

BRB No. 05-0370 BLA

EVELYN JOHNSON KILBURN )  
(Widow of ODAS KILBURN) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 ) DATE ISSUED: 01/26/2006  
 )  
 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 Recovery of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Ronald C. Cox (Atkins Law Office), Harlan, Kentucky, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order – Denying Waiver of Overpayment Recovery (03-BLO-0001) of Administrative Law Judge Mollie W. Neal rendered on a

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<sup>1</sup> Claimant is the widow of the deceased miner, Odas Kilburn, who died on October 9, 1999. Director's Exhibit 2. Claimant filed a survivor's form on October 26, 1999. Director's Exhibit 1. Benefits were denied by the district director on February 14,

survivor's 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 found the evidence of record established that claimant was "with 'fault'" in causing an overpayment. *See* 20 C.F.R. §725.542. Accordingly, the administrative law judge denied waiver of recovery of the overpayment.

On appeal, claimant argues that the administrative law judge erred in finding that claimant was at fault, and thus in failing to address the issue of whether waiver would be appropriate. Claimant contends that the administrative law judge erred in not considering the subjective reasonableness of claimant's actions, given her age, education, intelligence and physical condition, before determining whether claimant was at fault. Claimant also contends that the Department of Labor (DOL) recouped more than the amount of the overpayment. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order. The Director argues that the administrative law judge reasonably found that claimant knew she was required to inform DOL of her award of state benefits, and she did not do so. The Director argues that the issue of excess funds recouped is not before the Board, as it was not raised before the administrative law judge.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Where a claimant is without fault in the creation of an overpayment of benefits, the claimant may obtain a 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). The regulations for determining whether a claimant is at fault in the creation of an overpayment of benefits are those promulgated by the Social Security Administration at 20 C.F.R. §§404.504-404.512. Whether an overpaid individual is without fault is determined by applying 20 C.F.R. §404.507:

What constitutes fault...on the part of the overpaid individual...depends upon whether the facts show that the incorrect payment to the individual... resulted from:

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2002 and on January 7, 2003. Director's Exhibits 20, 23. Claimant requested a hearing before an administrative law judge. Director's Exhibit 24.

(a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or

(b) Failure to furnish information which he knew or should have known to be material; or

(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.

20 C.F.R. §405.507.

Claimant's husband was receiving Federal Black Lung benefits at the time of his death. The record indicates that claimant filed a survivor's claim form on October 26, 1999, on which she check-marked her agreement to notify DOL if she received any "workers' compensation or occupational disease payments" because of the miner's disability or death due to pneumoconiosis. Director's Exhibit 1. Because claimant's husband also had been receiving state benefits at the time of his death, the record contains a second form, which claimant filled out, indicating that she wanted to receive full Federal survivor's benefits while she awaited reinstatement of state benefits, and she agreed to refund any overpayment in Federal benefits due to offset. Director's Exhibit 3. In January 2000, the Commonwealth of Kentucky awarded claimant benefits retroactive to October 1999. Director's Exhibit 5. Because the Federal benefits should have been offset by the state benefits awarded for the same time period, an overpayment occurred. In April 2001, DOL issued an amended award, determining, *inter alia*, that claimant had been overpaid \$8002.70 in Federal benefits. Director's Exhibit 6. The Director concedes that the overpayment was recouped; in fact, the Director concedes that approximately \$1459.90 more than the total owed, was deducted from claimant's Federal benefits. *See* Director's Brief at 3, n.1.

At the hearing, the following exchange took place:

Mr. Cox (counsel for claimant): As far as when Mr. Kilburn died and they started sending you these Federal Black Lung benefits, tell me about what happened and how you came about receiving those.

Claimant: Well, I went in and signed up for it, and they told me if I got overpaid while I was getting - - waiting for them to pay my checks to me, that I'd have to pay it back, so they didn't tell that after - - I sent my compensation check back and they sent back to me, and then I sent the Black Lung back. No, I called them and they told me to keep the Black Lung.

Mr. Cox: Who did you call?

Claimant: The Black Lung.

Mr. Cox: The Department of Labor?

Claimant: Yes.

Mr. Cox: Do you remember around when that was?

Claimant: It was just after he died- -

Mr. Cox: Okay.

Claimant: - - which that first check I got after he died, and I called them and they said to go ahead and spend it because I was eligible for it - -

Tr. at 13-14.

Subsequently, the following exchange occurred:

Mr. Cox: Okay. Did you feel like it was your fault that there was an overpayment?

Claimant: No

Mr. Cox: And why is that?

Claimant: Because the lawyer I had, he said if they overpaid me while I was waiting for them to get straightened up, I'd have to pay it back, and I said, "well, I signed the paper that I would." But, he didn't say they'd wait two or three years and tell me that.

Mr. Cox: But, you actually sent a check back?

Claimant: Yeah.

Mr. Cox: Okay. And then you talked to somebody at the Department of Labor, did you rely on what they told you, that you wouldn't have an overpayment?

Claimant: Yeah.

Tr. at 19.

The administrative law judge found that claimant indicated that she knew, or could have been expected to know, that she was not entitled to keep both the state and the Federal Black Lung checks. Decision and Order at 3. The administrative law judge further found that claimant testified that she was told that she was not entitled to keep both state compensation and [Federal] Black Lung checks, and that her attorney advised her that if she was overpaid, she would have to pay it back. Decision and Order at 3; Tr. at 13, 19. Since no evidence was produced to corroborate claimant's testimony that she contacted either DOL or a state office to clarify the matter, the administrative law judge found that claimant was "with fault" in causing the overpayment. Decision and Order at 3.

After consideration of the administrative law judge's Decision and Order, the issue on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. As the administrative law judge found, claimant testified that she knew that she was not entitled to keep both state compensation and Federal Black Lung checks, and that her attorney advised her that she would have to pay back any overpayment. Additionally, because there is no evidence corroborating claimant's testimony that she contacted DOL and tried to return any Federal Black Lung checks, the administrative law judge reasonably found claimant "at fault" in creation of the overpayment and thus refused to waive recovery of it. An administrative law judge is not required to credit testimony merely because it is uncontradicted. *See Hampton v. Director, OWCP*, 11 BLR 1-118, 1-119 (1988). We, therefore, affirm the administrative law judge's finding that claimant was with fault in the creation of the overpayment, as based on substantial evidence.<sup>1</sup>

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<sup>1</sup> At the hearing, claimant's attorney noted that the Department of Labor (DOL) recouped more than was overpaid, but he stated that the amount recouped in excess of the overpayment was about \$700, and that claimant had been repaid by DOL. Tr. at 8. The Director, Office of Workers' Compensation Programs (the Director), now asserts that claimant had been overpaid \$8002.70, and the amount recouped was \$9462.50. *See* Director's Brief at 3, n.1. Thus, \$1459.80 is alleged to have been "over recouped." The Director states that claimant received a check for \$756.70 in February 2003, and, at the time the Director's brief was filed, on May 12, 2005, claimant was owed \$703.20. *Id.* However, the Director argues that the issue of whether DOL recouped more money than claimant was overpaid was not raised before the administrative law judge. Since, according to the Director, the Office of Workers' Compensation Programs was in the process of addressing this issue while the instant appeal was pending before the Board, the district director should verify that the amount of money recouped from claimant is equal to the amount of the actual overpayment.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge