

BRB No. 97-1024 BLA

ALICE RUNNING KESSLER )  
(Widow of OLIVER RUNNING) )

Claimant-Petitioner )

v. )

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

Respondent )

DATE ISSUED:

DECISION AND ORDER

Appeal of the Decision and Order Denying Waiver of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Cathryn Celeste Helm (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLO-0009) of Administrative Law Judge Thomas M. Burke (the administrative law judge) denying waiver of recovery of an overpayment of benefits 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). This case is before the Board for the second time.<sup>1</sup> In denying claimant's request for waiver of recovery of the

---

<sup>1</sup> Claimant is the widow of the miner, Oliver Running, who filed an application for benefits in November 1979 and died in 1980 while the case was still pending. On May 21, 1981, the district director awarded interim benefits on the miner's application for benefits, with claimant receiving an award of derivative survivor's benefits. Director's Exhibits 1, 2. Following a formal hearing, Administrative Law Judge Stuart A. Levin (Judge Levin) denied benefits on the miner's claim in

overpayment of benefits in this case, Administrative Law Judge Joel R. Williams found the evidence insufficient to establish that recovery of the overpayment of benefits would defeat the purpose of the Act or be against equity and good conscience. Director's Exhibit 25. On appeal, the Board vacated Judge Williams's decision denying waiver of recovery of the overpayment and remanded the case to Judge Williams for further consideration of the financial condition, *i.e.*, monthly income and monthly expenses, of claimant's entire household. Director's Exhibit 30; *Kessler v. Director, OWCP*, BRB No. 94-0775 BLA (Mar. 30, 1995)(unpub.). In addition, the Board instructed Judge Williams to apply the broader definition of "against equity and good

---

a Decision and Order issued on July 28, 1983. Director's Exhibit 3. Judge Levin's denial of benefits was affirmed by the Board in a Decision and Order issued on February 26, 1986. Director's Exhibit 10; *Running v. Consolidation Coal Company*, BRB No. 83-2027 BLA (Feb. 26, 1986)(unpub.).

In August 1983, subsequent to Judge Levin's denial of benefits, the district director notified claimant of the existence of an overpayment of benefits in the amount of \$12,465.00. Director's Exhibit 4. Following the Board's affirmance of Judge Levin's denial of benefits, the district director sent a revised notice of the overpayment of benefits in the amount of \$13,277.00, representing the overpayment of benefits in both the miner's name and the claimant's name. Director's Exhibits 11, 12; *see also* Director's Exhibits 5, 17. While finding that claimant was without fault in the creation of the overpayment, the district director, nonetheless, found that recovery of the overpayment would not be against equity and good conscience or defeat the purpose of the Act and, therefore, denied waiver of recovery of the overpayment. Director's Exhibits 18, 19. The case was transferred to the Office of Administrative Law Judges.

conscience,” as set forth by the United States Court of Appeals for the Eighth Circuit, within whose jurisdiction this case arises, in *Groseclose v. Bowen*, 809 F.2d 502 (8th Cir. 1987). *Id.* On remand, Judge Williams remanded the case to the district director for further development of the record concerning claimant’s current financial condition. Director’s Exhibit 31. Following the development of the record, the district director denied waiver of recovery of the overpayment. Director’s Exhibit 39. The administrative law judge found that the amount of the overpayment of benefits was \$13,277.00 and that claimant was not at fault in the creation of the overpayment. The administrative law judge further found that the evidence was insufficient to establish that recovery of the overpayment would defeat the purpose of the Act pursuant to 20 C.F.R. §§410.561c, 725.542(b)(1). Likewise, the administrative law judge found that the evidence was insufficient to establish that recovery of the overpayment would be against equity and good conscience pursuant to 20 C.F.R. §§410.561d, 725.542(b)(2). Accordingly, the administrative law judge denied waiver of recovery of the overpayment of benefits.

On appeal, claimant challenges the administrative law judge’s denial of waiver of recovery of the overpayment of benefits, contending that the administrative law judge erred in finding that the evidence was insufficient to establish that recovery would defeat the purpose of the Act or to establish that recovery would be against equity and good conscience. In response, the Director, Office of Workers’ Compensation Programs (the Director), urges affirmance of the administrative law judge’s finding that recovery of the overpayment would not defeat the purpose of the Act pursuant to Section 410.561c. However, the Director requests that the case be remanded for further consideration of whether recovery would be against equity and good conscience, contending that the administrative law judge did not consider adequately the evidence pursuant to Section 410.561d.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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).

In order to establish waiver of recovery of an overpayment, claimant is required to demonstrate that recovery would either defeat the purpose of the Act by depriving her of ordinary and necessary living expenses, or be against equity and good conscience because claimant has relinquished a valuable right or changed her position for the worse in reliance on the receipt of

---

<sup>2</sup> The parties do not challenge the administrative law judge’s determination that the amount of the overpayment is \$13,277.00 or his finding that claimant was without fault in the creation of the overpayment. These findings are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

interim benefits. 20 C.F.R. §§410.561c, 410.561d, 725.561(b)(1), (2).

In challenging the administrative law judge's denial of waiver of recovery of the overpayment, claimant contends that the administrative law judge erred in finding that the evidence of record is insufficient to establish that recovery of the overpayment would defeat the purpose of the Act.<sup>3</sup> Specifically, claimant contends that she is entitled to a cushion of income against future expenses and, thus, since it is reasonable to assume that expenses will continue to increase, she needs all of her income to meet these expenses. Contrary to claimant's contention, speculative future expenses are not relevant to the inquiry under Section 410.561c, but rather, the administrative law judge must base his calculations on claimant's current expenses as set forth in the record before him. 20 C.F.R. §§410.561c, 725.542(b)(1); *see Keiffer v. Director, OWCP*, 18 BLR 1-35 (1993); *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992); *see also McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993). Moreover, the administrative law judge reasonably found, based on claimant's December 12, 1996 Overpayment Recovery Questionnaire and testimony at the January 29, 1997 formal hearing, that claimant retained income or resources sufficient to meet her ordinary and necessary expenses inasmuch as he found that claimant's monthly income was \$1,959.00 and her monthly expenses totaled \$1,925.00, resulting in a surplus of \$34.00 per month. Decision and Order at 3, 5; Claimant's Exhibit 1; Hearing Transcript at 18-30, 42-46, 90-91. In addition, the administrative law judge found that claimant possesses assets totaling \$51,293.00, including an annuity valued at \$28,000.00. *Id.* As a result of the monthly surplus of income and the additional assets, the administrative law judge determined that recovery of the overpayment would not deprive claimant of "the funds necessary to meet her current and necessary living expenses nor would it completely deprive her of a cushion of personal savings." Decision and Order at 5. Inasmuch as the record supports the administrative law judge's computation of claimant's monthly income and expenses, we affirm his finding that recovery would not defeat the purpose of the Act. 20 C.F.R. §§410.561c, 725.542(b)(1); *Keiffer, supra*; *Knop v. Director, OWCP*, 16 BLR 1-59 (1990); *see also Gordon v. Director, OWCP*, 14 BLR 1-60 (1990).

---

<sup>3</sup> To "defeat the purpose of the Act" means to deprive a person of income required for ordinary and necessary living expenses. 20 C.F.R. §410.561c.

We, however, vacate the administrative law judge's finding that the evidence of record is insufficient to establish that recovery of the overpayment would be against equity and good conscience pursuant to Section 410.561d.<sup>4</sup> Decision and Order at 5-6. In order to establish that claimant changed her position for the worse in reliance upon the payment of benefits, claimant must establish that she took some action, or incurred some debt, that she would not have, but for the receipt of the benefits. 20 C.F.R. §410.561d; *see McConnell, supra*; *Keiffer, supra*; *see also Benedict v. Director, OWCP*, 29 F.3d 1140, 18 BLR 2-309 (7th Cir. 1994). The administrative law judge found that while claimant alleged that she changed her position for the worse by transferring money to two of her children, she failed to produce evidence that the monies were transferred to her children prior to claimant's receiving notification of the overpayment. Decision and Order at 5-6. In so finding, the administrative law judge noted that the transfer of \$4,000.00 to one of her children took place in July 1993 and that there is no evidence, other than testimony at the hearing, concerning the transfer of \$8,000.00 to another child. Decision and Order at 5, n.33. Contrary to the administrative law judge's characterization, the record indicates that the transfer of \$4,000.00 to one of her children occurred in July 1983, prior to the initial August 1983 notification of the existence of the overpayment. *See* Claimant's Exhibit 8; Hearing Transcript at 46-48, 53-56, 60, 85-86. In addition, testimony at the January 29, 1997 hearing,<sup>5</sup> revealed that claimant transferred \$8,000.00 to her youngest daughter to help her pay for an educational course and a new car. Hearing Transcript at 48-50, 55-56, 60, 85-86. Moreover, claimant testified that she would not have transferred the money to her children except for the receipt of the black lung benefits. Hearing Transcript at 85-86. Inasmuch as the administrative law judge has not adequately explained his finding concerning the credibility and relevancy of the hearing testimony, we vacate his finding at Section 410.561d and remand the case to the administrative law judge for further consideration. *See generally Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Zyskoski v. Director, OWCP*, 12 BLR 1-159 (1989); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985).

On remand, the administrative law judge must consider the testimony received at the hearing, assess its credibility, and assess whether it is sufficient to establish that claimant changed her position for the worse by transferring the money to her children. 20 C.F.R. §410.561d; *see McConnell, supra*; *see also Benedict, supra*. In determining whether claimant changed her position for the worse and, thus, that recovery of the overpayment would be against equity and

---

<sup>4</sup> "Against equity and good conscience" means that adjustment or recovery of the overpayment will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right or changed his position for the worse. 20 C.F.R. §410.561d.

<sup>5</sup> Testimony at the January 29, 1997 hearing was provided by claimant and her daughter, Denise Mutzenberger, who stated that she was familiar with claimant's financial situation because she has been assisting claimant with financial records, bookkeeping and paperwork matters for at least four years. Hearing Transcript at 16-17. In addition, Ms. Mutzenberger stated that she prepared the December 12, 1996 Overpayment Recovery Questionnaire signed by claimant. Hearing Transcript at 17.

good conscience, claimant's current financial condition is not relevant. Rather, the administrative law judge must determine whether, as a result of the receipt of benefits, claimant took some action that she would not have taken, but for the receipt of the benefits. 20 C.F.R. §410.561d; *Hervol v. Director, OWCP*, 16 BLR 1-53 (1990); *see also Groseclose, supra; McConnell, supra*. We, therefore, remand the case to the administrative law judge for further consideration of the relevant evidence of record pursuant to Section 410.561d.

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

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge