

BRB No. 06-0257 BLA

LOIS PRESTON)	
(Widow of CLARENCE PRESTON))	
)	
Claimant-Petitioner)	DATE ISSUED: 09/25/2006
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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:

Claimant, the miner's widow, appeals the Decision and Order (2004-BLO-00009) of Administrative Law Judge Daniel J. Roketenetz denying waiver of recovery of an overpayment of benefits on a 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 determined that claimant was at fault in creating an overpayment in the amount of \$13,789.90, due to claimant's receipt of concurrent Federal and State Black Lung benefits from May 2002 to April 2004, and failure to notify the Department of Labor (DOL) of her State award of benefits. Accordingly, the administrative law judge found that waiver of recovery of the overpayment was not appropriate pursuant to 20 C.F.R. §725.542.

On appeal, claimant asserts that she was not at fault in creating the overpayment, and argues that the attorney fees and costs she expended in obtaining her State award should have been deducted from the overpayment amount pursuant to 20 C.F.R. §725.535(d). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of waiver but requesting a remand for the administrative law judge to address claimant's expenditures and make appropriate adjustments to the amount of the overpayment.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Claimant initially argues that she is without fault because the overpayment resulted from the fact that she was awarded Federal benefits on April 3, 2002, payable as of March 2001, and was subsequently awarded retroactive State benefits on April 24, 2004, thus the overpayment was created regardless of any action or inaction on her part. Claimant maintains that her failure to inform DOL immediately of her State award does not automatically establish that the overpayment was caused by an intentionally false statement, a willful concealment, or a deliberate failure to furnish material information, *see* 20 C.F.R. §§404.507, 725.543; rather, claimant did not have actual knowledge of the amount of her State award until just four days before DOL notified her that she was at fault in creating an overpayment,¹ and since the Federal benefits had already been paid, nothing claimant did or did not do could have avoided the creation of the overpayment. In view of the retroactive payment of State benefits, the Director concedes that "[t]here may be merit to claimant's contention that the 'at fault' finding is inappropriate," but argues that the Board need not reach this issue because the administrative law judge's ultimate finding, that waiver of recovery of the overpayment is inappropriate, must be upheld. Director's Brief at 5. In this regard, the Director notes that claimant has not argued that she is entitled to a waiver, and therefore the administrative law judge's denial of waiver may be affirmed as unchallenged on appeal. Further, the Director maintains

¹ The record reflects that claimant was awarded Federal benefits on April 3, 2002, and was subsequently awarded State benefits on April 21, 2004. Director's Exhibits 2, 6. On May 7, 2004, claimant's counsel forwarded a check to claimant in payment of her retroactive State award, adjusted for attorney fees and costs advanced. On May 11, 2004, the district director issued his preliminary finding that claimant was at fault in creating an overpayment in the amount of \$13,789.90, and requested either reimbursement or submission of a Form OWCP-20, Overpayment Recovery Questionnaire, within 30 days. Director's Exhibit 8.

that the administrative law judge properly determined that claimant had sufficient resources to repay the overpayment, hence, recovery would neither be against equity and good conscience nor would it defeat the purpose of the Act pursuant to Section 725.542. Director's Brief at 5-6; Decision and Order at 3, 6; *see generally Napier v. Director, OWCP*, 999 F.2d 1032, 17 BLR 2-186 (6th Cir. 1993). In view of the parties' arguments on appeal and the Director's concession, we affirm the administrative law judge's finding that waiver of recovery of the overpayment is inappropriate, but vacate his finding that claimant was at fault in creating the overpayment. *See* 20 C.F.R. §725.542; *Napier*, 999 F.2d 1032, 17 BLR 2-186; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant also contends that the administrative law judge erred in accepting, without evaluation, DOL's calculation of the amount of claimant's overpayment. Specifically, claimant maintains, and the Director agrees, that the attorney fees and costs claimant expended in pursuit of her State award of benefits should not have been included in the amount of the overpayment pursuant to 20 C.F.R. §725.535(d). The parties' arguments have merit. The record reflects that, by order issued on August 15, 2005, the administrative law judge granted claimant's request for a decision on the record, and allowed the parties until September 17, 2005 within which to submit additional evidence for inclusion in the record. On September 9, 2005, claimant's counsel submitted documentation, including copies of checks dated between May 7, 2004 and January 31, 2005, to substantiate that claimant had paid a total of \$5,437.24 in attorney fees and \$482.24 in costs in connection with her State award. As this evidence was date-stamped as received in the Office of Administrative Law Judges on September 12, 2005, and as the administrative law judge did not address claimant's expenditures, we vacate his finding that the overpayment amount totals \$13,789.90, and remand this case for the administrative law judge to review claimant's evidence and adjust the amount of claimant's overpayment liability as appropriate pursuant to 20 C.F.R. §725.535(d). *See Molnar v. Barnes & Tucker Co.*, 15 BLR 1-53 (1991); *Scuilli v. Bethlehem Mines Corp.*, 8 BLR 1-206 (1985).

Accordingly, the administrative law judge's Decision and Order denying waiver of recovery of overpayment is affirmed in part, vacated in part, and this case is remanded 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