

BRB No. 02-0458 BLA

STUART M. COLE)
)
 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 on Remand Granting Partial Waiver from Recovery of Overpayment of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Stuart M. Cole, Cedar Bluff, Virginia, *pro se*.

Sarah M. Hurley (Eugene Scalia, 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, without the assistance of counsel, appeals the Decision and Order on Remand Granting Partial Waiver from Recovery of Overpayment (98-BLO-0008) of Administrative Law Judge Edward Terhune Miller (the administrative law judge) 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). This case, regarding the issue of overpayment, is before the Board for a second time.¹ Initially, the administrative

¹ The issue of entitlement is not before the Board. Claimant filed a claim for benefits on April 16, 1980. Director's Exhibit 1. Administrative Law Judge Steven M. Charno denied benefits. Director's Exhibit 10. The Board vacated the denial of benefits and remanded the claim. Director's Exhibit 13; *Cole v. Jewell Ridge Coal Corp.*, BRB No. 87-3079 (Mar. 29, 1991)(unpub.). On remand, Administrative Law Judge Charles P. Rippey

awarded benefits. Director's Exhibit 14. Subsequent to an appeal by employer, the Board affirmed the award of benefits, but modified Judge's Rippey's commencement date of benefits from April 1980, the date upon which claimant filed his claim, to May 1987, the date upon which there was the first evidence of totally disabling pneumoconiosis. Director's Exhibit 24; *Cole v. Jewell Ridge Coal Corp.*, BRB No. 95-0709 BLA (Aug. 14, 1995) (unpub.). Subsequently, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, affirmed the Board's Decision and Order. Director's Exhibit 25; *Cole v. Jewell Ridge Coal Corp.*, 95-2812 (4th Cir. Mar. 26, 1996)(unpub.). Claimant was then informed by the Department of Labor of an overpayment in the amount of \$52,013 for the period between the April 1980 date and the modified April 1987 date. Claimant sought waiver of the overpayment. Director's Exhibit 31. The Department of Labor found no grounds to waive the overpayment. Director's Exhibit 34. Subsequent to a hearing, Administrative Law Judge Daniel J. Roketenetz remanded the case for recalculation of the overpayment in view of claimant's testimony that his FECA benefits ended in September, 1997. Director's Exhibit 43. On March 11, 1998, the Department of Labor issued an amended award of benefits notifying employer that it had underpaid claimant \$4,052.40 for the period between October 1997 and March, 1998. Employer was instructed to pay the amount to the Trust Fund in view of claimant's outstanding overpayment. Employer agreed to do so and claimant's outstanding overpayment was recalculated to be \$47,961.40.

law judge issued a Decision and Order granting claimant partial waiver of the recovery of overpayment. The administrative law judge found that claimant was without fault in the creation of the overpayment, that claimant was entitled to a waiver of \$16,869.28, and that the Director, Office of Workers' Compensation Programs (the Director), was entitled to recover \$31,092.12. The administrative law judge found that the total overpayment of \$47,961.40 was reduced by \$16,869.12 based on claimant's reliance on the receipt of the overpayment to purchase a new truck. The administrative law judge concluded that recovery of the amount used for the purchase of a new truck would be against equity and good conscience, but that recovery of the remainder of the overpayment would not defeat the purpose of the Act.

Subsequent to an appeal by claimant, the Board vacated the administrative law judge's finding that recovery of the overpayment would not defeat the purpose of the Act. *Cole v. Director, OWCP*, BRB No. 99-0901 BLA (Jun. 9, 2000)(unpub.). The Board affirmed, as unchallenged on appeal, the administrative law judge's determination that claimant was without fault in creation of the overpayment. *Cole*, slip op. at 2. The Board also affirmed as unchallenged on appeal, the administrative law judge's finding that waiver of repayment of the purchase price of a truck was proper. *Cole*, slip op. at 3. The Board further held, however, that the administrative law judge either failed to address certain expenses or failed to explain why he made certain findings in considering claimant's monthly expenses, *Cole*, slip op. at 3, and that if all of these additional expenses had been credited as monthly expenses by the administrative law judge, claimant's monthly cushion would be reduced and a finding that claimant had sufficient assets and monthly income would perhaps not be supported by the evidence of record. *Cole*, slip op. at 3. Lastly, the Board instructed the administrative law judge, on remand, to consider claimant's testimony regarding expenses owed for anesthesia given to his wife during surgery. *Cole*, slip op. at 3 n.2.

On remand, the administrative law judge considered the evidence of record as directed by the Board. After consideration of such evidence, the administrative law judge concluded that claimant's monthly expenses of \$200.00 were greater than previously calculated. Decision and Order on Remand at 4-6. Accordingly, the administrative law found that claimant's monthly income, less his monthly expenses, left claimant a surplus that was "more than enough to meet any miscellaneous expenses that may arise." Decision and Order on Remand at 7. The administrative law judge thus found that the record established that claimant's repayment of the overpayment would not defeat the purposes of the Act. Accordingly, the administrative law judge found that the Director was entitled to recover \$31,092.12 plus interest.

On appeal, claimant contends generally that the administrative law judge erred in failing to grant full waiver of the recovery of overpayment. The Director responds, urging affirmance of the administrative law judge's Decision and Order on Remand.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this 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).

The issue before the Board in this case is whether the administrative law judge complied with the Board's remand instructions in considering whether certain expenses of claimant constituted ordinary and necessary living expenses. In establishing a waiver of recovery of an overpayment, claimant is required to demonstrate that recovery would either defeat the purpose of Title IV of the Act by depriving him of ordinary and necessary living expenses, or would 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, 725.542; *see Keiffer v. Director, OWCP*, 18 BLR 1-35 (1993); *see also McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993). It is claimant's burden to affirmatively establish entitlement to a waiver of the recovery of an overpayment. *See Bennett v. Director, OWCP*, 18 BLR 1-48 (1994); *see generally Keifer, supra*.

When this case was previously before the Board, the administrative law judge was specifically instructed to consider whether claimant's weekly \$50.00 donations to his church and \$150.00 monthly insurance payments constituted ordinary and necessary living expenses. The Board also held that the administrative law judge failed to provide any reason for his conclusion that claimant's monthly fuel expenses were \$200.00 rather than the \$300.00 that claimant testified to at the hearing. Lastly, the Board instructed the administrative law judge to consider claimant's testimony that he owed \$800.00 for anesthesia for his wife during surgery. The Board held that if all of these expenses were credited, claimant's monthly cushion would be reduced by \$450.00 a month and thus recovery of the overpayment could well defeat the purpose of the Act, as claimant would not be left with a sufficient cushion of income.

On remand, the administrative law judge again considered claimant's monthly income, including that of his spouse, after taxes and including black lung benefits. The administrative law judge concluded that the amount of such income was \$2495.10. Decision and Order on Remand at 3. The administrative law judge further found that claimant had assets totalling \$116,441.01. Decision and Order on Remand at 3-4. In considering claimant's monthly expenses, the administrative law judge specifically addressed the issues raised by the Board.

The administrative law judge rationally concluded that claimant's monthly church donation of \$200.00 should be counted as a monthly expense as it was not excluded as an ordinary and necessary living expenses pursuant to 20 C.F.R. §410.561(c).² The administrative law judge further found that claimant's \$150.00 per month for life insurance expense should not be counted as a monthly expense as the payment was withheld from claimant's paycheck. Accordingly, the administrative law judge concluded that the amount of claimant's "take-home" pay already reflected the deduction for this expense. Decision and Order on Remand at 6. We hold that substantial evidence supports this determination.

In addressing claimant's monthly fuel expenses, the administrative law judge again concluded that such expenses were \$200.00 per month. Decision and Order on Remand at 5. In making this determination, the administrative law judge specifically relied upon the testimony of claimant. Claimant initially indicated that he thought that "the fuel would run \$300 a month for the two vehicles." Hearing Transcript at 34. Upon further questioning, claimant stated that such figures "may be a little high" and that the figure could be "revise[d]...to two hundred." Hearing Transcript at 34. After reviewing this testimony, the administrative law judge concluded that \$200.00 a month for fuel expenses was a correct amount based on claimant's testimony and the fact that claimant was unable to provide any evidence regarding any greater amount. Decision and Order on Remand at 6. We affirm the administrative law judge's conclusion in this regard as rational and we are unable to conclude that such a finding constitutes an abuse of the administrative law judge's discretion as trier-of-fact. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Finally, the administrative law judge addressed the \$800.00 that claimant argued he owed for anesthesia for his wife. The administrative law judge found that claimant "neither documented that he paid or intended to pay for the \$800.00 medical expenses out of pocket," Decision and Order on Remand at 7, nor did claimant indicate that such an expense was recurring rather than a one-time expense. Accordingly, the administrative law judge, in a permissible exercise of his discretion as trier-of-fact, concluded that this expense was not an ordinary and necessary expense within the purview of Section 410.561(c). *See Kuchwara, supra*.

After addressing the Board's concerns and considering the entirety of the evidence regarding claimant's monthly expenses, the administrative law judge concluded that such

² This finding has not been challenged by the Director. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

expenses totalled \$2,091.02. The administrative law judge thus found that based on the claimant's monthly income of \$2,495.10, less the expenses of the \$2,091.02, claimant was left with a monthly surplus of \$404.08. Decision and Order on Remand at 7. The administrative law judge concluded that this amount, plus the "over \$100,000 in assets" possessed by claimant, constituted a sufficient cushion for claimant. *See McConnell, supra; but see Benedict v. Director, OWCP*, 29 F.3d 1140, 18 BLR 2-309 (7th Cir. 1994). Based on the administrative law judge's thorough analysis of the relevant evidence of record in accordance with the Board's remand instructions, we affirm the administrative law judge's determination that recovery of the \$31,0912.12 does not defeat the purpose of the Act. 20 C.F.R. §§410.561(c), 410.561(d), 725.542; *see Keiffer, supra; see also McConnell, supra.*

Accordingly, the administrative law judge's Decision and Order on Remand Granting Partial Waiver from Recovery of Overpayment is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge