

BRB No. 13-0018 BLO

RONALD M. GIBSON)
)
 Claimant-Petitioner)
)
 v.)
)
 CONSOLIDATION COAL COMPANY) DATE ISSUED: 09/20/2013
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

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

Ronald Gibson, Pineville, Kentucky, *pro se*.

Sarah M. Hurley (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: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order Denying Waiver of Overpayment of Benefits (2010-BLO-00014) of Administrative Law

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Judge Ralph A. Romano, issued with respect to a claim filed on April 25, 2005, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The record reflects that, on March 23, 2006, the district director issued an initial finding of entitlement and claimant began receiving interim benefits paid by the Black Lung Disability Trust Fund (the Trust Fund). Director's Exhibits 2, 3. After a formal hearing was held at the request of employer, Administrative Law Judge Larry S. Merck issued a Decision and Order denying benefits on June 12, 2008. Director's Exhibit 4. By letter dated June 19, 2008, the district director informed claimant that an overpayment of benefits had occurred in the amount of \$24,172.22 because he had received interim benefits, but was subsequently found not to be entitled to benefits by Judge Merck. Director's Exhibit 11. Claimant was advised that if he wished to seek waiver of the recovery of the overpayment, he was required to complete and submit an overpayment questionnaire, together with supporting financial documentation. *Id.* Claimant requested waiver, submitted a completed copy of an overpayment questionnaire, and provided, on multiple occasions, copies of his financial information. Director's Exhibits 9, 12, 14-18, 23, 34-38. On February 25, 2010, the district director determined that claimant was without fault in the creation of the overpayment but denied waiver because claimant had not shown that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. Director's Exhibit 41. Thereafter, claimant requested a hearing and the case was assigned to Judge Romano (the administrative law judge).

In his Decision and Order issued on September 18, 2012, the administrative law judge found, based on the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant was without fault in the creation of the overpayment. The administrative law judge determined, however, that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience. Thus, the administrative law judge denied claimant's request for waiver of recovery of the overpayment and ordered claimant to reimburse the Trust Fund in the amount of \$24,172.22.

On appeal, claimant challenges the administrative law judge's denial of waiver of recovery of the overpayment. The Director responds, urging the Board to affirm, as supported by substantial evidence, 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.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board 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 applicable law.² 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).

The regulation at 20 C.F.R. §725.522(b) provides that “[i]f benefit payments are commenced prior to the final adjudication of the claim and it is later determined by an administrative law judge, the Board, or court that the claimant was ineligible to receive such payments, such payments shall be considered overpayments.” See 20 C.F.R. §§725.522(c), 725.540. The regulation at 20 C.F.R. §725.542 also provides, in pertinent part, that there shall be no adjustment or recovery of an overpayment in any case where an incorrect payment has been made with respect to an individual who is without fault and where adjustment or recovery would either defeat the purpose of the Act or be against equity and good conscience. 20 C.F.R. §725.542; see *Jarvis v. Carbon Fuel Company*, 23 F.3d 401 (Table), 1994 WL 179473 (4th Cir. Feb. 25, 1994) (unpub); *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992). Recovery defeats the purpose of the Act if it deprives an individual of income required for ordinary and necessary living expenses. See 20 C.F.R. §725.543; *Keiffer v. Director, OWCP*, 18 BLR 1-35 (1993); *Nelson v. Director, OWCP*, 14 BLR 1-159 (1990). Recovery is against equity and good conscience if the individual changed his or her position for the worse or relinquished a valuable right in reliance upon receipt of the overpaid benefits. *Id.*

In this case, the administrative law judge noted that there was no dispute by the parties that an overpayment occurred in the amount of \$24,172.22. Decision and Order at 2. He further found, based on the Director’s concession, that claimant was without fault in the creation of the overpayment.³ *Id.* at 3. In considering whether recovery of the overpayment would defeat the purpose of the Act, the administrative law judge considered the overpayment questionnaire and the financial information provided by claimant. *Id.* at 4. The administrative law judge summarized claimant’s monthly

² The record indicates that claimant’s last coal mine employment was in Kentucky. Director’s Exhibit 4. Accordingly, we will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

³ We affirm the administrative law judge’s finding that claimant was without fault in the creation of the overpayment, as that finding is unchallenged on appeal and is favorable to claimant. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

expenses, sources of income and assets, including Certificates of Deposits (CDs), as follows:

Evidence documenting Claimant's monthly household income is inconsistent. At the District Director level, Claimant reported income totaling \$1,707 in Social Security benefits and \$614.42 from a pension, totaling \$2,321.[42]. Claimant's reported monthly expenses totaled \$2,017.68. However, in preparation for his hearing, Claimant submitted a questionnaire indicating his monthly household expenses totaled \$2,304 in January 2012, \$2,482 in February 2012, and \$2,515 in March 2012. On the same questionnaire, Claimant reported \$1,900 in Social Security income and \$570.75 from a pension, totaling \$2,470.75. Finally, bank records indicate Claimant receives a monthly direct deposit of \$1,239 for Social Security and \$570.75 for a pension, totaling only \$1,809.75. As of March 13, 2012, Claimant held \$2,009.38 in his checking account. Claimant and his daughter also testified that Claimant owns a certificate of deposit ("CD") worth \$38,000.

Id. (internal citations omitted).

Based on his review of the evidence, the administrative law judge found that while "it is unclear from the record whether [c]laimant could withstand repayment based on his Social Security and pension income alone, [c]laimant's \$38,000 CD provides sufficient liquid income to repay the overpaid funds." Decision and Order at 4. The administrative law judge noted that claimant testified that he "plans to use the CD for funeral expenses," but the administrative law judge explained that he "cannot consider such prospective expenses in making [his] determination." *Id.*, citing *Keiffer*, 18 BLR at 1-39. The administrative law judge found that because claimant's "CD would still be worth approximately \$14,000 after repayment of the funds, allowing a cushion for emergencies and other unforeseen expenses," the recovery of the overpayment would not defeat the purpose of the Act. *Id.* Additionally, the administrative law judge found that because there "is no evidence in this case that [c]laimant relinquished a right or changed [his] position based on the award of benefits," recovery of the overpayment would not be against equity or good conscience. *Id.* Thus, claimant's request for waiver of the overpayment was denied.

We affirm, as supported by substantial evidence, the administrative law judge's determination that claimant is not entitled to waiver of the overpayment. The administrative law judge permissibly concluded that recovery of the overpayment would not violate the purpose of the Act on the basis that claimant's CD, in the amount of \$38,064.22, provides sufficient assets in excess of ordinary monthly income and expenses, from which to repay the overpayment. *See Napier v. Director*, OWCP, 999

F.2d 1032, 1036, 17 BLR 2-186, 2-192-93 (6th Cir. 1993); *see also Benedict v. Director, OWCP*, 29 F.3d 1140, 18 BLR 2-309 (7th Cir. 1994). The administrative law judge properly noted that regulations require consideration of current income and expenses, and, thus, we affirm the administrative law judge's finding that recovery of the overpayment would not defeat the purpose of the Act. *See* 20 C.F.R. §725.543; *Keiffer*, 18 BLR at 1-39.

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, insofar as claimant did not provide any evidence or argument to establish that he changed his position for the worse or that he relinquished a valuable right as a result of his receipt of interim benefit payments. *See Jarvis*, 23 F.3d at 401; *Keiffer*, 18 BLR at 1-39; *see also McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993). Consequently, we affirm the administrative law judge's determination that claimant failed to prove that he is entitled to a waiver of recovery of the overpayment pursuant to 20 C.F.R. §725.542.⁴

⁴ We note that in claimant's notice of appeal, claimant contends that his house is in need of a roof and a new heating system. However, these contentions were not brought before the administrative law judge at the hearing and will not be considered for the first time in this appeal. *See Kyle v. Director, OWCP*, 819 F.2d 139, 142, 10 BLR 2-112, 2-115 (6th Cir. 1987); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983).

Accordingly, the administrative law judge's Decision and Order Denying Waiver of Overpayment of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge