

BRB No. 08-0571 BLA

B.C.)
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 Claimant-Petitioner)
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 v.)
)
 WESTMORELAND COAL COMPANY) DATE ISSUED: 03/26/2009
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 Employer)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Regarding Overpayment of Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

B.C., Fenwick, West Virginia, *pro se*.

Jeffrey S. Goldberg (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Regarding Overpayment of Benefits (05-BLO-00003) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge), rendered with respect to 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). The administrative law judge initially found that the Office of Workers' Compensations Programs (the Office) had

correctly determined that an overpayment of benefits had occurred in the amount of \$160,744.50.¹ The administrative law judge further found that claimant was without fault in the creation of the overpayment, as conceded by the Director, Office of Workers' Compensation Programs (the Director), but that claimant failed to establish that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience. Accordingly, the administrative law judge denied claimant's request for a waiver of recovery of the overpayment.

On appeal, claimant generally 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.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are

¹ The record reflects that claimant filed a claim for benefits on May 1, 1986. The district director determined that employer was the responsible operator, and denied benefits. Following a hearing, an administrative law judge again denied benefits. Claimant appealed, and in a decision dated May 27, 1994, the Board vacated the denial of benefits and remanded the case for further consideration. On remand, in a decision dated April 20, 1995, Administrative Law Judge Paul H. Teitler awarded benefits. Director's Exhibit 1. Employer declined to assume liability, and appealed the award of benefits to the Board. Therefore, the Black Lung Disability Trust Fund began paying claimant interim benefits pursuant to 20 C.F.R. §725.522(a). Director's Exhibit 2. In a decision dated April 30, 1996, the Board vacated the award of benefits, and remanded the case for further consideration. Director's Exhibit 3. By letter dated May 3, 1996, claimant was informed that an overpayment of benefits had occurred in the amount of \$89,711.20. Initial overpayment recovery proceedings ensued, which claimant challenged, without the assistance of counsel. Director's Exhibits 4, 5. Meanwhile, claimant continued to pursue his entitlement to benefits. Between 1996 and 2001 his claim was serially approved by Judge Teitler, appealed by employer, and vacated by the Board. On August 8, 2002, the Board affirmed Judge Teitler's most recent award of benefits. Director's Exhibits 6, 8, 9, 11, 14, 17. However, employer appealed to the United States Court of Appeals for the Fourth Circuit, and in a decision dated February 17, 2004, the court reversed the award. Director's Exhibit 18.

rational, and are consistent 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).

Where a claimant is without fault in the creation of the overpayment, 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). 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. Recovery is against 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).

In determining that claimant is not entitled to waiver of recovery of the overpayment, the administrative law judge considered the relevant evidence, including claimant’s testimony at the hearing, at which claimant was represented by counsel, claimant’s 2003 tax return, and information regarding claimant’s income and estimated expenses from 2004 and 2005. Decision and Order at 9; Director’s Exhibits 28, 33, 45, 47, 48, 56, 57; Hearing Tr. at 8, 16, 17-18. The administrative law judge determined that claimant had annual expenses of approximately \$20,400.00, based on the written information claimant provided, and on his testimony that his expenses were no more than \$1,700.00 a month. Decision and Order at 9; Hearing Tr. at 8. In addition, the administrative law judge found that claimant had approximately \$440,000.00 in cash assets, including certificates of deposit and an individual retirement account (IRA). Decision and Order at 9; Director’s Exhibit 57. The administrative law judge found that claimant also had an estimated annual income of approximately \$37,000.00 from his miner’s pension, Social Security benefits, interest, and IRA distributions. Decision and Order at 9; Director’s Exhibits 48, 56. Thus, the administrative law judge initially found that repayment of the \$160,744.50 owed would not entirely deplete claimant’s income-producing cash assets. The administrative law judge further found, that, even assuming the total loss of his income-producing assets, claimant’s annual income of approximately \$27,000.00 from his pension and Social Security benefits alone would still exceed his annual expenses of \$20,400.00. Decision and Order at 9.

² The record indicates that claimant’s coal mine employment was in West Virginia. Director’s Exhibit 18. 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*).

Taking into consideration both claimant's financial information and claimant's concession that he had sufficient assets to repay the overpayment, the administrative law judge rationally concluded that recoupment of the overpayment would not leave claimant with insufficient resources to meet his ordinary and necessary expenses of daily living. Decision and Order at 9-10; Hearing Tr. at 8. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that recovery of the overpayment would not defeat the purpose of the Act. *See* 20 C.F.R. §404.508; *McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993); Decision and Order at 10.

The administrative law judge next considered claimant's contention that he has assets to repay the overpayment only because he has lived frugally and has amassed savings exceeding the overpaid amount, and that, therefore, recovery of the overpaid amount would be against equity and good conscience. Decision and Order at 10. The administrative law judge found, however, that the record contains no evidence, nor did claimant assert, that he either relinquished a valuable right or changed his position for the worse in reliance upon a notice that benefits would be paid or because of the overpayment itself. *See* 20 C.F.R. §404.509(a)(1); Decision and Order at 10.

Specifically, the administrative law judge considered claimant's testimony that he used his black lung benefits to pay his bills and "put three children through school."³ The administrative law judge permissibly concluded that, as the record does not indicate how much claimant spent on educational expenses, or when the expenses were incurred, there was no evidence to support a conclusion that claimant changed his position for the worse in reliance on future benefits.⁴ Decision and Order at 10-11. The administrative

³ As noted by the administrative law judge, the regulation at 20 C.F.R. §404.509(b) describes a situation where a claimant enrolls a child in private school because benefit payments made this possible, as one example of how an individual may incur a financial obligation, and thus change his or her position for the worse, in reliance on future payment of benefits. Decision and Order at 11. In his letter of appeal to the Board, claimant clarified that he was referring to having paid his children's lunch bills, clothing, and medical expenses, while the children were living at home attending school.

⁴ In a letter received by the Office of Workers' Compensation Programs (the Office) on October 21, 2004, claimant also stated that when he first began receiving black lung benefits he had a good paying job, and that he could not now return to that job because the mine had changed ownership. Director's Exhibit 34. To the extent that claimant's letter can be construed as a statement that he gave up his job in reliance on his black lung benefits, the record does not support such an inference. The record reflects that claimant retired from coal mine employment on April 2, 1986, Hearing Tr. at 14-15,

law judge also considered whether claimant's situation would have been different if he had requested modification of the decision of the United States Court of Appeals for the Fourth Circuit reversing his award of benefits,⁵ or if he had been afforded the informal conference with the Office that he had requested.⁶ Decision and Order at 11-12. Finally, the administrative law judge considered whether claimant had relied on erroneous information from the Director regarding his potential liability for repayment of any overpayment, and found that there was no evidence of such reliance.⁷ Decision and

and was first found entitled to receive black lung benefits almost ten years later, on April 20, 1995.

⁵ The administrative law judge considered claimant's testimony that he was not aware that he could seek modification of the Fourth Circuit court's reversal of his award of benefits, and that he did not have counsel at the time. Hearing Tr. at 9-13. The administrative law judge noted that a request for modification, if successful, could have reduced or eliminated the overpayment. Decision and Order at 6, 11. However, the record reflects that, by letter dated September 29, 2004, an Office claims examiner informed claimant that he had the right to request modification of the Fourth Circuit court's decision within one year of the date of the court's decision. Director's Exhibit 30. Moreover, the Office subsequently treated a submission of evidence by claimant as a timely request for modification, which the Office denied in a decision dated October 26, 2004. Director's Exhibit 35. Finally, by letter dated November 6, 2004, claimant's counsel acknowledged receipt of the Office's September 29, 2004 letter informing claimant of his right to request modification of the Fourth Circuit court's decision, and stated that claimant did not wish to appeal the denial of benefits, but would continue to pursue waiver of recovery of the overpayment. Director's Exhibit 38.

⁶ As the administrative law judge correctly noted, the revised regulations do not require the Office to hold an informal conference. 20 C.F.R. §725.416(a).

⁷ The administrative law judge found that, in a November 8, 2001 letter, the Office had erroneously informed claimant only that he "may" be responsible for repayment of all monies paid in the event that the Board reversed his award, and failed to inform him that the same would be true if his award was reversed by a United States Court of Appeals. Decision and Order at 12. A review of the letter reveals that the Office also informed claimant that "[i]f it is later determined by the Benefits Review Board or a U.S. Court of Appeals that you are not eligible to receive these benefits, an overpayment will exist and you will be responsible for repayment of all monies paid from the Black Lung Disability Trust Fund." Director's Exhibit 16. An earlier letter from the Office, dated June 24, 1999, similarly informed claimant that if the Benefits Review Board or a U.S.

Order at 12. The administrative law judge determined, and substantial evidence supports the conclusion that none of the circumstances qualified claimant for waiver of recovery of the overpayment under the standards set forth at 20 C.F.R. §404.509. Decision and Order at 12-13. We, therefore, affirm the administrative law judge's conclusion that claimant failed to establish entitlement to waiver of recovery of the overpayment in the amount of \$160,744.50.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

Court of Appeals determined that he was ineligible to receive benefits, he “may be responsible for repayment” Director’s Exhibit 11.