

BRB No. 02-0853 BLA

DALLAS D. WOOTEN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS=)	DATE ISSUED: 09/12/2003
)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Waiver of Recovery of Overpayment of Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Dallas D. Wooten, Bald Knob, West Virginia, *pro se*.

Michelle S. Gerdano (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying

¹ Claimant is Dallas D. Wooten, the miner, who filed his application for benefits on November 13, 1987. Director=s Exhibit 1. Initially, Administrative Law Judge Thomas W. Murrett awarded benefits on September 26, 1989, Director=s Exhibit 3; consequently, the Black Lung Disability Trust Fund commenced payment of interim benefits to claimant due to employer=s controversion of the claim. Director=s Exhibit 4. The Board, however, vacated the award of benefits and remanded the case for reconsideration. *Wooten v. Director, OWCP*, BRB No. 89-3468 BLA (Mar. 28, 1991); Director=s Exhibit 6. On remand, Administrative Law Judge Robert L. Hillyard, who was assigned to adjudicate the case, denied benefits in a Decision and Order dated June

Waiver of Recovery of Overpayment of Benefits (01-BLA-0928) of Administrative Law Judge Robert J. Lesnick 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). The administrative law judge found that claimant received a lump sum payment of \$22,115.40 based on an award of benefits that was paid by the Black Lung Disability Trust Fund. The administrative law judge further determined that claimant was without fault in creating the overpayment, but concluded that recovery of the overpayment would neither defeat the purpose of Title IV of the Act nor would it be against equity and good conscience. Accordingly, the administrative law judge denied waiver of the recovery of the overpayment.

23, 1993. Director=s Exhibit 8. By that time claimant had received a lump sum payment plus monthly benefits totaling \$22,115.40 and the Department of Labor (DOL) notified claimant of his pending overpayment. Director=s Exhibit 9. Claimant filed a motion for modification of Judge Hillyard=s denial, which was denied by the district director as untimely. However, since the district director had not rendered a substantive finding on claimant=s petition for modification, Administrative Law Judge Frederick D. Neusner remanded the case for further proceedings and struck the proceeding for recovery of overpayment from the docket of the Office of Administrative Law Judges because it was premature. Director=s Exhibit 24. The district director denied modification and ordered recovery of the overpayment. Director=s Exhibit 25. After a hearing, Administrative Law Judge Gerald M. Tierney adjudicated claimant=s modification petition and denied benefits on June 3, 1999. Director=s Exhibit 27. Consequently, DOL notified claimant of the overpayment again and acknowledged that claimant was without fault in its creation. Director=s Exhibit 28.

On appeal, claimant generally challenges the administrative law judge's denial of waiver of the recovery of the overpayment, contending that he is unable to repay the overpayment because his financial circumstances have changed since he submitted the documentation concerning his assets several years ago.² The Director, Office of Workers= Compensation Programs (the Director), responds, initially arguing that the administrative law judge erred by applying the old criteria set forth in 20 C.F.R. ' 410.561 (2000) in determining whether overpayment should be waived, but asserts that, nevertheless, this error is harmless because consideration under the appropriate, revised regulation at 20 C.F.R. ' 404.508 would not change the outcome of the case. In addition, the Director contends claimant is not entitled to waiver of recovery of the overpayment in this case because the administrative law judge properly determined that claimant=s present financial circumstances accord him sufficient financial resources to preclude waiver, *i.e.*, claimant would still have income which exceeds his expenses and he would still retain significant financial assets. Moreover, the Director asserts that claimant has not relinquished a valuable right or changed his position for the worse in reliance on his continued receipt of benefits, nor does the record reflect such relinquishment or reliance. Hence, the Director urges affirmance of the denial of waiver.³

² Claimant specifically avers that he is unable to repay the overpayment because his financial circumstances have changed since he submitted the documentation concerning his assets several years ago, that he has used most of the money in his bank account for necessary expenses, and that the monthly payment on his two outstanding bank loans, in the amounts of \$50,000 and \$13,300, is \$1,229.39. The Board, however, is limited to review of the record before the administrative law judge. *See generally Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-40 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985).

³ We affirm the administrative law judge=s finding that claimant was without fault in creating the overpayment inasmuch as this determination, which is not adverse to claimant, is unchallenged on appeal, and has been conceded by the Department of Labor.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

To obtain waiver of the recovery of an overpayment, claimant must show that recovery of the overpayment would deprive him of income required for ordinary and necessary living expenses such as food, clothing, rent or mortgage payments, utilities, maintenance, insurance, taxes, 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. *Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-37 (1993); see *Benedict v. Director, OWCP*, 29 F.3d 1140, 18 BLR 2-309 (7th Cir. 1994) (although the administrative law judge understated miner's expenses, waiver was denied because miner had sufficient other financial assets so that recovery would not seriously affect miner's standard of living); *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 a 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. *Keiffer*, 18 BLR at 1-37. Further, claimant must demonstrate that he has relinquished a valuable right or changed his position for the worse in reliance upon this receipt of the interim benefits. *Nelson v. Director, OWCP*, 21 BLR 1-4, 1-7 n. 6 (1997); *Ashe v. Director, OWCP*, 16 BLR 1-109, 1-112 (1992); *Potisek*, 14 BLR at 1-91. Such a determination requires the administrative law judge to consider the facts and circumstances of each case. *McConnell v. Director, OWCP*, 993 F.2d 1454, 1460, 18 BLR 2-168, 2-180 (10th Cir. 1993); *Quinvilan v. Sullivan*, 916 F.2d 524 (9th Cir. 1990); *Groseclose v. Bowen*, 809 F.2d 502 (8th Cir. 1987).

See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983); Decision and Order at 2.

Considering the financial circumstances of both claimant and his wife, *i.e.*, income, expenses, and assets, the administrative law judge found that claimant had liquid assets, consisting of bank accounts, two IRA=s, and cash, totalling \$86,436.89⁴ and that his monthly income, including \$1,624.00 from the Social Security Administration, \$546.71 from his pension, and \$227.36 from interest, totalling \$2,398.07. The administrative law judge found that claimant did not itemize his monthly ordinary and necessary living expenses, but did list the following approximate monthly expenditures: \$300.00 for food; \$150.00 for clothing; \$109.00 for utilities; \$1,500.00 for miscellaneous expenses; and \$198.94 for a loan payment, and concluded that claimant=s total monthly expenses were \$1,988.84.⁵ The administrative law judge also noted claimant=s assertion that repaying the overpayment would eliminate \$227.36 in monthly interest he uses towards ordinary living expenses. The administrative law judge concluded, however, that even if claimant were required to repay the overpayment, he would still be left with a monthly income of \$2,171.00, and, would still be able to meet his ordinary and necessary living expenses of \$1,988.84. Further, the administrative law judge acknowledged that while repaying the \$22,115.40 overpayment would reduce claimant=s cash assets from \$86,436.89 to \$66,321.89, such a reduction would neither deprive claimant of an emergency fund nor from meeting his ordinary and necessary living expenses. Additionally, the administrative law judge noted that claimant had not demonstrated that he relinquished a right or changed his position for the worse because of the overpayment and claimant had, in fact, Asubstantial bank accounts due in part to the overpayment.@ Decision and Order at 4. Accordingly, the administrative law judge found that repaying the overpayment would not deprive claimant of meeting his ordinary and necessary living expenses.

In the instant case, the administrative law judge found, not only that claimant had

⁴ In his Decision and Order, the administrative law judge stated at one point that, AThe total of liquid assets that Claimant has on hand is \$81,436.89.@ Decision and Order at 2. Subsequently, the administrative law judge stated that, AYClaimant has cash assets worth \$86,436.89.@ *Ibid.* The latter amount is supported by the record.

⁵ A review of the record reveals that claimant indicated that he pays \$194.94 per month on a loan the balance on which is \$9,151.24 owed to Boone County Bank. Director=s Exhibit 29.

failed to demonstrate that he would be relinquishing any right or change in his position for the worse if he were required to repay the overpayment, but also that claimant has substantial bank accounts due in part to the overpayment, and the repaying the overpayment would not deprive him of meeting his ordinary and necessary living expenses. This was rational. Decision and Order at 4; *Benedict*, 29 F.3d at 114, 18 BLR at 2-316-317; *Keiffer*, 18 BLR at 1-38-40. Although a review of claimant=s monthly expenses indicates that the administrative law judge erred by finding that the total sum of claimant=s monthly expenses was \$1,988.84 rather than \$2,257.94, and that repayment of the \$22,115.40 overpayment would reduce claimant=s cash assets from \$86,436.89 to \$66,321.89, rather than \$64,321.49, we, nonetheless, affirm the administrative law judge=s denial of waiver since the administrative law judge also found that claimant had not demonstrated that claimant had either relinquished any right or changed his position for the worse in reliance on the overpayment. Additionally, the administrative law judge found that claimant had substantial bank accounts, due in part to the overpayment, and that repayment would not deprive him of meeting his ordinary and necessary living expenses. *Benedict*, 29 F.3d at 114, 18 BLR at 2-316-317; *Keiffer*, 18 BLR at 1-38-40.

Accordingly, the administrative law judge=s Decision and Order Denying Waiver of Recovery of Overpayment of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge