

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

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**JANNIE M. JOHNSON, Appellant**

**and**

**DEPARTMENT OF LABOR, OFFICE OF  
ASSISTANT SECRETARY FOR  
ADMINISTRATION & MANAGEMENT  
Chicago, IL, Employer**

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**Docket No. 04-466  
Issued: July 8, 2004**

*Appearances:*  
*Jannie M. Johnson, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On December 15, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated November 4, 2003 finding an \$18,167.28 overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment in this case.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant received an \$18,167.28 overpayment of compensation for the period September 1, 2000 to September 8, 2001; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding a waiver of recovery of the overpayment

## **FACTUAL HISTORY**

On March 6, 1996 appellant, then a 40-year-old clerk, filed an occupational disease claim alleging that factors of her federal employment caused her to fall. On June 1, 1996 appellant elected disability retirement. On September 6, 2000 her claim was accepted for aggravation of post-polio syndrome. Appellant elected to receive compensation benefits and she was placed on total temporary disability effective September 1, 2000. The record contains a Form 1032 signed by appellant on September 18, 2000 indicating that she received no income during the previous 15 months. The form also explained that penalties might apply for failure to report all work activities.

On May 14, 2001 appellant was released to return to light duty. On June 20, 2001 the employing establishment offered appellant a job that the Office found to be suitable. In a July 21, 2001 letter, appellant refused the offer noting that she already had a job in the private sector. In an August 13, 2001 letter, the Office sent appellant a Form CA-1032 and requested information regarding her earnings for the previous 15 months. Appellant did not respond. On September 8, 2001 her compensation was suspended. An April 25, 2003 investigative report noted that appellant started work as a receptionist on July 16, 2001 but failed to report her earnings to the Office.

In an August 5, 2003 letter, the Office preliminarily found that appellant received an overpayment of \$18,167.28 and was not without fault in creating the overpayment as she failed to report her earnings from employment. The Office found that during the period of September 1, 2000 to September 8, 2001 appellant earned \$28,140.06 in salary as a receptionist while receiving \$18,167.28 in compensation from the Office. Appellant submitted an overpayment questionnaire that showed her monthly income was \$980.00 and her expenses totaled \$1,185.00 with outstanding credit card and loan debts of \$10,500.00. Appellant indicated that she had no assets, savings or personal property. In a November 4, 2003 decision, the Office finalized the overpayment determination, finding that appellant received an \$18,167.28 overpayment, that she was not without fault for creating it, and that she was not entitled to waiver of the overpayment.<sup>1</sup>

## **LEGAL PRECEDENT -- ISSUE 1**

Section 8116(a) of the Federal Employees' Compensation Act provides that, while an employee is receiving compensation or if she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.<sup>2</sup>

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<sup>1</sup> The Board notes that the Office received additional information from appellant on September 12, 2003. As this evidence was received after the September 4, 2003 decision, the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c). Appellant may wish to resubmit such evidence to the Office through the reconsideration process. See 5 U.S.C. § 8128; 20 C.F.R. § 10.138.

<sup>2</sup> 5 U.S.C. § 8116(a).

### **ANALYSIS -- ISSUE 1**

In the present case, appellant received compensation from the Office for the period September 1, 2000 to September 8, 2001. Appellant was not entitled to compensation for total disability because she had started work as a receptionist on July 16, 2001 but did not report her employment or earnings to the Office as required. The record contains evidence which shows that appellant received \$18,167.28 in compensation for the period September 1, 2000 to September 8, 2001. She was not entitled to receive compensation because she was working for a private employer during the same period.<sup>3</sup> Therefore, the Office properly determined that appellant received an \$18,167.28 overpayment.

### **LEGAL PRECEDENT -- ISSUE 2**

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 this subchapter or would be against equity and good conscience.”<sup>4</sup> No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides 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 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....”<sup>5</sup>

Section 10.433(c) of the Office’s regulations provides:

“Whether or not [the Office] 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

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<sup>3</sup> See *supra* note 2 and accompanying text. Appellant earned \$28,140.06 in salary as a receptionist during this period.

<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> 20 C.F.R. § 10.433(a).

complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."<sup>6</sup>

### **ANALYSIS -- ISSUE 2**

In the present case, the Office found appellant at fault in the creation of the overpayment based on its determination that her failure to complete a CA-1032 form and report her earnings from employment when requested constituted a failure to provide information which she knew or should have known to be material. The Board finds that appellant was at fault in creating the overpayment of compensation and, therefore, the overpayment was not subject to waiver. Appellant was aware of the requirement to report her employment income. She previously signed a CA-1032 form on a September 18, 2000 that informed her of the penalties for failing to report income. Appellant failed to return a CA-1032 form sent to her on August 13, 2001. As she completed and signed a CA-1032 form previously and there is no reason to believe that she did not understand the importance of completing such forms, the Board finds that she failed to provide information which she knew or should have known to be material to the receipt of compensation. Therefore, the Office properly determined that appellant was not entitled to waiver of the overpayment.<sup>7</sup>

### **CONCLUSION**

The Office properly found that appellant received an overpayment of \$18,167.28, that she was at fault in creating the overpayment and that therefore she was not entitled to waiver of the overpayment.

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<sup>6</sup> 20 C.F.R. § 10.433(c).

<sup>7</sup> As recovery from continuing compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *See Levon H. Knight*, 40 ECAB 658, 665 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 4, 2003 decision by the Office of Workers' Compensation Programs is affirmed.

Issued: July 8, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member