

BRB No. 92-2580 BLA

ELMER J. SEGERS )

)  
Claimant-Respondent )

v. )

)  
DIRECTOR, OFFICE OF WORKERS' ) Date Issued:  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

)  
Petitioner ) DECISION and ORDER

Appeal of the Decision and Order of Peter McC. Giesey, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr., Raleigh, Illinois, for claimant.

Eileen McCarthy (Thomas S. Williamson, Jr. Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, Acting Chief Administrative Appeals Judge, SMITH, Administrative Law Judge, and SHEA, Administrative Law Judge.\*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting Waiver of Repayment (89-BLO-0126) of Administrative Law Judge Peter McC. Giesey on 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 record reflects an overpayment in the amount of \$19,611.60. This case is before the Board for

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

the third time. Claimant was initially determined to be entitled to benefits on May 6, 1981. On September 21, 1983, Administrative Law Judge Aaron Silverman issued a Decision and Order denying benefits. The denial of benefits was affirmed by the Board by Decision and Order in *Segers v. Old Ben Coal Co.*, BRB No. 83-2329 BLA (Apr. 30, 1986)(unpub.) and in a Decision and Order on Reconsideration in *Segers v. Old Ben Coal Co.*, BRB No. 83-2329 BLA (Aug. 27, 1987)(unpub.). Claimant, after being notified of an overpayment on September 15, 1988, requested a formal hearing before the Office of Administrative Law Judges. After the case was transferred to the Office of Administrative Law Judges for a formal hearing, Administrative Law Judge Charles P. Rippey issued a First Procedural Order requesting briefs on the issue of jurisdiction. The administrative law judge subsequently found that he did not have jurisdiction to hear the case and issued a Second Procedural Order and Order of Dismissal. On appeal, the Board held that claimant was entitled to a hearing before an administrative law judge and vacated the administrative law judge's Second Procedural Order and Order of Dismissal and remanded the case to the administrative law judge for a determination on the merits. See *Segers v. Director, OWCP*, BRB No. 89-2201 BLA (Dec. 26, 1990)(unpub.). On remand, the administrative law judge stated that claimant was without fault in causing the overpayment and determined that recovery of the overpayment would defeat the purpose of the Act. Accordingly, the administrative law judge granted waiver of recovery of the overpayment. On appeal, the Director contends that the administrative law judge erred in making his finding that recovery of the overpayment would defeat the purpose of the Act. Claimant responds in support of the administrative law judge's Decision and Order.

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

In making his finding that recovery of the overpayment would defeat the purpose of the Act pursuant to 20 C.F.R. §410.561c, the administrative law judge found that claimant's average monthly income was approximately \$1,479.00. The administrative law judge next found that, according to forms filed by claimant in September 1988, claimant's monthly expenses totaled \$1,254.14. The administrative law judge then stated that claimant's expenses had not been brought up to date and summarily adjusted the 1988 figure for inflation, which he estimated to be at twenty percent between 1988 and 1992, to arrive at monthly expenses of \$1,505.00. See Decision and Order at 2. The Director contends that the

administrative law judge erred in increasing claimant's monthly expenses based on his estimation of the rate of inflation over a four year period. We agree. The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). As the administrative law judge did not provide an explanation of how he arrived at the figure of twenty percent inflation over a four year period, and as the record does not contain evidence relating to the rate of inflation during the four year period, his finding violates the APA. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As a result, the administrative law judge's findings regarding claimant's expenses are vacated and the case is remanded for the administrative law judge to reconsider the evidence regarding claimant's expenses.<sup>1</sup>

The Director also contends that the administrative law judge erred in assuming that claimant would not be required to repay the overpayment if he had not elected to receive a lump payment of \$50,000 in liquidated pension benefits. In making his finding, the administrative law judge notes that claimant has more than \$50,000 in the bank. The administrative law judge then states that he agrees with claimant's counsel's argument that waiver should be granted because "but for the liquidation of that pension fund, [claimant] would not have liquid assets of any significance." See Decision and Order at 3. The administrative law judge further states that had claimant not elected to receive a lump sum payment, there would now be no basis for requiring repayment. See Decision and Order at 3. However, claimant's wife testified that claimant would receive \$400 or \$500 per month in pension benefits if he had not elected to receive the lump sum payment. See Transcript at 8. Thus, as the Director argues, it appears that the administrative law judge did not consider the fact that, had claimant not elected to receive the lump sum payment, claimant would receive a monthly payment from his pension plan which would be greater than the \$250 in interest income that he currently receives from his certificates of deposit. As a result, the administrative law judge's finding that recovery of the overpayment would defeat the purpose of the Act is vacated and the case is remanded for the administrative law judge to reconsider all of the evidence regarding claimant's assets, income, and expenses, see *Ashe v. Director, OWCP*, 16 BLR 1-109 (1991), and for the administrative law judge to provide an explanation for any adjustments made to any of the information submitted by claimant. Further, if the administrative law judge determines that recovery of the overpayment would not defeat the purpose of the Act, then he must determine whether recovery would be against equity and

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<sup>1</sup>It is noted that the administrative law judge may wish to reopen the record to allow the submission of updated expense information from claimant.

good conscience. See *Potisek v. Director, OWCP*, 14 BLR 1-87 (1990)(*en banc*, with J. Brown dissenting).

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

ROBERT J. SHEA  
Administrative Law Judge