

BRB No. 95-0372 BLA

NELLIE KEENE )  
(Widow of LOREN KEENE) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 ) DATE ISSUED: \_\_\_\_\_ DIRECTOR, OFFICE OF  
WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Respondent ) DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr. (Culley & Wissore), Raleigh, Illinois, for claimant.

Sarah M. Hurley (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: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (93-BLO-0085) of

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<sup>1</sup>Claimant is Nellie Keene, widow of the miner, who filed a claim for benefits on August 29, 1978 and was initially awarded benefits on May 21, 1981. Director's Exhibit 1. On February 15, 1985, Administrative Law Judge Richard D. Mills issued a Decision and Order denying benefits, which was affirmed by the Board on January

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28, 1988. *Keene v. Zeigler Coal Co.*, BRB No. 85-561 BLA (Jan. 28, 1988)(unpub.).

On April 20, 1989, the Board, on reconsideration, remanded the case to Judge Mills, who again denied benefits on July 31, 1991. Claimant did not appeal this denial. Claimant was informed of an overpayment in the amount of \$36,661.40, Director's Exhibit 3, and requested waiver of the recovery of the overpayment, which was denied, Director's Exhibit

6. On March 25, 1993, claimant requested a formal hearing. Director's Exhibit 8.

Administrative Law Judge John C. Holmes granting partial waiver of the recovery of an overpayment 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 administrative law judge found that claimant was without fault in causing the overpayment and waived recovery of \$5,000.00 of the overpayment as being against equity and good conscience pursuant to 20 C.F.R. §410.561d. The administrative law judge then determined that recovery of the remainder of the overpayment would not defeat the purpose of the Act pursuant to 20 C.F.R. §410.561c and ordered claimant to repay \$31,661.40 in a lump sum.

On appeal, claimant contends that the administrative law judge erred in finding that recovery of the entire overpayment should not be waived pursuant to Sections 410.561c and 410.561d, and that the Secretary of Labor has exceeded the scope of his power in applying the recoupment provisions of the Social Security Act (SSA) rather than those of the Longshore and Harbor Workers' Compensation Act (LHWCA) to this claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a motion to remand, urging the Board to vacate the administrative law judge's finding that recovery of the overpayment would not defeat the purpose of the Act pursuant to Section 410.561c and to remand the case for further findings on that issue.

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).

On appeal, claimant generally alleges that the administrative law judge erred in failing to waive expenditures that she testified she would not have made "but for" the receipt of black lung benefits. Claimant's Brief at 2. The administrative law judge found that claimant spent \$5,000.00 in reliance upon the payment of benefits and waived recovery of that amount pursuant to Section 410.561d.<sup>2</sup> Decision and Order at 2. Because claimant fails to refer to any specific expenditures in her brief, and there is no indication in the hearing transcript that claimant made any additional expenditures in reliance upon the payment of benefits, Hearing Transcript at 11-17, we have no basis upon which to review the administrative law judge's determination.

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<sup>2</sup>We affirm the administrative law judge's waiver of \$5,000.00 pursuant to 20 C.F.R. §410.561d as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

See *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Thus, we affirm the administrative law judge's finding that recovery of the remainder of the overpayment would not be against equity and good conscience pursuant to Section 410.561d. See *Hervol v. Director, OWCP*, 16 BLR 1-53 (1990).

Claimant next contends that repayment of the entire overpayment would decrease her interest income and make her income less than her expenses, thus defeating the purpose of the Act pursuant to Section 410.561c. Claimant's Brief at 3. The Director agrees with claimant and argues that the administrative law judge erred in failing to consider the effect that any diminution of claimant's interest income will have on her monthly income. Director's Motion to Remand at 6.

The administrative law judge found the argument raised by claimant and the Director to be without merit because claimant "knew or should have known in 1985, over nine years prior to the hearing" that repayment of the overpayment would be required. Decision and Order at 2. Further, the administrative law judge noted that claimant had an attorney, that she continued to contest the denial of the claim, and that she collected interest on the benefits paid during that time.<sup>3</sup> *Id.* The administrative law judge stated that claimant testified that her monthly income and expenses are relatively the same and concluded that she is not entitled to waiver pursuant to Section 410.561c and that, "due to the protracted nature of these proceedings and the benefits derived by claimant in laborious and persistent resistance to repayment, as well as the relative well-being of claimant currently," a lump sum repayment is appropriate unless determined otherwise by the Director. Decision and Order at 3.

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<sup>3</sup>The administrative law judge calculated how much claimant had received in interest from the benefits, noting that "compounding interest would skyrocket the amount of her largess far beyond that paid," and that "we should all get such favorable `loans' from the government." Decision and Order at 3. We note that these factors are not relevant to the issue of whether recovery of the overpayment would defeat the purpose of the Act. *Cf. Benedict v. Director, OWCP*, 29 F.3d 1140, 18 BLR 2-309 (7th Cir. 1994)(Cudahy, J., concurring).

Section 410.561c(b) provides that recovery will defeat the purpose of the Act in situations where the person from whom recovery is sought needs substantially all of her current income to meet ordinary and necessary living expenses. *Potisek v. Director, OWCP*, 14 BLR 1-87 (1990)(*en banc*, Brown, J., dissenting). 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 her current income for such needs. 20 C.F.R. §410.561c; *Gordon v. Director, OWCP*, 14 BLR 1-60 (1990). Moreover, the administrative law judge should discuss the impact of depletion of an income-producing asset on claimant's current monthly income relative to her monthly expenses as well as how claimant's other assets would enhance her repayment ability. *Keiffer v. Director, OWCP*, 18 BLR 1-35 (1993); *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992).

In the present claim, the administrative law judge found that claimant testified that her monthly income and expenses are relatively the same and that claimant contends that repayment of the overpayment would decrease her monthly income by \$125.00. The administrative law judge erroneously failed to discuss how claimant does not need substantially all of her monthly income to meet her monthly expenses pursuant to Section 410.561c. See *Potisek, supra*; *Gordon, supra*. Further, the administrative law judge failed to discuss how requiring claimant to repay the entire overpayment in a lump sum<sup>4</sup> will decrease her interest income and ultimately affect her monthly income to expenses ratio. See *Keiffer, supra*; *Ashe, supra*.

Thus, we vacate the administrative law judge's findings pursuant to Section 410.561c and remand this case for the administrative law judge to provide a specific explanation for his findings as to the amounts of claimant's current monthly income

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<sup>4</sup>The purpose of the formal hearing is to establish the existence of the debt, not how it will be paid. See 20 C.F.R. §410.560; *Jones v. Director, OWCP*, 14 BLR 1-80 (1990)(*en banc*)(J. Brown, concurring). The administrative law judge's inquiry is merely whether claimant is in a financial position to assume repayment of the debt created by the overpayment. Once the debt is established as owing, and collection efforts begin, see 20 C.F.R. §725.544, claimant has the right to seek modification if his financial circumstances change, see 4 C.F.R. §104.2(b); 20 C.F.R. §725.310.

and expenses, as well as the relation between the two, see *Knope v. Director, OWCP*, 16 BLR 1-59 (1990); *Weis v. Director, OWCP*, 16 BLR 1-56 (1990), and to consider the effect that repayment of the overpayment will have on claimant's overall financial circumstances, see *Keiffer, supra*; *Ashe, supra*; see also *McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993).

Claimant also contends that the Secretary has exceeded his authority by promulgating overpayment regulations which are patterned after the SSA. This contention is without merit as the Board has previously held that application of Section 204 of the SSA to Part C claims is appropriate. See *Potisek, supra*; see also *Bracher v. Director, OWCP*, 14 F.3d 1157, 18 BLR 2-97 (7th Cir. 1994). Thus, we reject this contention.

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

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge