

BRB No. 97-1039 BLA

ALBERT PARULIS)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: _____
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

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

George G. Oschal III (Cefalo and Associates), West Pittston, Pennsylvania, for claimant.

Sarah M. Hurley (Marvin Krislov, Deputy Solicitor for National Operations; 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 and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BL0-0023) of Administrative Law Judge Ralph A. Romano denying waiver of recovery of an overpayment of benefits on 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 an overpayment had been made to claimant in the amount of \$41,685.76. The administrative law judge further noted that the Director, Office of Workers' Compensation Programs (the Director), stipulated that claimant was not at fault in the creation of the overpayment. The administrative law judge, however, found that recovery of the overpayment would neither defeat the purpose of Title IV of the Act nor be against equity and good conscience. Accordingly, the administrative law judge denied claimant a waiver of the overpayment. On appeal, claimant contends that the administrative law judge erred in not granting a waiver of the overpayment. The Director responds, urging affirmance of the denial of

waiver of the overpayment.¹

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In an overpayment case, a claimant, in order to obtain a waiver of recovery of the overpayment, has the burden of establishing either: (1) that recovery of the overpayment would defeat the purpose of Title IV of the Act in that it would deprive claimant of funds needed to meet ordinary and necessary living expenses or (2) that recovery would be against equity and good conscience in that claimant had relinquished a valuable right or changed his position for the worse in reliance on the receipt of interim benefits. See 20 C.F.R. §725.542; 20 C.F.R. §§410.561c, 410.561d; *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992).

Claimant contends that recovery of the overpayment would defeat the purpose of Title IV of the Act. Claimant argues that the administrative law judge failed to account for an increase in claimant's monthly expenses due to his treatment for cancer and for a decrease in claimant's monthly income due to his anticipated resignation from part time employment. Claimant's argument is rejected. The administrative law judge properly noted that the regulations pertinent to overpayment recovery do not provide for consideration of prospective expenses. Rather, the regulations contemplate only *current* income and *current* expenses. See 20 C.F.R. §410.456c(b); *Keiffer v. Director, OWCP*, 18 BLR 1-35 (1993). Although claimant testified at the hearing that he would be retiring in "a few more weeks," he acknowledged that he was still employed. Transcript at 14-15. Similarly, claimant acknowledged at the December 9, 1996 hearing that currently he was not undergoing chemotherapy and was not scheduled to see his physician again until March of 1997. *Id.* at 17. The administrative law judge found that although there was testimony regarding a possible increase in monthly costs associated with claimant's health, there was no evidence establishing "actual increased expenses." Decision and Order at 3. Because the anticipated medical expenses may never actually occur, the administrative law judge properly focused on evidence of current income and expenses in the record before him. See *Keiffer*, 18 BLR at 1-40. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that recovery of the overpayment would not defeat the purpose of Title IV of the Act.

¹Inasmuch as no party challenges the administrative law judge's findings that an overpayment of \$41,685.76 exists and that claimant was not at fault in creating the overpayment, these findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant also generally contends that the recovery of the overpayment would be against equity and good conscience. Claimant, however, has failed to present any evidence that he relinquished a valuable right or changed his position for the worse in reliance on the receipt of the interim benefits. We, therefore, affirm the administrative law judge's finding that claimant failed to establish that recovery of the overpayment would be against equity and good conscience.²

Although the administrative law judge properly denied claimant a waiver of the overpayment, the administrative law judge erred in setting a repayment schedule.³ The purpose of the formal hearing is to establish the existence of debt, and not the terms of repayment. *See Keiffer, supra*. We, therefore, vacate the administrative law judge's repayment schedule.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER

²In the event claimant's financial situation changes in the future regarding his ability to meet his ordinary and necessary living expenses, claimant may file a petition for modification with the district director. *See* 33 U.S.C. §922, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §§725.310 and 725.480; *Lee v. Consolidation Coal Co.*, 843 F.2d 159, 11 BLR 2-106 (4th Cir. 1988); *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986).

³The administrative law judge ordered claimant to make an immediate lump sum payment of \$20,000.00, with the remaining balance to be paid by monthly payments based on a five year amortization schedule. Decision and Order at 4.

Administrative Appeals Judge