

BRB No. 11-0445 BLA

LEONARD S. CUMBRIDGE)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 03/16/2012
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (10-BLO-0009) of Administrative Law Judge Richard A. Morgan denying waiver of recovery of an overpayment that occurred with respect to a subsequent claim filed on August 31, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The administrative law judge initially found, as stipulated by the parties, that an overpayment in the amount of \$15,498.47 occurred and that claimant was without fault in creating the overpayment.¹ The administrative law judge further found that

¹ The record reflects that, in a Proposed Decision and Order dated March 21, 2007, the district director awarded benefits to claimant. Employer declined to assume liability, and requested a formal hearing before an administrative law judge. Therefore, the Black

claimant failed to establish that recovery of the overpayment of benefits 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 and ordered claimant to reimburse the Black Lung Disability Trust Fund (the Trust Fund) in the amount of \$15,498.47.

On appeal, claimant challenges the administrative law judge's denial of waiver of recovery of the overpayment. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's findings that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience.

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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Where a claimant is without fault in the creation of an overpayment, the claimant may obtain 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

Lung Disability Trust Fund began paying claimant interim benefits pursuant to 20 C.F.R. §725.522(a). Director's Exhibit 2. In a Decision and Order dated April 30, 2009, the administrative law judge denied benefits. Director's Exhibit 3. There is no evidence that claimant took any further action on his 2006 claim. By letter dated May 7, 2009, the district director informed claimant that an overpayment of benefits occurred in the amount of \$15,498.47. Claimant requested waiver of recovery of the overpayment, and submitted a completed overpayment questionnaire, along with copies of his financial information. Director's Exhibits 4-6, 11, 13, 19.

² The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

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).

In considering whether recovery of the overpayment would defeat the purpose of the Act, the administrative law judge considered the overpayment questionnaire, the financial information provided by claimant, and claimant's testimony at the hearing. Director's Exhibits 5, 6, 19, 20. Based on his review of the evidence, the administrative law judge found that claimant's monthly income exceeds his expenses by \$200.00 to \$800.00 per month, depending on whether claimant engages in part-time summer work.³ Decision and Order at 5-6. Further, the administrative law judge found that claimant has a total of \$19,661.91 in savings in two bank accounts. *Id.* at 5; Director's Exhibits 19, 20 at 19-20. Therefore, the administrative law judge found that repayment of the \$15,498.47 owed would not deprive claimant of income required to meet his ordinary and necessary living expenses.

Claimant argues that the administrative law judge failed to evaluate his overall financial condition, but instead analyzed only his monthly income and expenses. We disagree. The administrative law judge appropriately took into consideration all of claimant's financial information and determined that claimant has sufficient funds to repay the overpayment. Therefore, the administrative law judge rationally concluded that recovery of the overpayment would not leave claimant with insufficient funds to meet his ordinary and necessary living expenses. *See Keiffer v. Director, OWCP*, 18 BLR 1-135 (1993); Decision and Order at 5-6.

Claimant argues further that the administrative law judge erred in failing to consider that claimant's physical condition is likely to deteriorate due to his age and health problems, that his medical expenses are likely to increase, and that his expenses related to the care of a disabled adult son may also increase. Claimant's Brief at 10. Claimant's argument lacks merit. In determining whether repayment would defeat the purpose of the Act, the administrative law judge may not consider prospective expenses. *See* 20 C.F.R. §410.561c(b); *Milton v. Harris*, 616 F.2d 968, 974 (7th Cir. 1980); *Keiffer*, 18 BLR at 1-39-40.

³ The administrative law judge determined that claimant has monthly expenses of approximately \$1,900.00, based upon the written information claimant provided. Decision and Order at 5. In addition, the administrative law judge found that claimant's monthly income ranges from approximately \$2,100.00 to \$2,700.00, depending on whether claimant engages in part-time summer employment. *Id.*; Director's Exhibits 19, 20 at 19-20.

Claimant next argues that the administrative law judge erred by establishing a schedule pursuant to which claimant must repay the \$15,498.47 owed to the Trust Fund. Specifically, claimant argues that the administrative law judge established a repayment schedule when he stated that “claimant *can make payments* to re-pay the Trust Fund while still having enough of a ‘buffer’” to meet his ordinary and necessary expenses. Decision and Order at 6 (emphasis added).

Contrary to claimant’s contention, in considering whether claimant would be able to repay the Trust Fund and still be able to meet his ordinary and necessary living expenses, the administrative law judge did not establish a payment schedule for claimant to repay the overpayment. The purpose of a formal hearing before an administrative law judge in an overpayment proceeding is to establish the existence of the debt, not how that debt will be paid. *See* 20 C.F.R. §410.560; *Keiffer*, 18 BLR at 1-40; *Jones v. Director, OWCP*, 14 BLR 1-80 (1990) (*en banc*)(Brown, J., concurring). Here, the administrative law judge considered claimant’s available assets, as well as his monthly income and expenses, and found that claimant has the financial capacity to reimburse the Trust Fund without being deprived of income needed to meet his ordinary and necessary expenses. The administrative law judge’s decision, however, does not establish a particular schedule for the repayment of that debt. Therefore, we reject claimant’s argument, and we affirm the administrative law judge’s determination that 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); Decision and Order at 6.

The administrative law judge also found that there was “no evidence . . . that the claimant relinquished a right or changed position based on the award of benefits.” Decision and Order at 6. The administrative law judge, therefore, determined that recovery of the overpayment would not be against equity and good conscience. On appeal, claimant states that the administrative law judge erred in concluding that requiring him to repay the benefits he received would not be against equity and good conscience, but claimant sets forth no specific argument on this issue. *See* 20 C.F.R. §725.542(b)(2); Claimant’s Brief at 5, 8-10. The administrative law judge’s finding is, therefore, affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, we affirm the administrative law judge’s determination that claimant failed to establish that he is entitled to waiver of recovery of the overpayment pursuant to 20 C.F.R. §725.542.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge