

BRB No. 99-1168 BLA

CLARENCE TUCKER	)	
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Barry H. Joyner (Henry L. Solano, 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLO-0014) of Administrative Law Judge Donald W. Mosser denying waiver of an overpayment totaling \$73,178.35 with respect to 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). On February 1, 1978, claimant filed a claim for black lung benefits. Director’s Exhibit 1. Claimant was awarded benefits by the district director. Director’s Exhibit 2. Subsequently, however, Administrative Law Judge Charles P. Rippey denied benefits in a Decision and Order issued on August 17, 1989, which the Board affirmed in *Tucker v. Director, OWCP*, BRB No. 89-3191 BLA (Aug. 21, 1992)(unpub.). Director’s Exhibit 9. Judge Rippey denied claimant’s request for modification on August 18, 1994. Director’s Exhibit 15. Claimant did not appeal this decision but filed a second request for modification that was denied by Administrative

Law Judge Thomas F. Phalen, Jr. on September 3, 1997. Director's Exhibit 16. The district director subsequently informed claimant of the existence of an overpayment as a consequence of the denial of benefits and requested payment. Claimant requested waiver of recovery of the overpayment. The district director denied claimant's request, and the case was referred to the Office of Administrative Law Judges.

Administrative Law Judge Donald W. Mosser (the administrative law judge), found claimant's total monthly income to be \$1,879, and monthly expenses to be \$1,706, resulting in a monthly surplus of \$173. The administrative law judge also found that claimant's assets included a certificate of deposit (CD) in claimant's name or his niece's in the amount of \$12,000, a savings/investment account in claimant's name and his wife's in the amount of \$58,000, and a savings account in claimant's name or his son's in the amount of \$50,000. The administrative law judge noted that claimant testified that he owns his home and two cars, that have been paid for in full. The administrative law judge found that recovery of the overpayment would not defeat the purpose of the Act nor would it be against equity and good conscience. Accordingly, the administrative law judge declined to grant waiver of recovery of the overpayment and ordered repayment. Claimant appeals, arguing that the administrative law judge erred in failing to waive recovery. The Director, Office of Workers' Compensation Programs, has submitted a response brief supporting affirmance of the administrative law judge's decision.<sup>1</sup>

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 the 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish waiver of recovery of the overpayment to the miner, claimant is required to demonstrate that recovery would either defeat the purpose of the Act by depriving him of ordinary and necessary living expenses or would be against equity and good conscience because claimant has relinquished a valuable right or changed his position for the worse in

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<sup>1</sup> We affirm the administrative law judge's findings that an overpayment of \$73,178.35 exists, and that claimant was not at fault in the creation of the overpayment, inasmuch as these findings are not contested on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

reliance on the receipt of interim benefits. 20 C.F.R. §§410.561c, 410.561d. Claimant argues that the assets he holds, amounting to \$120,000, are not a proper source from which to recover the overpayment. Claimant further asserts that it would defeat the purpose of the Act to require him to repay the overpayment because it would take approximately thirty-five years to pay off the overpayment if the entirety of his monthly income in excess of his monthly expenses were used to pay the overpayment.

Claimant's arguments are without merit. Contrary to claimant's suggestion, the administrative law judge did not order repayment directly from the assets which claimant holds. Rather, the administrative law judge left it to the district director, in consultation with claimant and his attorney, to work out a reasonable manner of payment. Decision and Order at 5. Further, claimant concedes that his average monthly income exceeds his average monthly expenses by \$173. Claimant's Brief at 4. Claimant offers no reason, other than the small amount of monthly surplus and an extended payment period, for vacating the administrative law judge's decision. Therefore, we affirm the administrative law judge's finding that repayment of the overpayment would not defeat the purpose of the Act, inasmuch as the administrative law judge rationally determined that the evidence indicates that claimant's monthly income is sufficient to meet his ordinary and necessary living expenses and claimant offers no specific legal or factual challenge to the administrative law judge's finding. *See* 20 C.F.R. §§725.542, 725.543, 410.561c; *Potisek v. Director, OWCP*, 14 BLR 1-87 (1990)(*en banc*)(Brown, J., dissenting); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge