

BRB No. 98-1552 BLA

JAMES McGAR)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: <u>9/7/99</u>
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Barry H. Joyner (Henry L. Solano, Solicitor of Labor; 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (88-BLO-0113) of Administrative Law Judge Donald W. Mosser (the administrative law judge) denying waiver of an overpayment totaling \$55,444.50 with respect to 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 July 1977, claimant filed a claim for black lung benefits. Director's Exhibit 3 at 3. Claimant was awarded benefits by the district director. *Id.* Ultimately, however, benefits were denied by Administrative Law Judge Richard E. Huddleston in a Decision and Order issued in February 1988. *Id.* The district director subsequently informed claimant of the existence of an overpayment as a consequence of the denial of benefits and requested payment. Claimant requested waiver of recovery of the overpayment. The district director denied claimant's request and the case was referred to the Office of Administrative Law Judges. The administrative law judge found claimant's total monthly income to be \$1,230.83, and monthly expenses to be \$1,141.98, resulting in a monthly surplus of \$88.85.

The administrative law judge also found that claimant's assets included \$4,500 in a checking account, motor vehicles, and real estate lots worth \$3,600 in total. The administrative law judge found that recovery of the overpayment would not defeat the purpose of the Act nor would it be against equity and good conscience. Accordingly, the administrative law judge declined to grant waiver of recovery of the overpayment and ordered repayment "in a manner determined by the district director." Claimant appeals, arguing that the administrative law judge erred in failing to waive recovery. The Director, Office of Workers' Compensation Programs, has submitted a response brief supporting affirmance of the administrative law judge's decision.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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish waiver of recovery of the overpayment to the miner, 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. Claimant argues that the administrative law judge erred in not finding that claimant needs substantially all of his current income to meet current ordinary and necessary living expenses. Claimant's Brief at 6. This argument is without merit. Claimant concedes that claimant's average monthly income exceeds his average monthly expenses by \$88.85. Claimant's Brief at 4. Claimant offers no other reason, other than the small amount of monthly surplus, for vacating the administrative law judge's decision. Therefore, we affirm the administrative law judge's finding that repayment of the overpayment would not defeat the purpose of the Act, as the administrative law judge rationally determined that the evidence indicates that claimant's monthly income is sufficient to meet his ordinary and necessary living expenses. See 20 C.F.R. §§725.542, 725.543, 410.561c; *Potisek v. Director, OWCP*, 14 BLR 1-87 (1990)(*en banc*)(Brown, J., dissenting); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

¹ We affirm the administrative law judge's findings that an overpayment of \$55,444.50 exists, and that claimant was not at fault in the creation of the overpayment, inasmuch as these findings are not contested on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Next, claimant argues that the administrative law judge erred in not finding that recovery of the overpayment would be against equity and good conscience. Specifically, claimant contends that it would take claimant 43 years to repay the overpayment, based on a monthly payment of \$88.85 and the use of some of claimant's assets. Claimant also notes that it will be increasingly unlikely that he will be able to do odd jobs because of his age, and argues that his future pension and social security payments may not keep up with inflation. Under the regulations, recovery is against equity and good conscience if claimant relinquished a valuable right or changed his position for the worse in reliance upon the overpayment. See 20 C.F.R. §410.561d. Claimant's financial circumstances are irrelevant to whether recovery of an overpayment would contravene equity and good conscience.² See 20 C.F.R. §410.561d; *Hervol v. Director, OWCP*, 16 BLR 1-53 (1990). As claimant raises no further assertions of error, we affirm the administrative law judge's finding that recovery of the overpayment would not be against equity and good conscience. See 20 C.F.R. §§410.561c, 410.561d; *Skrack, supra*.

Accordingly, the administrative law judge's Decision and Order denying waiver of recovery of the overpayment is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

² Moreover, in considering whether recovery would defeat the purpose of the Act, the administrative law judge is not required to consider claimant's potential future income or expenses; the regulations require that this inquiry concerns claimant's current ability to meet current expenses. 20 C.F.R. §410.561c(b).