

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 16-0258 BLO

BARBARA JEAN NORFOLK)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 02/27/2017
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Waiver of Recovery of Overpayment of Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Rita A. Roppolo (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; 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: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Waiver of Recovery of Overpayment of Benefits (2011-BLO-00013) of Administrative Law Judge John P. Sellers, III, issued with respect to a survivor's claim filed on August 3, 2001, pursuant to

the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).¹ The record reflects that on June 20, 2003, the district director issued an initial finding of entitlement and claimant began receiving interim benefits paid by the Black Lung Disability Trust Fund (the Trust Fund). Director's Exhibits 2, 3. Administrative Law Judge Janice K. Bullard ultimately denied benefits on March 23, 2010, and the Board affirmed the denial of benefits on March 17, 2011. Director's Exhibits 9, 10.

By letter dated July 18, 2011, the district director informed claimant that an overpayment of benefits had occurred in the amount of \$21,720.60 because she had received interim benefits but was subsequently found not to be entitled to benefits by Judge Bullard. Director's Exhibit 11. The district director made a preliminary finding that claimant was at fault in the creation of the overpayment and advised her that waiver of recovery would be denied unless she could prove that she was not at fault and that recovery would "defeat the purpose of the law" or be "against equity and good conscience." *Id.* Claimant responded, indicating that she was not at fault and that repayment would affect her ability to pay for ordinary and necessary living expenses. Director's Exhibit 12. On July 27, 2011, the district director determined that claimant was without fault in the creation of the overpayment but denied waiver because claimant had not shown that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. Director's Exhibit 13. Thereafter, claimant requested a hearing and the case was assigned to Judge John P. Sellers, III (the administrative law judge).

In the administrative law judge's Decision and Order, he accepted the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant was without fault in the creation of the overpayment. The administrative law judge determined, however, that recovery of the overpayment would not 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 Trust Fund in the amount of \$21,720.60.

On appeal, claimant challenges the administrative law judge's denial of waiver of recovery of the overpayment. The Director responds, urging the Board to affirm the administrative law judge's findings that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience.

¹ Claimant is the widow of the miner, James E. Daniel, who died on July 29, 2001. Director's Exhibit 2. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 10.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When a claimant receives an initial determination of eligibility for benefits prior to a final adjudication on her claim, she is eligible to receive interim benefit payments from the Trust Fund while litigation on the claim continues. *McConnell v. Director, OWCP*, 993 F.2d 1454, 1456, 18 BLR 2-168, 2-170 (10th Cir. 1993). However, if she is ultimately found ineligible for benefits upon the final adjudication of her claim, the interim payments she received are considered "overpayments" that are subject to recovery by the Trust Fund. *See* 20 C.F.R. §§725.522(b), 725.540; *Napier v. Director, OWCP*, 999 F.2d 1032, 1035, 17 BLR 2-186, 2-191 (6th Cir. 1993). A claimant's obligation to repay these funds is waived, however, if the claimant establishes that she is without fault in the creation of the overpayment, and that recovery would either "[d]efeate the purpose" of the Act, or "[b]e against equity and good conscience." 20 C.F.R. §725.542; *Napier*, 999 F.2d at 1034 n.3, 17 BLR at 2-190 n.3. Under the Social Security Administration regulation used to determine whether claimant is entitled to a waiver, *see* 20 C.F.R. §725.543, incorporating 20 C.F.R. §§404.506-404.512, defeating the purpose of the Act means "depriv[ing] a person of income required for ordinary and necessary living expenses." 20 C.F.R. §404.508(a); *Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-37 (1993). The regulation defines "ordinary and necessary expenses" to include:

- (1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under title XVIII), taxes, installment payments, etc.;
- (2) Medical, hospitalization, and other similar expenses;
- (3) Expenses for the support of others for whom the individual is legally responsible; and

² The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 5, 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

- (4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

20 C.F.R. §404.508(a)(1)-(4).

Claimant contends on appeal that the administrative law judge erred in finding that requiring her to repay the interim benefits would not be against equity and good conscience. In support of this argument, claimant maintains that the \$269.00 by which her monthly income exceeds her monthly expenses “does not leave [her] very much room for any increase in her expenses,” thereby creating “an undue hardship.” Claimant's Brief at 2. By asserting that her monthly financial surplus is insufficient to permit recovery of the overpayment, however, claimant is challenging the administrative law judge's finding that recovery would not defeat the purpose of the Act, i.e., deprive her of income required for ordinary and necessary living expenses. 20 C.F.R. §725.543; *see Keiffer*, 18 BLR at 1-37-38; *Ashe v. Director, OWCP*, 16 BLR 1-109, 1-110-11 (1992). For the following reasons, we reject claimant's argument.

After considering claimant's responses to the Department of Labor's Overpayment Questionnaire and the Director's interrogatories, the administrative law judge stated:

. . . Claimant appears to have a regular surplus of income over expenses based on the only evidence of her income in the record, her [Overpayment Recovery] Questionnaire. While her total monthly income is listed as \$2,419.00, her expenses are listed as \$2,150.00. The difference between the [c]laimant's total monthly income and her documented expenses is \$269. It is noted that the [c]laimant claimed no significant assets or significant savings I find that the [c]laimant's monthly surplus of \$269 is mathematically adequate to demonstrate that she has sufficient income to meet her ordinary and necessary living expenses as itemized.

Decision and Order at 6, *citing Benedict v. Director, OWCP*, 29 F.3d 1140, 1144, 18 BLR 2-309, 2-310-11 (7th Cir. 1994) (a \$110 monthly surplus “demonstrated [that the claimant] ha[d] sufficient income to meet more than his ordinary and necessary needs.”); Supplemental Director's Exhibit 2. The administrative law judge observed that the evidence relevant to claimant's “current financial situation, including identification of additional monthly expenses,” could have been enhanced by testimony or additional documentary evidence. Decision and Order at 6. As the administrative law judge noted, however, claimant was unable to attend the hearing on March 12, 2015, she did not provide her testimony in the time granted by the administrative law judge after the

hearing, and she subsequently requested that a decision be made on the record.³ *Id.*; Hearing Transcript at 5; April 13, 2015 Order. Accordingly, the administrative law judge acted within his discretion in concluding that requiring claimant to repay the interim benefits would not deprive her of the income necessary to meet her ordinary and necessary living expenses, based on the existence of a \$269.00 monthly surplus as reflected in claimant's Overpayment Recovery Questionnaire.⁴ *See Keiffer*, 18 BLR at 1-39; Decision and Order at 7. Therefore, we affirm the administrative law judge's finding that recovery of the overpayment would not defeat the purpose of the Act under 20 C.F.R. §725.543.

Furthermore, to the extent that claimant alleges that the administrative law judge erred in finding that recovery of the overpayment would not be against equity and good conscience, we also reject this contention. The administrative law judge noted correctly

³ Claimant's counsel reported at the March 12, 2015 hearing that a flood prevented claimant from attending. Hearing Transcript at 5. The administrative law judge left the record open for additional evidence, including claimant's testimony, which the administrative law judge agreed could be obtained by telephone, deposition, or at a supplemental hearing. *Id.* at 8; Decision and Order at 2. In an April 13, 2015 Order, the administrative law judge formally granted the parties' request for a decision on the record once claimant's testimony was taken, and gave the parties until May 1, 2015 to arrange claimant's testimony. April 13, 2015 Order at 1. On October 8, 2015, the administrative law judge issued an Order noting that the parties had yet to obtain claimant's testimony. October 8, 2015 Order at 1. He further observed that claimant's counsel submitted a letter from claimant in which she stated, "I really can't take time off work for a hearing so I am stating here and now that a decision can be made without me being present." *Id.*, quoting Claimant's Exhibit 1. The administrative law judge interpreted this as a request for a decision on the record, granted it, and ruled that the record would close in thirty days. October 8, 2015 Order at 1-2. Claimant submitted a completed Overpayment Recovery Questionnaire, and the Director, Office of Workers' Compensation Programs, submitted claimant's response to his interrogatories and the completed Overpayment Recovery Questionnaire. Supplemental Director's Exhibits 1, 2; Claimant's Exhibit 2.

⁴ The administrative law judge observed correctly that he did not have the authority to determine the repayment schedule. Decision and Order at 7, citing *Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-40 (1993). The administrative law judge also indicated correctly that, once the district director issues an order setting forth the repayment schedule, claimant may request an adjustment in her monthly payments, based on changed financial circumstances. Decision and Order at 7; *see* 20 C.F.R. §725.544; *Keiffer*, 18 BLR at 1-40.

that the applicable standard is whether claimant changed her position for the worse or relinquished a valuable right in reliance on the benefit payments. 20 C.F.R. §404.509(b); *see Benedict* 29 F.3d at 1144, 18 BLR at 2-316-17; Decision and Order at 7-8. He was also correct in observing that claimant's financial circumstances are not relevant to addressing that standard. *See Benedict*, 29 F.3d at 1144, 18 BLR at 2-316-17; *McConnell*, 993 F.2d at 1460, 18 BLR at 2-180; Decision and Order at 8. The administrative law judge accurately determined that claimant put forth no evidence that she incurred new expenses, took an action, or relinquished a valuable right in reliance on the receipt of interim benefits.⁵ Decision and Order at 8. Therefore, we affirm, as rational and supported by substantial evidence, the administrative law judge's finding that recovery of the overpayment from claimant would not be against equity or good conscience. 20 C.F.R. §404.590(b); *see Ashe*, 16 BLR at 1-110-11; Decision and Order at 8.

⁵ The administrative law judge added, “[t]o the contrary, the [c]laimant denies memory of any receipt of benefits.” Decision and Order at 8; *see* Supplemental Director's Exhibit 1; Claimant's Exhibit 1. Despite claimant's assertion that she did not recall receiving benefits, the administrative law judge determined that there is record evidence establishing that monthly benefit checks were issued to claimant from August 2003 to October 2006, and that claimant submitted information to the Office of Workers' Compensation Programs to facilitate the deposit of benefit checks directly into her bank account. Decision and Order at 5; Director's Exhibits 23, 25. These findings are not contested by claimant.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge