

BRB No. 01-0594 BLA

RUSSELL STAPLETON)
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,))
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Edward Waldman (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 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 the Decision and Order (2000-BLA-0007) of Administrative Law Judge Donald W. Mosser denying waiver of 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).¹ The record reflects an overpayment of

¹The 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 20 C.F.R. Parts 718, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

interim benefits in the amount of \$28,989.60. *See* Director's Exhibit 10. The administrative law judge accepted the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant was without fault in creating the overpayment. The administrative law judge denied waiver of recovery, however, after concluding that claimant has sufficient assets to repay the overpayment and that repayment is not against equity and good conscience, nor would it defeat the purpose of the Act. 20 C.F.R. §§410.561f and 410.561h.

On appeal, claimant challenges the denial of waiver of recovery. The Director responds, urging affirmance of the Decision and Order of the administrative law judge as it is rational and supported by substantial evidence.

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

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. 1:00CVO3086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board requested supplemental briefing in the instant 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 parties regarding the impact of the challenged regulations.

disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. In order to qualify for waiver of recovery of an overpayment, claimant must prove that he was without fault in creating the overpayment and that recovery would defeat the purpose of the Act or would be against equity and good conscience. 20 C.F.R. §§725.540, 725.542, 725.543; *Potisek v. Director, OWCP*, 14 BLR 1-87 (1990). In the present case, the administrative law judge noted that because the Director did not assert that claimant was at fault in creating the overpayment, the issue before him was whether requiring claimant to repay the excess benefits would defeat the purpose of the Act or be against equity and good conscience. Decision and Order at 2, 5. With respect to the latter element, the administrative law judge determined that recovery would not be against equity and good conscience, as claimant did not contend, nor did he present evidence establishing, that he relinquished a valuable right in reliance upon the overpayment. Decision and Order at 6. We affirm this finding, as it has not been challenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710.

Turning to the question of whether recovery of the overpayment would defeat the purpose of the Act, claimant is required to prove that repaying the excess benefits would deprive him of the income required for ordinary and necessary living expenses, including expenses for the support of his dependents. See 20 C.F.R. §§725.542, 725.543; *Kieffer v. Director, OWCP*, 18 BLR 1-35 (1993); *Nelson v. Director, OWCP*, 14 BLR 1-159 (1990). Such deprivation will be found to exist when claimant does not have the income or financial resources sufficient for more than ordinary or necessary needs, or is dependent on all of his current income for such needs. *Id.* In the present case, the administrative law judge found that claimant's monthly income totaled \$2,209.72, and that claimant holds certificates of deposit worth approximately \$120,000, and has a checking account with a balance of \$10,000.² Decision and Order at 3-4; Claimant's Exhibit A; Director's Exhibit 11. The administrative law judge also referenced the fact that Mr. Stapleton owns his house and two vehicles. *Id.* Based on claimant's estimates, the administrative law judge found that the monthly expenses for claimant and his dependent spouse equaled \$1,322.19.³ *Id.* The

²Claimant's monthly income consists of \$532.00 per month from his United Mine Workers' of America pension, Social Security benefits of \$1069.00 per month, and an average of \$608.72 per month in interest income. Claimant's Exhibit A.

³The administrative law judge did not include \$422.00 per month in Social Security benefits payable to claimant's spouse which, when deducted from claimant's

administrative law judge determined, therefore, that claimant's income and assets exceed his monthly expenses. *Id.*

Claimant contends the administrative law judge's finding is not correct, as the administrative law judge failed to include the amounts claimant spends for the support of his granddaughter who resides in his household. Pursuant to 20 C.F.R. §§404.508(a), 410.561c(a), and 725.543, claimant's expenses include only those amounts required for the support of himself and for those individuals that he has a legal obligation to support. 20 C.F.R. §§404.508(a)(3), 410.561c(a), 725.543. The record in the present case indicates that claimant's granddaughter is over the age of eighteen and claimant testified that there was no court order requiring that he contribute to her support. Hearing Transcript at 11. Thus, the administrative law judge acted rationally in finding that these expenses "would not be considered necessary under the Act as the claimant's granddaughter is over eighteen and the claimant is not legally responsible for her." Decision and Order at 6. We affirm, therefore, the administrative law judge's finding that the money that claimant spends on behalf of his granddaughter are not ordinary and necessary expenses under the terms of the Act. 20 C.F.R. §410.561c; *Gordon v. Director, OWCP*, 14 BLR 1-60 (1990).

Claimant also asserts that if he is required to repay the overpayment, his assets, *i.e.*, his checking account and certificates of deposit, will be depleted, and that his interest income will be reduced such that he will be unable to meet his monthly expenses. This contention is without merit. The administrative law judge, in considering this issue, found that "[e]ven without considering whether the amount of claimant's expenses are appropriate, claimant's monthly income, even without his interest income, exceeds his expenses." Decision and Order at 6. The administrative law judge further noted that claimant testified that he normally reinvests his interest income, rather than using it to meet his monthly expenses. *Id.*; Hearing Transcript at 10. Thus, the administrative law judge determined that if claimant "paid the overpayment out of these assets, he would still be left with approximately \$100,000.00," and a monthly income that is "more than sufficient to meet his monthly expenses." Decision and Order at 6. As the administrative law judge properly considered the depletion of claimant's income producing assets on his future monthly income and expenses, the administrative law judge rationally determined that claimant failed to satisfy his affirmative burden to establish that repayment of the overpayment would defeat the purpose of the Act. *See Kieffer, supra; Nelson, supra; Potisek, supra.* His findings are, therefore, affirmed.

expenses, decreases that figure to \$900.19 per month. Director's Exhibit 11.

Accordingly, the Decision and Order of the administrative law judge denying waiver of recovery of the overpayment is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge