

BRB No. 94-0775 BLA

ALICE KESSLER)
(Widow of OLIVER RUNNING))
)
Claimant-Petitioner)
)
v.)
)
) DATE ISSUED: _____
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman, Denver, Colorado, for claimant.

Cathryn Celeste Helm (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (90-BLO-0117) of

¹Claimant is Alice Kessler, widow of the miner, Oliver Running, who filed an application for benefits in November 1979 and was awarded interim benefits. The miner died on March 14, 1980, and claimant received benefits from March 1, 1980,

until July 28, 1983 when Administrative Law Judge Stuart A. Levin issued a Decision and Order denying entitlement. The Board affirmed the denial of benefits, see *Running v. Consolidation Coal Co.*, BRB No. 83-2027 BLA (Feb. 26, 1986)(unpub.), and claimant was notified of an overpayment in the amount of \$13,277.00. Director's Exhibits 11, 12. Claimant sought waiver of the recovery of the overpayment, Director's Exhibit 13, and a hearing was held on April 28, 1993.

Administrative Law Judge Joel R. Williams denying waiver of the recovery of an overpayment on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge accepted the district director's determination that claimant was without fault in causing the overpayment and found that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience. Accordingly, waiver was denied pursuant to 20 C.F.R. §725.542.

On appeal, claimant contends that the administrative law judge erred in failing to find that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience. The Director, Office of Workers' Compensation Programs, (the Director) responds, urging that the case be remanded to the administrative law judge for reconsideration.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred pursuant to 20 C.F.R. §410.561c in computing the amount by which her monthly expenses exceed her income. Claimant's Brief at 4. Claimant also challenges the administrative law judge's conclusion that certain expenses were not reasonable. Claimant's Brief at 5.

The administrative law judge found that claimant's current expenses exceed her income by "about \$65 per month" which was not "significant." Decision and Order at 3. Additionally, the administrative law judge found that about one third of claimant's expenses tended to fluctuate and included items which are not necessarily reasonable living expenses. *Id.* Finally, the administrative law judge determined that it is speculative whether claimant will incur medical or nursing home expenses in the future. *Id.*

Section 410.561c(b) provides that recovery will defeat the purpose of the Act in situations where the person from whom recovery is sought needs substantially all of his current income to meet ordinary and necessary living expenses. *Potisek v. Director, OWCP*, 14 BLR 1-87 (1990)(*en banc*, Brown, J. dissenting). Claimant must show that recovery of the overpayment would deprive him or her of income required to meet expenses such as food, clothing, rent or mortgage payments, utilities, home maintenance, insurance, taxes, installment payments, medical costs, support for

others for whom claimant is legally responsible, and other miscellaneous expenses reasonably considered as part of claimant's standard of living. *Jones v. Director, OWCP*, 14 BLR 1-80 (1990)(*en banc*, Brown, J. concurring). Thus, the administrative law judge must consider whether a claimant has income or financial resources sufficient for more than ordinary or necessary needs, or is dependent on all of his or her current income for such needs.

In this case, claimant's most recent overpayment recovery questionnaire, which was submitted on April 24, 1993, lists claimant's monthly income as \$1,934.72 and her monthly expenses as \$2,109.45, a difference of \$174.73. Claimant's Exhibit 2. The administrative law judge does not explain how he computed the figure of \$65.00. Moreover, claimant's financial statement, as well as the administrative law judge's finding that claimant's expenses exceed her income, show that claimant requires at least all of her current income to meet her current and necessary living expenses. Finally, while the administrative law judge concluded that some expenses were not reasonable, he did not list the questioned expenses and determine how the deduction of these expenses reduces the overall amount of claimant's monthly expenses.

Thus, we vacate the administrative law judge's findings pursuant to Section 410.561c and remand this case for the administrative law judge to consider the financial circumstances of the entire household, *see Keiffer v. Director, OWCP*, 18 BLR 1-35 (1993); *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992); *see also McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993), and to provide specific explanations for his findings as to the amounts of claimant's current monthly income and expenses, *see Knope v. Director, OWCP*, 16 BLR 1-59 (1990); *Weis v. Director, OWCP*, 16 BLR 1-56 (1990).

Claimant next contends that the administrative law judge erred in failing to find that recovery of the overpayment would be against equity and good conscience pursuant to 20 C.F.R. §410.561d because she changed her position for the worse when during the summer of 1983 she paid \$4,000.00 in medical expenses for an ailing grandchild. Claimant's Brief at 7. Citing *Groseclose v. Bowen*, 809 F.2d 502 (8th Cir. 1987), claimant also contends that the administrative law judge failed to apply the correct legal standard in this case arising within the jurisdiction of the United States Court of Appeals for the Eighth Circuit. Claimant's Brief at 9-10.

Pursuant to Section 410.561d, the administrative law judge found that claimant did not relinquish a valuable right or change her position for the worse when she paid her husband's funeral expenses because she made this payment prior to being notified that she would receive black lung benefits. Decision and Order at 3. Further, the administrative law judge found that claimant's use of the benefits

received for ordinary expenses incurred "does not translate into the relinquishment of a valuable right or a change of her position for the worse." *Id.* The administrative law judge then stated:

There is an equitable maxim that those who seek equity must do equity. I am disturbed in this regard by the Petitioner's recent transfer of a substantial asset to adult children. There is no foundation for permitting the waiver of collection of an overpayment so that funds otherwise available may be preserved for heirs who are not shown to be legal dependents.

Decision and Order at 3-4. The administrative law judge concluded that collection of overpayment would not be against equity and good conscience.

While the administrative law judge considered the equitable nature of claimant's transfer of a substantial asset, and properly found that mere expenditure of benefits received does not mandate a finding that recovery would be against equity and good conscience, see *Hervol v. Director, OWCP*, 16 BLR 1-53 (1990), he did not apply the broader standard articulated in *Groseclose*, in which the Eighth Circuit court stated that

[n]otwithstanding the deference given to administrative interpretations, we believe that the Secretary's definition of "against equity and good conscience" is unreasonably narrow. It cannot be said that the relinquishment of a valuable right and the changing of one's position for the worse represent the only circumstances in which recoupment would be inequitable.

809 F.2d at 506. Also, the administrative law judge failed to discuss the testimony of claimant's daughter that claimant contributed \$4,000.00 for the medical care of her grandchild in reliance upon her black lung benefits. Hearing Transcript at 42; see *Potisek, supra*. Therefore, we vacate the administrative law judge's findings pursuant to Section 410.561d and remand this case for reconsideration of the relevant evidence in light of *Groseclose*.²

²We reject claimant's contention that the administrative law judge erred pursuant to Section 410.561d because claimant lacked knowledge that the payments were incorrect. Claimant's Brief at 9. The pertinent regulation contemplates a situation where benefit payments are commenced prior to a final determination of eligibility and where an administrative law judge, the Board, or a circuit court subsequently determines claimant to be ineligible for those benefits, and provides that "such payments shall be considered overpayments...." 20 C.F.R. §725.522(c); *Weis*,

supra. Similarly, we reject claimant's argument that the Director is foreclosed from collection of the overpayment for failure to consider the grounds for compromise, suspension, or termination of collection pursuant to Section 725.544. As the Director states, it is within her discretion to determine whether to collect or compromise an overpayment. See Section 725.544(a).

Accordingly, the administrative law judge's Decision and Order denying waiver of the recovery of the overpayment is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge