

BRB No. 04-0898 BLA

FRANK J. NORMAN)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 05/05/2005
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Waiver of Overpayment of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Sarah M. Hurley (Howard M. Radzely, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denying Waiver of Overpayment (01-BLO-0962) of Administrative Law Judge Michael P. Lesniak on a miner's 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 Board previously reversed the administrative law judge's finding that claimant was at fault in creating the overpayment and remanded the case for the administrative law judge to determine whether recovery of the overpayment would defeat the purpose of the Act or

be against equity and good conscience.¹ *Norman v. Director, OWCP*, BRB No. 03-0442 BLA (Mar. 29, 2004) (unpub.). On remand, the administrative law judge reiterated that the question of fault was waived by the Director and that the parties did not contest his previous finding that the amount of the overpayment is \$17,803.50. The administrative law judge, however, found that claimant failed to establish that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience. Accordingly, the administrative law judge denied claimant's request for a waiver of recovery of the overpayment of \$17,803.50.

On appeal, claimant contends that the administrative law judge erred in denying waiver of recovery of the overpayment. In response, the Director, Office of Workers' Compensation Programs (the Director), argues that the administrative law judge's decision denying waiver of the recovery of the \$17,803.50 overpayment is supported by substantial evidence and should be affirmed.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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).

Where a claimant is without fault in the creation of the overpayment, the claimant may obtain a waiver of recovery of the overpayment by demonstrating that recovery would either defeat the purpose of the Act or would be against equity and good conscience. 20 C.F.R. §725.542; *Ashe v. Director, OWCP*, 16 BLR 1-109, 1-111 (1992). Recovery defeats the purpose of the Act if it deprives claimant of income required for ordinary and necessary living expenses. See 20 C.F.R. §725.543, incorporating 20 C.F.R. §§404.506 - 404.512. Recovery is against equity and good conscience if claimant changed his or her position for the worse or relinquished a valuable right in reliance upon receipt of the overpaid benefits. 20 C.F.R. §404.509(a)(1).

After consideration of the administrative law judge's Decision and Order, the issue on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. Claimant's sole argument is that the administrative law judge erred in finding that recovery of the overpayment would not defeat the purpose of the Act because the administrative law judge offered no explanation for his ultimate conclusion that claimant

¹ The full procedural history of this case is set forth in the Board's Decision and Order of March 29, 2004. *Norman v. Director, OWCP*, BRB No. 03-0442 BLA (Mar. 29, 2004) (unpub.).

could repay the overpayment. We disagree. Initially, we note that the burden is on claimant to demonstrate error in the administrative law judge's determination. Claimant has failed to do so. Furthermore, the record reflects that the administrative law judge considered the relevant evidence, specifically, claimant's overpayment recovery questionnaire completed on October 12, 2000 in which claimant declared a monthly income of \$2,740.33. Decision and Order on Remand at 2-4; Director's Exhibit 3. The administrative law judge noted that the debts reported in the questionnaire under "Other debts," including loans from City National Bank, CitiFinancial, National City Bank, BankCard Services, Finger Hut, and First Community Bank, would be paid off by the time of his 2004 decision. *Id.* The administrative law judge further found that without those expenses, claimant's monthly expenses totaled \$1,388.38, instead of the \$2,572.15 declared by claimant, leaving a monthly surplus of \$1,351.95. *Id.*

The administrative law judge reasoned that claimant's monthly surplus of \$1,351.95 and his other reported assets, consisting of \$360.49 in cash and in a checking account, Certificates of Deposit worth \$20,000, and real property valued at \$4,000, established that claimant's monthly income is sufficient to cover his ordinary and necessary living expenses. We affirm these findings as unchallenged on appeal and hold that, contrary to claimant's contention, the administrative law judge rationally found that because claimant's monthly income exceeds his ordinary and necessary living expenses by \$1,351.95, recovery of the overpayment would not defeat the purpose of the Act. *See* 20 C.F.R. §404.508; *McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 4. Because claimant did not present any evidence that he relinquished a valuable right or changed his position for the worse because of the overpayment, the administrative law judge rationally found that recovery of the overpayment would not be against equity and good conscience. *See* 20 C.F.R. §404.509(a)(1).

Accordingly, the administrative law judge's Decision and Order on Remand – Denying Waiver of Overpayment is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge