

BRB No. 01-0613 BLA

DONALD R. ELDRIDGE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’ COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	DATE ISSUED:
)	
Respondent)	DECISION and ORDER

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

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Jeffrey S. Goldberg (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 the Decision and Order (00-BLO-0004) of Administrative Law Judge Donald W. Mosser denying waiver of recovery of 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

¹ The 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.

\$42,254.80, Director's Exhibits 7, 22, 25; Hearing Transcript at 6-7.² The administrative law judge initially found that the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant was without fault in the creation of the overpayment, Hearing Transcript at 7. The administrative law judge further found that claimant failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. *See* 20 C.F.R. §§725.542, 725.543, 404.506 - 404.512.³

² Claimant originally filed a claim on August 5, 1988, Director's Exhibit 1, and was awarded benefits in a Decision and Order issued on October 31, 1990, by Administrative Law Judge Richard D. Mills, Director's Exhibit 1. Inasmuch as claimant's employer appealed the award of benefits and, therefore, refused to pay benefits, claimant was awarded interim benefits by the Black Lung Disability Trust Fund (the Trust Fund) on January 11, 1991, Director's Exhibit 2. On appeal, the Board vacated the award of benefits and remanded the case for reconsideration, Director's Exhibits 3, 5. *Eldridge v. Monterey Coal Co.*, BRB No. 91-0448 BLA (July 23, 1992)(unpub.) and (Apr. 19, 1994)(on recon.) (unpub.). Subsequently, benefits were denied by Judge Mills in a Decision and Order On Remand issued on August 26, 1997, Director's Exhibit 6. Consequently, the miner was notified of an overpayment by the Department of Labor, *see* 20 C.F.R. §725.542; Director's Exhibit 7.

³ The regulations provide that the "standards for determining the applicability of the criteria listed in [20 C.F.R.] §725.542 shall be the same as those applied by the Social Security Administration under [20 C.F.R.] §§404.506 through 404.512...." 20 C.F.R. §725.543.

Accordingly, the administrative law judge denied claimant's request for waiver of recovery of the overpayment.

On appeal, claimant contends that the administrative law judge erred in calculating the amount of claimant's income, assets and expenses in finding that claimant failed to establish that recovery of the overpayment would defeat the purpose of the Act and contends that the administrative law judge erred in finding that claimant failed to establish that recovery of the overpayment would be against equity and good conscience. In response, the Director agrees that the administrative law judge erred in finding that claimant failed to establish that recovery of the overpayment would be against equity and good conscience. The Director further contends that the administrative law judge did not adequately determine whether claimant was legally responsible for the support of his adult daughter and/or whether claimant's income and expenses should include the income and expenses of his daughter. In all other aspects, the Director contends that the administrative law judge properly calculated the amount of claimant's income, assets and expenses in finding that claimant failed to establish that recovery of the overpayment would defeat the purpose of the Act.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Act provides regulations regarding the issue of waiver in Section 725.542. This section states:

There shall be no adjustment or recovery of an overpayment in any case where an incorrect payment has been made with respect to an individual:

- (a) Who is without fault, and where
- (b) Adjustment or recovery would either:
 - (1) Defeat the purpose of title IV of the Act, or
 - (2) Be against equity and good conscience.

20 C.F.R. §725.542.

The standards for determining the applicability of waiver are the same as those used by the Social Security Administration. 20 C.F.R. §725.543. Section 404.509(a)(1) provides: "Against equity and good conscience" means that adjustment or recovery of an incorrect overpayment will be considered inequitable if an individual, in reliance upon a notice that such payment would be made or because of the overpayment itself, relinquished a valuable

right or changed his position for the worse. 20 C.F.R. §404.509(a)(1). Moreover, as the administrative law judge noted, claimant's financial condition is irrelevant to this inquiry, *see* 20 C.F.R. §404.509(b); *Hervol v. Director, OWCP*, 16 BLR 1-53 (1990).

In this case the administrative law judge found that recovery of the overpayment in this case would not be "against equity and good conscience." In making this determination, the administrative law judge rejected claimant's contention that he had relied on the receipt of interim benefits to his detriment by purchasing land for \$10,000, *see* Hearing Transcript at 18-19, as there was no evidence that claimant could not have undertaken that financial burden without the receipt of the interim benefits. Decision and Order at 9.

Both claimant and the Director contend that inasmuch as a claimant's financial condition is irrelevant to the determination of whether recovery of the overpayment would be against equity and good conscience, the proper inquiry is not whether claimant had the resources to purchase land even without having received interim benefits, but rather whether claimant changed his position for the worse due to the receipt of the interim benefits.

In this case, the Director concedes that claimant changed his position for the worse by purchasing land due to the receipt of interim benefits. Consequently, in light of the Director's concession, we vacate the administrative law judge's finding that recovery of the overpayment would not be against equity and good conscience and remand the case for reconsideration of this issue. *See generally Pendley v. Director, OWCP*, 13 BLR 1-23 (1989); *Cornett v. Director, OWCP*, 9 BLR 1-179 (1986)(*recon.en banc*); *McCuller v. Director, OWCP*, 8 BLR 1-467 (1986). On remand, the administrative law judge should determine the amount that claimant paid for the purchase of the land in reliance on his receipt of the interim benefits, that should be waived as being against equity and good conscience,⁴ which could result in a reduction in the amount of the overpayment owed.

⁴ In regard to the amount of land that claimant purchased and the price that was paid, claimant initially indicated on his 1998 Overpayment Recovery Questionnaire that he owned 39 acres in a joint tenancy (apparently with his ex-wife), at an estimated value of \$10,000, *see* Director's Exhibit 14. Contrary to the Director's characterization that the record does not provide any evidence as to how much claimant paid for the land, an April, 1999, statement from claimant's financial advisor indicates that claimant made a one-time withdrawal from his income-producing assets of \$10,000 for the purchase of the land, *see* Director's Exhibit 21. Claimant subsequently testified that he used part of his interim benefits to purchase a total of 19 acres of land, Hearing Transcript at 18-19, and that the land, which he estimated would sell for \$200-300 per acre, Hearing Transcript at 24, was worth more at the time that he bought it than it was worth at the time of the hearing.

In addition, claimant also testified that he relied on his receipt of interim benefits to his detriment by paying off debts that he would not have done otherwise, Hearing Transcript at 18-19. Thus, the administrative law judge must also consider, on remand, whether claimant relinquished a valuable right or changed his position for the worse by paying off debts due to his receipt of interim benefits, so that the recovery of the amount of the debts that claimant paid off should be waived as being against equity and good conscience, potentially resulting in a further reduction in the amount of the overpayment.

The administrative law judge next considered whether recovery of the overpayment would defeat the purpose of the Act, and found that it would not as claimant's monthly income exceeded his monthly expenses. *See* 20 C.F.R. §404.508. Section 404.508 provides: "Defeat the purpose of" the Act means to deprive a person of income required for current ordinary and necessary living expenses, and in making a such a finding, the administrative law judge must determine whether claimant has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. 20 C.F.R. §404.508.

The administrative law judge determined that claimant had "approximately \$1,700 per month in income," which included \$950 per month from Social Security, approximately \$400 per month in interest and/or dividends from bonds, and about \$350 per month from stock dividends. Decision and Order at 3. In addition, the administrative law judge found that claimant's assets included stock shares valued at approximately \$158,582, bonds valued at \$44,301, approximately \$2500 in a checking account, \$3500 in a savings account, 39 acres of land that claimant stated was worth approximately \$200-300 per acre, or about \$7800, a house and a vehicle. On the other hand, the administrative law judge found that claimant's monthly expenses totaled \$1,610.50.

Claimant contends that the administrative law judge erred in counting claimant's investments "twice," as both income and assets, without considering the impact and tax consequences, as projected by claimant's financial advisor, of the depletion and eventual exhaustion of the principal of claimant's income producing assets on which claimant also relied for his monthly income, *see* Director's Exhibit 21; Claimant's Exhibit 2. Thus, claimant contends that the depletion of his income producing investments as a result of the recovery of the overpayment would harm claimant's ability to meet his current and future expenses.

The administrative law judge rejected this contention, citing the holding of the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, in *Benedict v. Director, OWCP*, 29 F.3d 1140, 1144, 18 BLR 2-309, 2-317 (7th Cir. 1994). Decision and Order at 8. As the Seventh Circuit determined in *Benedict, supra*, the administrative law judge, here, found that claimant's receipt of interim benefits enabled him

to maintain his high level of savings, which he otherwise may have spent if he had not received interim benefits. *Id.* Thus, the administrative law judge found that recovery of the overpayment of such benefits would not defeat the purpose of the Act because claimant had benefitted from the use of these benefits, as they allowed his savings and investments to grow to their current amount. *Id.*

In *Benedict, supra*, however, the Seventh Circuit discussed whether a claimant's receipt of interim benefits enabled him to maintain or increase his level of savings or investments only in so far as it was relevant to the question of whether recovery of the overpayment would be against equity and good conscience. That, however, is only one avenue in the inquiry as to whether recovery of the overpayment should be waived. The other avenue of the inquiry is whether recovery of the overpayment would defeat the purpose of the Act. Regarding this avenue, claimant correctly notes that the Board has held that the administrative law judge must also discuss the impact that the gradual depletion and ultimate exhaustion of a claimant's income-producing assets would have on the claimant's future monthly income relative to his monthly expenses and, therefore, his ability to repay the overpayment. *See Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-39 (1993); *Ashe v. Director, OWCP*, 16 BLR 1-109, 1-112 (1992).

In this case, the administrative law judge found that if claimant repaid the interim benefits out of his assets, which included the value of his stock shares, bonds, checking and savings accounts, and land, claimant would still be left with approximately \$175,000 in assets. The administrative law judge, therefore, found that claimant could use his assets to meet his daily expenses. Decision and Order at 8-9. However, as claimant contends, in determining whether recovery of the overpayment would defeat the purpose of the Act, the administrative law judge did not discuss, specifically, the impact that depletion or exhaustion of income-producing assets would have on future monthly income relative to expenses. *See Keiffer, supra; Ashe, supra.* Accordingly, the administrative law judge's finding that recovery of the overpayment would not defeat the purpose of the Act is vacated and the case is remanded for reconsideration of this issue.

In addition, as claimant correctly contends, in determining the value of claimant's assets, the administrative law judge failed to consider whether or not claimant is the sole owner of land, inasmuch as his 1998 Overpayment Recovery Questionnaire reflects that he owned the land in a joint tenancy, *see Director's Exhibit 14; Claimant's Exhibit 3.*⁵

While an administrative law judge should consider the financial circumstances of the

⁵ The record is unclear as to who owns the land in a joint tenancy with claimant, *see Director's Exhibit 14; Claimant's Exhibit 3.*

entire household, including the income and expenses of both claimant and spouse as well as jointly and separately owned assets of both, in determining claimant's ability to repay an overpayment, *see* 20 C.F.R. §404.508(a)(3); *Keiffer*, 18 BLR at 1-38; *Ashe*, 16 BLR at 1-112, if land is owned in a joint tenancy by claimant and his ex-wife, who is not a member of claimant's household, *see* Claimant's Exhibit 3, the administrative law judge should consider this fact when determining the value of claimant's land and assets.

Moreover, as the Director contends, the administrative law judge did not make a definitive finding as to whether claimant was legally responsible for his adult daughter or determine whether claimant's income also included income received by his daughter. The record is unclear as to whether claimant is legally responsible for his daughter and as to the amount of his daughter's income and expenses. Claimant testified that his daughter: lives with him; is nearly a hundred percent dependent on him for support, Hearing Transcript at 10; Director's Exhibit 14; Claimant's Exhibit 1; is disabled; and he believes she receives \$500 per month in Social Security Income benefits, as well as medical insurance benefits, Hearing Transcript at 11, 22. Claimant's tax returns from 1996 through 1998 do not, however, claim his daughter as a dependent. Director's Exhibit 19. While the administrative law judge noted that there is "some question" as to whether claimant is legally responsible to support his daughter, the administrative law judge noted that it is claimant's burden to establish that recovery of the overpayment would defeat the purpose of the Act, *see Keiffer, supra; Ashe, supra*, but found that there is no evidence in the record to show how expenses relating to support for his daughter increased claimant's total living expenses or whether claimant's estimated monthly expenses included the support for his daughter, Decision and Order at 6.

Because the Act 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 assets and expenses of the individual claimant alone, an administrative law judge may consider the financial circumstances of the entire household as an entity in determining a claimant's ability to repay an overpayment, *see* 20 C.F.R. §404.508(a)(3); *Ashe*, 16 BLR at 1-112; *see also McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993)(the regulations count the income and expenses of the household as defined by legal responsibility). Thus, as the Director urges, the administrative law judge should also determine on remand whether claimant is legally responsible for his daughter and, if so, determine and include the amount of claimant's daughter's income and expenses with claimant's, in determining claimant's ability to repay the overpayment.

Claimant also contends that the administrative law judge erred in calculating the amount of claimant's expenses.⁶ The administrative law judge noted that claimant listed over

⁶ Claimant contends that the administrative law judge underestimated expenses for

\$14,000 in “anticipated” burial expenses and over \$6,000 in “anticipated” home remodeling expenses, in light of the fact that claimant’s daughter had become wheelchair bound, Hearing Transcript at 20; Director’s Exhibit 20; Claimant’s Exhibit 1; Decision and Order at 4. The administrative law judge, however, determined that he could not consider such expenses as the regulations pertinent to recovery of the overpayment do not provide for consideration of prospective expenses, but only current expenses. *See* 20 C.F.R. §404.508(b)(recovery will defeat the purpose of the Act where “the person from whom recovery is sought needs substantially all of his current income ... to meet current ordinary and necessary living expenses”); *Keiffer*, 18 BLR at 1-39, 1-40; *Gordon v. Director, OWCP*, 14 BLR 1-60, 1-63 (1990); Decision and Order at 6. Thus, while claimant contends that the above expenses will definitely occur and are not, therefore, prospective expenses, because claimant has stated that these are “anticipated” expenses that have not yet been incurred, we affirm the administrative law judge’s finding that they are, in fact, prospective expenses which cannot be considered in determining waiver. *See* 20 C.F.R. §404.508(b); *Keiffer, supra*; *Gordon, supra*.

Next, claimant contends that there was no legitimate basis for reducing his monthly food expenses from \$500 to \$250. In fact, claimant contends that his March 2000 financial statement specifically notes that his food expenses include the costs for dining out and groceries, while his prior Overpayment Recovery Questionnaires did not make such a distinction. Claimant also contends that the administrative law judge should allow for price increases, noting that \$500 for food expenses should not be unreasonable in the year 2000, when over \$500 in food expenses was approved in *Keiffer, supra*, in the year of 1989. Finally, claimant notes that his food expenses were not challenged by the Director and contends that the administrative law judge did not explain why the \$500 food expense was unreasonable.

The administrative law judge noted that while claimant’s July 1998 and April 1999 Overpayment Recovery Questionnaires listed claimant’s monthly food expenses as \$250, *see* Director’s Exhibits 14, 20, claimant’s March 2000 financial statement listed an increased monthly food expense of \$500, *see* Claimant’s Exhibit 1. Because claimant failed to explain why these food expenses doubled in less than a year, the administrative law judge found that the \$250 amount was more reasonable.

The administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record to determine whether the evidence is documented and reasoned, *see*

insurance, utility and medical expenses, rather than accounting for their actual costs of \$510.63. However, inasmuch as claimant contends that the administrative law judge underestimated these expenses by a total of only 63 cents, any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and, therefore, to determine whether a party has met its burden, *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Thus, inasmuch as the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that the \$250 amount for claimant's monthly food expenses was more reasonable.

In addition, claimant contends that the administrative law judge erred in excluding expenses totaling \$54 per month for gifts and \$110 per month for raising show dogs, *see* Claimant's Exhibit 1, as these expenses went beyond ordinary and necessary expenses and the regulations do not provide for hobby expenses to be compensated as ordinary and necessary expenses, Decision and Order at 7-8. Claimant contends that his expenses for "birthday and [C]hristmas gifts to his children and grandchildren," as well as for raising show dogs, are ordinary and necessary expenses for claimant. Moreover, claimant contends that the regulations do not itemize what are acceptable expenses, as evidenced by the administrative law judge's allowance of expenses for leisure, charity, membership dues, vacation and travel.

Ordinary and necessary expenses include "[o]ther miscellaneous expenses which may reasonably be considered as part of the individual's standard of living," *see* 20 C.F.R. §404.508(a)(4). Thus, while claimant claimed \$54 per month in expenses for gifts, he did not indicate that the gifts were for "birthday and [C]hristmas gifts to his children and grandchildren." Claimant's Exhibit 1. In finding that the expenses for gifts and raising show dogs were not ordinary and necessary expenses, the administrative law judge did not specifically consider whether they could be "considered as part of the individual's standard of living," *see* 20 C.F.R. §404.508(a)(4). Moreover, as claimant contends, the administrative law judge's finding appears to be inconsistent with the administrative law judge's allowance for expenses for leisure, charity, membership dues, vacation and travel. *See Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see also Wike v. Bethlehem Mines Corp.*, 7 BLR 1-593 (1984). Thus, we vacate the administrative law judge's finding that the expenses for gifts and raising show dogs were not ordinary and necessary expenses and remand the case for the administrative law judge to consider whether they could be "considered as part of the individual's standard of living," *see* 20 C.F.R. §404.508(a)(4).

Finally, claimant contends that the administrative law judge substituted his opinion for that of claimant's financial advisor in determining that claimant's monthly tax expenses were \$87 per month, as opposed to \$840 per month. The administrative law judge noted that claimant's financial advisor listed claimant's monthly tax expenses as \$840 per month in 1999, *see* Director's Exhibit 21, and that claimant indicated on his 2000 financial statement

that he paid a total of \$5,852 in quarterly federal tax payments and \$748 in quarterly state tax payments, *see* Claimant's Exhibit 1. However, the administrative law judge noted that claimant's tax returns for 1999 were not in the record, whereas claimant's 1996 tax returns indicate that claimant paid a total of \$612 for both federal and state taxes, his 1997 tax returns indicate that claimant paid a total of \$208 for both federal and state taxes and claimant's most recent tax returns of record from 1998 indicate that claimant paid a total of \$1,041 for both federal and state taxes. Thus, as the record does not provide a reason for why claimant's tax burden would have changed so drastically from the previous three years, the administrative law judge found that claimant's financial advisor's listing of claimant's monthly tax expenses of \$840 per month in 1999 was overestimated and, therefore, found that, based on claimant's most recent tax returns of record from 1998, claimant's monthly tax expenses were \$87 per month. Decision and Order at 7.

The administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record to determine whether the evidence is documented and reasoned, *see Fields, supra; Lucostic, supra*, and, therefore, to determine whether a party has met its burden of proof, *see Maddaleni, supra; Kuchwara, supra*. Thus, inasmuch as the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Anderson, supra; Worley, supra*, we affirm the administrative law judge's finding that the record does not support a finding that claimant's monthly tax expenses were \$840 per month in 1999 and that claimant's monthly tax expenses are more accurately reflected in the record by claimant's most recent tax returns of record from 1998, as a permissible exercise of his discretion and as supported by substantial evidence. Nevertheless, the administrative law judge mischaracterized the amount of taxes that claimant paid on his 1998 state tax return as \$190, Decision and Order at 7, whereas the record reflects that claimant actually paid \$238.44 in state taxes in 1998, *see* Director's Exhibit 19. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Thus, based on claimant's most recent tax returns of record from 1998, claimant's monthly tax expenses would actually amount to \$90.79 per month. Consequently, on remand, the administrative law judge should correct his calculation of claimant's monthly tax expenses, based on claimant's most recent tax returns of record from 1998, to accurately reflect the amount of taxes, *i.e.*, \$238.44, that claimant paid on his 1998 state tax return. *See* Director's Exhibit 19.

Accordingly, the administrative law judge's Decision and Order denying waiver of recovery of overpayment is affirmed in part, vacated in part, and the case is remanded 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