

BRB No. 03-0109 BLA

DONALD FLETCHER)
)
 Claimant-Respondent)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 09/25/2003
) COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Helen H. Cox (Howard M. 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 HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (01-BLO-0011) of Administrative Law Judge Stuart A. Levin (the administrative law judge) granting waiver of recovery of an overpayment in the amount of \$96,144.70 of Black Lung benefits awarded claimant 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).¹ The administrative law judge indicated that the parties stipulated that claimant

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

was without fault in the creation of the overpayment. Considering the monthly income and expenses of claimant's household, the administrative law judge found that the failure to grant claimant's petition for waiver of recovery of the overpayment would defeat the purpose of Title IV of the Act within the meaning of 20 C.F.R. §410.561c, since it would deprive claimant and his family of income required for ordinary and necessary living expenses. Accordingly, the administrative law judge granted claimant's request for waiver of recovery of the overpayment.

On appeal, the Director contends that the administrative law judge's finding, that requiring claimant to repay the overpayment would defeat the purpose of Title IV of the Act, is contrary to the evidence that shows that the monthly food expenses for claimant's household of three do not amount to the \$1,500.00 claimed. The Director urges the Board to vacate the administrative law judge's Decision and Order and remand the case to the administrative law judge for further consideration of the evidence relevant to claimant's actual monthly expenses for food. Claimant responds, and seeks affirmance of the decision below.

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

In the instant case, the administrative law judge found that the parties stipulated that claimant was without fault in the creation of the overpayment. Decision and Order at 1. Claimant is thus entitled to waiver of recovery of the overpayment if recovery would either defeat the purpose of Title IV of the Act or be against equity and good conscience. 20 C.F.R. §§725.542, 725.543; 20 C.F.R. §§404.508, 404.509;² *McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993).

The Director contends that the record does not support the administrative law judge's decision to grant claimant's request for waiver of recovery of overpayment insofar as the

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.

²The newly promulgated regulation at 20 C.F.R. §725.543 adopts the 20 C.F.R. Part 404 waiver provisions, see 20 C.F.R. §§404.506 – 404.512, in place of the 20 C.F.R. Part 410 waiver provisions. The Part 404 criteria apply in the present claim. 20 C.F.R. §725.2 (c).

record does not substantiate the \$1,500.00 monthly food expense claimed by claimant. The administrative law judge found that recovery would defeat the purpose of Title IV of the Act since it would deprive claimant of income required for ordinary and necessary living expenses. Specifically, the administrative law judge found that claimant's monthly household income is \$3,335.00. The administrative law judge then set forth claimant's monthly household expenses totaling \$3,727.50 and claimant's "cash on hand" and bank funds totaling \$11,100.00, as provided by claimant in the Overpayment Recovery Questionnaire dated October 6, 2000. *See* Director's Exhibit 17. Considering the relevant evidence, the administrative law judge determined that failure to grant claimant's petition for waiver of recovery of the overpayment would deprive claimant's household of income required for ordinary and necessary living expenses. With regard to the claimed \$1,500.00 monthly food expense at issue in the case sub judice, the administrative law judge found:

In addition, while a \$1500 per month food bill for three people indicates a family with a healthy appetite, illustrative register receipts have been provided. As Mrs. Fletcher explained, in her October 7, 2000 letter to the Department [of Labor,] "We do not have the money to pay this back as it has all been spent. We do have some savings for our son's education and also in case I become ill and cannot work. It takes most of our income to make payments each month."

Decision and Order at 3; *see* Director's Exhibit 17.

The Director contends that while the administrative law judge correctly determined that claimant's household income is \$3,335.00, he erroneously accepted claimant's assertion that his monthly household expense for food is \$1,500.00, where the record supports a finding that less than half that amount was spent. The Director also asserts that, contrary to the administrative law judge's finding, the financial information provided by claimant shows that he may actually be capable of repaying the overpayment without unduly depleting his financial resources. The Director argues that the administrative law judge's finding that recovery of the overpayment would deprive claimant and his family of income required for ordinary and necessary living expenses is not supported by the evidence of record.

In response to the Director's appeal, claimant contends that although the administrative law judge indicated that the claimed \$1,500.00 monthly food expense was supported by "illustrative register receipts," Decision and Order at 3 (emphasis added), he "relied substantially" upon claimant's wife's statements to establish claimant's inability to "make payments on the overpayment." Claimant's Brief at 3. Claimant points out that these statements by Mrs. Fletcher are uncontradicted. Claimant thus argues that the administrative law judge's decision to grant claimant's request for waiver of recovery of the overpayment is supported by substantial evidence and should not be disturbed on appeal.

In order to establish that recovery of an overpayment would defeat the purpose of Title IV of the Black Lung Act, claimant must show that recovery would deprive him of income required for ordinary and necessary living expenses, including expenses of claimant's dependents, as determined pursuant to the criteria enacted by the Social Security Administration.³ The regulation at 20 C.F.R. §404.508(b) provides:

Adjustment or recovery will defeat the purposes of title II in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses.

20 C.F.R. §404.508(b). Claimant bears the burden of establishing that he qualifies for waiver of recovery of the overpayment. 20 C.F.R. §§404.506(c), 404.508.

The Director's contentions have merit. A review of the case file supports the Director's argument that claimant cannot substantiate the \$1,500.00 in monthly household food expenses based on the record as it now stands. Specifically, the record documents monthly food expenses of some \$450.00 for the month of January 1999 and \$510.00 for the month of February 1999.⁴ While the administrative law judge found that these grocery store

³ As previously noted, *supra* note 2, the waiver criteria under the Social Security Act, provided at 20 C.F.R. Part 404, apply in the instant case. The regulation at 20 C.F.R. §404.508(a) provides:

General. Defeat the purpose of title II means defeat the purpose of benefits under title II, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends on whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs.

20 C.F.R. §404.508. The regulation then indicates what an individual's ordinary and necessary expenses include, such as fixed living expenses, medical, hospitalization and other similar expenses; expenses for the support of others for whom the individual is legally responsible; and 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).

⁴The Director, Office of Workers' Compensation Programs, correctly notes that "the grocery receipts of record cover non-food items, particularly cigarettes." Director's Brief at 7 n.5. In fact, several of the receipts include charges for cigarettes and/or snuff. On remand,

receipts are “illustrative” of claimant’s household’s monthly food expenses, Decision and Order at 3, the \$1,500.00 claimed monthly expense for food is three times as much as the amount substantiated by the record.

Further, in accepting the \$1,500.00 monthly food expense as claimed, the administrative law judge relied on statements made by Mrs. Fletcher in her October 7, 2000 letter to the Department of Labor to the effect that the household has some savings for their younger son’s⁵ education and in case she were to become ill and not able to work. Director’s Exhibit 17; Decision and Order at 3. Mrs. Fletcher’s statements, however, neither explain nor support the food expense claimed. Furthermore, the grant of a waiver depends on a claimant’s current ability to repay the overpayment and thus, Mrs. Fletcher’s statements about any future inability to work and about any future college education expense for claimant’s younger son, are not taken into consideration. *Ashe v. Director, OWCP*, 16 BLR 1-109, 1-112 (1992); *Gordon v. Director, OWCP*, 14 BLR 1-60 (1990). The Board has held that in considering waiver of recovery of an overpayment, an administrative law judge’s decision must be based on evidence of claimant’s current income and expenses, not on what could happen in the future. *Keiffer v. Director, OWCP*, 18 BLR 1-35 (1993).

Based on the foregoing, we vacate the administrative law judge’s finding that recovery of the overpayment would defeat the purpose of Title IV of the Act as it would deprive claimant of the income required for ordinary and necessary living expenses, as it is not substantiated by the record. We remand the case to the administrative law judge for further findings. On remand, the administrative law judge may reopen the record to allow claimant the opportunity to substantiate the claimed \$1,500.00 monthly household food expense and to offer any additional evidence of his *current* income and expenses. The administrative law judge must then analyze the evidence relevant to claimant’s current household income and expenses and re-evaluate claimant’s ability to make payments towards recovery of the overpayment.

If, on remand, the administrative law judge finds that waiver cannot be granted based on a finding that recovery would defeat the purpose of Title IV of the Act, then he must consider whether recovery would be against equity and good conscience under 20 C.F.R.

the administrative law judge is instructed to determine whether these items constitute “ordinary and necessary living expenses” as defined in 20 C.F.R. §404.508.

⁵ The record supports the administrative law judge’s finding that claimant’s household consists of claimant, his wife and their then sixteen-year old son; claimant’s then twenty-year old son was in college. Decision and Order at 2; Director’s Exhibit 17.

§404.509. To determine whether recovery would be against equity and good conscience, the administrative law judge must evaluate whether claimant has relinquished a valuable right or changed his position for the worse in reliance on the overpayment. 20 C.F.R. §404.509.

Accordingly, the administrative law judge's Decision and Order is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge