020 EESSC newsletter thanked individuals including appellant for efforts in an October 3 and 4, 2020 event.

A.V. submitted the fourth quarter of 2018 MAESSR newsletter, which included appellant in a list of new volunteers. An EESSC September 2019 newsletter thanked helpers, including appellant, for a show on June 19 and 20, 2019. A November 2020 EESSC newsletter thanked those who helped make an event on October 3 and 4, 2020 happen, including appellant.

In a case summary report dated April 19, 2021, A.V. related that a website search on April 19, 2021 revealed public charity form dated 2019 for DDR.

In a state public charity form covering the period January 1 to December 31, 2019, signed on January 1, 2020 appellant indicated that DDR had received no contributions during that year and had no expenses.

By decision dated July 20, 2021, OWCP found that appellant had forfeited her entitlement to wage-loss compensation for the period November 11, 2018 through November 12, 2020. It found that she knowingly failed to report her earnings and employment activities and also failed to report her volunteer work with dog rescue organizations.

On July 20, 2021, OWCP advised appellant of its preliminary determination that she had received an \$91,543.07 overpayment of compensation for the period November 11, 2018 through November 12, 2020 as she had forfeited her entitlement to compensation. It calculated the overpayment by determining the net amount that she received for the period in question, \$91,543.07. OWCP further notified appellant of its preliminary finding that she was at fault in the creation of the overpayment. It provided her with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, OWCP notified appellant 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.

In a July 31, 2021 overpayment action request form, appellant requested a telephonic prerecoumpment hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant subsequently submitted a completed Form OWCP-20 and provided supporting financial information. She advised that she had no monthly income and listed monthly expenses of \$3,458.00. Appellant indicated that she had \$4,140.00 in assets.

On August 6, 2021, appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Subsequently OWCP received an August 6, 2021 letter, wherein EESSC office holders advised that appellant was not an employee, had never been paid, and had volunteered three times "in the course of a year for a total of approximately 10 [to] 12 hours."

In an August 15, 2021 letter, the Chief Executive Officer (CEO) of MAESSR indicated that appellant had "only volunteered two to three hours over a three day period at an even we attending in [her home state]." The CEO advised that she had not received any payment.

A hearing was held on December 16, 2021 regarding the July 20, 2020 forfeiture determination and preliminary overpayment determination. Appellant testified that through DDR she helped a few dogs receive medical care and accepted donations of food. She did not have a website or do mailings or solicitations. Appellant related that she had not fostered or assisted any dogs since the end of 2019. She maintained that her charity did not qualify for a bank account and that she used her own money for the charity. Appellant was not on a committee for any charity, but did sell merchandise for NEESSR during their three-day fund-raising event. She stayed overnight at a hotel at her own expense. Appellant had six dogs through NEESSR that had since passed away. She adopted all the dogs. Appellant stopped performing all volunteer activity in December 2019.

On January 21, 2021, appellant submitted additional financial documentation, including January 2022 records from a credit union showing a current balance of \$13,316.52. Appellant also owed \$35,793.97 on a bank loan.

An unsigned and undated Form OWCP-20 form, received on January 11, 2022, listed monthly income of \$6,497.48, monthly expenses of \$5,962.62, liquid assets of \$4,016.00, and a second home valued at around \$50,000.00.

By decision dated March 24, 2022, OWCP's hearing representative affirmed the July 20, 2021 forfeiture decision.

By separate decision dated March 24, 2022, OWCP's hearing representative finalized that appellant received an overpayment of compensation in the amount of \$91,543.07 for the period November 11, 2018 through November 12, 2020 as she had forfeited her entitlement to compensation. She further finalized that appellant was at fault in the creation of the overpayment. The hearing representative required recovery of the overpayment by deducting \$650.00 from appellant's continuing compensation payments, every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA⁵ 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 if he or she knowingly failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that, forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.⁷ The term knowingly is defined within OWCP’s regulations as with knowledge, consciously, willfully, or intentionally.⁸

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.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant forfeited her right to compensation for the period November 11, 2018 through November 12, 2020, pursuant 5 U.S.C. § 8106(b)(2) of FECA, because she knowingly failed to report her employment activities, volunteer activity, and/or earnings.

OWCP based its finding of forfeiture on appellant’s failure to report employment activities and volunteer work on EN1032 forms dated November 23, 2019 and November 12, 2020. The signed EN1032 forms advised her to report any self-employment, involvement in any business enterprise, or volunteer work, including volunteer work for which she received any form of monetary or in-kind compensation for the prior 15 months. Appellant reported that, during this period, she did not perform any employment or self-employment and did not perform volunteer work.

The evidence of record supports that appellant attended an event with EESSC in June 2019. She further filed charity registration forms and annual reports for DDR. In a state public charity

⁵ *Supra* note 2.

⁶ 5 U.S.C. § 8106(b).

⁷ *J.T.*, Docket No. 20-1563 (issued April 9, 2021); *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

⁸ 20 C.F.R. § 10.5(n); *R.A.*, Docket No. 18-0406 (issued January 28, 2019).

⁹ *Id.* at § 10.5(g).

¹⁰ *Id.*

form covering the period January 1 through December 31, 2018, appellant advised that DDR had received contributions of \$194.62 and had expenses of \$154.62. In a state public charity form covering the period January 1 through December 31, 2019, she related that DDR had received no contributions during the year and had incurred no expenses. The evidence supports that appellant was the president of DDR during the period covered by the forfeiture and received donations totaling \$194.62.

OWCP further found that appellant failed to disclose volunteer activities for animal charities during the time in question. The Board notes that OWCP had an interest in knowing whether she performed any volunteer activities even if she had no actual earnings as it is relevant to determining whether she had the capacity to earn some level of wages on the open market.¹¹ For the period November 11, 2018 to November 12, 2020, the evidence supports that appellant joined MAESSR, a dog rescue, as a new volunteer in the fourth quarter of 2018. In newsletters, EESSC, an organization that provided activities such as agility and obedience trials for dogs, generally thanked her and others for efforts in events held on June 19 and 20, 2019 and October 3 and 4, 2020. In a letter dated August 6, 2021, EESSC advised that appellant had never been paid and had volunteered three times during an unspecified year for approximately 10 to 12 hours. On August 15, 2021, the CEO of MAESSR asserted that appellant had volunteered two to three hours over period of three days at an event in her home state. The Board thus finds that appellant's failure to report volunteer work constituted knowing omissions by her on the EN1032 forms covering the period of the forfeiture.¹² If a Form EN1032 is improperly completed resulting in a finding of forfeiture, the period of forfeiture is the entire period covered by the form in question.¹³

Appellant can be subject to the forfeiture provision of section 8106(c) only if she knowingly failed to report earnings or employment. OWCP has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.¹⁴ The Board finds that appellant's signing of a strongly-worded certification clause on the EN1032 forms demonstrates that she was aware of the materiality of her failure to report her employment activity.¹⁵ Therefore, appellant knowingly failed to comply with the reporting requirements. OWCP, consequently, properly found that she knowingly failed to report employment activities or volunteer activities under section 8106(c)(2) of FECA on the EN1032 forms she completed on November 23, 2019 and November 12, 2020, such that she forfeited compensation for the period November 11, 2018 through November 12, 2020.

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

¹¹ See *S.M.*, Docket No. 16-1612 (issued April 11, 2018).

¹² See *G.B.*, Docket No. 20-0536 (issued January 20, 2023).

¹³ *S.H.*, Docket No. 21-1349 (issued February 17, 2023); *J.C.*, Docket No. 16-1058 (issued July 10, 2017); *R.B.*, Docket No. 15-1946 (issued September 2, 2016); *Martin James Sullivan*, 50 ECAB 158 (1998).

¹⁴ See *S.M.*, Docket No. 16-1612 (issued April 11, 2018).

¹⁵ *C.W.*, Docket No. 18-1557 (issued June 25, 2019); *M.O.*, Docket No. 18-0686 (issued January 25, 2019).

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 (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.”¹⁸

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$91,543.07 from November 11, 2018 through November 12, 2020 as she forfeited her entitlement to compensation.

OWCP’s regulations provide that OWCP must declare an overpayment of compensation for any compensation already paid the period of a given forfeiture of compensation.¹⁹ As found above, appellant forfeited her entitlement to compensation for the period November 11, 2018 through November 12, 2020, pursuant 5 U.S.C. § 8106(b)(2) of FECA. Therefore, fact of overpayment has been established.

If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by an 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.²⁰

OWCP determined that it paid appellant net compensation in the amount of \$91,543.07 during the period in question. The Board, accordingly, finds that the \$91,543.07 paid constitutes an overpayment of compensation.²¹

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

¹⁶ 5 U.S.C. § 8102(b).

¹⁷ *Id.* at § 8129(a).

¹⁸ 20 C.F.R. § 10.529.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See S.H.*, Docket No. 21-1349 (issued February 17, 2023).

good conscience.”²² No waiver of recovery of an overpayment is possible if the claimant is at fault in the creation of the overpayment.²³

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.²⁴

With respect to whether an individual is without fault, section 10.433(b) of OWCP regulations provides that whether 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.²⁵

ANALYSIS -- ISSUE 3

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

As discussed above, the record supports that appellant engaged in employment activity and volunteer work for the period November 11, 2018 through November 12, 2020. She signed EN1032 forms on November 23, 2019 and November 12, 2020 reporting that she had participated in no volunteer work or self-employment activities.

The explicit language of the EN1032 forms demonstrates that appellant knew or should have known that the nature of her activities would require her to report such employment activities and volunteer work on the forms.²⁶ Her failure to accurately report her employment activities and volunteer work on the EN1032 forms constitutes a failure to provide information which she knew or should have known to be material in the creation of the overpayment.²⁷ Consequently, appellant is not eligible for a waiver of recovery of the overpayment.

²² 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

²³ *See L.C.*, Docket No. 19-1094 (issued February 25, 2020); *M.O.*, *supra* note 15.

²⁴ 20 C.F.R. § 10.433(a).

²⁵ *Id.* at § 10.433(b).

²⁶ *M.O.*, *supra* note 15; *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

²⁷ *B.K.*, Docket No. 17-0406 (issued December 12, 2017).

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.²⁸

Section 10.411 of OWCP's regulations provides in pertinent part:

"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 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 any hardship."²⁹

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly required recovery of the overpayment by deducting \$650.00 from appellant's continuing compensation payments every 28 days.

OWCP gave due regard to the financial information submitted, as well as the facts set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize resulting hardship. OWCP's hearing representative considered appellant's monthly income, expenses, and assets and determined that she was able to repay \$650.00 every 28 days. The Board finds that OWCP properly required recovery of the overpayment by deducting \$650.00 every 28 days from appellant's continuing compensation benefits.

CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited her right to compensation for the period November 11, 2018 through November 12, 2020, pursuant 5 U.S.C. § 8106(b)(2) of FECA, because she knowingly failed to report her employment activities, volunteer activity, and/or earnings. The Board further finds that OWCP properly found that she received an overpayment of compensation in the amount of \$91,543.07 from November 11, 2018 through November 12, 2020 as she forfeited her entitlement to compensation and that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. The Board finds that OWCP properly required recovery of the overpayment by deducting \$650.00 from appellant's continuing compensation payments every 28 days.

²⁸ 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²⁹ *Id.* at § 10.441(a).

ORDER

IT IS HEREBY ORDERED THAT the March 24, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 15, 2025
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board