

BRB No. 99-0418 BLA

CARMELINE M. KANE	)	
(Widow of THOMAS KANE)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Respondent	)	

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Andrew J. Primerano (Kennedy & Lucadamo, P.C.), Hazleton, Pennsylvania, for claimant.

Sarah M. Hurley (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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLO-0007) of Administrative Law Judge Ralph A. Romano denying waiver of the recovery of an overpayment of benefits on claims 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). In his Decision and Order, the administrative law judge found that an overpayment of benefits had been made to claimant in the amount of \$17,681.80 and accepted the

concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant was without fault in the creation of the overpayment.<sup>1</sup> The administrative law judge additionally found that recovery of the overpayment would not defeat the purpose of Title IV of the Act or be against equity and good conscience. Accordingly, he denied claimant's request for a waiver of recovery of the overpayment.

On appeal, claimant contends that the administrative law judge erred in finding that recovery of the overpayment would not defeat the purpose of Title IV of the Act or be against equity and good conscience. The Director responds, urging affirmance.

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

In cases involving an overpayment, where claimant is found to be without fault, the administrative law judge must consider whether recovery of the

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<sup>1</sup> Claimant is Carmeline M. Kane, widow of Thomas Kane, the miner. The district director initially awarded benefits on the deceased miner's lifetime claim and on claimant's survivor's claim. Because the responsible operator contested the claims and declined to pay benefits, the Black Lung Disability Trust Fund began paying interim benefits to claimant pending a final decision. Director's Exhibit 5. An administrative law judge denied both claims, and on September 16, 1994, the district director suspended the interim benefits and informed claimant that an overpayment of \$17,681.80 existed. Director's Exhibit 8. The denial of both claims is now final. The district director again notified claimant of the overpayment on February 26, 1996 and September 18, 1997. Director's Exhibits 12, 15.

overpayment would defeat the purpose of the Act by depriving claimant of income required for ordinary and necessary living expenses, or be against equity and good conscience because claimant relinquished a valuable right or changed her position for the worse in reliance upon the incorrect payment. 20 C.F.R. §§410.561c, 410.561d; *Nelson v. Director, OWCP*, 21 BLR 1-4, 1-7 (1997). Claimant bears the burden of establishing entitlement to waiver. *Ashe v. Director, OWCP*, 16 BLR 1-109, 1-111 (1992).

Based on the documentary evidence and formal hearing testimony, the administrative law judge found that claimant's monthly income exceeds her monthly expenses and that she holds approximately \$100,000 in assets.<sup>2</sup> Decision and Order at 4-6; Director's Exhibits 16, 17, 18, 21, 22; Hearing Transcript 10-36. The administrative law judge therefore concluded that claimant failed to meet her burden of showing that recovery of the overpayment would deprive her of income required for ordinary and necessary living expenses, and consequently found that recovery would not defeat the purpose of Title IV of the Act. See 20 C.F.R. §410.561c; see *Ashe, supra*. Claimant does not challenge the administrative law judge's calculation of her current monthly income and expenses. She argues that the administrative law judge erred in finding that recovery would not deprive her of income required for ordinary and necessary living expenses when she would have to partially liquidate the investment accounts intended for her retirement. Claimant's Brief at 6-7. The regulations pertaining to overpayments, however, do not provide for consideration of future expenses. *Keiffer v. Director, OWCP*, 18 BLR 1-35, 39 (1993). Therefore, the administrative law judge properly declined to consider claimant's future retirement expenses at Section 410.561c. Decision and Order at 4; see *Keiffer, supra*. Accordingly, we affirm the administrative law judge's finding pursuant to Section 410.561c that recovery of the overpayment would not defeat the purpose of Title IV of the Act.

The administrative law judge considered claimant's contention that recovery of the overpayment would be against equity and good conscience because she changed her position for the worse in reliance on the benefits. Decision and Order at 6-7. Claimant argued that she sent her three children to private school, encouraged them to attend Penn State University instead of a less expensive local college, refinanced her mortgage, and bought a used car for each child. She testified that she would not have taken these actions absent the benefits award. Hearing Transcript at 13-17. The administrative law judge, however, found that

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<sup>2</sup> These assets include approximately \$98,098 in two investment accounts, \$1,835 in a savings account, and \$150 in a checking account. Director's Exhibits 21, 22; Hearing Transcript at 18-20.

“[t]he evidence [did] not bolster this argument.” Decision and Order at 6. He therefore concluded that claimant failed to prove that she changed her position for the worse in reliance on the benefits. See *Ashe, supra*.

On appeal, claimant asserts that the administrative law judge did not adequately consider her argument that she changed her position for the worse because of the payment of benefits. Claimant’s Brief at 4-6. Review of the administrative law judge’s decision, however, indicates that he addressed each of claimant’s arguments, Decision and Order at 6-7, and we conclude that substantial evidence supports his findings.

As the administrative law judge found regarding claimant’s mortgage, claimant did not refinance until 1996, two years after the Department of Labor suspended benefits and demanded repayment. Director’s Exhibit 5. Thus, the administrative law judge was not persuaded that the refinancing transaction occurred because of the award of benefits. See *McConnell v. Director, OWCP*, 993 F.2d 1454, 1461, 18 BLR 2-168, 2-182-83 (10th Cir. 1993)(new action or obligation must be causally linked to the award of benefits). Additionally, the administrative law judge reasonably declined to classify the refinancing as a change for the worse when it lowered claimant’s monthly mortgage payment. Hearing Transcript at 14; see *McConnell, supra*.

Additionally, the administrative law judge rationally concluded that claimant did not prove that she purchased cars for her three children because of the benefits. In so finding, the administrative law judge relied upon claimant’s testimony that the plan to buy each child a \$5000 used car was her late husband’s last wish,<sup>3</sup> that the purchase money came from the investment accounts funded by the proceeds of her husband’s life insurance policy, and that she purchased the third car for her youngest child in 1997. Hearing Transcript at 16-18, 22. Because it appeared that claimant was carrying out her late husband’s wishes and because the money to purchase these cars came from claimant’s substantial investment accounts, the administrative law judge was not convinced that these “gifts would not have been made but for the benefit money.” Decision and Order at 7; see *McConnell; supra; Posnack v. Secretary, Health and Human Services*, 631 F. Supp. 1012, 1016 (E.D.N.Y. 1986)(claimant must have made substantial purchases that she otherwise would not have made). The administrative law judge found this conclusion bolstered by claimant’s purchase of the third car in 1997, three years after the Department of Labor terminated her benefits and demanded repayment. Under the facts and circumstances of the case, the administrative law judge’s credibility determination is

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<sup>3</sup> The miner died before benefits were awarded. Director’s Exhibits 2, 4, 5.

reasonable and therefore we will not disturb it. See *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985).

Regarding the childrens' private high school education, the administrative law judge accurately noted that they were already attending private high school prior to the award of benefits. Hearing Transcript at 12-13. Therefore, he rationally found that by continuing to send her children to private high school, claimant did not change her position for the worse based on the award of benefits. See *McConnell, supra*.

Regarding the choice of a more expensive college, the administrative law judge accurately noted that claimant does not pay for her children's tuition and that each child is responsible for his or her own educational loans. Hearing Transcript at 35-36. Although claimant testified that she took out an educational loan to assist each child in 1997, Hearing Transcript at 35; Director's Exhibit 16, the administrative law judge properly considered that this transaction occurred after claimant's benefits were terminated and she had been notified several times that an overpayment existed.<sup>4</sup> Additionally, the administrative law judge relied on claimant's testimony regarding the childrens' expected graduation dates to find that her youngest child did not even enter Penn State University until 1996, two years after the termination of benefits. Hearing Transcript at 25. Taking all of these facts into account, the administrative law judge reasonably concluded that claimant did not change her position for the worse with respect to her childrens' college education because of the award of benefits. See *McConnell, supra*. Therefore, we affirm the administrative law judge's finding that claimant failed to prove pursuant to Section 410.561d that recovery of the overpayment would be against equity and good conscience.<sup>5</sup>

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<sup>4</sup> As the administrative law judge noted, as of the hearing claimant had made no payments on the educational loans, which were in forbearance. Hearing Transcript at 35-36.

<sup>5</sup> Claimant argues that the Board should adopt the broad interpretation of the

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phrase “against equity and good conscience” set forth in *Groseclose v. Bowen*, 809 F.2d 502 (8th Cir. 1987) and *Quinlivan v. Sullivan*, 916 F.2d 524 (9th Cir. 1990). Claimant’s Brief at 5-7. Those cases, however, involved unusual circumstances not present here. Therefore, we decline to apply their holdings in this case.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge