U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSE CAIN and U.S. POSTAL SERVICE,
POST OFFICE, Southeastern, PA

Docket No. 98-1723; Submitted on the Record;
Issued September 1, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited her right to compensation under 5 U.S.C § 8106(b) in the amount of $11,710.00 for the period August 30, 1994 through January 29, 1995 because she knowingly failed to report earnings; (2) if so, whether an overpayment in the amount of $11,710.00 was created; (3) whether the Office properly found that appellant was not without fault in the creation of the overpayment, such that recovery of the overpayment was not subject to waiver; and (4) whether the Office properly required recovery of the overpayment by withholding $500.00 every 4 weeks from her continuing compensation.

The Office accepted that on January 25, 1989 appellant, then a 28-year-old distribution clerk, sustained lumbosacral strain, a chronic pain syndrome and a consequential fracture of her right foot while lifting a sack of mail. It also accepted that, thereafter, appellant underwent a laminectomy with spinal fusion, causally related to her employment injuries. Appellant stopped work, was placed on the periodic rolls and received appropriate compensation benefits for wage loss due to temporary total disability.

On January 29, 1995 appellant completed a Form CA-1032 indicating that she had not worked in any capacity,[1] including paid employment for an employer, self-employment, or volunteer work, during the preceding six months, the period of time covered by the form.[2]

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[1] The Form CA-1032 advised appellant to report "all self-employment or involvement in business enterprises," including but not limited to "providing services in exchange for money, goods or other services" including such activities as "child care, odd jobs, etc.," even if her "activities were part time or intermittent."

[2] Although the Form CA-1032 signed on January 29, 1995 covered the previous 15-month period, as appellant had previously submitted a CA-1032 dated August 29, 1994, the Office determined that the period covered by the January 29, 1995 CA-1032 began August 30, 1994 and ran through January 29, 1995.

In a November 9, 1995 investigative memorandum, provided to the Office on November 20, 1995, the postal inspection service documented that appellant had worked at a day care center, played volleyball with the "Setters" volleyball team and engaged in other activities which were beyond her supposed physical restrictions. The investigative memorandum noted that Ms. Janet Ward, owner and manager of Magic Moments for Children Day Care Center was interviewed and advised that appellant worked on an "as needed" basis as a substitute teacher's aide and was paid $5.50 per hour. Ms. Ward stated that when appellant helped out, she supervised the four-year-old children, that she would use appellant if one of her regular aides could not report for work, that she would call appellant and ask her if she wanted to work on a specific day and that she solicited appellant's help because she knew that appellant was home all day and did not work. She stated that the money appellant earned was applied to her child's tuition fee. Ms. Ward also provided time cards disclosing that appellant worked a total of 71.5 hours between October 13, 1994 and January 3, 1995 and between 5 and 29 hours per week. She noted that appellant's daily routine was to put out breakfast or put out snacks for the children and clean up afterward and that her duties included general supervision, assisting children to the bathroom, getting snacks, supervising play time, and assisting children in their activities with arts and crafts.[3] The investigative memorandum also indicated that surveillance of appellant's activities was conducted on several occasions between November 15, 1994 and April 29, 1995, which indicated appellant running, kicking, tossing, dribbling, punting and head butting while playing kickball/soccer with children, and lifting children, bending, squatting, pushing and pulling the children on swings while working at the day care center. The surveillance revealed appellant supervising children, lifting and carrying a child, leading children in exercise or play and escorting children into the day care center. The surveillance further revealed that appellant was observed on several occasions driving and running errands as well as carrying furniture. Photographs taken of these activities were submitted to the record.

On February 28, 1997 the Office determined that appellant forfeited her entitlement to compensation for the period of August 30, 1994 through January 29, 1995, the period covered by the January 29, 1995 Form CA-1032.[4]

[3] In a November 6, 1995 interview with a postal inspector, appellant denied that she worked at Magic Moments Nursery School, claiming only that she went there to observe her daughter. When advised that the nursery school manager had disclosed that appellant was a part-time substitute teacher's aid on call, appellant again denied working or even volunteering there. Appellant did admit that her daughter received a reduced rate in tuition because she donated toys and that she was in the school yard with the kids, but again denied that she worked there.

[4] On January 15, 1997 an Office of Administrative Law Judges' decision found that appellant was guilty of filing a false claim under the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801(a)(3) and was liable to the employing establishment for penalties and the costs of investigation and litigation in the amount of $11,352.00. The evidence as adduced at the January 15, 1997 administrative law hearing demonstrated that the tuition rate for appellant's daughter was $76.00 per week, plus $4.00 to attend a gym class, that the tuition agreement required that the full tuition be paid, whether or not the child missed a scheduled day, that appellant paid tuition by check every two weeks, that canceled checks showed that between October 18, 1994 and January 9, 1995 the amount of tuition appellant paid varied and that appellant and Ms. Ward agreed that appellant would receive credit towards her daughter's tuition, as she told Ms. Ward that she could not accept a paycheck because it might affect the Federal Employees' Compensation Act benefits she was receiving.

On March 13, 1997 the Office made a preliminary determination that an overpayment existed based upon the fact that forfeiture of all compensation payments received for the period August 30, 1994 through January 29, 1995 had been declared. The overpayment was calculated to be $11,710.00. The Office made a preliminary finding that appellant was at fault in the creation of the overpayment, as she knowingly omitted information on wages earned during the period in question on the January 29, 1995 Form CA-1032.

Appellant disagreed with the forfeiture determination and the finding of fault and she requested an oral hearing.

The hearing was held on September 17, 1997 at which appellant testified. Appellant claimed that she never was an employee of Magic Moments Day Care Center, that she helped out occasionally at the center but never received payment for her services and did not help out frequently or consistently enough to be considered a volunteer worker. With respect to the tuition reduction she received for her daughter, appellant claimed: "Janet [the manager] would tell on Fridays what my check would be on Monday -- what amount was due and I had, the only thing I could understand was that I had donated toys and snacks and -- I mean, I never asked her to lower my tuition.... She would just tell me what to pay and that [i]s what I would write my check for." Appellant claimed that she donated toys to the center but never asked for anything in return. She testified, with respect to what she did at the center: "I was there to watch my daughter's education and if the child asked me to help him go to the potty, I would take him, or if they asked me to help them get something down, like a bag of chips or something, I would hand it to them.... Occasionally, they [woul]d be having an art class and they would ask me what I thought, or could I help somebody paste something and I would do so."

By decision dated February 13, 1998, the hearing representative affirmed the February 28, 1997 decision finding that an overpayment had been created in the amount of $11,710.00 because appellant had forfeited her entitlement to monetary compensation benefits for the period August 30, 1994 through January 29, 1995 on the grounds that she knowingly omitted reporting earnings on the Form CA-1032 for that period. The hearing representative further found that appellant was not without fault in the creation of that overpayment as she failed to furnish information that she knew or should have known was material, such that waiver of recovery of the overpayment was not possible. The hearing representative noted that, as appellant's family monthly income was at least $5,900.00 per month and her family's ordinary and necessary living expenses were only $4,100.00 per month, appellant's family had $1,800.00 excess income from which to recover an overpayment. The hearing representative determined that the overpayment would be recovered by withholding $500.00 every 4 weeks from appellant's continuing compensation benefits.

The Board finds that the Office properly determined that appellant forfeited her right to compensation under 5 U.S.C. § 8106(b) in the amount of $11,710.00 for the period August 30, 1994 through January 29, 1995 because she knowingly failed to report earnings.

Section 8106(b) of the Act[5] states in pertinent part:

[5] 5 U.S.C. § 8106(b) (1974).

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.... An employee who--
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> > (1) fails to make an affidavit or report when required; or
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> > (2) 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. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section."[6]

In the present case, the Office properly determined that, in her January 29, 1995 Form CA-1032 appellant knowingly omitted any mention of her earnings at the Magic Moments for Children Day Care Center for the period October 13, 1994 through January 3, 1995. Although the Form CA-1032 signed on January 29, 1995 covered the previous 15-month period, as appellant had previously submitted a CA-1032 dated August 29, 1994, the Office properly determined that the period covered by the January 29, 1995 CA-1032 began August 30, 1994 and ran through January 29, 1995.

Although appellant denied that she worked at the day care center or had any earnings during the period identified, the owner/manager of that establishment, Ms. Ward, indicated that appellant worked on an "as needed" basis as a substitute teacher's aide and was paid $5.50 per hour, which was applied to her child's tuition fee. Ms. Ward provided time cards indicating that appellant worked a total of 71.5 hours between October 13, 1994 and January 3, 1995 and between 5 and 29 hours per week and indicated that when appellant helped out, she supervised the four-year-old children, that she would use appellant if one of her regular people could not report for work and that she would call appellant and ask her if she wanted to work on a specific day. Ms. Ward indicated that appellant's daily routine when working with the four year olds was to put out breakfast or put out snacks for the children and clean up afterward and that her duties included general supervision of children and assisting children to the bathroom, getting snacks, supervising play time and assisting children in their activities with arts and crafts.

In analyzing whether a claimant has earnings or wages during a defined period, wages are defined as every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses, and reasonable value of subsistence, board, rent, housing, lodging, payment in kind, tips, reimbursed

[6] While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and, therefore, a statutory provision about such earnings would be meaningless. 24 ECAB at 260.

expenses and any other similar advantages or valuable consideration, including tuition credit, received from the individual's employer or directly with respect to work for him or her.[7]

In this case, the evidence includes the January 15, 1997 administrative judge's finding that the tuition rate for appellant's daughter was $76.00 per week, plus $4.00 to attend a gym class, that the tuition agreement required that the full tuition be paid, whether or not the child missed a scheduled day, that appellant paid tuition by check every two weeks. Canceled checks showed that between October 18, 1994 and January 9, 1995 the amount of tuition appellant paid varied significantly and that Ms. Ward agreed that appellant would receive credit towards her daughter's tuition, as she told Ms. Ward that she could not accept a paycheck because it might affect the compensation benefits she was receiving.

Appellant acknowledged at the hearing that she helped out occasionally at the center, that if the child asked her to help him go to the potty, she would take him, or if they asked her to help them get something down, she would hand it to them, that when they were having an art class and they asked her to help, she would and that with respect to the tuition reduction she received for her daughter, Ms. Ward would tell on Fridays what her reduced tuition payment would be on Monday and that amount was what for which she would write her check.

The Board finds that the employer testimony of record, the testimony and conclusions from the administrative law hearing and appellant's testimony during the Office hearing, is substantial evidence which supports: (1) the fact that appellant received a significant advantage and valuable consideration for services rendered, in the form of tuition reduction over an 11-week period; (2) that this tuition reduction in varying amounts every two weeks was not as a result of an incident of toy donation, but was contingent upon how many hours appellant had worked at the day care center the previous two weeks; and (3) that appellant understood that she worked for valuable consideration, a reduction in her child's tuition fee, for which reporting on her CA-1032 was required. Accordingly, the Board finds that appellant knowingly omitted earnings that she received for her efforts at the day care center, such that she must forfeit her right to compensation for the period covered by the January 29, 1995 Form CA-1032.

The Board finds that the forfeiture resulted in an overpayment in the amount of $11,710.00 The record reveals that appellant forfeited her right to compensation benefits in the amount of $11,710.00 for the period August 30, 1994 through January 29, 1995 as she knowingly failed to report earnings during this period. Thus, the Board finds that based on appellant's forfeiture of compensation for this period, an overpayment in the amount of $11,710.00 was created.

The Board further finds that the Office properly found that appellant was not without fault in the resulting overpayment, such that recovery of the overpayment was not subject to waiver.

[7] *See Barbara L. Kanter*, 46 ECAB 165 (1994); *Iris E. Ramsey*, 43 ECAB 1075 (1992) (appellant rode in cab with her trucker husband and drove the truck to relieve him while traveling cross country; appellant also sold home-painted and fired ceramic yard ornaments).

Section 8129(a) of the Act[8] 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. The only exception to this requirement is a situation which meets the test 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 the Act or would be against equity and good conscience."[9] Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations provide 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 the individual knew or should have known to be incorrect; or
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> (2) Failed to furnish information which the individual knew or should have known to be material; or
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> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[10]

In this case, the Office applied the second standard in determining that appellant was at fault in creating the overpayment. The Form CA-1032 contained instructions which advised appellant to report "all self-employment or involvement in business enterprises," including but not limited to "providing services in exchange for money, goods or other services" including such activities as "child care, odd jobs, etc.," even if her "activities were part-time or intermittent." As appellant has admitted that she knew she was receiving a tuition break for her daughter in exchange for her services at the day care center, the Board finds that she should have known that this valuable consideration was material and had to be reported on the CA-1032 form. As she failed to report this material information, the Board finds that the Office correctly determined that appellant was not without fault in the overpayment creation.

The Board also finds that the Office properly required recovery of the overpayment by withholding $500.00 every 4 weeks from her continuing compensation.

The Office's implementing regulations at 20 C.F.R. § 10.321(a) provide that whenever an overpayment of compensation has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent compensation payments

[8] 5 U.S.C. §§ 8101-8193.

[9] 5 U.S.C. § 8129(b).

[10] 20 C.F.R. § 10.320(b).

having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances and other relevant factors, such that any resulting hardship upon the individual is minimized.[11]

In the instant case, the hearing representative carefully considered appellant's family finances and determined that her family had, after payment of all ordinary and necessary living expenses, at least $1,800.00 excess income from which to recover an overpayment. The hearing representative determined that the overpayment would be recovered by withholding $500.00 every 4 weeks from appellant's continuing compensation benefits. As the hearing representative gave due regard to the relevant factors cited in 20 C.F.R. § 10.321(a), the Board finds that he did not abuse his discretion in setting the rate of adjustment in this case.

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 13, 1998 is hereby affirmed.

Dated, Washington, D.C.
September 1, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[11] *See Lucille Peacock*, 42 ECAB 470 (1991).