

BRB No. 97-1537 BLA

WALTER JENNINGS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/27/1998
	)	
DIRECTOR, OFFICE OF WORKERS	)	
COMPENSATION PROGRAMS, UNITED)	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

Walter Jennings, Richlands, Virginia, *pro se*.<sup>1</sup>

Jennifer U. 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 BROWN, Administrative Appeals Judges.

PER CURIAM:

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<sup>1</sup>Tim White, a benefits counselor with Stone Mountain Health Services of Vasant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant appeals the Decision and Order (97-BL0-0004) of Administrative Law Judge Richard A. Morgan granting a partial waiver of recovery of an 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). In a Decision and Order dated March 28, 1996, Administrative Law Judge Charles P. Rippey noted that the parties agreed that an overpayment had been made to claimant in the amount of \$84,008.17.<sup>2</sup> Judge Rippey also noted that the Director, Office of Workers' Compensation Programs (the Director), stipulated

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<sup>2</sup>Claimant filed a claim for benefits on April 2, 1980. Director's Exhibit 1. In a Proposed Decision and Order dated January 25, 1982, the district director found claimant entitled to benefits. Director's Exhibit 6. Inasmuch as the designated responsible operator declined to pay benefits, the Black Lung Disability Trust Fund initiated benefits payments. See Director's Exhibit 7. By Decision and Order dated July 23, 1992, Administrative Law Judge Clement J. Kichuk denied benefits. Director's Exhibit 17. By Decision and Order dated February 24, 1994, the Board affirmed Judge Kichuk's denial of benefits. *Jennings v. Rebel Coal Co.*, BRB No. 92-2275 BLA (Feb. 24, 1994) (unpublished). There is no evidence that claimant took any further action in regard to his 1980 claim.

By letter dated November 23, 1994, the Department of Labor notified claimant that he was liable for an overpayment in the amount of \$84,007.80. Director's Exhibit 21. By letter dated September 12, 1995, the Department of Labor notified the Office of Administrative Law Judges that the overpayment had been amended to \$84,008.17 to account for an incorrect calculation. Director's Exhibit 43.

that claimant was not at fault in the creation of the overpayment. Judge Rippey, however, found that recovery of the overpayment would not be against equity and good conscience. Accordingly, Judge Rippey denied claimant a waiver of the overpayment.

Claimant subsequently filed a request for modification. Administrative Law Judge Richard A. Morgan (the administrative law judge) reviewed the entire record in order to determine whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge found that an overpayment had been made to claimant in the amount of \$84,008.17. The administrative law judge also noted that the Director stipulated that claimant was not at fault in the creation of the overpayment. The administrative law judge further found that recovery of the overpayment would not defeat the purpose of Title IV of the Act. The administrative law judge, however, found that recovery of \$8,925 of the overpayment would be against equity and good conscience. The administrative law judge, therefore, granted claimant a partial waiver of recovery of the overpayment in the amount of \$8,925.00 and held claimant liable for the remaining \$75,083.17. The administrative law judge also found that claimant could repay the \$75,083.17 in monthly installments of \$250.00. On appeal, claimant generally contends that the administrative law judge erred in not granting a complete waiver of recovery of the overpayment. The Director responds, urging affirmance of the administrative law judge's granting of a partial waiver of recovery of the overpayment.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, 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 an overpayment case, a claimant, in order to obtain a waiver of recovery of the overpayment, has the burden of establishing either: (1) that recovery of the overpayment would defeat the purpose of Title IV of the Act in that it would deprive claimant of funds needed to meet ordinary and necessary living expenses or (2) that recovery would be against equity and good conscience in that claimant had relinquished a valuable right or changed his position for the worse in reliance on the receipt of interim benefits. See 20 C.F.R. §725.542; 20 C.F.R. §§410.561c, 410.561d; *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992).

In the instant case, the administrative law judge found that claimant's monthly income exceeded his monthly expenses by \$476.00. Decision and Order at 9. The administrative law judge, therefore, effectively found that recovery of the overpayment would not deprive claimant of funds needed to meet ordinary and

necessary living expenses. See 20 C.F.R. §410.561c; *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992). Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that recovery of the overpayment would not defeat the purpose of Title IV of the Act.

The administrative law judge, however, found that claimant changed his position for the worse and relinquished a valuable right by both paying \$3,325 toward his daughter's college education and by paying \$5,600 for house repairs. Decision and Order at 10. The administrative law judge, therefore, found that recovery of this portion of the overpayment would be against equity and good conscience. *Id.* The administrative law judge, therefore, granted claimant a partial waiver of recovery of the overpayment in the amount of \$8,925.00. *Id.* Inasmuch as no party challenges the administrative law judge's finding that claimant is entitled to a partial waiver of \$8,925.00, this finding is affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We finally note that the administrative law judge exceeded his authority by imposing a monthly repayment schedule. The purpose of the formal hearing is to establish the existence of debt, not how it will be repaid.<sup>3</sup> See *Keiffer v. Director, OWCP*, 18 BLR 1-35 (1993). The administrative law judge, citing *McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993), concluded that he had the authority to establish a monthly repayment schedule. Decision and Order at 11. The administrative law judge's reliance on *McConnell* is misplaced. In *McConnell*, the United States Court of Appeals for the Tenth Circuit merely recognized that claimant's monthly income exceeded his monthly expenses by a sufficient amount to allow him to repay the overpayment. The Tenth Circuit did not specifically hold that an administrative law judge has the authority to set a repayment

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<sup>3</sup>In *Keiffer*, the Board held that the:

purpose of the formal hearing is to establish the existence of the debt, not how it will be repaid. See 20 C.F.R. §410.560; [*Jones v. Director, OWCP*, 14 BLR 1-80 (1990)(*en banc*) (Brown, J., concurring)]. The administrative law judge's inquiry is merely whether claimant is in a position to assume repayment of the debt caused by the overpayment. Once the debt is established as owing, and collection efforts begin, see 20 C.F.R. §725.544, claimant has the right to seek modification if his financial circumstances change, see 4 C.F.R. §104.2(b); 20 C.F.R. §725.310.

*Keiffer*, 18 BLR at 1-40.

schedule. We, therefore, vacate the administrative law judge's repayment schedule.

Accordingly, the administrative law judge's Decision and Order granting a partial waiver of recovery of the overpayment is affirmed in part and vacated in part.

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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JAMES F. BROWN  
Administrative Appeals Judge