

¹ 5 U.S.C. § 8101 *et seq.*

found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On January 28, 2008, appellant, then a 37-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 23, 2008 she injured her left shoulder and right hip when she slipped on black ice and fell into rocks and bushes while in the performance of duty. OWCP initially accepted the claim for sprain/strain of left shoulder and subsequently expanded the acceptance of the claim to include left shoulder adhesive capsulitis. It paid appellant wage-loss compensation on its supplemental rolls effective March 9, 2008, and on its periodic compensation rolls from July 5, 2009.²

The record reflects that, on December 6, 2018, December 12, 2019, December 20, 2020, December 7, 2021, December 26, 2022, and January 12, 2024, appellant signed financial disclosure statements (Form EN-1032), which contained language advising her what type of employment activities, earnings, and volunteer activities that she was required to report for each 15-month period prior to the time she signed each form. The EN-1032 forms 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 forms contained certification clauses 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. On the EN-1032 forms, appellant indicated that, during the previous 15-month period covered by each form, she had not worked for an employer or been self-employed, was not involved in a business enterprise, and had not engaged in volunteer work.

In an August 5, 2021 report of investigation, K.C., a special agent of the employing establishment's Office of Inspector General (OIG), reported that appellant operated a business under her social media account, which was titled in her name, and beginning April 10, 2017, she advertised and solicited sales of customized shirts, bags, drinking glasses, and other customized items. Appellant advised her followers to inbox or message her for pricing details and that payments *via* online banking were accepted. Videos posted on appellant's social media page showed appellant using computers and printers to create customized shirts. Postings from appellant's social media page were linked to a t-shirt retail page and contained the same directives to inbox or message for pricing details. K.C. also reported that when appellant was interviewed by special agents from OIG, on July 28, 2021, she denied any self-employment, business activity, or income. Appellant told the special agents that her physical condition was deteriorating. She also stated that her pain made it impossible for her to find work within her restrictions.

² By decision dated June 30, 2022, an OWCP hearing representative finalized OWCP's December 8, 2021 preliminary overpayment determination that appellant received an overpayment of compensation in the amount of a \$21,540.91 for the period March 5, 2009 through October 9, 2021, for which she was without fault, because she was paid at an incorrect pay rate. The hearing representative denied waiver of recovery of the overpayment, and required recovery of the overpayment by deducting \$150.00 from appellant's continuing compensation benefits every 28 days.

K.C. also obtained a subpoenaed copy of appellant's online banking account records showing sales of shirts, bags, drinking glasses, and other customized items appellant advertised and sold through her social media page. The records show that from January 14, 2018 to June 8, 2023 appellant received payments totaling over \$24,000.00 in earnings from the sale of those items. Each payment indicated what item(s) appellant sold in exchange for the payment received.

By decision dated February 5, 2024, OWCP found that appellant had forfeited her entitlement to compensation for the period January 1, 2018 through January 12, 2024 under 5 U.S.C. § 8106(b) as she knowingly failed to report employment earnings from and employment/volunteer activities. It notified her that all compensation paid during that period would be considered an overpayment, subject to recovery in accordance with 5 U.S.C. § 8129.

On February 5, 2024, OWCP also advised appellant of its preliminary overpayment determination that she had received a \$203,167.65 overpayment of compensation for the period January 1, 2018 through January 12, 2024 as she had forfeited her entitlement to compensation. Worksheets of the overpayment computation provided indicated that appellant's existing overpayment at the corrected payrate for the period January 1, 2018 through October 9, 2021 amounted to \$162,397.72,³ and for the period October 10, 2021 through November 29, 2023 appellant had received \$40,636.40. OWCP also noted that appellant had received a previously-declared overpayment of \$133.53 during the period November 30 through December 2, 2023, for a total overpayment of \$203,167.65. Compensation payment history records were attached. OWCP found appellant 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 prerecoupment hearing.

On February 24, 2024, appellant requested waiver of recovery of the overpayment and requested that OWCP render a decision based on the written evidence. In a completed Form OWCP-20 dated February 26, 2024, she reported monthly income of \$12,793.20, total monthly expenses of \$10,213.49, and total assets of over \$16,000.00. Appellant also submitted supporting financial documentation.

By decision dated March 11, 2024, OWCP finalized the February 5, 2024 forfeiture determination and the February 5, 2024 preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$203,167.65, as she had forfeited her entitlement to compensation for the period January 1, 2018 through January 12, 2024. It further finalized that appellant was at fault in the creation of the overpayment and thereby precluded from wavier of recovery. It required recovery of the overpayment *via* payments of \$2,000.00 each month.

³ *Id.*

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA⁴ provides that an employee who “fails to make an affidavit or report when required or knowingly omits or understates any part of his earnings, forfeits his right to compensation with respect to any period for which the affidavit or report was required.”⁵

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.⁶ The term knowingly is defined within OWCP’s regulations as with knowledge, consciously, willfully, or intentionally.⁷

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.⁸ 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant forfeited her entitlement to wage-loss compensation for the period January 1, 2018 through January 12, 2024 pursuant 5 U.S.C. § 8106(b)(2) of FECA, because she knowingly failed to report her employment activities and earnings.

The record reflects that on December 6, 2018, December 12, 2019, December 20, 2020, December 7, 2021, December 26, 2022, and January 12, 2024, appellant signed EN-1032 forms, which contained language clearly advising her what type of employment activities, earnings, and volunteer activities she was required to report for each 15-month period prior to the time she signed each form. This would include earnings from appellant’s online business of selling shirts, bags, drinking glasses, and other customized items. On her completed EN-1032 forms, appellant reported that she did not have any earnings. She further reported that she had not engaged in any employment, any self-employment, or any business enterprise, or performed volunteer work for any form of compensation during the 15-month period covered by each form. Subpoenaed online

⁴ See *supra* note 1.

⁵ 5 U.S.C. § 8106(b).

⁶ *M.S.*, Docket No. 21-0815 (issued January 11, 2024); *J.T.*, Docket No. 20-1563 (issued April 9, 2021); *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

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

⁸ *Id.* at § 10.5(g).

⁹ *Id.*

banking account records, however, showed sales of shirts, bags, drinking glasses, and other customized items that appellant advertised and sold through her social media page. The evidence of record, therefore, establishes that appellant had unreported earnings and/or employment/volunteer activities, which constituted a forfeiture of FECA compensation.

Appellant can be subject to the forfeiture provision of section 8106(c) only if she knowingly failed to report earnings or employment activities. 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 or employment/volunteer activities.¹⁰ The Board finds that appellant's failure to report all earnings and employment activities on her EN-1032 forms establishes that she knew that she had income from employment and performed work activities, which she failed to disclose on the EN-1032 form. Appellant's signing of a strongly-worded certification clause on the EN-1032 forms demonstrates that she was aware of the materiality of her failure to report her employment earnings/activity.¹¹ Therefore, as she knowingly failed to comply with the reporting requirements, OWCP properly determined that she forfeited her entitlement to compensation during the period January 1, 2018 through January 12, 2024.

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.¹² 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."¹³

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."¹⁴

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of \$203,167.65 for the period January 1, 2018 through January 12, 2024 because she forfeited her entitlement to compensation.

¹⁰ *Supra* note 5.

¹¹ See *M.S.*, Docket No. 21-0815 (issued January 11, 2024); *C.W.*, Docket No. 18-1557 (issued June 25, 2019); *M.O.*, Docket No. 18-0686 (issued January 25, 2019).

¹² 5 U.S.C. § 8102(b).

¹³ *Id.* at § 8129(a).

¹⁴ 20 C.F.R. § 10.529.

As found above, appellant forfeited her entitlement to wage-loss compensation for the period January 1, 2018 through January 12, 2024 because she knowingly failed to report employment activities and earnings, pursuant to 5 U.S.C. § 8106(b). As appellant received compensation during the period of the forfeiture, the Board finds that an overpayment of compensation for that period was created.¹⁵

With regard to the amount of the overpayment, as noted above, where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture.¹⁶ The case record establishes that for the period January 1, 2018 through October 9, 2021, OWCP paid appellant wage-loss compensation in the amount of \$162,397.72; for the period October 10, 2021 through November 29, 2023, OWCP paid appellant \$40,636.40; and for the period November 30 through December 12, 2023, OWCP paid appellant \$133.53. The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received an overpayment of compensation of \$203,167.65.¹⁷

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."¹⁸ No waiver of recovery of an overpayment is possible if the claimant is at fault in the creation of the overpayment.¹⁹

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.²⁰

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.

¹⁵ *M.G.*, Docket No. 22-1079 (issued November 25, 2024).

¹⁶ *Id.*

¹⁷ *See M.G.*, Docket No. 24-0154 (issued March 27, 2024); *J.D.*, Docket No. 13-0086 (issued June 3, 2013).

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

¹⁹ *See L.C.*, Docket No. 19-1094 (issued February 25, 2020); *M.O.*, Docket No. 18-0686 (issued January 25, 2019).

²⁰ 20 C.F.R. § 10.433(a).

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.²¹

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 received earnings and engaged in employment activity which led to the forfeiture of compensation.

The explicit language of the EN-1032 forms demonstrates that appellant knew or should have known that the nature of her activities of operating a business under her social media page required her to report such employment activities and earnings on the forms.²² Appellant's failure to accurately report her earnings and employment activities on the EN-1032 forms constitutes a failure to provide information, which she knew or should have known to be material in the creation of the overpayment.²³ Consequently, she is at fault in the creation of the overpayment and thereby precluded from waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited her entitlement to wage-loss compensation for the period January 1, 2018 through January 12, 2024, pursuant to 5 U.S.C. § 8106(b)(2) of FECA, because she knowingly failed to report her employment activities and earnings. The Board further finds that appellant received an overpayment of compensation in the amount of \$203,167.65 for the period January 1, 2018 through January 12, 2024 because she forfeited her entitlement to compensation. 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.

²¹ *Id.* at § 10.433(b).

²² *See M.O.*, *supra* note 19; *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

²³ *B.K.*, Docket No. 17-0406 (issued December 12, 2017).

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 23, 2025
Washington, DC

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

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

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