

BRB No. 97-1749 BLA

MACK BAILEY)	
)	
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 and the Decision on Motion for Reconsideration of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

William C. Garrett, Gassaway, West Virginia, for claimant.

Michelle S. Gerdano (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:

Claimant appeals the Decision and Order and the Decision on Motion for Reconsideration (94-BLO-0037) of Administrative Law Judge Robert S. Amery ordering repayment of an overpayment in the amount of \$32,304.90 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 February, 1985, claimant filed a claim for benefits. Director's Exhibit 2. In February, 1988, Administrative Law Judge Parlen L. McKenna issued a Decision and Order - Awarding Benefits. *Id.* Employer appealed, and, in April, 1990, the Board issued a Decision and Order remanding the case for further consideration. *Bailey v. Sewell Coal Co.*, BRB No. 88-1973 BLA (Apr. 30, 1990)(unpub.); Director's Exhibit 3. On remand, in February, 1991, Administrative Law Judge G. Marvin Bober issued a Decision and Order - Denying Benefits. Director's Exhibit 5. Claimant appealed, and, in September, 1992, the Board issued a Decision and Order affirming the denial of benefits. *Bailey v. Sewell Coal Co.*, BRB Nos. 91-1008 BLA and 91-1008 BLA-A (Sept. 19,

1992)(unpub.); Director's Exhibit 6. Claimant appealed, and, in October, 1993, the United States Court of Appeals for the Fourth Circuit affirmed the Board's decision denying the claim. *Bailey v. Sewell Coal Co.*, No. 92-2409 (4th Cir. Oct. 22, 1993)(unpub.); Director's Exhibit 7. In November, 1993, the district director notified claimant that there was an overpayment in the amount of \$32,304.90. Director's Exhibit 9. In August, 1995, Administrative Law Judge Robert S. Amery (the administrative law judge) issued a Decision and Order granting a partial waiver of recovery of the overpayment in the amount of one-half of the overpayment amount. In reaching this finding, the administrative law judge found that there was insufficient evidence that recovery of the overpayment would be against equity and good conscience. The administrative law judge rejected the Director's contention that the entire overpayment should be repaid by means of a lump sum and monthly installments of \$250.00. The administrative law judge stated that monthly payments were inappropriate because claimant's monthly expenses are approximately the same as his monthly income and requiring him to make monthly payments would deprive claimant and his wife of ordinary and necessary living expenses, which would defeat the purpose of the Act. The Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Reconsideration, and, in November, 1995, the administrative law judge issued a Decision on Motion for Reconsideration vacating his prior Decision and Order. The administrative law judge found that claimant must repay the lump sum of \$16,152.45 and must pay \$100.00 per month until the total overpayment of \$32,304.90 was repaid in full. Claimant appeals to the Board, arguing that the administrative law judge erred in denying waiver of recovery of the overpayment. The Director responds, advocating affirmance of the administrative law judge's Decision on Motion for Reconsideration denying waiver of recovery of the overpayment.¹

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Recovery of an overpayment is waived when the claimant is without fault, and recovery would either defeat the purpose of the Act, or be against equity and good

¹ Initially, we affirm the administrative law judge's findings that an overpayment in the amount of \$32,304.90 exists, that claimant was not at fault in the making of the overpayment, and that recovery of the overpayment would not be against equity and good conscience, inasmuch as these findings are not contested on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 1995 Decision and Order at 3-4.

conscience. 20 C.F.R. §§410.561a, 725.542. To defeat the purpose of the Act means to deprive a person of income required for ordinary and necessary living expenses. 20 C.F.R. §410.561c. Ordinary and necessary expenses are defined in Section 410.561c(a)(1)-(4) and include “other miscellaneous expenses which may reasonably be considered as part of the individual’s standard of living.” 20 C.F.R. §410.561c(a)(4).

The administrative law judge, in his 1995 Decision and Order, stated that claimant testified that he and his wife have, *inter alia*, an annuity in the amount of \$23,448.70. 1995 Decision and Order at 2. The administrative law judge held that a lump sum should be taken from this “substantial annuity” to “prevent unjust enrichment.” *Id.* at 4. Accordingly, the administrative law judge ordered claimant to repay to the Department of Labor the sum of \$16,152.45, an amount equal to half of the overpayment. The administrative law judge, however, granted claimant a partial waiver of the recovery of the remainder of the \$32,304.90 overpayment because it would defeat the purpose of the Act to recover the remainder. On reconsideration, the administrative law judge ordered claimant to pay, in addition to a lump sum of \$16,152.45, the sum of \$100.00 each month until the total sum of \$32,304.90 is paid in full. The administrative law judge stated:

The Director contends that I erred by concluding that it would defeat the purpose of the Act to require the Claimant to repay the overpayment of black lung benefits in monthly installments and by ordering a partial waiver of recovery of the debt. The Director pointed out that, although the Claimant presented evidence showing that his income exceeded expenses by only about \$50.00 a month, his wife testified that they had \$300.00 to \$400.00 left over each month and this money was used to celebrate their grandchildren’s birthdays, entertaining relatives and house guests and helping out “if somebody comes in need.” The Director contends that these expenditures do not qualify as “ordinary and necessary living expenses” within the definition in the regulation, 20 CFR 410.561c(a)(1)-(4). According to the Director, even if the Claimant made payments of \$100.00 to \$200. [sic] per month in satisfaction of the debt, he would still have a substantial monthly cushion. The Director also states that if, in the future, the Claimant’s financial situation deteriorates, he could request the District Director to amend the payment schedule, or even to waive repayment of the balance of the overpayment, in accordance with 20 CFR 725.544.

The Claimant has submitted nothing in opposition to the motion, although given an opportunity to do so. Accordingly, the Director’s Motion for Reconsideration is granted.

Decision on Motion for Reconsideration at 1.

Claimant, on appeal, argues that the administrative law judge erred by not providing any authority or basis for his decision, on reconsideration, not to waive recovery of the overpayment. In response, the Director argues that the administrative law judge effectively adopted the Director’s motion as his Decision on Motion for Reconsideration and that the

administrative law judge therefore considered claimant's entire financial situation. The Director also states that clearly, the administrative law judge agreed with the Director's reasonable conclusion that claimant does not depend upon all of his income to meet his ordinary and necessary living expenses. The Director concludes that based on the hearing testimony, the repayment of \$100.00 per month would leave claimant a monthly cushion of \$200-300 and that this would not defeat the purpose of the Act.

Claimant's argument has merit. In relying upon the testimony of claimant's wife that she and claimant usually had a \$300.00 to \$400.00 balance in their checking account, the administrative law judge did not address the testimony of claimant's wife that the surplus funds in their checking account were used sometimes to pay for car expenses. Decision on Motion for Reconsideration at 1; Hearing Transcript at 33-34. Further, the administrative law judge did not address the testimony of claimant's wife that, in order to pay back the overpayment, they would have to use the annuity, rather than any surplus cash in their checking account, and that their checking account did not grow by \$300-400 each month. Hearing Transcript at 33-36. Moreover, the failure of claimant to file a response to the Director's Motion for Reconsideration did not relieve the administrative law judge of his duty to provide a decision that comports with the Administrative Procedure Act. 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Specifically, the administrative law judge must independently evaluate the evidence of record instead of essentially adopting the Director's argument on reconsideration as his decision.² See *Hall v. Director, OWCP*, 12 BLR 1-80 (1988)(*en banc*). Finally, we note that the administrative law judge exceeded his authority by imposing a monthly repayment schedule, inasmuch as the purpose of the formal hearing is to establish the existence of the debt, not how it will be repaid. See *Keiffer v. Director, OWCP*, 18 BLR 1-35 (1993); 20 C.F.R. §725.544(f). We therefore vacate the administrative law judge's Decision on Motion for Reconsideration and remand the case for the administrative law judge to consider specifically the relevant evidence of record in its entirety in determining whether recovery of the overpayment would defeat the purpose of the Act.

² The administrative law judge should also make a determination as to whether the expenses for "grandchildren's birthdays, entertaining relatives and house guests and helping out 'if somebody comes in need,'" and possibly car expenses, are "miscellaneous expenses reasonably considered as part of claimant's standard of living." *Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-38 (1993); 20 C.F.R. §410.561c(a)(4); see Decision on Motion for Reconsideration at 1; Hearing Transcript at 33-35.

Accordingly, the administrative law judge's Decision and Order and Decision on Motion for Reconsideration are affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge