

ALFRED D. ASHE)	
)	
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 George P. Morin, Administrative Law Judge, United States Department of Labor.

Leo M. Stepanian (Stepanian and Muscatello), Butler, Pennsylvania for claimant.

Jeffrey S. Goldberg (Marshall J. Breger, 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, the United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, and SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (89-BLO-7) of Administrative Law Judge George P. Morin denying waiver of recovery of an overpayment of \$18,787.60 in Black Lung interim benefits awarded to claimant 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, based on a stipulation by the parties, that an overpayment in the amount of \$18,787.60 had occurred and that claimant was without fault in creating the overpayment. The administrative law judge further found that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience. Consequently, the administrative law judge denied claimant's request for waiver of recovery pursuant to 20 C.F.R. §§725.542 and 725.543 and ordered claimant to repay the overpayment. Claimant appeals contending that he is entitled to certain federal and state exemptions pursuant to 20 C.F.R. §725.544(c). Claimant also asserts that as he is unable to repay the overpayment, recovery would therefore defeat the purpose of the Act and be against equity and good conscience. Claimant additionally contends that in determining whether he had sufficient income and financial resources to repay the overpayment, the administrative law judge erred in considering his wife's income; assets jointly held with his wife

and a certificate of deposit worth approximately \$19,000.00 held solely in his wife's name. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that 20 C.F.R. §725.544 is inapplicable herein inasmuch as that provision applies to the collection and compromise of claims and not waiver proceedings. The Director also contends that the administrative law judge properly considered the income of both claimant and his wife as well as the jointly and separately held assets of both claimant and his wife in determining whether claimant had the income and financial resources to repay the overpayment. Oral Argument was held in Washington, D.C., on November 14, 1991, pursuant to the Board's Order of October 9, 1991.

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 law. 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 this case, claimant received monthly interim benefits from August 1983 to October 1987. These benefits were terminated, however, when an administrative law judge determined that claimant was not entitled to benefits.¹ The Director now seeks recovery of these interim benefits. As claimant was without fault in creating the overpayment, the administrative law judge correctly found that recovery must be waived if it would defeat the purpose of the Act or be against equity and good conscience. 20 C.F.R. §§725.542, 725.543, 410.561 et seq.; Potisek v. Director, OWCP, 14 BLR 1-87, 1-90 (1990); Jones v. Director, OWCP, 14 BLR 1-80, 1-85 (1990).

The administrative law judge determined that claimant and his wife have a combined monthly income of \$1,504.78, combined monthly expenses of \$1,427.00 and a certificate of deposit worth approximately \$19,000.00. Decision and Order at 4-5.² The administrative law judge found that the couple's joint income, without the interim Black Lung benefits, was adequate to meet their monthly expenses as provided in 20 C.F.R. §410.561. The administrative law judge further found that claimant had not incurred any expenses in reliance on the receipt of benefits. Decision and Order at 5-6; Director's Exhibits 7, 19. Thus, the administrative law judge found that the evidence was sufficient to establish that claimant and his wife had the income and financial resources to meet their ordinary and necessary living expenses as well as to repay the overpayment. Decision and Order at 5.

As the Director contends, the burden is on claimant to establish that recovery of the overpayment would defeat the purpose of the Act in that it would deprive claimant of funds needed to meet ordinary and necessary living expenses or that recovery would be against equity and good conscience as claimant had relinquished a valuable right or changed his position for the worse in reliance on the receipt of interim benefits. 20 C.F.R. §§725.543, 410.561c and d. Valente v. Secretary of Health and Human Services, 733 F.2d

¹Claimant did not appeal the administrative law judge's Decision and Order denying benefits.

²Although not specifically considered by the administrative law judge, the record also indicates that claimant and his wife have nearly \$7,000.00 in checking and savings accounts and mutual fund shares. Director's Exhibit 17; Claimant's Brief at 3.

1037 (2d Cir. 1984); Sierakowski v. Weinberger, 504 F.2d 831 (6th Cir. 1974); Posnack v. Secretary of Health and Human Services, 631 F.Supp. 1012 (E.D.N.Y. 1986). The administrative law judge found that claimant failed to meet his burden of showing that recovery of the overpayment would deprive him of the income needed to meet ordinary and necessary living expenses. Consequently, waiver of the recovery of the overpayment was denied and claimant was ordered to make a lump sum payment of \$2,000.00 and monthly installment payments of \$200.00 until the overpayment was repaid in full. Decision and Order at 6.

Claimant asserts that he is entitled to federal and state exemptions provided by Section 725.544. As the Director contends, however, Section 725.544 is inapplicable to the issue of waiver, but instead pertains to the separate issue of collection and compromise of claims. See Jones, supra at 1-83; Potisek, supra at 1-90. Consequently, this contention by claimant is rejected.

We also reject claimant's assertion that the administrative law judge erred in considering the income of his wife and the couple's jointly and separately held assets in determining whether claimant could repay the overpayment.³ As the Director asserts, the Black Lung benefits program contains provisions for augmented benefits when the claimant has dependents and also contemplates a view of a claimant's financial situation in the broader context of the household, rather than a narrow view concerned only with the bare expenses and assets of the individual claimant alone. See 20 C.F.R. §§410.560(a) and (d); 410.561c; Gavin v. Heckler, 620 F.Supp. 999, 1001 (D.C. Ill. 1985); see also Clary v. Bowen, 637 F.Supp. 1186, 1189 (W.D.N.C. 1986). Thus, in the instant case, although not necessarily required to do so, the administrative law judge permissibly considered the financial circumstances of the entire household as an entity, including the combined income and expenses of both claimant and his wife as well as the jointly and separately owned assets of both claimant and his wife in determining claimant's ability to repay the overpayment.

The administrative law judge, however, does not provide an explicit explanation of the evidence he relied on in concluding that there was a link between the interim benefit payments and the funding of the certificate of deposit nor does the administrative law judge explain the relevance that such a link would have regarding whether recovery would defeat the purpose of the Act, i.e., whether claimant has the income and financial resources to meet his ordinary and necessary expenses. Furthermore, although the administrative law judge ordered repayment in monthly installments, he failed to discuss the impact that the gradual depletion and, ultimately, the complete exhaustion of the certificate of deposit, an income-producing asset, would have on claimant's future monthly income relative to his monthly expenses.⁴ Moreover, the

³Claimant's position is that the administrative law judge may consider as his assets only the income and assets in his name alone and may not consider his wife's income, assets he holds jointly with his wife or assets held solely in his wife's name. Claimant, however, asserts that both his and his wife's expenses should be considered in determining his expenses. Claimant's Brief at 2.

⁴The Director correctly notes that the administrative law judge included the \$148.20 in interest

administrative law judge did not discuss claimant's access to the checking and savings accounts and mutual fund shares, the availability of which could enhance claimant's repayment ability, in determining whether claimant has the income and resources to meet his ordinary and necessary expenses. Consequently, the administrative law judge did not consider all of the relevant assets nor did he adequately explain the basis of his repayment schedule. We, therefore, vacate the administrative law judge's finding concerning waiver and we remand this case to the administrative law judge to consider all of the available assets and to make a determination of whether claimant qualifies for a waiver of recovery under 20 C.F.R. §410.561c based thereon.

that the certificate of deposit generates each month in claimant's total monthly income. Since the difference between the couple's income and expenses is only \$77.78 per month, the repayment schedule ordered by the administrative law judge will most likely eventually deplete the principal in the certificate of deposit.

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge