

BRB No. 01-0138 BLA

MERLIN SPEARS, JR.)

Claimant-Petitioner)

v.)

DATE ISSUED:

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

ORDER

DECISION and

Appeal of the Decision and Order of Robert J. Lesnick,
Administrative Law Judge, United States Department of Labor.

Merlin Spears, Jr., Lyburn, West Virginia, *pro se*.

Dorothy L. Page (Howard M. Radzely, Acting 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, DOLDER
and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order
(99-BLA-1272) of Administrative Law Judge Robert J. Lesnick 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).¹ The administrative law judge found that, although claimant was not at

¹Claimant is Merlin Spears, Jr., the miner, who filed a claim with the Department
of Labor (DOL) on April 6, 1994, which was initially awarded but subsequently denied
by Administrative Law Judge George P. Morin in a Decision and Order dated December

fault in the creation of the overpayment, recovery of the total amount of the overpayment, \$28,319.70, would not defeat the purpose of Title IV of the Act, nor be against equity and good conscience. Accordingly, the administrative law judge denied claimant's request for a waiver of recovery of the overpayment. On appeal, claimant generally challenges the administrative law judge's denial of waiver of recovery of the overpayment. The Director, Office of Workers' Compensation Programs, in response, urges affirmance of the administrative law judge's Decision and Order.²

31, 1998. Director's Exhibits 1, 10. Claimant took no further action and the denial became final. After claimant's interim benefits ceased, DOL notified claimant of the amount of the overpayment, specifically, \$28, 319.70. Claimant then requested a waiver of recovery of the overpayment. Director's Exhibits 11, 12.

²Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 D.D.C. Feb. 9, 2001 (order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

Accordingly, on August 10, 2001, the Board issued a second order in which it rescinded its earlier order requesting supplemental briefing.

In order to obtain a waiver of recovery of an overpayment, a claimant who is without fault in the creation of the overpayment,³ 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 of 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).

In order to determine whether claimant has the income or financial resources sufficient to repay his interim black lung benefits, the administrative law judge considered, *inter alia*, evidence of claimant's monthly income. In so doing the administrative law judge considered testimony from claimant that his wife's income would soon be reduced. The administrative law judge found that, after retirement, claimant's wife would receive a pension of over \$600 per month, gross. Decision and Order at 4. Claimant's testimony suggests, however, that he was uncertain at the time of the hearing about the exact amount of his wife's pension, as she had not yet received her first check. Transcript at 13-15. On remand, the administrative law judge may wish to reopen the record to admit current evidence to establish the amount of claimant's wife's pension, and re-calculate claimant's monthly income accordingly.

In determining claimant's ordinary and necessary expenses, the administrative law judge declined to include a monthly expense of \$358.54, which claimant testified was the cost of the mortgage on his son's home. Director's Exhibit 12; Hearing Transcript at 23. In finding that this expense was not "ordinary and necessary", the administrative law judge failed to consider the entirety of claimant's hearing testimony. Claimant testified that the mortgage at issue was on the house his disabled son lives in, that his son was unable to get a mortgage of his own, and that claimant had to "go get the loan in [his] name for [his son] to buy the house;" thereafter claimant's son became disabled, lost his job and could no longer make the mortgage payments. Transcript at 23-24. The Board has held that payments shall be considered part of claimant's ordinary and necessary

³We affirm the administrative law judge's finding, based upon the parties concession, that claimant is without fault in the creation of the overpayment pursuant to 20 C.F.R. §725.542(a)(2), as it is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

expenses to the extent that claimant is legally responsible for them. *See Gordon v. Director, OWCP*, 14 BLR 1-60 (1990). Thus, on remand, the administrative law judge should reconsider whether the mortgage on the house in which claimant's son lives should be included in claimant's ordinary and necessary expenses. *See* 20 C.F.R. §725.452(b)(1); *see also* C.F.R. §410.561c. Moreover, the administrative law judge should consider whether claimant bought the house, and thereby relinquished a valuable right, or changed his position for the worse, in reliance on the receipt of interim black lung benefits. *See* 20 C.F.R. §725.542(b)(2) *see also* 20 C.F.R. §410.561d; *Hervol v. Director, OWCP*, 16 BLR 1-53, 1-54 n.1 (1990).

We find no error in the administrative law judge's finding that claimant's grandson was not legally dependent upon him, and, thus, that the money provided by claimant to his grandson is not part of claimant's ordinary and necessary expenses. Director's Exhibit 12; Hearing Transcript at 26. Claimant testified that he occasionally provided his grandson with money for college and that he bought some of his grandson's meal tickets. *Id.* Notwithstanding claimant's occasional contributions to his grandson, the record contains no evidence that the claimant's grandson was legally dependent upon him. *See* 20 C.F.R. §410.561c; *Gordon, supra*. Thus, we affirm the administrative law judge's finding.

In other respects, the administrative law judge's calculation of claimant's monthly expenses is unclear, and therefore, unreviewable. For example, the administrative law judge accepted Claimant's Exhibit 1 into evidence post-hearing. This exhibit includes dental and eye care expenses for claimant and his wife. *See* Claimant's Exhibit 1. While the administrative law judge did not take issue with these claimed expenses, his decision does not reflect whether he took them into account in determining claimant's monthly expenses, and if so, to what extent. Because the administrative law judge did not adequately explain his determination, his opinion does not comport with the Administrative Procedure Act, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). On remand, the administrative law judge is instructed to identify explicitly, these and all other expenses which he has credited as ordinary and necessary, and to set forth his calculations in determining claimant's monthly surplus.

In light of the foregoing, we remand this case to the administrative law judge for further consideration of the evidence at 20 C.F.R. §725.452. *See also* 20 C.F.R. §§410.561c; 410.561d.

Accordingly, the administrative law judge's Decision and Order denying waiver of recovery of the overpayment is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge