



BRB No. 17-0023 BLO

CHARLES E. BRIGMON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW HARLAN BLOCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 08/30/2017
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claimant's Request for Waiver of Overpayment of Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Helen H. Cox (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, Associate Solicitor of Labor; 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: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Claimant's Request for Waiver of Overpayment of Benefits (2014-BLO-00006) of Administrative Law Judge Scott R. Morris, issued with respect to a claim filed on April 14, 2003, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant received an overpayment<sup>1</sup> in the amount of \$64,470.79.<sup>2</sup> Although the Director, Office of Workers' Compensation Programs (the Director), concedes that claimant was without fault in the creation of the overpayment, the administrative law judge found that claimant failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. Accordingly, the administrative law judge denied claimant's request for waiver of recovery of the overpayment.

On appeal, claimant argues that the administrative law judge erred in determining that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience. The Director urges the Board to affirm the administrative law judge's finding that claimant failed to establish that he is entitled to waiver of recovery of the overpayment.<sup>3</sup>

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<sup>1</sup> Claimant received interim benefits in response to an initial finding of entitlement by the district director, but was subsequently found not entitled to benefits by Administrative Law Judge John P. Sellers. Director's Exhibits 2, 6. The Board affirmed Judge Sellers' February 28, 2012 Decision and Order Denying Benefits. *Brigmon v. New Harlan Block Coal Co.*, BRB No. 12-0303 BLA (Feb. 25, 2013) (unpub.). Claimant took no further action regarding his claim. By letter dated August 28, 2013, the district director informed claimant that he received monthly payments totaling \$74,727.10 and \$29,743.69 in medical benefits, for a total overpayment of \$104,470.79. Director's Exhibit 8. Claimant requested that the district director waive recovery of the overpayment, and submitted an overpayment questionnaire and financial information. Director's Exhibit 11. The district director denied claimant's request for waiver. Director's Exhibit 12. Claimant thereafter made a partial repayment of \$40,000.00 and the case was forwarded to the Office of Administrative Law Judges for a formal hearing, which was held on March 23, 2016.

<sup>2</sup> The administrative law judge relied on the district director's calculation of the overpayment and noted that no party has challenged the amount of the overpayment. Decision and Order at 3.

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that the remaining balance of the overpayment is \$64,470.79 and that claimant was not at

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.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). However sympathetic the Board may be to the claimant's situation, it cannot render a decision *de novo*. 20 C.F.R. §§802.211, 802.301; *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

When a claimant receives an initial determination of eligibility for benefits prior to a final adjudication on his claim, he is eligible to receive interim benefit payments from the Trust Fund while litigation on his claim continues. *See McConnell v. Director, OWCP*, 993 F.2d 1454, 1456, 18 BLR 2-168, 2-170 (10th Cir. 1993). However, if he is ultimately found ineligible for benefits upon the final adjudication of his claim, the interim payments he received are considered "overpayments" that are subject to recovery by the Trust Fund. 20 C.F.R. §§725.522(b), 725.540; *see Napier v. Director, OWCP*, 999 F.2d 1032, 1035, 17 BLR 2-186, 2-191 (6th Cir. 1993). A claimant's obligation to repay these funds is waived, however, if the claimant establishes that he is without fault in the creation of the overpayment, and that recovery would either "[d]efeate the purpose" of the Act, or "[b]e against equity and good conscience." 20 C.F.R. §725.542; *see Napier*, 999 F.2d at 1034 n.3, 17 BLR at 2-190 n.3. Under the Social Security Administration regulation used to determine whether claimant is entitled to a waiver, 20 C.F.R. §725.543, incorporating 20 C.F.R. §§404.506-404.512, defeating the purpose of the Act means "depriv[ing] a person of income required for ordinary and necessary living expenses." 20 C.F.R. §404.508(a); *see Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-37 (1993). The regulation defines "ordinary and necessary expenses" to include:

- (1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under title XVIII), taxes, installment payments, etc.;
- (2) Medical, hospitalization, and other similar expenses;

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fault in the creation of the overpayment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

<sup>4</sup> The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

- (3) Expenses for the support of others for whom the individual is legally responsible; and
- (4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

20 C.F.R. §404.508(a)(1)-(4).

In determining whether recovery of the overpayment would defeat the purpose of the Act, the administrative law judge considered the overpayment questionnaire (Form OWCP-20), financial information provided by claimant, and the hearing testimony of claimant and his wife. Decision and Order at 4-5; Director's Exhibits 11, 15; Claimant's Exhibits 1-4. Taking into account the evidence presented, the administrative law judge calculated the combined income and expenses of claimant and his wife. Decision and Order at 8-9. The administrative law judge found that claimant had a total monthly income of \$6,093.90, and that there was an average monthly surplus of \$504.43, after deductions for ordinary and necessary living expenses. *Id.* at 9. Based on the monthly surplus of \$504.43,<sup>5</sup> the administrative law judge concluded that "payment of the entire overpayment amount will not gravely impact [c]laimant's financial position, particularly if, as the Director suggests, [c]laimant reimburses the [Trust Fund] at \$300[.00] per month."<sup>6</sup> *Id.* Thus, the administrative law judge determined that waiver of recovery of the overpayment would not defeat the purpose of the Act. *Id.*

In this appeal, claimant acknowledges that he has an approximate monthly surplus of \$504.43, and does not dispute the administrative law judge's calculations. Thus, they are affirmed as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Claimant's Brief at 6. However, claimant argues that the administrative law judge erred in failing to consider that claimant's physical condition is likely to deteriorate due to his age and cancer diagnosis, causing his medical bills to increase. Claimant states that "the possibility of unexpected emergencies and expenses is certainly high." Claimant's Brief at 6. Claimant's argument lacks merit.

In determining whether repayment would defeat the purpose of the Act, an administrative law judge's analysis is limited to current income and expenses; the regulations do not provide for consideration of undetermined possible future expenses

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<sup>5</sup> The administrative law judge also noted that claimant had \$5,896.00 in a checking account. Decision and Order at 9; Director's Exhibit 11.

<sup>6</sup> The district director has ordered claimant to repay the overpayment at a rate of \$300.00 per month. Director's Exhibit 12.

which are speculative in nature.<sup>7</sup> 20 C.F.R. §404.508(b); *see Milton v. Harris*, 616 F.2d 968, 974 (7th Cir. 1980); *Keiffer v. Director, OWCP*, 18 BLR 1-35, 1-39-40 (1993); Decision and Order at 6. As claimant raises no other error, we affirm the administrative law judge's finding that claimant has a monthly surplus averaging \$504.43, and that repayment of the overpayment at the rate of \$300.00 a month would not deprive claimant of the income required to meet his ordinary and necessary living expenses. *See Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109; Decision and Order at 9. Therefore, we affirm the administrative law judge's determination that recovery of the overpayment would not defeat the purpose of the Act under 20 C.F.R. §725.543.

Furthermore, to the extent that claimant alleges that the administrative law judge erred in determining that recovery of the overpayment would not be against equity and good conscience, we also reject this contention. Claimant's Brief at 6. The administrative law judge noted correctly that the applicable standard is whether claimant changed his position for the worse or relinquished a valuable right in reliance on the benefits payments. 20 C.F.R. §404.509(b); *see Benedict v. Director, OWCP*, 29 F.3d 1140, 1144, 18 BLR 2-309, 2-316-17 (7th Cir. 1994); Decision and Order at 9. The administrative law judge accurately found that claimant put forth no evidence that he incurred new expenses, took an action, or relinquished a valuable right in reliance on the interim benefits payments. Decision and Order at 9. Therefore, we affirm, as rational and supported by substantial evidence, the administrative law judge's determination that recovery of the overpayment from claimant would not be against equity and good conscience. 20 C.F.R. §§404.590(b), 725.542, 725.543; *see Ashe v. Director, OWCP*, 16 BLR 1-109, 1-110-11 (1992); Decision and Order at 9.

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<sup>7</sup> Counsel for the Director, Office of Workers' Compensation Programs, states that "the purpose of this litigation is solely to fix the amount of the debt owed . . . [o]nce debt is established as owing and collection efforts commence, claimant's contentions may be relevant to the compromise, suspension or even termination of debt collection." Director's Brief at 3-4, *citing* 20 C.F.R. §725.544.

Accordingly, the administrative law judge's Decision and Order Denying Claimant's Request for Waiver of Overpayment of Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge