

BRB No. 96-0744 BLA

DORIS NELSON)
(Widow of RALPH NELSON))
)
 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 Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

James E. Lloyd (Claudon, Lloyd, Barnhart & Beal, Ltd.), Canton, Illinois, for claimant.

Eileen McCarthy (J. Davitt McAteer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (94-BLO-0033) of Administrative Law Judge Charles P. Rippey ordering the repayment of an overpayment pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969,

¹ Claimant is the surviving spouse of the deceased miner.

as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found that an overpayment had been made to claimant in the amount of \$11,544.40.² In a

² Claimant's Part B claim for survivor's benefits was initially denied by the Social Security Administration (SSA). Director's Exhibit 1. Claimant subsequently filed a request for reconsideration on September 18, 1973. *Id.* In making her request for reconsideration, claimant indicated that she had remarried on July 6, 1973. *Id.* On April 25, 1979, the SSA approved claimant's application for benefits and forwarded the file to the Department of Labor (DOL). Director's Exhibit 2.

On June 15, 1979, the DOL sent claimant an "Authorization for Payment of Benefits." Director's Exhibit 3. The DOL informed claimant that her first check would be in the amount of \$13,168.40, representing past due benefits from January 1, 1974. *Id.* The DOL, however, requested claimant to indicate if she had remarried since the filing of her survivor's claim. Director's Exhibit 4. On July 21, 1979, claimant advised the DOL that she had, in fact, remarried on July 6, 1973 and obtained a divorce on October 10, 1978. *Id.* However, the DOL ultimately paid claimant accumulated benefits from January 1, 1974. See Director's Exhibit 5.

On May 5, 1993, the DOL informed claimant that she had received an overpayment of \$11,544.40 because the DOL had erroneously paid her benefits for

series of Procedural Orders, the administrative

the time during which she was remarried. Director's Exhibit 6. In a Memorandum of Informal Conference dated January 25, 1994, the district director denied claimant's request for a waiver of recovery of the overpayment. Director's Exhibit 20.

law judge had previously rejected claimant's contention that 28 U.S.C. §2415(a) barred the Department of Labor (DOL) from seeking recovery of the overpayment. The administrative law judge, therefore, concluded that this issue was moot. Based upon a review of the documentary evidence, the administrative law judge further found that claimant was capable of repaying the amount of the overpayment. The administrative law judge, therefore, ordered claimant to repay the overpayment. On appeal, claimant argues that 28 U.S.C. §2415(a) bars the DOL from seeking to recover the overpayment. Claimant also contends that the administrative law judge erred in not granting a waiver of recovery of the overpayment. Claimant further argues that she was improperly denied the opportunity to offer testimony regarding the merits of her request for a waiver of recovery of the overpayment. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, contending that the administrative law judge properly found that collection of the overpayment was not barred pursuant to 28 U.S.C. §2415(a). The Director, however, requests that the case be remanded to allow claimant the opportunity to testify regarding the merits of her request for a waiver of recovery of the overpayment. In a reply brief, claimant reiterates her previous contentions.³

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially contends that 28 U.S.C. §2415(a) bars the DOL from recovery of the overpayment in the instant case. We disagree. Section 2415(a) provides in relevant part that:

except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later....

³ It is undisputed that claimant received an overpayment in the amount of \$11,544.40.

28 U.S.C. §2415(a).

Claimant contends that the DOL had enough information in 1979 to seek recovery and, thus, the instant action, commenced in 1993, is untimely pursuant to 28 U.S.C. §2415(a). Contrary to claimant's contention, the DOL's action to recover an overpayment is not an action for money damages within the meaning of Section 2415(a).⁴ *Cf. King v. Railroad Retirement Board*, 981 F.2d 365 (8th Cir. 1992) (holding that a Railroad Retirement Board's action to recover an overpayment was not an action for money damages within the meaning of 28 U.S.C. §2415). We, therefore, affirm the administrative law judge's finding that the DOL is not precluded by 28 U.S.C. §2415 from seeking recovery of the overpayment in the instant case.

Claimant also argues that she is entitled to a waiver of recovery of the overpayment in the instant case. In order to establish a waiver of recovery of an overpayment, a claimant has the burden of establishing that recovery of the overpayment would defeat the purpose of Title IV of the Act⁵ or would be against

⁴ We also note that an overpayment does not become a claim or a debt within the meaning of the Debt Collection Act until a determination that it will not be waived has been made. *Jones v. Director, OWCP*, 14 BLR 1-80 (1990) (*en banc*) (Brown, J., concurring).

⁵ Recovery of an overpayment defeats the purpose of Title IV of the Act if it deprives a claimant of funds needed to meet ordinary and necessary living expenses. 20 C.F.R. §410.561c; *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992).

equity and good conscience.⁶ See 20 C.F.R. §725.542; 20 C.F.R. §§410.561c, 410.561d; *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992).⁷

In the instant case, the administrative law judge did not address sufficiently the merits of whether claimant was entitled to a waiver of recovery of the overpayment. See Decision and Order at 2. Moreover, the administrative law judge erred in finding that the issue of claimant's ability to repay the overpayment was not properly before him. *Id.* The issues to be resolved by the administrative law judge are confined to those identified as contested by the district director or raised in writing before the district director. See 20 C.F.R. §725.463(a); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992). The list of contested issues forwarded to the administrative law judge by the district director in the instant case includes whether claimant is entitled to a full or partial waiver of recovery of the overpayment pursuant to 20 C.F.R. §725.542. Director's Exhibit 24. Consequently, we remand the case to the administrative law judge to address whether claimant can establish that recovery of the overpayment would defeat the purpose of Title IV of the Act or would be against equity and good conscience. See 20 C.F.R. §725.542; 20 C.F.R. §§410.561c, 410.561d; *Ashe*, *supra*.

⁶ Recovery of an overpayment is against equity and good conscience if a claimant has relinquished a valuable right or changed her position for the worse in reliance upon the incorrect payment. 20 C.F.R. §410.561d; *Ashe*, *supra*.

⁷ Claimant must also demonstrate that she was without fault in the creation of the overpayment. However, in the instant case, the Director does not contest the fact that claimant was without fault in the creation of the overpayment.

Claimant also contends that the administrative law judge erred in not providing her with an opportunity to testify. Had the sole issue in the instant case been whether the DOL was precluded from pursuing a recoupment of the overpayment pursuant to 28 U.S.C. §2415(a), we agree with the administrative law judge that claimant's testimony would have been of no value to the administrative law judge in addressing this issue. However, claimant also has consistently sought a waiver of recovery of the overpayment. The United States Supreme Court, in addressing the procedures necessary when recoupment of overpayments is sought pursuant to Section 204(a) of the Social Security Act,⁸ held that prior to the recovery of an overpayment, a beneficiary has a right to an oral hearing on the issues of fault and whether recovery would defeat the purpose of the Act or be against equity and good conscience.⁹ *Califano v. Yamasaki*, 442 U.S. 682 (1979); see also *Potisek v. Director, OWCP*, 14 BLR 1-87 (1990) (*en banc*) (Brown, J. dissenting); *Jones, supra*. Consequently, the administrative law judge, on remand, is instructed to provide claimant with an opportunity to testify regarding the merits of her request for a waiver of recovery of the overpayment.

Accordingly, the administrative law judge's Decision and Order ordering the repayment of an overpayment is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

⁸ The Black Lung Act, through incorporation of the Social Security Act, confers jurisdiction on administrative law judges and the Board to decide the question of waiver and recovery of Black Lung benefits. This authority is derived from Section 204 of the Social Security Act, 42 U.S.C. §404(a), which is made applicable to the Federal Coal Mine and Safety Act by 30 U.S.C. §923(b). Section 204(a) of the Social Security Act requires the Secretary to recover overpayments either by decreasing the amount of ongoing benefits a beneficiary will receive or by requiring the overpaid beneficiary to refund the amount by which he was overpaid.

⁹ The United States Supreme Court explained that:

Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale.

Califano v. Yamasaki, 442 U.S. 682, 697 (1979).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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An action by the Department of Labor to recover an overpayment is not an action for money damages within the meaning of 28 U.S.C. §2415(a). Section 2415(a) provides that an action for money damages brought by the United States which is founded upon an express or implied contract is barred unless the complaint is filed within six years after the right of action accrues. Thus, the Board held that the Department of Labor was not precluded by 28 U.S.C. §2415 from seeking recovery of the overpayment in this case. *Nelson v. Director, OWCP*, BLR 1- , BRB No. 96-0744 BLA (Jan. 29, 1997).