

BRB No. 98-0118 BLA

CHARLES F. ALLEN)

Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS')

COMPENSATION PROGRAMS,)

UNITED STATES DEPARTMENT OF)

LABOR)

Respondent)

DATE ISSUED:

DECISION AND ORDER

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

Charles F. Allen, Big Stone Gap, Virginia, *pro se*.

Jill M. Otte (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, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the Decision and Order - Denying Waiver of Overpayments (97-BLO-0003) of Administrative Law Judge Richard A. Morgan with respect to a claim filed pursuant to the provisions of Title IV of the Federal

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge initially stated that the evidence established that there had been an overpayment of benefits in the amount of \$57,021.76, representing \$53,947.90 in monthly benefits paid by the Black Lung Disability Trust Fund (Trust Fund) and \$3,073.86 in medical benefits.² The administrative law judge also found that claimant was not at fault in the creation of the overpayment. The administrative law judge further found that the evidence was insufficient to establish that recovery of the overpayment would defeat the purpose of the Act pursuant to 20 C.F.R. §410.561c. Likewise, he found that the evidence was insufficient to establish that recovery of the overpayment would be against equity and

² Claimant filed his application for benefits on December 10, 1979. On February 13, 1981, the district director awarded interim benefits on claimant's application for benefits. Following a formal hearing, Administrative Law Judge Robert E. Kendrick awarded benefits in a Decision and Order issued on March 1, 1988. Director's Exhibit 1. Judge Kendrick's award of benefits was vacated by the Board and the case was remanded for further consideration. *Allen v. Westmoreland Coal Co.*, BRB No. 88-1130 BLA (Feb. 20, 1990)(unpub.). On remand, the case was assigned to Administrative Law Judge Daniel L. Stewart, who issued a Decision and Order denying benefits on August 16, 1991. Director's Exhibit 2. This denial was affirmed by the Board on February 28, 1994. Director's Exhibit 3; *Allen v. Westmoreland Coal Co.*, BRB No. 91-2070 BLA (Feb. 28, 1994)(unpub.). Claimant appealed the denial to the United States Court of Appeals for the Fourth Circuit, which dismissed the case for want of prosecution on May 5, 1994. Director's Exhibit 4; *Allen v. Westmoreland Coal Co.*, No. 94-1359 (4th Cir. May 10, 1994)(unpub.).

In December 1994, the district director notified claimant of the existence of an overpayment of benefits in the amount of \$71,668.40. Director's Exhibit 5. In April 1995, the district director, noting that employer paid a portion of the benefits to claimant, sent a revised notice of the overpayment of benefits in the amount of \$57,021.76, representing \$53,947.90 in monthly benefits paid by the Black Lung Disability Trust Fund and \$3,073.86 in medical benefits. Director's Exhibit 10. While finding that claimant was without fault in the creation of the overpayment, the district director, in a proposed decision dated October 3, 1996, found that recovery of the overpayment would not be against equity and good conscience or defeat the purpose of the Act and, therefore, denied waiver of recovery of the overpayment. Director's Exhibit 22. In addition, the district director set a proposed payment schedule of \$350.00 per month until March 2002, resulting in a total repayment of \$26,222.70 and a compromise of \$27,725.20 of the overpayment. *Id.* By letter dated October 14, 1996, claimant requested a formal hearing. Director's Exhibit 23. The case was transferred to the Office of Administrative Law Judges. Director's Exhibit 24.

good conscience pursuant to 20 C.F.R. §410.561d. In addition, the administrative law judge established a repayment schedule, requiring a payment in the amount of \$250.00 per month until claimant repaid a total amount of \$26,222.70, which the administrative law judge noted was the amount sought by the district director in compromise. Accordingly, the administrative law judge denied waiver of recovery of the overpayment of benefits. In response to claimant's appeal, the Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's denial of waiver of recovery of the overpayment of benefits. Additionally, the Director notes that the administrative law judge erred in establishing a monthly repayment schedule inasmuch as the administrative law judge's duty, as fact-finder, is to determine whether a debt exists and not the method of its repayment. The Director also argues that the administrative law judge exceeded his authority in requiring only payment of the amount set forth in the district director's compromise offer.³

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish waiver of recovery of an overpayment, 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 be against equity and good conscience because claimant has relinquished a valuable right or changed his position for the worse in reliance on the receipt of interim benefits. 20 C.F.R. §§410.561c, 410.561d, 725.542; *see Keiffer v. Director, OWCP*, 18 BLR 1-35 (1993); *see also McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993).

In denying waiver of recovery of the overpayment, the administrative law judge

³ Inasmuch as the parties do not challenge the administrative law judge's finding that claimant was not at fault in the creation of the overpayment and this finding is not adverse to claimant, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

found that the total amount of the overpayment is \$57,021.76, representing \$53,947.90 in monthly benefits by the Trust Fund and \$3,073.86 in medical benefits. Decision and Order at 4. Inasmuch as the administrative law judge correctly determined that from December 1979 through July 1991, claimant received \$53,947.60 in monthly benefits from the Trust Fund and \$3,073.86 in medical benefits, we affirm the administrative law judge's finding that the total amount of the overpayment of benefits by the Trust Fund is \$57,021.76. *See Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); Director's Exhibit 6; Hearing Transcript at 10-16.

Furthermore, we affirm the administrative law judge's finding that the evidence is insufficient to establish that recovery of the overpayment would be against equity and good conscience.⁴ As the administrative law judge correctly found, the record does not contain evidence that claimant either changed his position for the worse or relinquished a valuable right based on his reliance on the receipt of the black lung benefits. Decision and Order at 6. Consequently, we affirm the administrative law judge's finding that recovery of the overpayment would not be against equity and good conscience pursuant to Section 410.561d. *McConnell, supra*; *Benedict v. Director, OWCP*, 29 F.3d 1140, 18 BLR 2-309 (7th Cir. 1994); *Keiffer, supra*.

However, we vacate the administrative law judge's determination that recovery of the overpayment would defeat the purpose of the Act. Including the income and expenses of claimant's entire household, the administrative law judge correctly found that claimant's monthly income is \$1,671.50, as well as possessing a bank account valued at \$649.00, and that he had monthly expenses totaling \$1,153.20 and, therefore, that claimant had a monthly surplus of \$518.00. Decision and Order at 4-5; Director's Exhibit 6; Hearing Transcript at 10, 12-15; *Keiffer, supra*; *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992); *see also Knope v. Director, OWCP*, 16 BLR 1-59 (1990). Thus, the administrative law judge found that recovery of the overpayment would not defeat the purpose of the Act because claimant retained income or resources sufficient to meet his ordinary and necessary expenses. Decision and Order at 4-5. The administrative law judge next stated that claimant was not able to make full and immediate restitution of the overpayment but that

⁴ To be "against equity and good conscience" means that adjustment or recovery of the overpayment will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right or changed his position for the worse. 20 C.F.R. §410.561d.

repayment in monthly payments would not defeat the purpose of the Act. Decision and Order at 5, 6. The administrative law judge then ordered claimant to make monthly payments in the amount of \$250.00, based on the documented difference between his monthly income and monthly expenses, until claimant repaid the Trust Fund \$26,222.70, the amount sought by the district director after compromise. Decision and Order at 6-7.

The purpose of the formal hearing in an overpayment proceeding is to determine whether recovery of an overpayment may be waived, and the administrative law judge may not determine the terms or methods of repayment or consider issues relating to compromise and collection of the overpayment. *See* 20 C.F.R. §725.544; *Ashe, supra*; *Jones v. Director, OWCP*, 14 BLR 1-80 (1990)(*en banc*)(Brown, J., dissenting). In determining whether recovery would defeat the purpose of the Act in the instant case, the administrative law judge erred in considering the terms of the repayment and adopting the compromise amount previously proposed by the district director, rather than restricting his inquiry to whether claimant has income or financial resources sufficient for more than ordinary or necessary needs, or whether claimant is dependent upon all of his current income for such needs. *Keiffer, supra*; *Ashe, supra*; *Jones, supra*.

We, therefore, vacate the administrative law judge's finding that recovery of the overpayment would not defeat the purpose of the Act and remand the case for the administrative law judge to discuss fully the sole issue of whether recovery of the overpayment would deprive claimant of the income needed to meet his ordinary and necessary living expenses.⁵ 20 C.F.R. §410.561c; *Ashe, supra*; *see also McConnell, supra*; *Jones, supra*; *Gordon v. Director, OWCP*, 14 BLR 1-60 (1990). Pursuant to Section 410.561c, to obtain waiver of recovery of the overpayment, claimant must show that recovery would deprive him of income needed for ordinary and necessary living expenses such as food, clothing, rent or mortgage payments, utilities, maintenance, insurance, taxes,

⁵ Speculative future expenses are not relevant to the inquiry under Section 410.561c; 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); *see Keiffer v. Director, OWCP*, 18 BLR 1-35 (1993); *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992); *see also McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993).

installment payments, medical costs, support of others for whom claimant is legally responsible, and other miscellaneous expenses reasonably considered as part of claimant's standard of living. 20 C.F.R. §410.561c(a)(1)-(4); *Jones, supra*. A determination regarding such deprivation depends upon whether a claimant has income or financial resources sufficient for more than ordinary or necessary needs, or is dependent upon all of his current income for such needs. 20 C.F.R. §410.561c(b).

Accordingly, the administrative law judge's Decision and Order - Denying Waiver of Overpayments is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge