

BRB No. 01-0932 BLA

DIMPLE COLEMAN )  
(Widow of LANTA COLEMAN, JR.) )  
 )  
Claimant-Respondent )  
 )  
v. ) DATE ISSUED:  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Petitioner ) DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Mary Forrest-Doyle (Eugene Scalia, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (2001-BLO-0001) of Administrative Law Judge Joseph E. Kane granting waiver of the recovery of an overpayment of 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).<sup>1</sup> The record reflects an overpayment in the amount of

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<sup>1</sup>The 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

\$8,947.50. Decision and Order at 3; Director's Exhibits 6, 7. The administrative law judge found, and the Director concedes, that claimant was without fault in the creation of the overpayment. Decision and Order at 7-8. Considering the evidence of record and claimant's testimony, the administrative law judge concluded that although recovery of the overpayment would not be against equity and good conscience, it would defeat the purpose of Title IV of the Act, and thus found that waiver of the overpayment was proper. *See* 20 C.F.R. §§725.540, 725.547, 410.561 (2000); Decision and Order at 8-9. Accordingly, the administrative law judge granted waiver of recovery of the overpayment.<sup>2</sup> On appeal, the Director contends that the administrative law judge erred in granting waiver of recovery of the overpayment as it would defeat the purpose of Title IV of the Act. Claimant responds, asserting that the administrative law judge properly granted waiver of recovery of the overpayment.<sup>3</sup>

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 the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>3</sup>The administrative law judge's findings that the amount of the overpayment is \$8,947.50, that claimant was without fault in the creation of the overpayment and that the recovery of the overpayment would not be against equity and good conscience, are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In cases involving an overpayment, the administrative law judge must determine whether claimant is without fault in the creation of the overpayment. 20 C.F.R. §§410.561a, 410.561b (2000). If claimant is not without fault, recovery cannot be waived. 20 C.F.R. §§410.561a, 410.561b (2000); *Hampton v. Director, OWCP*, 11 BLR 1-118 (1988). If the administrative law judge determines that claimant is without fault, the administrative law judge must then consider whether recovery of the overpayment would defeat the purpose of Title IV of the Act,<sup>4</sup> or be against equity and good conscience.<sup>5</sup> 20 C.F.R. §§410.561a, 410.561c, 410.561d (2000); *Nelson v. Director, OWCP*, 21 BLR 1-4 (1997); *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992). Claimant bears the burden of proof to demonstrate that she qualifies for a waiver of overpayment pursuant to 20 C.F.R. §410.561 (2000), *et seq.*. See *Bennett v. Director, OWCP*, 18 BLR 1-48 (1994); *Ashe, supra*; *Jones v. Director, OWCP*, 14 BLR 1-80 (1990) (*en banc*) (Brown, J., concurring).

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<sup>4</sup>“Defeat the purpose of Title IV of the Act” means to deprive a person of income required for ordinary and necessary living expenses. The administrative law judge must determine 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. §410.561c (2000).

<sup>5</sup>“Against equity and good conscience” means that adjustment or recovery of an incorrect payment will be considered inequitable if an individual, because of a notice that such payment would be made or by reasons of the incorrect payment, relinquished a valuable right or changed his position for the worse. In reaching such a determination, the individual's financial circumstances are irrelevant. 20 C.F.R. §410.561d (2000); *Hervol v. Director, OWCP*, 16 BLR 1-53 (1990).

The Director contends that the administrative law judge erred in finding waiver established on the ground that recovery would defeat the purpose of Title IV of the Act. In the instant case, the administrative law judge, based on the documentary evidence and formal hearing testimony, found that claimant's monthly income exceeds her monthly expenses by less than \$50.00 and that \$112.00 of the income is not expected to continue much longer.<sup>6</sup> Decision and Order at 3-5, 9; Director's Exhibit 8; Hearing Transcript 13-16. The administrative law judge also noted that other than claimant's home, valued at \$35,000.00, the only significant asset that claimant had was \$7,471.00 in a savings account.<sup>7</sup> Decision and Order at 9. The administrative law judge concluded that repayment of the funds, however, would exhaust the savings account and would leave claimant with no cushion for emergencies, and consequently found that recovery would defeat the purpose of Title IV of the Act.<sup>8</sup> See 20 C.F.R. §410.561c (2000); *Ashe, supra*; Decision and Order at 9. The Director's assertion that the administrative law judge erred in his finding that the recovery of the overpayment would defeat the purpose of the Act has merit based upon the circumstances of the instant case.

To establish that recovery of an overpayment would defeat the purpose of the Act, claimant must show that recovery would deprive her of income required for ordinary and necessary living expenses such as food, clothing, rent or mortgage payments, utilities, maintenance, insurance, taxes, installment payments, medical costs, support of others for whom claimant is legally responsible, and other miscellaneous expenses reasonably considered as part of claimant's standard of living. See 20 C.F.R. §§410.561c, 725.543 (2000); *Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-39-40 (1993); *Nelson, supra*; *Potisek v. Director, OWCP*, 14 BLR 1-87 (1990)(*en banc*, Brown, J., dissenting); *Jones, supra*. A determination regarding such deprivation depends on whether claimant has income or

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<sup>6</sup>The record indicates that claimant was receiving \$56.00 bi-weekly as compensation for the miner's arm injury. Director's Exhibit 8; Hearing Transcript at 12, 23. Claimant, as well as her oldest daughter, Pebble May, who handles most of claimant's financial transactions, testified that they did not know how much longer the payment would continue. Hearing Transcript at 16, 28.

<sup>7</sup>The administrative law judge noted that claimant alleged that \$8,000.00 of the \$15,471.00 deposited in her savings account belonged to her disabled daughter, Tonya Coleman. Decision and Order at 5; Hearing Transcript at 14-15.

<sup>8</sup>Although noted earlier in the decision, the administrative law judge failed to include \$3000.00 in claimant's checking account in considering claimant's assets. Decision and Order at 5, 8-9; Director's Exhibit 8.

financial resources sufficient for more than ordinary or necessary needs, or is dependent on all of her current income for such needs. *Id.*

As the Director correctly asserts, the federal black lung benefits program, which provides for the augmentation of benefits on account of a claimant's dependents, contemplates a view of claimant's financial situation in the broad context of the household, rather than a narrow view concerned only with the bare expenses and assets of the individual claimant alone. *See McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993); *Keiffer, supra*; *Ashe, supra*. Thus the administrative law judge must consider the combined income, expenses, and assets of claimant and any dependents in determining the claimant's ability to repay the overpayment. *See McConnell, supra*; *Keiffer, supra*; *Ashe, supra*. In the instant case, the administrative law judge listed claimant's income, expenses, and assets but did not consider the impact of the entire financial circumstances of the household, including savings and assets, on claimant's ability to repay the overpayment. *See Keiffer, supra*; *Ashe, supra*; Decision and Order at 8-9.

The Director also argues that the administrative law judge erred in finding that recovery would deprive claimant of income required for ordinary and necessary living expenses as claimant, sometime in the future, would not receive \$112.00 for the miner's work-place injury and, therefore, would not have a cushion for unexpected emergencies. Contrary to the administrative law judge's finding, the regulations pertaining to overpayments, however, do not provide for consideration of future or speculative expenses or loss of payments. *Keiffer, supra*. Rather, the regulations contemplate only current income and current expenses. *See* 20 C.F.R. §410.561c(b) (2000); *Keiffer, supra*. Thus, the administrative law judge's Decision and Order must be based on the evidence of current expenses in the record before him, 20 C.F.R. §725.477(b), not on what could happen in the future. Therefore, the administrative law judge incorrectly considered claimant's future unexpected expenses and losses at Section 410.561c (2000). Decision and Order at 9; *Keiffer, supra*.

We, therefore, vacate the administrative law judge's finding concerning waiver of recovery of the overpayment as it would defeat the purpose of Title IV of the Act, and remand the case to the administrative law judge to consider the relevant evidence of record and render appropriate findings. *See Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-233 (6th Cir. 1995); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990). On remand, the administrative law judge must specifically consider, by examining the entire financial picture of the household, whether claimant has the current income and financial resources to meet her current ordinary and necessary expenses pursuant to Section 410.561c (2000).<sup>9</sup>

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<sup>9</sup>The administrative law judge must also include the \$3000.00 in claimant's checking

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account. Decision and Order at 5; Director's Exhibit 8.

Accordingly, the administrative law judge's Decision and Order granting waiver of recovery of the overpayment is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge