

BRB No. 99-0901 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-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 (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, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Granting Partial Waiver from Recovery of Overpayment (98-BLO-0008) of Administrative Law Judge Edward Terhune Miller 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). The administrative law judge found that claimant was without fault in creating the \$47,961.40 overpayment¹, that claimant is entitled to a waiver in the amount of \$16,869.28

¹ The administrative law judge found that the Director, Office of Workers' Compensation Programs, correctly applied the amount of \$4,052.40, representing an underpayment by the responsible operator to claimant, to the original overpayment amount of

and that the Director, Office of Workers' Compensation Programs (the Director), is entitled to recover \$31,092.12. Claimant generally contends that the administrative law judge erred in failing to grant full waiver of recovery of the overpayment. The Director responds, urging affirmance of the partial waiver of recovery of the overpayment.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In cases involving an overpayment, the administrative law judge must determine whether claimant is without fault in the creation of the overpayment. 20 C.F.R. §§410.561a, 410.561b. Inasmuch as it is unchallenged, we affirm the administrative law judge's finding that claimant is without fault in the creation of the overpayment pursuant to 20 C.F.R. §§410.561a, 410.561b. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Next, 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 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).

\$52,013.80 pursuant to 20 C.F.R. §725.546. Decision and Order at 1, n.1.

In considering whether recovery of the overpayment would defeat the purpose of the Act, the administrative law judge found that claimant has enough money to meet his current ordinary and necessary living expenses, given a monthly income of \$2,495.10. The administrative law judge calculated that claimant's monthly expenses were \$1,891.02, leaving a monthly surplus of \$604.08. However, in addition to the monthly expenses noted by the administrative law judge, claimant testified to having life insurance expenses of \$150 a month, *see* Hearing Transcript at 32, and making church donations of \$50 a week. The administrative law judge neither included these items as monthly expenses, nor provided a reason to exclude them. Moreover, without explanation, the administrative law judge included automobile fuel expenses totaling \$200, rather than the \$300 claimant testified to at the hearing, *see* Hearing Transcript at 34. If the additional expenses totaling approximately \$450 a month were fully credited as monthly expenses, claimant's monthly "cushion", *McConnell v. Director, OWCP*, 993 F.3d 1454, 18 BLR 2-168 (10th Cir. 1993), would be substantially reduced to approximately \$154.08 before the monthly repayment of any overpayment amount. Thus, we vacate the administrative law judge's finding that claimant has sufficient assets and monthly income and remand this case for the administrative law judge to reconsider all of claimant's alleged monthly expenses and, after so doing, to redetermine whether partial recovery of the overpayment would defeat the purpose of the Act.² *McConnell, supra; Benedict v. Director, OWCP*, 29 F.3d 1140, 18 BLR 2-309 (7th Cir. 1994); Decision and Order at 6.

Nonetheless, we hold that the administrative law judge properly found, based on claimant's list entitled "Large Items Purchased from Black Lung Payment within the Last 4 Years", that the payment of pre-existing debts like claimant's mortgage and credit card debts, expenditures totaling \$26,973.12, did not change claimant's position for the worse and therefore did not entitle claimant to a waiver for this amount on the basis that recovery would be against equity and good conscience. *McConnell, supra*; Decision and Order at 8; Director's Exhibit 33. Concerning the remaining items, the administrative law judge properly found that, excluding the expenses pertaining to claimant's truck, there is not a sufficient nexus or causal connection between the receipt of benefits and claimant's purchase of the listed items.³ Inasmuch as the Director did not challenge the administrative law

²The administrative law judge is also instructed to consider claimant's testimony at the hearing in 1998 that he owed about \$800 for anesthesia given to his wife during surgery. Hearing Transcript at 17.

³ The administrative law judge properly found that many items of the "Large Items Purchased" list were made years after claimant received the overpayment, two of which were made after the Board set the date of entitlement as of 1988 in its Decision and Order issued in 1995. Decision and Order at 7, 8; *Cole v. Jewell Ridge Coal Corp.*, BRB No. 95-0709 BLA (Aug. 14, 1995)(unpublished); Director's Exhibit 33.

judge's waiver of repayment of the purchase price of the truck and the accompanying expenses amounting to \$16,869.12, we affirm the finding. *Skrack, supra*.

Finally, claimant contends that he relinquished a valuable right, and thus changed his position for the worse, when he resigned from his job as a mine inspector in reliance on the receipt of black lung benefits. Contrary to claimant's contention, the administrative law judge properly found that claimant testified that he resigned for health reasons and not because of his benefits. Decision and Order at 9; *see* Hearing Transcript at 20. Moreover, the administrative law judge properly found the fact that claimant left his position in 1987 and did not receive his black lung benefits lump sum award until 1992 further supports the finding that claimant did not "[give] up valuable employment in reliance on the receipt of black lung benefits." *Id.*

Accordingly, the administrative law judge's Decision and Order Granting Partial Waiver from Recovery of Overpayment is affirmed in part, vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge