

BRB No. 02-0800 BLA

CARLES DYKES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
GARDEN CREEK POCAHONTAS)	
COMPANY)	DATE ISSUED: 07/22/2003
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS=)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Carles Dykes, Oakwood, Virginia, *pro se*.

Mary Forrest-Doyle (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order on

¹On August 22, 2002, the Board acknowledged claimant=s appeal in the instant

Remand (00-BL0-0017) of Administrative Law Judge John C. Holmes denying claimant's request for a waiver of recovery of an overpayment of benefits in the amount of \$18,265.59, 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).³ This case is before the Board for the second time. In a Decision and Order dated March 21, 2001, the administrative law judge initially stated that he concurred with the conclusion 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 also found, however, that recovery of the overpayment would neither defeat the purpose of Title IV of the Act nor be against equity and good conscience. Accordingly, the administrative law judge denied claimant's request for waiver and ordered claimant to repay the full overpayment amount of \$18,265.59, at a repayment rate of \$300.00 per month. Claimant appealed. The Board held that substantial evidence supported the administrative law judge's determination that recovery of the overpayment would not be against equity and good conscience. *Dykes v. Director, OWCP*, BRB No. 01-0569 BLA (Mar. 27, 2002)(unpublished). The Board vacated, however, the administrative law judge's finding that recovery of the overpayment would not deprive claimant of income required for his ordinary and necessary living expenses and thus would not defeat the purpose of Title IV of the Act. 20 C.F.R. ' 404.508; *Dykes v. Director, OWCP*, BRB No. 01-0569 BLA (Mar. 27, 2002)(unpublished). The Board thus vacated the administrative law judge's finding that claimant must repay the overpayment at a rate of \$300.00 per month, and remanded the case for the administrative law judge to reconsider the evidence relevant to whether claimant has established that recovery of the overpayment would deprive him of income required for his ordinary and necessary living expenses. *Dykes v. Director, OWCP*, BRB No. 01-0569 BLA (Mar. 27, 2002)(unpublished).

In his Decision and Order on Remand dated July 16, 2002, the administrative law judge calculated claimant's income to be \$2,391.00, and allowed monthly expenses totaling \$2,378.90. The administrative law judge thus found claimant has a monthly income surplus

case. The Board incorrectly identified claimant as Charles Dykes. Claimant's name is Carles Dykes.

²Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, acting on behalf of claimant, filed an appeal of the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

³The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

of Approximately \$12.00. @ Decision and Order on Remand at 6. The administrative law judge determined that, because claimant has a monthly income surplus, recovery of the overpayment would not defeat the purpose of the Act. On appeal, claimant generally contends that the administrative law judge erred in denying his request for a waiver of recovery of the overpayment. The Director has filed a response brief, contending that the administrative law judge erred in overestimating claimant=s monthly expenses. The Director states that the error was harmless, however, since, notwithstanding the overestimation, the administrative law judge still determined that there was a monthly income surplus and that, therefore, recovery of the overpayment would not defeat the purpose of the Act.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In an overpayment case, a claimant, in order to obtain a waiver of recovery of the overpayment, has the burden of establishing either: (1) that recovery of the overpayment would defeat the purpose of Title IV of the Act in that it would deprive claimant of funds needed to meet ordinary and necessary living expenses or (2) that recovery would be against equity and good conscience in that claimant had relinquished a valuable right or changed his position for the worse in reliance on the receipt of interim benefits. 20 C.F.R. '725.542; 20 C.F.R. '410.561c, 410.561d; *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992).

In determining that claimant failed to establish that recovery of the overpayment would defeat the purpose of Title IV of the Act, the administrative law judge reconsidered on remand the relevant evidence as to whether claimant has the funds needed to meet his ordinary and necessary living expenses. The administrative law judge found claimant=s monthly income totals \$2,391.00, representing \$1,196.00 in Social Security benefits, \$715.00 in pension payments, and \$480.00 in his wife=s Social Security benefits. Decision and Order on Remand at 3-4. We affirm this finding as supported by substantial evidence. Claimant=s overpayment questionnaire indicates that the administrative law judge correctly determined the amount of income derived from claimant=s Social Security benefits and pension. *Id*; Director=s Exhibit 11. In addition, the administrative law judge properly found that claimant testified at the hearing that his wife=s monthly Social Security benefits contribute \$480.00. Decision and Order on Remand at 2-4; Hearing Transcript at 17.

With regard to claimant=s monthly expenses, the administrative law judge properly found that claimant=s mortgage and property taxes amount to \$440.38 per month, based upon claimant=s hearing testimony. Decision and Order on Remand at 4; Hearing Transcript at 13. Substantial evidence also supports the administrative law judge=s determination that claimant has the following monthly expenses: \$600.00 for food and clothing; \$196.00 for

utilities; \$172.67 for automobile insurance; \$51.30 for life insurance; \$11.67 for flood insurance; \$39.25 for homeowner=s insurance; and \$418.00 for an automobile payment. Decision and Order on Remand at 4-5; Director=s Exhibit 11; Hearing Transcript at 13-17.

In addition, the administrative law judge rationally disallowed, as ongoing monthly expenses, three installment loan payments listed by claimant on his overpayment questionnaire. Decision and Order on Remand at 5; Director=s Exhibit 11. Specifically, the administrative law judge rationally determined that claimant would have paid off the \$265.45 loan balance owed to B&L Maytag. *Id.* Claimant indicated on the overpayment questionnaire that he was paying \$100.00 per month on this loan, and the administrative law judge correctly stated that claimant did not testify at the hearing, fourteen months later, that payments to B&L Maytag were ongoing. Decision and Order on Remand at 5. In addition, the administrative law judge properly disallowed, as an ongoing expense, a \$115.00 payment to People=s Bank for burial plots. The administrative law judge correctly stated that claimant testified at the hearing that this loan would be paid off in Aanother month or two.@ *Id.*; Hearing Transcript at 15. The administrative law judge further properly disallowed a Lowe=s credit card payment as an ongoing monthly expense. Decision and Order on Remand at 5. The administrative law judge correctly stated that claimant testified at the hearing that he had a \$400.00 balance on the Lowe=s credit card, with a \$25.00 minimum monthly payment. *Id.*; Hearing Transcript at 15. The administrative law judge rationally determined that, if claimant paid \$25.00 per month, the loan balance would have been paid off within twenty months, *i.e.*, before the issuance of the Decision and Order on Remand. Decision and Order on Remand at 5.

The Director contends that, although the administrative law judge properly considered most of claimant=s expenses, he erroneously considered claimant=s loan payment to First Union Bank and claimant=s medical expenses. First, with regard to claimant=s monthly payment to First Union Bank, we agree with the Director that the administrative law judge erred in including this payment as a separate monthly expense, since claimant=s overpayment questionnaire and hearing testimony indicate that the payment to First Union Bank, in the amount of \$394.63 per month, is actually claimant=s monthly mortgage payment, which the administrative law judge had already included in his calculation of claimant=s expenses. Decision and Order on Remand at 4; Director=s Exhibit 11; Hearing Transcript at 13-14. As the Director contends, the administrative law judge thus erred by including this expense twice. In addition, the Director is correct in stating that the record does not support the administrative law judge=s finding that claimant pays \$55.00, as an ongoing expense per month, for health care. While claimant testified at the hearing that he pays for a portion of his prescriptions, or \$50.00, and \$5.00 per office visit to the doctor, Hearing Transcript at 16, claimant neither indicated how frequently he assumed these costs nor testified that these costs were ongoing expenses. *Id.* In improperly including the \$394.63 loan payment to First Union Bank, and \$55.00 in medical expenses, the administrative law judge thus overestimated claimant=s monthly expenses in the amount of \$449.63.

As the Director contends, however, the administrative law judge's overestimation of claimant's expenses constitutes harmless error, since the correct, lower amount of monthly expenses only bolsters the administrative law judge's finding that claimant's income exceeded his expenses, resulting in an income surplus.⁴ *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that recovery of the overpayment would not defeat the purpose of Title IV of the Act. The Board previously affirmed the administrative law judge's finding that recovery of the overpayment would not be against equity and good conscience, since claimant failed to establish that he had relinquished a valuable right or changed his position for the worse in reliance on the receipt of interim benefits. *Dykes v. Director, OWCP*, BRB No. 01-0569 BLA (Mar. 27, 2002)(unpublished), slip op. at 3. We, therefore, affirm the administrative law judge's determination on remand that claimant is not eligible for a waiver of recovery of the overpayment.

Accordingly, the administrative law judge's Decision and Order on Remand denying waiver of recovery of the overpayment is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

⁴The Director contends that, in light of claimant's limited savings, an income surplus of only \$12.00 per month would be insufficient to justify denying waiver of recovery of the overpayment. Director's brief at 8, n.7. The Director asserts that, when claimant's monthly expenses are correctly listed, however, to exclude the \$449.63 which the administrative law judge erroneously allowed as ongoing monthly expenses, claimant's income surplus is far greater, and the denial of waiver is thus appropriate. *Id.*

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge