

BRB No. 97-1485 BLA

HARRY R. DARBY	)		
	)		
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick, Morgantown, West Virginia, for claimant.

Jennifer Toth (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, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1683) of Administrative Law Judge Daniel L. Leland denying waiver of recovery of the overpayment of benefits 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). Based on the stipulation of the parties, the administrative law judge found that the record reflects an overpayment in the amount of \$17,521 and that claimant was without fault in the creation of the overpayment. The administrative law judge further found that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience. See 20 C.F.R. §§410.561c, 410.561d,

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

Claimant appeals, contending generally that financial circumstances do not permit his ability to repay the overpayment, and further argues that the annuities the administrative law judge considered to determine his financial ability to repay the overpayment, are not his assets, but rather are the sole property of his spouse and children. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.<sup>1</sup>

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 applicable 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).

On February 24, 1974, claimant filed a claim for benefits, Director's Exhibit 9. The district director notified claimant on February 11, 1980 that the Department of Labor would pay interim benefits on behalf of employer, Director's Exhibit 2. On October 31, 1980, Administrative Law Judge Joel Williams denied benefits, Director's Exhibit 9. The Decision and Order denying benefits was affirmed by the Board, *Darby v. Director, OWCP*, BRB No. 91-0514 BLA (Dec. 28, 1981)(unpub.); Director's Exhibit 18, and was further affirmed by the United States Court of Appeals for the Fourth Circuit, *Darby v. Director, OWCP*, No. 85-1004 (4th Cir. Feb. 18, 1987); Director's Exhibit 20. On November 1, 1988, the district director instituted overpayment proceedings, and denied claimant's request for a waiver of recovery of the overpayment, Director's Exhibit 21. On March 1, 1990, Administrative Law Judge Stuart Levin granted claimant a waiver of recovery of the overpayment, Director's Exhibit 39. In response to an appeal from the Director, the Board vacated the administrative law judge's Decision and Order, and remanded the case to the administrative law judge, *Darby v. Director, OWCP*, BRB No. 91-0514 BLA (Dec.

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<sup>1</sup> We affirm the administrative law judge's finding that recovery of the overpayment would not be against equity and good conscience pursuant to 20 C.F.R. §§410.561a, 410.561d, 725.543, as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

28, 1993)(unpub.); Director's Exhibit 42. In an Order dated July 11, 1996, Administrative Law Judge Gerald Tierney remanded the case for information concerning claimant's current financial status. Following the submission of this new evidence, the case was referred to the Office of Administrative Law Judges.

Regarding whether recovery of the overpayment would defeat the purpose of the Act, the administrative law judge found that claimant reported monthly income of \$1908.62, based on both claimant's and his spouse's Social Security benefits and claimant's pension, Claimant's Exhibit 1. The administrative law judge also noted claimant's assets: a fully paid-off three bedroom home; approximately \$9000 in joint checking and savings; and approximately \$58,000 in annuities. Claimant submitted two expense reports dated August 23, 1994 and May 3, 1996, Director's Exhibits 45, 50. Claimant's August 23, 1994 overpayment questionnaire detailed both monthly and annual expenses, and was accompanied by receipts, canceled checks, tax returns, and bank statements. The May 3, 1996 expense report was unsubstantiated. Relying mostly on the August 1994 statement because it was substantiated, but also considering the May 3, 1996 questionnaire, the administrative law judge found that claimant's ordinary and necessary monthly living expenses were \$1750, and that his monthly income exceeds his expenses by approximately \$158.62. Decision and Order at 3.

With respect to claimant's assets, the administrative law judge found that claimant could not include his wife's expenses as part of the household and then exclude her \$58,000 worth of annuities from the household income and assets. The administrative law judge noted that claimant's spouse inherited the money from her father, which she put into four certificates of deposit, and then converted into two annuities in her name with her children. Even though the annuities were not derived from the original overpayment funds but were derived from her inheritance, the administrative law judge found that these funds could be used to repay the overpayment. The administrative law judge found that claimant would still have sufficient funds left over after repaying the \$17,521 overpayment. Depletion of the annuities would not deplete his monthly income since the income generated from the annuities was automatically paid back into the annuities. Additionally, the administrative law judge noted that claimant could use \$9000 in his joint checking and savings accounts to repay part of the overpayment, and still cover his monthly expenses with a small cushion for emergencies. The administrative law judge therefore found that claimant had not met his burden of proving that repayment of the overpayment would deprive him of money to meet his ordinary and necessary living expenses, see Decision and Order at 3-4.

On appeal, claimant contends generally that "financial circumstances do not

permit his ability to repay any amount at this time.” Claimant’s Brief at 2 (unpaginated). Claimant further argues that the administrative law judge erred in finding that the annuities held in the name of claimant’s wife, children and grandchildren are assets which can satisfy the overpayment. In support, claimant argues that there is no evidence that these annuities were generated as a consequence of federal black lung benefits, but rather contends that these assets can be traced exclusively to claimant’s spouse’s inheritance from her parents.

To establish that recovery of an overpayment would defeat the purpose of the Act, claimant must show that recovery would deprive him of income required for ordinary and necessary living expenses, including expenses for support of claimant’s dependents. See 20 C.F.R. §§410.561c, 725.543; *Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-39-40 (1993); *Nelson v. Director, OWCP*, 14 BLR 1-159 (1990); *Potisek v. Director, OWCP*, 14 BLR 1-87 (1990)(*en banc*, Brown, J., dissenting); *Jones v. Director, OWCP*, 14 BLR 1-80 (1990)(*en banc*, Brown, J., concurring). A determination regarding such deprivation depends on whether claimant has 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.*

We hold that the administrative law judge properly found that recovery of the overpayment would not defeat the purpose of the Act inasmuch as the administrative law judge rationally found that claimant’s monthly income exceeds his monthly expenses. In making this determination, the administrative law judge properly considered the financial circumstances of the entire household, including the combined income and expenses of both claimant and his spouse, as well as jointly and separately owned assets of both, in determining claimant’s ability to repay an overpayment. See *McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993); *Keiffer, supra*; *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992). Thus, contrary to claimant’s assertion, the administrative law judge properly considered the annuities as part of claimant’s household assets. The administrative law judge also rationally found that depletion of the annuities would not affect claimant’s monthly income since any income generated was automatically reinvested into the annuity. We further reject claimant’s assertion that there must be a link between the asset and the original overpayment funds. See *Ashe, supra*. Inasmuch as the administrative law judge’s findings are rational, and are supported by substantial evidence, we affirm the administrative law judge’s finding that waiver of recovery of the overpayment would not defeat the purpose of the Act. See *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Consequently, the administrative law judge properly denied claimant’s request for a waiver of recovery of the overpayment.



Accordingly, the administrative law judge's Decision and Order denying waiver 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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REGINA C. McGRANERY  
Administrative Appeals Judge