



BRB No. 16-0220 BLA

KEVIN CLINE)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 02/16/2017
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Waiver of Overpayment of Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Jeffrey S. Goldberg (Maia Fisher, Associate Solicitor of Labor; 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, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Waiver of Overpayment of Benefits (2014-BLO-00005) of Administrative Law Judge Richard A. Morgan issued with respect to a claim filed on June 17, 2011, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant received an overpayment in the amount of \$15,013.20¹ and,

¹ The administrative law judge noted that an overpayment occurred because claimant received interim benefits in response to an initial finding of entitlement by the

based on the concession of the Director, Office of Workers' Compensation Programs (the Director), further found that claimant was without fault in the creation of the overpayment. The administrative law judge determined, however, that because claimant provided no information or documentation about his financial circumstances, he failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. Thus, the administrative law judge denied claimant's request for waiver of recovery of the overpayment and ordered claimant to reimburse the Black Lung Disability Trust Fund (the Trust Fund) in the amount of \$15,013.20.

On appeal, claimant challenges the administrative law judge's denial of the waiver, asserting that he was not afforded a full opportunity to present evidence in support of his case. In addition, claimant requests that the case be assigned to a new administrative law judge on remand. The Director responds, urging the Board to affirm the administrative law judge's decision.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Where a claimant is without fault in the creation of an overpayment, the claimant may obtain waiver of recovery of the overpayment by demonstrating that recovery would either defeat the purpose of the Act or would be against equity and good conscience. 20 C.F.R. §725.542; *Ashe v. Director, OWCP*, 16 BLR 1-109, 1-111 (1992). Recovery defeats the purpose of the Act if it deprives claimant of income required for ordinary and necessary living expenses. *See* 20 C.F.R. §725.543, incorporating 20 C.F.R. §§404.506-404.512; *Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-39 (1993). Recovery is against

district director, but was subsequently found not to be entitled to benefits by the administrative law judge. *See* Decision and Order at 2; Director's Exhibits 2, 3. The administrative law judge further noted that the March 19, 2013 Decision and Order Denying Claim by Reason of Abandonment and Cancelling Hearing was not appealed. Decision and Order at 2.

² The record reflects that claimant was employed in the coal mining industry in West Virginia. Director's Exhibits 1, 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

equity and good conscience if claimant changed his or her position for the worse or relinquished a valuable right in reliance upon receipt of the overpaid benefits. 20 C.F.R. §404.509(a)(1); *Keiffer*, 18 BLR at 1-39.

Claimant asserts that the administrative law judge erred in failing to afford him a reasonable opportunity to submit evidence in support of his case and to respond to arguments made by the Director. Claimant's argument lacks merit.

As summarized by the administrative law judge, the record reflects that by letter dated July 18, 2013, the district director informed claimant that an overpayment of benefits had occurred in the amount of \$15,013.20 because claimant had received interim benefits, but was subsequently found not to be entitled to benefits by the administrative law judge. Director's Exhibit 6. Claimant was advised that if he wished to seek waiver of recovery of the overpayment, he was required to complete and submit an overpayment questionnaire, together with supporting financial documentation. *Id.* Claimant, through counsel, requested ninety days to respond to the overpayment notice. Director's Exhibits 4-6. On October 23, 2013, the district director determined that claimant was without fault in the creation of the overpayment, but denied waiver because claimant did not submit the overpayment questionnaire or any other financial documentation and, therefore, could not establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. Director's Exhibit 7. Pursuant to claimant's request for a formal hearing, the case was assigned to the administrative law judge.

In a July 13, 2015 Pre-Hearing Order, the administrative law judge noted that claimant still had not submitted any evidence regarding his assets, liabilities, income and expenses, and allowed claimant thirty days to submit the requested documentation. July 13, 2015 Notice of Hearing at 2. Claimant did not respond. On October 5, 2015, the administrative law judge again instructed claimant to exchange his completed overpayment questionnaire and supporting documentation with the Director at least twenty days prior to the hearing, scheduled for November 20, 2015.³ October 5, 2015 Supplemental Pre-Hearing Order at 1. On October 28, 2015, claimant's counsel replied that he had "no current information to provide at this time," as claimant had not responded to counsel's "numerous attempts to contact" him. Counsel's October 28, 2015 Letter. On November 17, 2015, the Director informed the administrative law judge that claimant had not submitted the requested financial documentation, and asked the court to continue the hearing to allow claimant time to respond. Director's November 17, 2015 Letter. In response, claimant's counsel objected to a continuance and stated that he

³ The hearing was subsequently rescheduled for November 19, 2015, without objection. November 9, 2015 Order Rescheduling Hearing.

would attend the hearing but that his client would not be present. Counsel's November 18, 2015 Letter. Thus, the administrative law judge held the hearing as scheduled.

At the hearing, claimant's counsel stated that on November 10, 2015 he received a call from claimant's wife, who reported that claimant had been in the hospital for "either three weeks or three months," and that she was not able to leave him. Hearing Tr. at 6-7. Counsel further stated that claimant's wife had informed him that claimant's black lung benefits had been offset by his Social Security disability benefits. *Id.* at 7-8. Therefore, counsel asserted that the overpayment should be the responsibility of the Social Security Administration. *Id.* at 8. The administrative law judge stated that he would allow the Director to respond to claimant's argument post-hearing,⁴ and that any documents to support claimant's argument should be provided to the Director "as soon as possible." *Id.* The administrative law judge repeatedly emphasized that he needed "some documentary proof" in support of claimant's argument that there had been a Social Security "offset," and stated that he would accept a sworn affidavit from claimant's wife. *Id.* at 10. Counsel requested that "deadlines for [response] not be too short" because of his difficulty contacting claimant. *Id.* at 11. The administrative law judge responded, stating, "[w]ell, I'm going to ask the [Director] to respond within about [thirty] days and if you wish to submit something in response to that, just do it very quickly." *Id.* Counsel responded "[o]kay." *Id.*

On December 9, 2015 the Director filed his post-hearing brief, acknowledging claimant's argument regarding a Social Security offset, but asserting that claimant had still not provided any documentation to support his request for a waiver of the overpayment.⁵ Director's December 9, 2015 Response Brief. Claimant did not respond and, on January 5, 2016, the administrative law judge issued his decision denying claimant's request for waiver of the overpayment.

In determining that a waiver was not warranted, the administrative law judge noted that, while claimant was without fault in the creation of the overpayment, claimant had not submitted any evidence to contest the accuracy of the overpayment amount. Decision and Order at 4-5. The administrative law judge further found that repayment of the overpayment would not defeat the purpose of the Act, observing that claimant did not

⁴ The Director was excused from attendance at the hearing. Hearing Tr. at 4-5.

⁵ With respect to claimant's counsel's argument regarding a possible Social Security benefit offset, the Director stated that, "At this time, the Director has absolutely no proof that claimant receives benefits from the [S]ocial [S]ecurity [A]dministration nor the amount of said benefits and any changes in said benefit amount." Director's December 9, 2015 Response Brief.

submit an overpayment questionnaire; “provided no information regarding his financial situation whatsoever;” did not respond to the Director’s discovery requests; and did not submit any evidence post-hearing in support of his contention that there was a Social Security disability benefit offset. *Id.* at 6. Additionally, the administrative law judge found that because claimant “presented no proof in this case that he relinquished a valuable right or changed his position for the worse based on his notice that a payment would be made,” recovery of the overpayment would not be against equity or good conscience. *Id.* at 7. Therefore, claimant’s request for waiver of the overpayment was denied. *Id.*

On appeal, claimant does not challenge the administrative law judge’s specific findings. Rather, claimant asserts that the administrative law judge erred in issuing a decision without allowing claimant a reasonable opportunity to establish that waiver of the overpayment is warranted. Claimant’s Brief at 9-10. In support, claimant argues that despite his specific request for an extended period to respond to the Director’s arguments, the administrative law judge “did not address a timeframe for [c]laimant’s response.” Claimant’s Brief at 8-9. Claimant also notes that the administrative law judge allowed only twenty-five days for the Director’s post-hearing brief. *Id.* Further, claimant asserts that he did not receive the Director’s post-hearing brief, filed by the Director on December 9, 2015, and had to call for a copy.⁶ Finally, claimant notes that the administrative law judge issued his Decision and Order just twenty-seven days after the Director responded.⁷ *Id.* at 9-10. In light of these factors, claimant contends that he was denied sufficient time to present evidence in support of his case.

Claimant bears the burden of establishing that he is entitled to a waiver of recovery of an overpayment. *Ashe*, 16 BLR at 1-111. After reviewing the record in this case, the administrative law judge’s findings, and claimant’s arguments on appeal, we hold that the administrative law judge permissibly denied claimant’s request for waiver of the overpayment. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-62 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

In denying claimant’s request for a waiver, the administrative law judge emphasized that “to date, claimant has provided no financial documentation or completed

⁶ Claimant’s counsel does not state when he received a copy of the Director’s December 9, 2015 response.

⁷ Claimant’s counsel further notes that during the period between when the Director responded, on December 9, 2015, and the administrative law judge issued the Decision and Order on January 5, 2016, there were two holidays, Christmas and New Year’s. Claimant’s Brief at 10.

overpayment questionnaire, to support waiver of the overpayment,” despite the fact that the district director initially requested such supporting documentation on July 18, 2013, “over two years ago.” Decision and Order at 3. Claimant argues that, for several reasons,⁸ the administrative law judge should have allowed an extended period for claimant to submit additional evidence. However, as the Director correctly points out, claimant did not ask the administrative law judge for additional time to submit evidence. See Claimant’s Brief at 8; Director’s Brief at 7 n.5. Nor did claimant request an extension of time in light of his purportedly late receipt of the Director’s post-hearing brief.⁹ Rather, as the Director contends, claimant, who has been represented by counsel throughout these proceedings, “had over two years between the beginning of the overpayment process and the close of the record to develop evidence and did nothing.” Director’s Brief at 7. Further, after the Decision and Order was issued, claimant elected not to file a motion for reconsideration, and claimant does not assert on appeal that he obtained evidence that he was prevented from submitting.

We therefore hold that, contrary to claimant’s assertion, claimant was provided with a fair opportunity to fully present his case. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (due process requires that a party be allowed to exercise its rights at a meaningful time and in a meaningful manner); *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 807-08, 21 BLR 2-302, 2-318-19 (4th Cir. 1998). We further hold that, in light of the fact that claimant did not provide any evidence to establish that recovery of the overpayment would violate the purpose of the Act or that it would be against equity and good conscience, we affirm the administrative law judge’s determination that claimant failed to prove that he is entitled to a waiver of recovery of the overpayment pursuant to 20 C.F.R. §725.542. See *Ashe*, 16 BLR at 1-111; Decision and Order at 6-7.

⁸ Claimant’s counsel asserts that: his client is in poor health and could not attend the hearing; he had difficulty getting in touch with claimant; he had only recently obtained information about a possible Social Security offset; and he was unable to obtain information from the Social Security Administration because he did not represent claimant in his Social Security case. Claimant’s Brief at 8.

⁹ We note that any delay in the receipt of the Director’s brief would only impact the amount of time claimant had for responding to the Director’s brief, and would not alter the time for the submission of evidence.

Accordingly, the administrative law judge's Decision and Order Denying Waiver of Overpayment of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge