U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWIN C. WHITLOCK and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, Va.

Docket No. 96-352; Submitted on the Record;
Issued May 17, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant forfeited his right to monetary compensation from December 8, 1991 through March 8, 1993, thereby creating an overpayment of compensation; (2) whether appellant was at fault in the creation of overpayments from December 8, 1991 through March 8, 1993, from March 9 to October 16, 1993 and from February 6 to April 2, 1994; and if so, (3) whether the Office of Workers' Compensation Programs properly set the rate of recovery for the overpayment.

Appellant, a general foreman, sustained an injury in the performance of duty on May 19, 1986. The Office accepted his claim for the conditions of acute lower back strain and herniated nucleus pulposus at the L4-5 level. Appellant underwent two surgical procedures and sustained recurrences of disability in 1987 and 1991. He began receiving periodic compensation for temporary total disability on February 15, 1992. The Office notified appellant that to avoid an overpayment of compensation he was to notify the Office immediately when he returned to work. The Office advised appellant to return any compensation check received after he returned to work.

On March 1, 1993 the Office received an undated statement from George N. May, Head of the Human Resource Office of the employing establishment's Employee Services Division, advising that appellant was a pastor of the Indiana United Methodist Church and that he was enrolled in Virginia Weslyan College. Mr. May stated that he spoke to appellant on October 30, 1992, advised appellant that entitlement to compensation benefits was offset "penny for penny" with any income received from employment, and asked whether appellant had any income from the church. Appellant replied in the negative, that his income was being placed in a trust fund by the church, that it was going into a savings account where he could not get it, and that he would not be able to get it if he did not get his election between compensation and retirement benefits straight. Mr. May stated that Darlene Wylie, who also worked in the Employee Services Division, witnessed the conversation.

On March 8, 1993 appellant completed a Form CA-1032 indicating that he had no employment during the prior 15 months.

In October 1993 the Office received information from Dr. Donald H. Traylor, the District Superintendent of the Portsmouth District of the Virginia Conference of the United Methodist Church, who indicated that appellant was serving as a part-time lay pastor of the Indiana United Methodist Church and received a stipend of $10,482.00 for the calendar year 1993, of which $4,642.00 was budgeted for housing, $2,321.00 for travel and $3,519.00 for hospitalization. The District Superintendent also indicated that appellant had a current pension of $315.00.

In a letter dated November 18, 1993, appellant explained that he decided to go to college so that he might pursue a career in some other area as he was no longer physically able to do ship repair. He stated that his minister suggested that he could pursue his education by becoming a lay minister. The church agreed to pay his college tuition in return for his being at the church on Sunday mornings. His educational allowance went to pay tuition, he stated. The church did not pay a salary. The paperwork was done according to conference regulations, but the church could not afford even the minimum salary required to be in the conference, nor did the church pay any medical or retirement benefits. Appellant stated that his educational expenses were half of what they would have to come up with to pay a real minister. The church did not pay any taxes or social security because it simply could not afford to hire anyone to serve as minister, "so they get by with a student and, very gratefully to them, help a student get an education."

In a decision dated April 18, 1994, the Office adjusted appellant's monetary compensation based on his actual earnings of $10,482.00 as a minister in 1993. The Office notified appellant of the net compensation he would be receiving every four weeks.

In a decision dated April 18, 1994, the Office found that appellant forfeited his right to monetary compensation from December 8, 1991 through March 8, 1993 "because he has failed to report his earnings for that period" as required by 5 U.S.C. § 8106(b) of the Federal Employees' Compensation Act. In the attached memorandum, the Office found that appellant's March 8, 1993 signature, his reference to the Form CA-1032 and his completion of the items on the form "is conclusive enough to establish that he read the form and knowingly omitted information regarding his earnings."

In a preliminary decision dated October 28, 1994, the Office found that an overpayment occurred because of the forfeiture and that appellant was at fault in the matter because he advised the Office with his Form CA-1032 that he did not work and received no wages while the evidence supported that he was in receipt of wages.

In preliminary determinations dated October 31, 1994, the Office found that two additional overpayments occurred -- from March 9 to October 16, 1993 and from February 6 to April 2, 1994 -- when appellant received compensation for total disability while he was only partially disabled as a result of his capacity to earn as a minister. The Office found that he was at fault in the matter of the former overpayment because he knowingly accepted payments that he knew he was not entitled to, and that he was at fault in the matter of the latter overpayment because he was advised to return all checks if he returned to work and was aware that he was not entitled to total disability.

Appellant requested a hearing, which was scheduled for June 7, 1995.

The Office received a memorandum from the U.S. Naval Investigative Service concerning a January 3, 1994 interview of Dr. Traylor, who stated that appellant held the position of pastor since June 1992 and explained that appellant was paid in equal monthly sums, that the total entitlement was broken down into three allowance categories for housing, travel and hospitalization that were established by appellant's predecessor, and that the categories could be renamed but that appellant would receive the same amount each month. Dr. Traylor stated that the church did not withhold taxes from the salary but instead provided appellant with an Internal Revenue Service Form 1099. It was Dr. Traylor's understanding that appellant was attending college to obtain a degree in theology and to be later ordained as a Methodist minister.

The Office received another memorandum from the U.S. Naval Investigative Service concerning a January 26, 1994 interview of Mr. May who referred to a memorandum that he stated he wrote on October 30, 1992 following a conversation he had with appellant, consistent with the undated statement received by the Office on March 1, 1993.

The Office received another memorandum from the U.S. Naval Investigative Service concerning a January 26, 1994 interview of Darlene J. Wylie, an Employee Relations Assistant with the employing establishment, who stated that she overheard the conversation between appellant and Mr. May on October 30, 1992. She remembered appellant stating that approximately $2,300.00 in compensation was in a trust fund and was not considered income because he was not receiving it, and that he would not be able to receive the money placed in the trust fund unless he selected disability retirement.

The Office received another memorandum from the U.S. Naval Investigative Service concerning an October 19, 1994 interview of appellant. Appellant acknowledged receiving money from the Indiana United Methodist Church in June 1992 of approximately $800.00 to $1,000.00 per month and explained that he used the funds provided by the church for education expenses, whereby he placed the money in a savings account and paid tuition and other expenses when they came due. Appellant stated that he did not consider the funds received from the church to be a salary, rather he considered it money solely for the use of his educational expenses. He noted that he attempted to have the church pay Virginia Weslyan College directly, but the college refused and requested that the money be deposited directly into his account whereby appellant made the payments. He stated that he was confused by the Form CA-1032 and unsure of how to report the money received for his educational expenses. Appellant stated that he therefore contacted the office of his congressional representative and was advised that the monies received from the church were considered an education allowance, not a living expense and therefore need not be reported as income. Appellant stated that, based on this advice, he answered no to the question of having received income from employment or self-employment. Appellant also stated that he did not recall mentioning a salary from the church being placed into a trust fund that he could not access.

The Office received another memorandum from the U.S. Naval Investigative Service concerning an October 19, 1994 interview with Alan G. Derby, a former employee of appellant's congressman who had met with appellant and his wife. Mr. Derby stated that he had interceded on appellant's behalf in the processing of his workers' compensation claim. In response to

appellant's contention that Mr. Derby had advised him not to report income from the Indiana Methodist Church, Mr. Derby disagreed, stating that the congressman's office was very careful not to interpret the policies of government agencies. Mr. Derby stated that he had prior experience with the Office and was familiar with the policies and restrictions as related to entitlements; therefore, he stated, he would never have made such a recommendation. Mr. Derby stated that he was not aware of appellant's outside income from the church, and that if he had been aware he would have specifically told appellant to report the income. Mr. Derby stated that he never "advised" appellant on Office matters, rather he merely wrote letters to expedite the process of moving appellant from the temporary to the permanent disability rolls.

At the hearing on June 7, 1995, appellant testified that Mr. Derby had informed both him and his wife that the money he would be receiving would be for education, and that this was what the church based his income on. How he used it, appellant stated, was up to him, but it was a reimbursement for education. Appellant stated that he had written three letters to the Office trying to explain the reason he had a job, which was to pay for the education, the gas going to and from class, books and classroom expenses. He stated that every time he received a letter he tried to explain that he was working and tried to be as open and as honest as possible, and every time he got a letter "showing whether we were to pay this or shouldn't pay it or report this or not to report it, we were to go to [his congressman's] office as well as the retirement branch in the Naval Shipyard and explain to them." Appellant explained that he felt that part of the problem was the way the church was listing the stipend on its forms, showing housing and health insurance. It was a case, he stated, where some older people had done business that way for 50 years and they were not willing to change the letterhead on their paperwork. Appellant testified that he did not try to hide this from anybody: "Everybody in the Office and Norfolk Naval Shipyard and [the congressman's] office understood that I took a part-time student pastor's position to get me through college and pay our bills so that we could get through and pay those bills that we owed." He stated that if he told the Office wrong, it was an oversight or a misunderstanding. "It was not done intentional or to mislead anybody. It was based on information that we were told."

Asked to make a comment on the statement Mr. Derby disagreed with appellant's characterization of their meeting.

On the issue of fault, appellant stated that any fault on his part was not done intentionally or deliberately, that his fault was that he listened to other people and tried to do what they told him to do. If he was at fault, he stated, it was because he was misled. Appellant explained that the church would not have given him a job had he not agreed to go to school.

In a decision dated August 10, 1995, the Office found that appellant forfeited his right to compensation because he knowingly failed to report earnings from December 8, 1991 to March 8, 1993. The Office found that because appellant intelligently questioned whether he needed to report his allowance from the church, he had knowledge that this allowance was income and should have been reported. With respect to all of the overpayments, the Office found that appellant was at fault because he either knew or reasonably should have known that the money he was accepting was an incorrect amount and not his to keep. Noting that appellant's monthly income exceeded expenses by $850.00, the Office determined that $500.00

deducted from appellant's continuing compensation would leave sufficient income for his necessary living expenses.

The Board finds that appellant forfeited his right to monetary compensation from December 8, 1991 through March 8, 1993, thereby creating an overpayment of compensation.

Section 8106(b) of the Act provides in pertinent part:

"An employee who --

(1) fails to make an affidavit or report when required; or

(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."[1]

Regulations further define this section of the Act as follows:

"Affidavit or report by employee of employment and earnings."

* * *

"Earnings from employment referred to in this section or elsewhere in this part means gross earnings or wages before any deduction and includes the value of subsistence, quarters, reimbursed expenses, or any other advantages received in kind as part of the wages or remuneration."[2]

The Board notes that wages have been defined as follows:

"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 board, rent, housing, lodging, payments in kind, tips, and any other similar advantage received from the individual's employer or directly with respect to work for him."[3]

On the Form CA-1032 he completed on March 8, 1993, appellant represented that he had no employment during the prior 15 months. The record establishes, however, that he received a stipend or allowance from the Indiana United Methodist Church beginning June 1992 in

[1] 5 U.S.C. § 8106(b).

[2] 20 C.F.R. § 10.125(c).

[3] BLACK'S LAW DICTIONARY 1416 (5th ed. 1979).

exchange for working as a part-time lay minister. The Board finds that this stipend or allowance constitutes reimbursed expenses, if not gross earnings or wages, and that appellant should have reported this on his Form CA-1032.

To establish forfeiture under 5 U.S.C. § 8106, however, it is not enough to show that there were unreported earnings. The record must also establish that the claimant "knowingly" omitted or understated any part of his earnings. The Board has noted that forfeiture is a penalty, and as such the penalty provision of section 8106 must be narrowly construed.[4]

Appellant explained that he was confused about how to report the money he received from the church and that he solicited the recommendation of a congressional aide, Mr. Derby, who advised that the money was considered an education allowances, not living expense, and therefore need not be reported as income on the Form CA-1032. It was based on Mr. Derby's interpretation of income and allowances, appellant stated, that he answered no to the question of having received income from employment or self-employment.

In contrast, Mr. Derby stated that he did not make such a recommendation. He stated that he was not aware of appellant's outside income from the church, and that if he had been aware he would have specifically told appellant to report the income. He added that he did not advise appellant on Office matters, but assisted in getting the compensation claim processed.

The Board finds that appellant, a practicing minister and college student, was sophisticated enough to understand the clear language and intent of the Form CA-1032 he completed on March 8, 1993. When he represented on that form that he had no employment during the prior 15 months, he knowingly omitted the earnings he received for his services as a part-time lay minister commencing June 1992. Pursuant to section 8106(b) of the Act, appellant forfeited his right to compensation from December 8, 1991 through March 8, 1993, the period for which the report was required. The Board will affirm the Office's decision on the issue of forfeiture and the overpayment resulting therefrom.

The Board also finds that appellant was at fault in the creation of overpayments from December 8, 1991 through March 8, 1993, from March 9 to October 16, 1993 and from February 6 to April 2, 1994.

Section 8129 of the Act provides that an overpayment of compensation shall be recovered by the Office unless "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."[5] Thus, an overpayment cannot be waived by the Office unless appellant was without fault.[6]

[4] *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

[5] 5 U.S.C. § 8129.

[6] *See, e.g., Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

Section 10.320 of the implementing federal regulations provides the following:

> "In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition. 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
> >
> > (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."[7]

The Office found that overpayments occurred from December 8, 1991 through March 8, 1993, from March 9 to October 16, 1993 and from February 6 to April 2, 1994 when appellant received compensation for temporary total disability but was working as a minister and receiving compensation for his services. The Office found that appellant was at fault in the matter of these overpayments because he either knew or reasonably should have known that the money he was accepting was an incorrect amount and not his to keep. The record supports that in 1992, when appellant began receiving periodic monetary compensation for temporary total disability, the Office advised appellant that to avoid an overpayment of compensation he was to notify the Office immediately when he returned to work. The Office further advised appellant to return any compensation check received after he returned to work. Appellant, therefore, should have been expected to know that he was not entitled to compensation for temporary total disability after he began working as a part-time lay minister and his acceptance of continuing compensation for temporary total disability under these circumstances is sufficient to support the Office's finding of fault.

As appellant is at fault in the creation of the overpayments that occurred from December 8, 1991 through March 8, 1993, from March 9 to October 16, 1993 and from February 6 to April 2, 1994, recovery of the overpayments is not subject to waiver.

The Board also finds that the Office properly set the rate of recovery for the overpayment.

Office regulations provide:

> "Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual,

[7] 20 C.F.R. § 10.320(b).

and any other relevant factors, so as to minimize any resulting hardship upon such individual."[8]

In its August 10, 1995 decision, the Office noted the factors set forth above and took into consideration appellant's financial status as reported by him in an overpayment recovery questionnaire and in his testimony at the hearing. Noting that monthly income exceeded monthly expenses by $850.00, the Office found that appellant could repay at the monthly rate of $500.00 and still maintain sufficient income for necessary living expenses. As the Office properly took into consideration the relevant factors cited in 20 C.F.R. § 10.321(a), the Board finds that the Office properly set the rate of recovery in this case.[9]

The August 10, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
May 17, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[8] 20 C.F.R. § 10.321(a).

[9] *See Robert C. Schenck*, 38 ECAB 531 (1987).