U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0085 BLO

JERRY HUFFMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 02/22/2017
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Helen H. Cox (Maia Fisher, Associate Solicitor of Labor; 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: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

BOGGS, Administrative Appeals Judge:

Claimant appeals the Decision and Order (2011-BLO-00002) of Administrative Law Judge John P. Sellers, III, denying waiver of recovery of an overpayment that claimant received as a result of a claim filed pursuant to the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge found that claimant was overpaid $19,825.38 in benefits.[2] Although he determined that claimant was without fault for the overpayment, the administrative law judge found that claimant failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. Accordingly, the administrative law judge denied claimant's request for a waiver of his obligation to repay the overpaid amount to the Black Lung Disability Trust Fund (Trust Fund).[3]

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[1] Claimant filed a claim for benefits on August 29, 2007. Director's Exhibit 1. In a Proposed Decision and Order issued on May 16, 2008, the district director determined that claimant was eligible for benefits, and that benefits were payable by Sidney Coal Company. Director's Exhibit 2. Sidney Coal Company disagreed with the district director's decision, requested a formal hearing before an administrative law judge, and declined to pay benefits, at which point the Black Lung Disability Trust Fund (Trust Fund) began paying interim benefits to claimant. Director's Exhibit 3. In a Decision and Order issued on January 19, 2010, Administrative Law Judge Daniel F. Solomon found that claimant failed to establish entitlement to benefits, and denied the claim. Director's Exhibit 5. Claimant took no further action regarding his claim. By letter dated May 25, 2010, the district director informed claimant that he received an overpayment in benefits of $19,825.38. Director's Exhibit 7. Claimant requested that the district director waive recovery of the overpayment, and submitted an overpayment questionnaire and financial information. Director's Exhibits 8, 10, 11. The district director denied the waiver, and claimant requested a hearing. Director's Exhibits 12-15.

[2] The administrative law judge relied on the district director's calculation of the overpayment, noting that claimant did not dispute the amount. Decision and Order at 4. The district director first informed claimant that the amount was $19,846.16, but then corrected it to $19,825.38. Director's Exhibit 7. In an apparent clerical error, the administrative law judge twice cited the uncorrected figure. Decision and Order at 2, 13. The Director, Office of Workers' Compensation Programs (the Director), also cites the uncorrected figure in his brief. Director's Brief at 2, 9. The administrative law judge, however, correctly recognized that claimant "seeks waiver of an overpayment of $19,825.38." *Id.* at 2.

[3] The district director had ordered claimant to repay the overpayment at a rate of $825.00 per month. Director's Exhibit 12. The administrative law judge correctly noted that his task was not to approve the repayment schedule or establish one himself, but only to determine whether an overpayment debt exists and whether claimant is in a financial position to repay it. *See Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-40 (1993); Decision and Order at 11. On appeal, the Director states that he withdraws the district director's repayment schedule of $825.00 per month. Director's Brief at 2 n.1.

On appeal, claimant argues that the administrative law judge erred in determining that recovery by the Trust Fund of the overpayment would not defeat the purpose of the Act. The Director, Office of Workers' Compensation Programs (the Director), urges the Board to affirm the administrative law judge's finding that claimant failed to establish that he is entitled to a waiver.[4]

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.[5] 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).

When a claimant receives an initial determination of eligibility for benefits prior to a final adjudication on his claim, he is eligible to receive interim benefit payments from the Trust Fund while litigation on his claim continues. *McConnell v. Director, OWCP*, 993 F.2d 1454, 1456, 18 BLR 2-168, 2-170 (10th Cir. 1993). However, if he is ultimately found ineligible for benefits upon the final adjudication of his claim, the interim payments he received are considered "overpayments" that are subject to recovery by the Trust Fund. *See* 20 C.F.R. §§725.522(b), 725.540; *Napier v. Director, OWCP*, 999 F.2d 1032, 1035, 17 BLR 2-186, 2-191 (6th Cir. 1993). A claimant's obligation to repay these funds is waived, however, if the claimant establishes that he is without fault in the creation of the overpayment, and that recovery would either "[d]efeat the purpose" of the Act, or "[b]e against equity and good conscience." 20 C.F.R. §725.542; *Napier*, 999 F.2d at 1034 n.3, 17 BLR at 2-190 n.3. Under the Social Security Administration regulation used to determine whether claimant is entitled to a waiver, *see* 20 C.F.R. §725.543, incorporating 20 C.F.R. §§404.506-404.512, defeating the purpose of the Act means "depriv[ing] a person of income required for ordinary and necessary living expenses." 20 C.F.R. §404.508(a); *Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-37 (1993). The regulation defines "ordinary and necessary expenses" to include:

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[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that there was an overpayment, that claimant was not at fault for the overpayment, and that recovery of the overpayment would not be against equity and good conscience. *See* 20 C.F.R. §725.542(a), (b)(2); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 12-13.

[5] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibit 5 at 2. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under title XVIII), taxes, installment payments, etc.;

(2) Medical, hospitalization, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) 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).

The administrative law judge determined that the combined monthly income of claimant and his wife is $5,300.00 in pension, Social Security, and workers' compensation benefits, and that their monthly expenses for housing, insurance, utilities, credit card payments, food, clothing, pet supplies, medical copayments, etc. total $3,581.00. Decision and Order at 8-9, 11. In addition, the administrative law judge found that the couple's monthly tithe of $530.00 to their church — ten percent of their income, as required by the church — is an ordinary and necessary living expense. *Id*. at 10. The administrative law judge further found, however, that their additional monthly offering of $470.00 to the church is not an ordinary and necessary expense, because it is not a fixed monthly amount required by the church.[6] *Id.* Finally, the administrative law judge found that the $200.00 to $300.00 claimant's wife gives each month to her brother, and the unspecified amount of money she gives each month to help her mother pay for medication, are not ordinary and necessary expenses because there is no evidence that claimant and his wife are legally responsible for supporting her brother or mother. *Id*. at 10-11.

Based on a monthly income of $5,300.00 and ordinary and necessary expenses of $4,111.00, including the $530.00 tithe, the administrative law judge determined that, with a monthly "cushion" or "surplus" of $1,189.00, claimant has the financial capacity to repay the overpayment without being deprived of income required for his ordinary and necessary living expenses. Decision and Order at 11-12. Therefore, the administrative

[6] The administrative law judge cited claimant's wife's testimony that church members are required under the church's bylaws to give additional offerings beyond their tithes, but that the offerings may vary from month to month based on what members can afford, and that fixed or specific amounts were not expected. Decision and Order at 10; Hearing Transcript (Tr.) at 36, 54-55.

law judge found that claimant failed to establish that recovery of the overpayment would defeat the purpose of the Act. *Id*. at 11.

Claimant contends that the administrative law judge erred by not including four of his and his wife's expenditures as ordinary and necessary expenses: their additional $470.00 monthly offering to their church; claimant's wife's monthly financial support of her brother; her monthly financial support of her mother; and her treatment every two or three months by an arthritis specialist, which costs between $100.00 and $150.00 per visit. Claimant's Brief at 8-13, 15, 19; Hearing Transcript (Tr.) at 16-17, 19-20, 28, 31-32, 34-36, 54-55.

As it relates to claimant's additional $470.00 monthly offering to his church, the Director concedes that the administrative law judge erred in evaluating whether these payments are "fixed" expenses required by claimant's church pursuant to 20 C.F.R. §404.508(a)(1), as opposed to "voluntary charitable contributions" that "may be legitimate 'miscellaneous' expenses if a part of the claimant's lifestyle" pursuant to 20 C.F.R. §404.508(a)(4). Director's Brief at 7-8, n.4 (citing the Social Security Administration (SSA) Program Operations Manual System (POMS), SSA POMS GN § 02250.120, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0202250120). The Director asserts, however, that any error in the administrative law judge's evaluation of claimant's $470.00 monthly offering is harmless because "even if claimant's offering was included as a reasonable expense" he would still have a monthly "surplus" that is large enough to allow for repayment, without depriving him of income needed for ordinary and necessary living expenses. Director's Brief at 7-8. We agree.

Turning our attention to claimant's financial support of his wife's brother and mother, we note as an initial matter that claimant has not set forth a legal argument that these payments should be included as ordinary and necessary expenses. Although claimant briefly identifies as one of the "Issues Presented" whether excluding these payments is "rational, supported by substantial evidence, and in accordance with applicable law," claimant fails to provide any argument or analysis that would support his contention that the administrative law judge erred in excluding these costs. Claimant's Brief at 7. Instead, claimant devotes the bulk of that section of his brief to arguing that he should be allowed to include in his ordinary and necessary expenses the additional monthly offerings he makes to his church, which he explains are also meant to assist individual members of the church as needs arise. *Id.* at 9-11. Claimant adds that his "offerings and contributions to the church and individuals in need" should be counted as "regular monthly expenses as part of [his] religion," apparently referring again to the monthly offerings he makes to his church. *Id*. at 11. Claimant does not address the payments to his wife's brother and mother further until the "Conclusion" section of his brief, in which he merely restates, without more, that the administrative law judge

"excluded these costs as a necessary and ordinary expense because [claimant's wife] is not legally responsible to support either individual." *Id*. at 19.

Claimant bears the burden of establishing that he is entitled to a waiver of recovery of an overpayment. *See Benedict v. Director, OWCP*, 29 F.3d 1140, 1142, 18 BLR 2-309, 2-312 (7th Cir. 1994); *McConnell*, 993 F.2d at 1457, 18 BLR at 2-174. As the administrative law judge stated in his decision, neither claimant nor his wife specified the amount of money she gives to her mother each month to help pay for medication. The record reflects that she testified only that her mother's medication costs between $200.00 and $300.00 a month, and that she tries "to give [her mother] money, like every month. I try to help her out that way." Tr. at 31. The administrative law judge accurately noted the lack of a specific dollar amount when he summarized claimant's wife's testimony: "She estimated that her mother's medications were in the $200-$300 range per month, but she did not state how much she and her husband contributed to paying for them." Decision and Order at 5. Therefore, substantial evidence supports the administrative law judge's determination that claimant failed to meet his burden of establishing any specific amount of money given to claimant's wife's mother that could be counted as an ordinary and necessary expense. We therefore affirm the administrative law judge's determination not to count the unspecified amount of money claimant's wife gives to her mother as an ordinary and necessary expense, pursuant to 20 C.F.R. §404.508(a).[7]

As a result, even if the other expenses identified by claimant – the additional $470.00 monthly offerings to the church,[8] up to $75.00 for the cost of claimant's wife's the arthritis specialist,[9] and up to $300.00 for the support of claimant's brother-in-law –

[7] Because there is no evidence of the amount of money claimant's wife gives to her mother, we disagree with our dissenting colleague that claimant's wife's testimony could support a finding that claimant identified up to $300 in additional monthly expenses that should have been included in the administrative law judge's calculation. *Infra.*, at 12 n.15.

[8] Because claimant has a monthly surplus sufficient to deny a waiver of his obligation to repay the Trust Fund even if claimant's additional $470.00 monthly offering is included in his ordinary and necessary expenses, we need not address claimant's contention that not counting the additional offering as an ordinary and necessary expense violates his right under the First Amendment of the Constitution to freely exercise his religion. Claimant's Brief at 8-9.

[9] The Director does not address claimant's meritorious argument regarding his wife's visits to the arthritis specialist. Claimant's wife testified that the visits occur every two or three months and cost $100.00 to $150.00, which equates to an expense of $33.00

are included among claimant's ordinary and necessary expenses, claimant would still have a monthly surplus of $344.00.[10] As the administrative law judge noted, a monthly surplus of just $110.00 has been held sufficient to deny waiver, on the ground that recovery of an overpayment from a claimant with such a surplus would not deprive the claimant of income needed for ordinary and necessary expenses. *Benedict*, 29 F.3d at 1143-44, 18 BLR at 2-316; Decision and Order at 11.

Furthermore, the administrative law judge's decision to exclude the payments that claimant's wife gives to her mother and brother is consistent with decisions from federal courts of appeals addressing this question. Those courts have excluded from ordinary and necessary expenses financial support given to relatives for whom a claimant is not legally responsible. *See* 20 C.F.R. §404.508(a)(3); *McConnell*, 993 F.2d at 1459-60, 18 BLR at 2-179; *Jarvis v. Carbon Fuel Co.*, 23 F.3d 401 (unpub.) (Table), 1994 WL 179473 (4th Cir. April 12, 1994).

In *McConnell*, the United States Court of Appeals for the Tenth Circuit held that support payments for a claimant's wife's family could not be included as part of the claimant's expenses because "[t]he regulations expressly provide for including 'expenses for the support of others for whom the individual is legally responsible'" and claimant "presented no evidence whatsoever that he and his wife are legally responsible for the support of his wife's forty-three year old, partially-employed daughter or her offspring." *McConnell*, 993 F.2d at 1459, 18 BLR at 2-179. The court explained that "the regulations take a functional approach to determining income and expenses," one that focuses on determining the income and expenses of the household. *Id*. Therefore, the

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to $75.00 each month, but claimant contends that the administrative law judge failed to account for those visits. Claimant's Brief at 15; Tr. at 19-20, 34-35. Medical, hospitalization, and similar expenses are ordinary and necessary expenses pursuant to 20 C.F.R. §404.508(a)(2). Although the administrative law judge determined that the couple's ordinary monthly expenses included $150.00 for medical copayments, the Decision and Order does not reflect that he considered or accounted for the cost of the visits to the arthritis specialist. Decision and Order at 4-9. His failure to do so was harmless, however, as explained above. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

[10] The administrative law judge calculated $4,111.00 in monthly expenses. If the $470.00 church offering, the $75.00 payment for an arthritis specialist, and the $300.00 payment to claimant's wife's brother were included in that figure, claimant's monthly expenses would be $4,956.00. Subtracting those expenses from claimant's income ($5,300.00 minus $4,956.00) results in a monthly surplus of $344.00.

court stated, "we . . . interpret the regulations as sensibly counting the . . . expenses of *the household as defined by legal responsibility*." *McConnell*, 993 F.2d at 1459-60, 18 BLR at 2-179 (emphasis added). For this reason, the court concluded that while the claimant's support of family members was commendable, the court "[could] not include it as an expense under these regulations." *McConnell*, 993 F.2d at 1459, 18 BLR at 2-179. In sum, the court in *McConnell* determined that financial support payments to family members for whom one is not legally responsible are excluded as ordinary and necessary expenses because they are not expenses of the "household." *See McConnell*, 993 F.2d at 1459-60, 18 BLR at 2-179.

Similarly, in *Jarvis*, the United States Court of Appeals for the Fourth Circuit rejected claimant's contention that the administrative law judge "should have included among his ordinary and necessary living expenses his regular support payments for his married children. . . ." *Jarvis*, 1994 WL 179473 at *1. The court reasoned that although "support payments to others for whom the claimant is 'legally responsible' may be included within the claimant's ordinary and necessary living expenses," the administrative law judge "properly did not include these payments among [claimant's] expenses" because it was undisputed that claimant was not legally responsible for the support of his married children. *Id.* As in *McConnell* and *Jarvis*, it is undisputed in this case that claimant and his wife are not legally responsible for the support of claimant's wife's mother and brother. Tr. at 56.

Given the existence of well-reasoned circuit court case law on the subject, and the absence of factual support and legal argument in this case, we decline to hold that the administrative law judge erred as a matter of law in excluding these payments from claimant's ordinary and necessary expenses, and by not considering whether the money claimant's wife gives to her relatives qualifies as "other miscellaneous expenses" under 20 C.F.R. §404.508(a)(4).[11]

[11] Our dissenting colleague's reliance on *Gordon v. Director, OWCP*, 14 BLR 1-60 (1990), for the proposition that the administrative law judge is required to consider whether claimant's payments to family members constituted "other miscellaneous expenses," is misplaced. In *Gordon*, the Board considered whether claimant's credit card payments were "ordinary and necessary expenses" even though some of the debt was for items that claimant had purchased for his granddaughter, for whom he was not legally responsible. Contrary to our dissenting colleague's interpretation, the Board did not hold that "an expenditure that does not qualify as an ordinary and necessary expense under one category must still be considered under other categories." *Infra*, at 11. Rather, the Board held that, because credit card "installment payments" constitute legal obligations for claimant, and are explicitly included in the definition of "ordinary and necessary expenses" under the "fixed expenses" category of subsection (a)(1), it was error for the

In sum, the administrative law judge had an adequate basis for determining that recovery of the overpayment in this case would not defeat the purpose of the Act. Any other errors the administrative law judge may have made in considering the evidence of claimant's expenses were harmless.[12] *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278.

administrative law judge to exclude those "fixed expenses" simply because some of the debt resulted from purchases made by claimant for his granddaughter. *Gordon*, 14 BLR at 1-63.

[12] We reject claimant's argument that the administrative law judge erred by not considering "reasonably expected future changes" in claimant's income and expenses. Claimant's Brief at 14-16. Claimant, who is sixty years old, asserts that he will stop receiving state workers' compensation benefits when he turns sixty-five; that his three automobiles are older, with "high mileage," and that he may need to purchase a new car in the near future; and that his medical bills will likely increase as he gets older. *Id*. at 14-15; Director's Exhibit 1. In determining whether repayment would defeat the purpose of the Act, however, the administrative law judge must consider current expenses, not prospective ones. *See* 20 C.F.R. §404.508(b); *Milton v. Harris*, 616 F.2d 968, 974 (7th Cir. 1980); *Keiffer*, 18 BLR at 1-39-40.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

I concur:

GREG J. BUZZARD
Administrative Appeals Judge

HALL, Chief Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent. I concur with the majority that the administrative law judge erred by failing to consider the cost of claimant's wife's visits to an arthritis specialist, which may be as much as $75.00 a month.[13] I also agree with the Director that the administrative law judge erred by failing to consider whether the additional $470.00 monthly offering that claimant and his wife make to their church qualifies as an ordinary and necessary expense pursuant to 20 C.F.R. §404.508(a)(4), which covers "[o]ther miscellaneous expenses which may reasonably be considered as part of [claimant's] standard of living."[14]

However, the Director's concession that the administrative law judge erred with regard to the additional church offering compels me to conclude that the administrative law judge made a similar error regarding the money claimant's wife gives to her brother and mother each month. The Decision and Order reveals that the administrative law judge did not consider whether those monthly contributions, up to $300.00 each, are

[13] In addition, I concur with the majority's reasoning in affirming the administrative law judge's unchallenged findings, and in rejecting claimant's argument regarding "reasonably expected future changes" in his income and expenses.

[14] Thus, I agree with the majority that we need not consider claimant's contention that his First Amendment right to free exercise of his religion has been violated.

"miscellaneous expenses" that may reasonably be considered part of claimant's lifestyle, pursuant to 20 C.F.R. §404.508(a)(4). That appears to me to constitute the same type of error that the administrative law judge committed in considering the couple's additional offering to their church.

In a previous overpayment case, the Board held that 20 C.F.R. §410.561c(a)(1)-(4) — the regulation formerly used in these cases, which is materially the same as 20 C.F.R. §404.508(a)(1)-(4) — provided "four separate categories of expenses that constitute 'ordinary and necessary expenses,'" and made clear in its decision that an expenditure that does not qualify as an ordinary and necessary expense under one category must still be considered under other categories. *Gordon v. Director, OWCP*, 14 BLR 1-60, 1-63 (1990) (applying 20 C.F.R. §410.561c(a)(1)-(4)). The administrative law judge in *Gordon* excluded credit card purchases for the claimant's granddaughter from the claimant's ordinary and necessary expenses because the claimant was not legally responsible for her, pursuant to 20 C.F.R. §410.561c(a)(3). *Gordon*, 14 BLR at 1-62. The Board held that the administrative law judge erred because he failed to consider whether the purchases were "installment payments" that should have been included as fixed living expenses under §410.561c(a)(1). *Gordon*, 14 BLR at 1-63. In essence, the administrative law judge erroneously imposed the "legal responsibility" requirement found in 20 C.F.R. §410.561c(a)(3), as an additional requirement for all ordinary and necessary expenses, regardless of whether they qualified under one of the other subsections. *Id*. Applying the regulations in that manner, the Board held, was "not in accordance with the traditional rules of statutory or regulatory interpretation." *Id*.

In the case now before us, claimant's wife testified that she gives her brother, who is disabled from working, $200.00 to $300.00 a month. Tr. at 32. She also testified that she gives her mother money each month to "help" her mother pay for medication that costs "almost" $300.00 a month. *Id*. at 31. The administrative law judge noted that "ordinary and necessary expenses" include expenses "for the support of others for whom the individual is legally responsible," pursuant to 20 C.F.R. §404.508(a)(3), but found no evidence that claimant and his wife are legally responsible for the medical or financial needs of her brother and mother. Decision and Order at 10-11. The administrative law judge therefore determined, without any reference to 20 C.F.R. §404.508(a)(4), that "the regulations appear to exclude such magnanimity as an ordinary expense."[15] *Id*.

[15] The majority points out that the administrative law judge noted that claimant's wife did not specify how much money she gives her mother each month. Decision and Order at 5. However, the administrative law judge did not cite that as a reason for finding that claimant's wife's support of her mother was not an ordinary and necessary expense. Decision and Order at 10-11. Moreover, although claimant's wife did not specify whether she pays the entire cost of her mother's medication, or only some portion

While I agree with the majority and the Director that the administrative law judge properly found that the gifts of financial support claimant's wife gives to her relatives are not ordinary and necessary expenses under 20 C.F.R. §404.508(a)(3), *see McConnell v. Director, OWCP*, 993 F.2d 1454, 1459-60, 18 BLR 2-168, 2-179-80 (10th Cir. 1993), I believe the administrative law judge erred by ending his analysis there, without considering whether the gifts are ordinary and necessary expenses pursuant to 20 C.F.R. §404.508(a)(4). *See Gordon*, 14 BLR at 1-63. Neither the majority, nor the Director, has explained why that was not an error. Recall the additional offering to claimant's church: Even though the administrative law judge reasonably determined that the additional offering was not a fixed expense, under 20 C.F.R. §404.508(a)(1), the Director has conceded that the administrative law judge's analysis of the additional offering was erroneous because he failed to apply or consider 20 C.F.R. §404.508(a)(4). In my view, the administrative law judge's analysis of the money claimant's wife gives to her brother and mother is similarly incomplete and therefore erroneous.

I would not hold that the gifts of financial support to claimant's wife's relatives *are* "miscellaneous expenses which may reasonably be considered as part of [claimant's] standard of living." 20 C.F.R. §404.508(a)(4). I would instead remand this case for the administrative law judge to consider the evidence and determine whether it supports such a finding.[16] It is not obvious that such a finding would be inconsistent with the regulations. The Social Security Administration's Program Operations Manual System (POMS), which the Director has cited, includes "newspaper, hairdresser, pet maintenance, entertainment, [and] charitable donations" as examples of miscellaneous expenses consistent with a claimant's lifestyle. SSA POMS GN § 02250.120, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0202250120. If money spent every month to subscribe to a newspaper, groom a pet, or help other people through charitable

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of it, she testified that her mother's medication costs "almost" $300.00 a month, and that her mother's only income is over $600.00 a month ("six-something") in Social Security benefits. Tr. at 31-32. Given those facts, the administrative law judge could have reasonably inferred that claimant's wife, at the very least, pays a large portion of the cost of the medication.

[16] The Director contends that "[c]laimant has made no legal argument contending that payments to his in-laws qualify as 'ordinary and necessary expenses' under the regulations; therefore, the ALJ's determination to exclude these payments from the household's expenses should be affirmed." Director's Brief at 7. I disagree. In his brief, claimant cites the money his wife gives to her brother and mother and argues that it is an ordinary and necessary expense. Claimant's Brief at 9-11, 13, 19. Claimant also cites 20 C.F.R. §404.508(a)(1)-(4), the relevant regulation and subsections. *Id*. at 17.

donations can be considered an expense consistent with a claimant's lifestyle, it is not apparent to me why money given every month to help relatives cannot be.[17] Many people, and surely many claimants, have strong family ties to relatives other than those for whom they are legally responsible, and they help those relatives when necessary.

While each of the administrative law judge's errors in this case may be harmless in isolation, I believe the totality of them is not. Recovery defeats the purpose of the Act if the person from whom it is sought needs "*substantially* all of his current income" to meet current ordinary and necessary expenses. 20 C.F.R. §404.508(b) (emphasis added); *see Napier v. Director, OWCP*, 999 F.2d 1032, 1036, 17 BLR 2-186, 2-193 (6th Cir. 1993). If credited, the expenses that the administrative law judge failed to consider fully pursuant to 20 C.F.R. §404.508(a) — the additional offerings to the church ($470.00), the financial assistance from claimant's wife to both her brother and mother (up to $600.00), and the cost of visits to claimant's wife's arthritis specialist (up to $75.00) — could total as much as $1,145.00 in additional ordinary and necessary monthly expenses, shrinking

[17] Some language in *McConnell v. Director, OWCP*, 993 F.2d 1454, 1459-60, 18 BLR 2-168, 2-179-80 (10th Cir. 1993), which the majority cites, appears to reject such an interpretation of the regulations defining ordinary and necessary expenses. In that case, however, the United States Court of Appeals for the Tenth Circuit rejected an argument to include money spent on an employed adult daughter, on the grounds that the claimant and his wife were not legally responsible for her. *Id.* The Tenth Circuit did not consider the argument prompted by the Director's concession in this case, that such money might be counted as a miscellaneous expense consistent with the claimant's lifestyle. The unpublished decision in *Jarvis v. Carbon Fuel Co.*, 23 F.3d 401 (unpub.) (Table), 1994 WL 179473 (4th Cir. April 12, 1994), which the majority also cites, is no more dispositive or persuasive; the Fourth Circuit merely applied *McConnell* to affirm an administrative law judge's finding that a claimant's support payments to his adult children were not ordinary and necessary expenses, on the grounds that the claimant was not legally responsible for supporting them.

claimant's "cushion" from $1,189 per month to just $44 per month before any recovery payments.

The administrative law judge noted that a monthly income surplus of $110.00 has been deemed sufficient to establish that a claimant has enough income to meet ordinary and necessary expenses. *See Benedict v. Director, OWCP*, 29 F.3d 1140, 1144, 18 BLR 2-309, 2-316 (7th Cir. 1994); Decision and Order at 11 n.38. The Director cites *Benedict* in arguing that the administrative law judge's errors are harmless, but that argument lacks merit under my view of this case, because the Director assumes that claimant would still have a monthly surplus of $719.00. Director's Brief at 7-8. As I have shown, claimant's surplus could plausibly be even lower than the $110.00 surplus that was enough to deny waiver of recovery in *Benedict*. Moreover, a claimant with a "small monthly cushion" may still need "substantially all" of his or her income to meet ordinary and necessary expenses, and thus establish that recovery would defeat the purpose of the Act. *See* 20 C.F.R. §404.508(b); *McConnell*, 993 F.2d at 1460, 18 BLR at 2-180 (holding that recovery would not defeat the purpose of the Act where claimant's income exceeded expenses by almost $639.00 per month, and claimant would still have a surplus after making $525.00 recovery payments, but recognizing that claimants are entitled to retain sufficient monetary resources for emergencies).

Because the administrative law judge erred in considering the evidence of claimant's ordinary and necessary expenses, and because I cannot say those errors were harmless, I would vacate the administrative law judge's finding that recovery would not defeat the purpose of the Act, and remand this case for further consideration.

BETTY JEAN HALL, Chief
Administrative Appeals Judge