

BRB No. 97-1384 BLA

MAXINE ALLRED HENNINGSON)	
)	
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 Upon Remand of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Martin J. Linnet (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Helen H. Cox (Marvin Krislov, Deputy Solicitor for National Operations; 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 and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Upon Remand (89-BLO-74) of Administrative Law Judge Thomas Schneider denying waiver of the recovery of a \$16,389.90 overpayment of interim benefits awarded claimant 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). This case is before the Board for the fourth time. In his original Decision and Order, the administrative law judge found that claimant was without fault in creating a \$16,389.90 overpayment, but found that recovery would be against equity and good conscience and granted waiver pursuant to 20 C.F.R. §410.456d. The Director, Office of Workers' Compensation Programs (the Director), appealed and in *Allred v. Director, OWCP*, BRB No. 91-0649 BLA

(Mar. 30, 1993)(unpub.), the Board reversed the administrative law judge's finding that recovery would be against equity and good conscience and remanded the case to determine whether recovery would defeat the purpose of Title IV of the Act.

On remand, the administrative law judge reviewed claimants financial circumstances and found that assets exceeded liabilities by \$4,000.00, which he found was inadequate. The administrative law judge therefore found that recovery would defeat the purpose of Title IV of the Act pursuant to 20 C.F.R. §410.561c and ordered waiver. The Director appealed and in *Allred v. Director, OWCP*, BRB No. 94-0864 BLA (May 26, 1995)(unpub.), the Board held that the administrative law judge's analysis of claimant's financial circumstances was invalid and vacated the administrative law judge's finding that recovery would defeat the purpose of Title IV of the Act and, citing *McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993), the Board vacated its reversal of the administrative law judge's prior finding that recovery would be against equity and good conscience and remanded the case for further findings on both issues.

On remand, the administrative law judge found that recovery would not be against equity and good conscience pursuant to *McConnell*, but found recovery would defeat the purpose of Title IV of the Act and granted waiver. The Director appealed and in *Allred v. Director, OWCP*, BRB No. 96-1611 (Jan. 28, 1997)(unpub.), the Board vacated the administrative law judge's waiver of recovery and remanded the case to the administrative law judge to consider whether claimant's financial circumstances are such that she has the income and financial resources to meet her current ordinary and necessary expenses pursuant to Section 410.561c.

On remand, the administrative law judge concluded that two of claimant's rental properties, which were vacant and not producing any rental income, had more than sufficient value to repay the overpayment if they were sold. Moreover, the administrative law judge determined that recovery would therefore not defeat the purpose of Title IV of the Act since claimant had the financial resources to repay the overpayment upon the sale of the properties without adversely affecting her income required to meet living expenses. In addition, the administrative law judge found that the rental properties purchased with the proceeds of claimant's interim black lung benefits sufficiently maintained their value as well as generated some income such that claimant's position did not change for the worse and thus, recovery would not be against equity and good conscience. Accordingly, the administrative law judge denied waiver of recovery of the overpayment. In the instant appeal, claimant contends that the administrative law judge erred in speculating as to the amount of proceeds that could be generated from the sale of the two rental properties in

determining that recovery would not defeat the purpose of Title IV of the Act. Claimant also asserts that recovery of the overpayment would be against equity and good conscience based on the length of this litigation and claimant's declining health. The Director responds, urging affirmance of the denial of the waiver of recovery of the overpayment.

The Board's scope of review is limited by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are rational, are supported by substantial evidence, and are in accordance with applicable law. 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).

In cases involving an overpayment, the administrative law judge must determine whether claimant is without fault in the creation of the overpayment. 20 C.F.R. §§410.561a, 410.561b. If claimant is not without fault, recovery cannot be waived. 20 C.F.R. §§410.561a, 410.561b; *Hampton v. Director, OWCP*, 11 BLR 1-118 (1988). If the administrative law judge determines that claimant is without fault, the administrative law judge must then consider whether recovery of the overpayment would defeat the purpose of Title IV of the Act,¹ or be against equity and good conscience.² 20 C.F.R. §§410.561a, 410.561c, 410.561d; *Ashe v.*

¹ "Defeat the purpose of Title IV" means to deprive a person of income required for ordinary and necessary living expenses. The administrative law judge must determine whether the person 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. §410.561c.

²"Against equity and good conscience" means that adjustment or recovery of an

Director, OWCP, 16 BLR 1-109 (1992).

After consideration of the administrative law judge's Decision and Order Upon Remand, 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 contains no reversible error therein. Claimant contends that recovery of the overpayment by the sale of the two rental properties would defeat the purpose of Title IV of the Act. Claimant argues that the administrative law judge failed to account for the speculative aspect of selling the two properties while the regulations contemplate only *current* income and *current* expenses. See 20 C.F.R. §410.456c(b); *Keiffer v. Director, OWCP*, 18 BLR 1-35 (1993). We disagree. Contrary to claimant's contention, speculative future income and expenses are not relevant to the inquiry under Section 410.561c, but rather, the administrative law judge must base his calculations on claimant's current expenses as set forth in the record before him. 20 C.F.R. §§410.561c, 725.542(b)(1); *Keiffer, supra*; *Ashe, supra*; see also *McConnell, supra*. The administrative law judge permissibly determined that the value of the two properties which were generating no income would be sufficient, upon their sale, to generate more than enough proceeds to cover the overpayment without reducing claimant's monthly household income. Decision and Order Upon Remand at 6-7. The administrative law judge thus properly considered the entire financial circumstances of claimant's household and correctly found that the sale of the rental properties would not adversely impact on claimant's monthly income or her monthly expenses, and the administrative law judge's finding is supported by substantial evidence. See Decision and Order Upon Remand at 7; *Ashe, supra*. Thus, we affirm the administrative law judge's finding that recovery of the overpayment would not defeat the purpose of Title IV of the Act.

incorrect payment will be considered inequitable if an individual, because of a notice that such payment would be made or by reasons of the incorrect payment, relinquished a valuable right or changed his position for the worse. In reaching such a determination, the individual's financial circumstances are irrelevant. 20 C.F.R. §410.561d; *Hervol v. Director, OWCP*, 16 BLR 1-53 (1990).

Claimant also generally contends that the recovery of the overpayment would be against equity and good conscience, noting the speculative property values, the length of this litigation and claimant's deteriorating health. Claimant, however, has failed to present any evidence that she relinquished a valuable right or changed her position for the worse in reliance on the receipt of the interim benefits. We, therefore, affirm the administrative law judge's finding that claimant failed to establish that recovery of the overpayment would be against equity and good conscience.³

Accordingly, the Decision and Order Upon Remand of the administrative law judge denying claimant's request for waiver of the recovery of an overpayment is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

³In the event claimant's financial situation changes in the future regarding her ability to meet her ordinary and necessary living expenses, claimant may file a petition for modification with the district director. See 33 U.S.C. §922, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §§725.310 and 725.480; *Lee v. Consolidation Coal Co.*, 843 F.2d 159, 11 BLR 2-106 (4th Cir. 1988); *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge