

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

A.J., Appellant)	
)	
and)	Docket No. 22-0820
)	Issued: May 9, 2023
DEPARTMENT OF VETERANS AFFAIRS, VA)	
MEDICAL CENTER, Battle Creek, MI,)	
Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 2, 2022 appellant, through counsel, filed a timely appeal from a February 25, 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.

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.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant forfeited her entitlement to compensation for the period October 27, 2019 through May 17, 2021, as she knowingly failed to report her employment activities and earnings, pursuant to 5 U.S.C. § 8106(b)(2); (2) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$38,344.37 for the period October 27, 2019 through May 17, 2021 as she forfeited her entitlement to compensation for that 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 September 6, 2019 appellant, then a 36-year-old advanced medical support assistant, filed a traumatic injury claim (Form CA-1) alleging that on September 5, 2019 she sustained a left knee injury when she fell on her left hand and knee after the treadmill she was jogging on came to an abrupt stop while in the performance of duty. OWCP accepted the claim for left shoulder and arm strain, left knee contusion, left shoulder and arm injury of unspecified nerve, left leg strain, left shoulder complete rotator cuff tear or rupture, left shoulder impingement syndrome, and aggravation of cervical disc disorder at C5-6 with radiculopathy. On February 6, 2020 appellant underwent OWCP-authorized left shoulder trans arthroscopic surgery, subacromial decompression, and rotator cuff repair. On November 7 and 27, December 9 and 18, 2019, January 6, February 16, March 2, 16, and 30, April 12, 26, and May 11, 2020, appellant filed claims for wage-loss compensation (Form CA-7) for leave without pay for continuous dates of total and partial disability during the period October 27, 2019 through May 9, 2020. Each Form CA-7 included a section for the injured worker to certify any employment earnings/activity. The forms requested information regarding any and all earnings from employment; including any employment for which a salary, wages, income, sales commissions, or payment of any kind was received during the period(s) claimed. This was to include self-employment, odd jobs, involvement in business enterprises, as well as service with the military. The forms explicitly advised that fraudulently concealing employment, or failing to report income, may result in forfeiture of compensation benefits and/or criminal prosecution. The CA-7 forms then provided boxes for the employee to mark “Yes” or “No,” and spaces for the name and address of the business, the dates worked, and the type of work. The forms also contained certification clauses as to the truthfulness of the statements made under penalty of criminal prosecution for false or misleading statements. On her CA-7 forms, appellant marked the “No” boxes.

OWCP paid appellant wage-loss compensation on the supplemental rolls from October 19, 2019 through April 25, 2020; on the periodic rolls from April 26, 2020 through April 24, 2021; and on the supplemental rolls as of April 25, 2021.

In a report of contact dated May 12, 2021, the employing establishment noted that it was rumored that appellant was working at a private sector hospital. It further noted that it subsequently received a May 7, 2021 email that confirmed her employment with a private sector hospital.

On May 13, 2021 the employing establishment requested that OWCP terminate appellant's wage-loss compensation, investigate her claim for fraud, and determine whether her compensation should be forfeited and whether she received an overpayment of compensation and was at fault in the creation of the overpayment based on her failure to report her concurrent employment at a private sector hospital.

On May 18, 2021 appellant informed OWCP that she was an on-call employee at a private sector hospital.

In a compensation termination sheet dated May 18, 2021, OWCP calculated that appellant was underpaid in the amount of \$1,915.24 for the period April 25 through May 17, 2021. Additionally, it determined that she was not entitled to further wage-loss compensation after that date as she had returned to full-time employment with no wage loss.

By letter dated May 18, 2021, OWCP requested that the Social Security Administration provide a listing of appellant's employers and yearly wages for the period September 5, 2019 through May 18, 2021.

On May 25, 2021 OWCP received W-2 Wage and Tax statements for 2019 and 2020 and payroll records for the period September 22, 2019 through July 24, 2021 from appellant's private sector employer.

On June 22, 2021 appellant signed a Form EN-1032 indicating that she was employed as an on-call, after-hours staffing coordinator with a private sector hospital through the date of her Form EN-1032. She reported monthly income of \$900.00.

On July 27, 2021 OWCP notified appellant of its preliminary overpayment determination that she received an overpayment of compensation in the amount of \$21,787.39 because she received FECA compensation payments concurrent with earnings from a private sector hospital for the period October 27, 2019 through May 17, 2021. It further advised her of its preliminary determination that she was at fault in the creation of the overpayment. OWCP also forwarded an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) and requested that appellant submit supporting financial documentation, including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support her reported income and expenses. Additionally, it 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 precouplement hearing.

In an August 24, 2021 overpayment action request form, appellant requested a precouplement hearing before a representative of OWCP's Branch of Hearings and Review. She requested waiver of recovery of the overpayment, contending that she was unaware that she was required to report her employment with a private sector hospital, and that repayment of the overpayment would cause major financial hardship. Appellant submitted a Form OWCP-20 listing her monthly income as \$3,300.00 and monthly expenses as \$3,256.00. She noted that she had no assets. Appellant did not submit any supporting financial documentation.

On August 31, 2021 OWCP commenced payment of wage-loss compensation based on its determination of her loss of wage-earning capacity.

By decision dated September 8, 2021, OWCP finalized its preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$21,787.39 for the period October 27, 2019 through May 17, 2021. It found that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP required recovery of the overpayment at the rate of 25 percent of wage-loss compensation every 28 days from appellant's continuing compensation payments commencing May 18, 2021.

By decision dated September 29, 2021, OWCP vacated the September 8, 2021 overpayment decision, finding that appellant had filed a timely request for a prerecoupment hearing before an OWCP hearing representative regarding the July 27, 2021 preliminary overpayment determination.

On October 10, 2021 appellant returned to full-time modified-duty work at the employing establishment.

Following a preliminary review, by decision dated December 3, 2021, an OWCP hearing representative reversed the July 27, 2021 preliminary overpayment determination. The hearing representative found that, no overpayment was created as appellant was a full-time employee of the employing establishment, therefore, her private sector dissimilar earnings were not to be included in her OWCP pay rate, nor were they to be used to reduce compensation based on actual earnings. OWCP improperly included her private sector employment earnings to determine her weekly pay rate for FECA compensation and used her actual earnings to reduce her compensation. Appellant's private sector earnings could, however, be used to establish her ability to work full time. Office's hearing representative further found that OWCP improperly began recovery of the overpayment prior to the issuance of a final overpayment decision and, thus, she was entitled to wage-loss compensation. The hearing representative remanded the case to OWCP to determine appellant's wage-earning capacity, and whether she forfeited her entitlement to compensation because she knowingly failed to report her earnings from outside employment for the period October 27, 2019 through May 17, 2021.

On remand, OWCP on January 19, 2022 reimbursed appellant \$1,979.48 that was deducted from her continuing compensation payments for the period October 19, 2019 through September 4, 2021 to recover the \$21,787.39 overpayment.

By decision dated January 19, 2022, OWCP determined that appellant forfeited her entitlement to compensation for the period October 27, 2019 through May 17, 2021, pursuant to section 8106(b)(2) of FECA,³ because she knowingly failed to report earnings and employment on CA-7 forms covering this period. It found that she was employed at a private sector hospital during the relevant period and noted that the wording of the CA-7 forms advised her of the need to report earnings from such employment.⁴

³ *Id.* at § 8106(b)(2).

⁴ In a March 7, 2022 letter, appellant's private sector employer indicated that her on-call staffing coordinator position would be eliminated, effective March 13, 2022.

On January 25, 2022 OWCP notified appellant of its preliminary overpayment determination that she received an overpayment of compensation in the amount of \$38,344.37 because she forfeited her compensation for the period October 27, 2019 through May 17, 2021. It further advised her of its preliminary determination that she was at fault in the creation of the overpayment. OWCP again forwarded an overpayment action request form and a Form OWCP-20, and requested that appellant submit supporting financial documentation, including income tax returns, bank account statements, bills and cancelled checks, pay slips, and other records to support her reported income and expenses. Additionally, it 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. No response was received.

On January 26, 2022 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearing and Review regarding the January 19, 2022 forfeiture decision.

By decision dated February 25, 2022, OWCP finalized its January 25, 2022 preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$38,344.37 for the period October 27, 2019 through May 17, 2021 and that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. It required recovery of the overpayment in full within 30 days.

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.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.⁶ OWCP's procedures recognize that, forfeiture is a penalty,⁷ 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

⁵ *Supra* note 2 at § 8106(b).

⁶ *T.G.*, Docket No. 19-0051 (issued August 20, 2019); *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (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).

⁸ *Christine P. Burgess, id.*

⁹ 20 C.F.R. § 10.5(n); *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).

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

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant forfeited her entitlement to compensation for the period October 27, 2019 through May 9, 2020 as she knowingly failed to report her employment activities and earnings, pursuant to 5 U.S.C. § 8106(b)(2).

Appellant has acknowledged on her June 22, 2021 Form CA-1032 that she was employed as an on-call, after-hours staffing coordinator with a monthly income of \$900.00 at a private sector hospital from July 2012 and continuing. OWCP also received her W-2 Wage and Tax statements for 2019 and 2020 and payroll records for the period September 22, 2019 through July 24, 2021 indicating that she had earnings from a private sector hospital. The evidence of record establishes that appellant had earnings and employment outside of her federal employment during the period October 27, 2019 through May 9, 2020. Appellant, however, omitted these earnings and employment activities on the CA-7 forms dated November 7 and 27 and December 9 and 18, 2019, January 6, February 16, March 2, 16, and 30, April 12 and 26, and May 11, 2020, covering the period October 27, 2019 through May 9, 2020.

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.¹²

The explicit language of the CA-7 forms advised appellant that she should report her employment activities on the forms. Appellant's signing of the strongly-worded certification clauses on the CA-7 forms further shows that she was aware of the materiality of her failure to report her employment. As the CA-7 forms signed by her informed her that she must report employment, this evidence is persuasive evidence that she knowingly failed to report earnings and employment information.¹³

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 in self-employment on the applicable CA-7 forms covering the period October 27, 2019 through May 9, 2020. Accordingly, the Board finds that OWCP properly determined that she forfeited her right to compensation for the period October 27, 2019 through May 9, 2020.

¹⁰ *Id.* at § 10.5(g).

¹¹ *Id.*

¹² *See supra* notes 6 through 10.

¹³ *K.B.*, Docket No. 21-0604 (issued January 14, 2022); *T.G.*, Docket No. 16-1379 (issued August 4, 2017); *K.Z.*, Docket No. 12-0784 (issued August 27, 2012).

The Board further finds, however, that OWCP improperly determined that appellant forfeited her right to compensation for the period May 10, 2020 through May 17, 2021.

The case record does not contain CA-7 forms requiring the reporting of earnings/employment activity covering the period May 10, 2020 through May 17, 2021. As the case record does not establish that appellant made omissions or misrepresentations on CA-7 forms regarding earnings/employment activities for the period May 10, 2020 through May 17, 2021, the Board finds that OWCP improperly found forfeiture of entitlement to compensation for that period.¹⁴

LEGAL PRECEDENT -- ISSUE 2

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.¹⁵

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 period of forfeiture pursuant to 5 U.S.C. § 8129 and other relevant statutes.”¹⁶

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation for the period October 27, 2019 through May 9, 2020, resulting from her forfeiture.

As found above, appellant forfeited her right to compensation for the period October 27, 2019 through May 9, 2020. As noted above, OWCP may declare an overpayment of compensation for any compensation already paid for the period of a forfeiture of compensation.¹⁷ If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by a Form CA-7, which he or she fails to report, a claimant is not entitled to compensation for any portion of the period covered by the report, even though he or she may not

¹⁴ See *K.W.*, Docket No. 22-1088 (issued December 7, 2022); *K.B.*, *id.*

¹⁵ 20 C.F.R. § 10.5(n); *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).

¹⁶ *Id.* at § 10.529; see also *G.G.*, Docket No. 14-1848 (issued August 4, 2016).

¹⁷ *Id.*

have had earnings during a portion of that period.¹⁸ The Board, accordingly, finds that fact of the overpayment has been established.¹⁹

With regard to the period of the overpayment, in its February 25, 2022 decision, OWCP finalized the overpayment for the period October 27, 2019 through May 17, 2021. However, as found above, it properly determined that appellant forfeited her right to compensation for the period October 27, 2019 through May 9, 2020, but improperly determined that she forfeited her right to compensation for the period May 10, 2020 through May 17, 2021. The period of the overpayment is, therefore, modified to October 27, 2019 through May 9, 2020.

Based on the foregoing, the Board further finds that the case is not in posture for decision with regard to the amount of the overpayment. The case must, therefore, be remanded for OWCP to properly calculate the amount of the overpayment of compensation.²⁰ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of FECA provides that, “[a]djustment 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

Section 10.433 of OWCP’s implementing regulations provides that, in determining whether a claimant is at fault, it will consider all pertinent circumstances. An individual is at 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

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”²²

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

¹⁸ *See id.*

¹⁹ *See J.N.*, Docket No. 13-1761 (issued July 1, 2014).

²⁰ *See A.R.*, Docket No. 22-0750 (issued September 28, 2022).

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

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

may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.²³

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment for the period October 27, 2019 through May 9, 2020, thereby precluding waiver of recovery of the overpayment.

The record establishes that appellant forfeited her entitlement to compensation benefits because she had unreported employment earnings during the period October 27, 2019 through May 9, 2020 and knowingly failed to furnish this material information to OWCP. The CA-7 forms on which she omitted her earnings with a private sector hospital, included a strongly-worded certification clause which explicitly advised that failure to report employment earnings/activity may result in forfeiture of compensation benefits and/or criminal prosecution. By signing these forms, appellant is deemed to have acknowledged her duty to report her employment earnings/activity during the period of question. She, however, did not report her earnings from the private sector hospital and, thus, failed to furnish information, which she knew or should have known to be material to OWCP.²⁴ The Board, thus, finds that appellant is at fault in the creation of the overpayment and is, thereby, precluded from waiver of recovery.

CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited her entitlement to compensation for the period October 27, 2019 through May 9, 2020 as she knowingly failed to report her employment activities and earnings, pursuant to 5 U.S.C. § 8106(b)(2). The Board further finds, however, that OWCP improperly determined that she forfeited her right to compensation for the period May 10, 2020 through May 17, 2021. The Board also finds that appellant received an overpayment of compensation for the period October 27, 2019 through May 9, 2020, resulting from her forfeiture. However, the case is not in posture for decision with regard to the amount of the overpayment. The Board additionally finds that OWCP properly determined that appellant was at fault in the creation of the overpayment for the period October 27, 2019 through May 9, 2020, thereby precluding waiver of recovery of the overpayment.

²³ *Id.* at § 10.433(b); *J.C.*, Docket No. 19-0911 (issued March 25, 2021); *Duane C. Rawlings*, 55 ECAB 366 (2004).

²⁴ *See G.Z.*, Docket No. 16-0892 (issued May 19, 2017).

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2022 decision of the Office of Workers' Compensation Programs is reversed in part, affirmed in part, and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 9, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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