

BRB No. 01-0569 BLA

CARLES DYKES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
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.

Carles Dykes, Oakwood, Virginia, *pro se*.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order (00-

¹Ron Carson, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's Decision and Order. In a letter dated April 10, 2001, the Board stated that claimant would be considered to be representing himself on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

BLO-0017) of Administrative Law Judge John C. Holmes denying claimant's request for a waiver of recovery of an overpayment in the amount of \$18,265.59, 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).² The administrative law judge initially stated that he concurred in the conclusion of the Director, Office of Workers' Compensation Programs (the Director), that claimant was without fault in the creation of the overpayment. He also found that claimant failed to establish that recovery of the overpayment would defeat the purpose of Title IV of the Act or be against equity and good conscience. 20 C.F.R. §§725.542, 725.543;³ 20 C.F.R. §§404.506 - 404.512. Accordingly, the administrative law

²The 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 January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the instant case, the Director, Office of Workers' Compensation Programs, indicates that the revised regulations will not affect the outcome of the case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the Director regarding the impact of the challenged regulations.

³20 C.F.R. §725.543 was recently revised to adopt the waiver standards at 20 C.F.R. Part 404 which are used by the Social Security Administration in administering Title II of the Social Security Act. In revising this regulation, the Department of Labor explained that the Part 404 criteria better reflect the current law than the 20 C.F.R. Part 410 criteria referred to in the former regulation, because the Part 410 criteria have not been revised since 1972. 65 Fed.Reg. 80016. The revised regulation at 20 C.F.R. §725.543, applicable to this claim, provides:

The standards for determining the applicability of the criteria listed in §725.542 shall be the same as those applied by the Social Security Administration under §§404.506 through 404.512 of this title.

judge denied claimant's request for waiver and ordered claimant to repay the full overpayment amount of \$18,265.59, at a repayment rate of \$300 per month.

In response to claimant's appeal, the Director urges the Board to affirm the administrative law judge's denial of waiver of recovery of the overpayment. The Director also urges the Board, however, to vacate the administrative law judge's determination that claimant can repay the overpayment at a rate of \$300 a month because the administrative law judge underestimated claimant's monthly expenses. The Director thus seeks a remand of the case.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

The Director concedes that claimant was without fault in the creation of the overpayment. Director's Response Brief at 9. Claimant is thus entitled to waiver of recovery of the overpayment if recovery would either defeat the purpose of Title IV of the Act or be against equity and good conscience. 20 C.F.R. §§725.542, 725.543; 20 C.F.R. §§404.508, 404.509; *see McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993). The record in the instant case supports the administrative law judge's determination that recovery of the overpayment would not be against equity and good conscience in that there is no evidence that claimant changed his position for the worse or relinquished a valuable right because of reliance upon a notice that a payment would be made or because of the overpayment itself. *See* 20 C.F.R. §404.509(a)(1). The administrative law judge properly found that the record contains no evidence linking claimant's receipt of benefits with his decision to purchase a Jeep and a new cook stove, or to remodel his home. Decision and Order at 4.

The administrative law judge next found that recovery of the overpayment would not deprive claimant of income required for his ordinary and necessary living expenses and thus would not defeat the purpose of Title IV of the Act. 20 C.F.R. §404.508. Specifically, the administrative law judge found that claimant's monthly income is \$2,415.00 and his monthly expenses are \$1,804.38. The administrative law judge thus denied waiver of recovery of the

20 C.F.R. §725.543.

overpayment. We vacate the administrative law judge's finding in this regard for several reasons. The record supports the Director's contention that the administrative law judge misread claimant's car insurance expenses. The bill in question shows a premium of \$1,036.02 for the six-month period from August 17, 1999 through February 17, 2000. *See* Director's Exhibit 11. In calculating claimant's monthly car insurance expense, the administrative law judge mistakenly used the "minimum payment" due amount to find that "the biannual bill is only \$521, or \$87 a month." Decision and Order at 5. On remand, the administrative law judge should include in his recalculation of claimant's monthly expenses claimant's monthly car insurance expense.

Further, the administrative law judge found that claimant provided conflicting evidence regarding his Lowe's credit card balance and monthly payment schedule. In his Overpayment Recovery Questionnaire dated August 2, 1999, claimant indicated that his credit card balance with Lowe's was \$215 and that his monthly payment was \$12. Director's Exhibit 11 at 4. At the hearing held on September 12, 2000 before the administrative law judge, claimant testified that he then owed Lowe's about \$400 for a cook stove and that his monthly payments were approximately \$25 a month. Hearing Transcript at 15. In his Decision and Order, the administrative law judge stated:

Further, Mr. Dykes' form OWCP-20 and the supporting documentation is at odds with much of his testimony. He indicated on his form that the Lowe's bill was \$215, not \$400, and that his payments were only \$12 a month, not the \$25 he testified to. No documents supporting either assertion have been submitted. In either case, that bill would at this time be very nearly paid off, and therefore inclusion of it as an ongoing obligation would not be proper. The expense is disallowed.

Decision and Order at 4. We find merit in the Director's argument that the administrative law judge erroneously disallowed any monthly expense for claimant's monthly payment to Lowe's because he assumed that claimant had "nearly paid off" the balance. *Id.* Whether the balance on the Lowe's credit card was \$215 with a monthly payment of \$12 or \$400 with a monthly payment of \$25, claimant's obligation to make monthly payments on the credit card was then a current, ongoing expense, and as such the administrative law judge should have included the appropriate expense in computing claimant's monthly expenses. *See Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-40 (1993). On remand, the administrative law judge must resolve the discrepancy he found to exist between claimant's Overpayment Recovery Questionnaire and testimony, and include in his recalculation of claimant's monthly expenses the appropriate monthly payment to Lowe's.

The administrative law judge also disallowed any expense for claimant's repayment of his debt to First Union Bank. At the hearing, claimant testified that \$394.63 was what he

then owed the bank for home remodeling. Hearing Transcript at 14. The administrative law judge found:

The testimony is unclear as to the status of the remodeling loan. The benefits counselor assisting Mr. Dykes indicated that the \$394.63 was a monthly payment, but the Claimant appeared to testify that such was the total amount owed. I therefore find that the amount has not been shown as a valid monthly expense.

Decision and Order at 5. We hold that the administrative law judge erred in disallowing any expense in this regard on the basis that claimant “appeared to testify” that the sum represented the total amount owed, rather than the monthly payment. *Id.* As the Director correctly points out, the record contains a copy of a loan payment coupon, for payment number 8 due on August 18, 1999, with the payment due amount being \$394.63. *See* Director’s Exhibit 11. The administrative law judge did not address this evidence, which supports a finding that the amount in question is a monthly payment due, rather than the total amount owed by claimant to First Union Bank. On remand, the administrative law judge must address this evidence and make factual findings regarding its credibility and import on the calculation of claimant’s monthly expenses.

Based on the foregoing, we remand the case to the administrative law judge for reconsideration of the evidence relevant to whether claimant has established that recovery of the overpayment would deprive him of income required for his ordinary and necessary expenses and would thus defeat the purpose of Title IV of the Act. *See Keiffer, supra; Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). We, therefore, vacate the administrative law judge's finding that claimant must repay the overpayment at a rate of \$300 a month. We further remand the case for the administrative law judge to reassess claimant's monthly expenses to determine his ability to repay the overpayment.

Accordingly, the administrative law judge's Decision and Order 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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge