

BRB Nos. 90-0980 BLA  
and 90-1878 BLA

STANLEY CRABTREE )  
 )  
 Claimant-Respondent )  
 )  
 v. )

)  
 DIRECTOR, OFFICE OF WORKERS' ) Date Issued:  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Petitioner ) DECISION and ORDER

Appeal of the Decision and Order and Order Denying Attorney's Fee of  
Clement J. Kichuk, Administrative Law Judge, United States Department of  
Labor.

Vernon M. Williams (Wolfe & Farmer), Norton, Virginia, for claimant.

Marta Kusic (Judith E. Kramer, 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: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director),  
appeals the Decision and Order granting partial waiver of overpayment recovery and  
claimant appeals the Order Denying Attorney's Fee (89-BLO-0117) of Administrative  
Law Judge Clement J. Kichuk 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). Claimant filed a claim for benefits on November 16, 1978 and was

initially determined to be entitled to benefits. The putative responsible operator challenged claimant's eligibility and interim benefits were paid to claimant out of the Black Lung Disability Trust Fund. The case was then forwarded to the Office of Administrative Law Judges for a formal hearing and benefits payments were terminated on June 8, 1983 by the decision

of Administrative Law Judge Peter McC. Giesey who ruled against entitlement. The Benefits Review Board affirmed Administrative Law Judge Giesey's Decision and Order denying benefits on November 6, 1985. *Crabtree v. Beth-Elkhorn Corp.*, BRB No. 83-1571 BLA (Nov. 6, 1985)(unpub.). Claimant, after being notified of an overpayment in the amount of \$22,625.00, appealed the district director's denial of waiver of recovery of the overpayment to the Office of Administrative Law Judges. A formal hearing was held and Administrative Law Judge Kichuk determined that the amount of the overpayment and the fact that claimant was not at fault were not in dispute. The administrative law judge then determined that recovery of the overpayment would not defeat the purpose of the Act. The administrative law judge, however, determined that recovery of the entire overpayment would be against equity and good conscience. Accordingly, the administrative law judge granted waiver of \$20,000 of the \$22,625 overpayment and established a payment schedule for the remaining \$2,625. Subsequent to the issuance of this Decision and Order, the administrative law judge issued an order denying claimant's attorney's fee petition. On appeal, the Director contends that the administrative law judge erred in failing to include claimant's wife's monthly social security income in claimant's total monthly income, and in finding that recovery of the full amount of the overpayment would be against equity and good conscience. Claimant also appeals contending that the administrative law judge erred in denying the attorney's fee petition.

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).

On appeal, the Director first contends that although the administrative law judge properly determined that recovery of the overpayment would not defeat the purposes of the Act, he erred in failing to include claimant's wife's monthly social security income when calculating claimant's monthly income. We agree. As claimant's wife's expenses were properly included in the calculation of claimant's total monthly expenses, the administrative law judge erred in failing to include her income in the calculation of claimant's total monthly income. See *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992); see generally *McConnell v. Director, OWCP*, F.2d , No. 92-9500 (10th Cir.)(Apr. 27, 1993). As a result, the administrative law judge's calculation of claimant's monthly income is vacated and the case is remanded for the administrative law judge to recalculate claimant's monthly income to include claimant's wife's monthly income.

The Director further argues that the administrative law judge erred in finding that recovery of the entire overpayment would be against equity and good conscience as the administrative law judge did not refer to, and the record does not contain, any evidence that claimant has relinquished a valuable right or changed his position to his detriment in reliance on the benefit payments. In making this finding, the administrative law judge considered claimant's status in life, lack of skills, age, education, income, assets and health and determined that recovery of the entire overpayment would be inequitable and against good conscience. See Decision and Order at 4. However, the administrative law judge erred in failing to determine whether claimant changed his position for the worse or relinquished a valuable right in reliance upon the benefit payments as is required by *Potisek v. Director, OWCP*, 14 BLR 1-87 (1990)(*en banc*, with J. Brown dissenting). As a result, the administrative law judge's finding that recovery of the entire overpayment would be against equity and good conscience is vacated and the case is remanded to the administrative law judge for further findings on this issue.

Claimant, in his appeal, argues, and the Director agrees, that the administrative law judge erred in denying claimant's attorney's fee petition. The administrative law judge noted that the claim was pending on appeal and denied the petition on the grounds that it was inappropriate to request approval for attorney's fees at that step of the proceedings. See Order Denying Attorney's Fee at 1. However, the administrative law judge erred in denying the fee petition as claimant's attorney is entitled to fees at each level of the adjudicatory process as long as he is ultimately successful in prosecuting the claim. See *Yates v. Harman Mining Co.*, 12 BLR 1-175 (1989), *reaff'd on recon. en banc*, 13 BLR 1-56 (1989); *Clark v. Director, OWCP*, 9 BLR 1-211 (1986). Further, all fee petitions must be filed with and approved by the adjudication officer or tribunal before whom the services were performed. See *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). As a result, the administrative law judge's Order denying attorney's fee is vacated and the administrative law judge is ordered to reconsider the petition and award attorney's fees if claimant is successful in securing waiver of recovery of all or part of the overpayment.<sup>1</sup>

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<sup>1</sup>It is noted that the administrative law judge may make his award of attorney's fees contingent on claimant's ultimate success in prosecuting his claim.

Accordingly, the administrative law judge's Decision and Order granting partial waiver of overpayment recovery and the administrative law judge's Order denying attorney's fee are vacated and remanded 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