

BRB No. 09-0105 BLA

W.W.)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 09/30/2009
)	
WESTMORELAND COAL COMPANY)	
)	
Employer)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

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

W.W., Harts, West Virginia, *pro se*.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2008-BLO-00003) of Administrative Law Judge Robert D. Kaplan (the administrative law judge) ordering repayment to the Black Lung Disability Trust Fund (Trust Fund) of the overpayment received by claimant with respect to a claim filed on September 23, 2003, 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). Director's Exhibit 1. On August 26, 2004, the district director rendered a finding of entitlement and interim benefits were paid from the Trust Fund. Director's Exhibits 3, 4. Employer requested a

hearing on the matter, which ultimately resulted in the dismissal of the miner's claim on December 9, 2005.¹ Subsequently, the district director notified claimant that he had received an overpayment of \$29,467.60, that he was at fault in creating the overpayment, and that the district director would seek recovery of the overpayment. Director's Exhibit 7. However, following the hearing on the overpayment issue, the district director stipulated that claimant was without fault in creating the overpayment. In the Decision and Order that is the subject of this appeal, the administrative law judge found that, pursuant to 20 C.F.R. §725.542(b), recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience. Accordingly, the administrative law judge denied claimant's request for a waiver and ordered repayment in the amount of \$29,467.60.

Claimant generally appeals the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), responds and urges affirmance of the decision because claimant failed to prove that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience as required by 20 C.F.R. §725.542(b).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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.² 33 U.S.C. §921(b)(3), as incorporated into the Act 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 the overpayment, the claimant may obtain a waiver of recovery of the overpayment by demonstrating that recovery either would 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 (1992).

¹ On October 13, 2005, Administrative Law Judge Daniel F. Solomon issued an Order to Show Cause after claimant failed to respond to Employer's Motion to Dismiss for Refusal to Attend a Physical Examination. Director's Exhibit 5. Claimant failed to respond to this order, resulting in Administrative Law Judge Solomon issuing an Order of Dismissal. Director's Exhibit 6.

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

Recovery defeats the purpose of the Act if it deprives claimant of income required for ordinary and necessary living expenses. 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 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 evaluating the current case, the administrative law judge considered all relevant evidence, including claimant's overpayment recovery questionnaire and claimant's testimony at the hearing concerning the overpayment issue. Decision and Order at 3-8; *see* Director's Exhibit 8; Hearing Transcript at 6-13. In his questionnaire, claimant stated that he supported his wife, ten year old adopted grandson, and unemployed thirty-three year old son. Director's Exhibit 8. Claimant also declared that he had a monthly income of \$3,948.00 and monthly expenses of \$2,683.29. *Id.* In addition, claimant reported monthly debt payments of \$1,357.88.³ *Id.* Claimant further provided that he had \$30.00 cash on hand, \$59.75 in his checking account, and a savings account balance of \$26,683.42. *Id.* Claimant noted that the money in his savings account is collateral for car loans but did not provide any evidence that the money is encumbered. *Id.*

At the hearing, claimant testified that since he completed the questionnaire, one of his loan payments was reduced and his income from Social Security was increased. Hearing Transcript at 6, 12-13. Claimant also generally provided an overview of his current monthly income and expenses, including monthly debt payments. *See* Hearing Transcript at 6-13.

Based on a review of the evidence, including claimant's hearing testimony, the administrative law judge determined that claimant has a monthly income of \$4,036.00 and monthly expenses of \$3,433.12, resulting in a monthly surplus of \$602.88.⁴ Decision and Order at 7-8. In calculating claimant's expenses, the administrative law judge deducted one-quarter of claimant's food and clothing expenses based on his finding that financial support for claimant's son could not be included under the Act since claimant presented no evidence that he was legally responsible for his son. Decision and Order at 7. The administrative law judge also deducted \$298.29 from the monthly debt expenses

³ Claimant noted on the questionnaire that he was making a final payment of \$298.29 to satisfy his truck loan. Director's Exhibit 8.

⁴ The administrative law judge included expenses for claimant's daughter as the Director, Office of Workers' Compensation Programs, did not dispute her status as a disabled dependent and the district director determined in his August 26, 2004 Proposed Decision and Order that she is eligible for benefits as a disabled dependent adult. Decision and Order at 5 n.3; *see also* Director's Exhibit 4.

listed on the 2007 questionnaire due to his inference that claimant had paid off his truck loan. *Id.*

The administrative law judge noted that the Director believes that “claimant is capable of at least partially repaying the overpayment,” and claimant testified that he could afford to pay “a hundred dollars a month or something” towards the repayment. Decision and Order at 8; *see also* Hearing Transcript at 7. In addition, the administrative law judge referenced claimant’s testimony “that he has approximately \$22,000.00 in a savings account and \$400 to \$500 in his checking account.” Decision and Order at 8. The administrative law judge concluded, “[c]laimant’s monthly surplus . . . and his other assets establish that his monthly income is sufficient to pay his ordinary and necessary living expenses. Therefore, I find that recovery of the overpayment would not defeat the purposes of the [A]ct.” *Id.* Further, the administrative law judge found that “[c]laimant [did] not allege that he relinquished a valuable right or changed a position for the worse in reliance on the receipt of benefits, and I find that no such fact has been established.” *Id.* at 9. As a result, the administrative law judge determined that recovery of the overpayment would not be against equity and good conscience. Based on these findings, the administrative law judge concluded that claimant was not entitled to a waiver of recovery of the overpayment of \$29,467.60 and ordered repayment. *Id.*

We affirm the administrative law judge’s finding, as it is rational and supported by substantial evidence. In calculating expenses, the administrative law judge properly excluded those expenses attributable to claimant’s thirty-three year old son because claimant failed to prove he is legally responsible for him. *See McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993). Further, the administrative law judge rationally determined that the money in claimant’s savings account could properly be considered when evaluating claimant’s financial situation since claimant did not provide any evidence that the money was encumbered. *See Milton v. Harris*, 616 F.2d 968 (7th Cir. 1980). Based on the monthly surplus and claimant’s other assets, the administrative law judge properly found that claimant had sufficient income to meet his household’s ordinary and necessary needs and to repay the overpayment. *Benedict v. Director, OWCP*, 29 F.3d 1140, 18 BLR 2-309 (7th Cir. 1994). As a result, we affirm the administrative law judge’s determination that recovery of the overpayment in this case will not defeat the purpose of the Act.

We also affirm the administrative law judge’s finding that claimant failed to prove that recovery of the overpayment would be against equity and good conscience as defined in 20 C.F.R. §404.509(a). The administrative law judge acted within his discretion in determining that claimant did not provide any evidence or allege that he changed his position for the worse or relinquished a valuable right due to his receipt of the benefit payments.

Based on the administrative law judge's appropriate findings, we affirm the administrative law judge's determinations that claimant failed to prove that he is entitled to a waiver of recovery of the overpayment under the Act, pursuant to 20 C.F.R. §725.542(b) and that, therefore, claimant must repay the \$29,467.60 overpayment.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge