

BRB No. 95-0476 BLA

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

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr., Raleigh, Illinois, for claimant.

Cathryn Celeste Helm, (Thomas S. Williamson, Jr., 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, the United States Department of Labor.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director appeals the Decision and Order (93-BLO-0086) of Administrative Law Judge John C. Holmes granting a partial waiver of the 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 Director conceded and the administrative law judge found that claimant¹ was without fault in creating the \$33,581.60

¹ Claimant is Curtis Hutson, the miner, whose claim for benefits filed on January

30, 1984 was granted in an initial determination dated May 1, 1985 and in a Decision and Order issued on June 30, 1987. Director's Exhibit 1; Decision and Order at 1. The Board vacated the award and remanded the case to the administrative law judge, who denied benefits in a Decision and Order issued on August 21, 1989, which the Board affirmed on June 25, 1991. Decision and Order at 1; Director's Exhibits 2, 3.

Thereafter, the Director initiated an overpayment proceeding, directing claimant to repay the \$33,581.60. Director's Exhibits 4, 5.

overpayment. The administrative law judge found that although claimant's monthly income and expenses were equal, recovery of the overpayment would not defeat the purpose of the Act because claimant possessed \$261,990.00 in assets. See 20 C.F.R. §§725.542, 725.543, 410.561.

However, finding that claimant "established some change in position for the worse by incurring significant expenses in reliance on the black lung payments," the administrative law judge concluded that equity and good conscience warranted a waiver of \$10,000.00 for some of the home improvements claimant had made, and a waiver of \$5,000.00 for several trips to Florida which claimant and his wife had taken. Decision and Order at 3. Accordingly, the administrative law judge granted claimant a partial waiver of \$15,000.00, ordering him to pay the remaining \$18,581.60 in accordance with the terms to be set by the district director.

On appeal, the Director requests reversal of the administrative law judge's finding regarding the \$10,000.00 waiver, contending that claimant's expenditures for home renovations are not a change in position for the worse pursuant to Section 410.561d. Director's Brief at 7. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. Employer has not participated in this appeal.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

² We affirm as unchallenged on appeal the administrative law judge's findings that claimant received an overpayment in the amount of \$33,581.60; that claimant was without fault and that recovery of the overpayment would not defeat the purpose of the Act; and that recovery of the \$5,000.00 spent on Florida vacations is waived. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In cases involving an overpayment, where claimant is found to be without fault, the administrative law judge must consider whether recovery of the overpayment would defeat the purpose of the Act³ or be against equity and good conscience.⁴ *Hampton v. Director, OWCP*, 11 BLR 1-118 (1988). After determining that claimant was not at fault in the creation of the overpayment and that recovery would not defeat the purpose of the Act, the administrative law judge considered claimant's testimony regarding his home improvement expenditures to determine at Section 410.561d whether, on account of the overpayment, claimant had changed his position for the worse and therefore recovery of the overpayment would be against equity and good conscience.

At the hearing, claimant testified that he spent approximately \$25,000.00 in renovating his home. Hearing Transcript at 12. He stated that the receipt of the benefits allowed him to do "things that we wouldn't have done around the home. We did the interior entirely, central air, new heating, air conditioning, you know. Re-sided it, new roof." Hearing Transcript at 11-12. Claimant added that he spent \$6,000.00 having the basement waterproofed,⁵ stating that while he might have done some minor repairs to his home without the benefits, he would not have spent as much as he did. Hearing Transcript at 12. Claimant estimated that his house was worth approximately \$35,000.00 to \$40,000.00, conceding that it would be worth less without the improvements. Hearing Transcript at 13-14, 19.

Based on this testimony, the administrative law judge found that "since the Claimant acknowledged that he may have made some of the home improvements even without the black lung benefits, and because such improvements would tend to

³ "Defeat the purpose of the Act" means to deprive a person of income required for ordinary and necessary living expenses. 20 C.F.R. §410.561c. The administrative law judge must determine whether claimant has income or financial resources sufficient for more than ordinary or necessary needs, or is dependent upon all of his current benefits for such needs. *Id.*

⁴ "Against equity and good conscience" means that adjustment or recovery of an incorrect payment will be considered inequitable if an individual, because of notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right or changed his position for the worse. 20 C.F.R. §410.561d. In reaching such a determination, the individual's financial circumstances are irrelevant. *Id.*; *Hervol v. Director, OWCP*, 16 BLR 1-53 (1990).

⁵ The record contains no other evidence of how much was spent for each specific improvement.

maintain or improve the value of the home," claimant was entitled to a \$10,000.00 waiver pursuant to Section 410.561d for "home improvements based upon his detrimental reliance on the black lung benefits." Decision and Order at 3.

The Director contends that the administrative law judge erred by "partially waiving the overpayment simply because claimant made improvements to his home in reliance on his black lung benefits." Director's Brief at 7. Citing *McConnell v. Director, OWCP*, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993)⁶, the Director argues as follows:

Since the repairs to claimant's home would have resulted in maintaining or improving an asset, the expenditure of black lung benefits was to claimant's benefit, not to his detriment In the Director's view, the absence of any evidence that claimant's home *decreased* in value as a result of his reliance upon the benefits received precludes a finding that recovery of the overpayment would be against equity and good conscience. (citation omitted). Claimant simply has not changed his position "for the worse" by improving his home.

Director's Brief at 7.

Claimant responds that most of the improvements were intended to make the dwelling more "livable," not to increase its value, adding that "there is no evidence in the record to support an inference that simply making an improvement thereby increases the value of an asset." Claimant's Brief at 2.

The administrative law judge's Decision and Order granting a partial waiver is not affirmable as he failed to make specific findings or explain how he arrived at the \$10,000.00 waiver figure. The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2) requires that every adjudicatory decision be accompanied by a statement of the findings of fact and conclusions of law and the basis therefor on all material issues of fact, law, or discretion presented in the record. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

⁶ The United States Court of Appeals for the Tenth Circuit held in *McConnell* that a change in position for the worse means that a claimant takes a new action or incurs a new expense or obligation, which is for the worse, and which is causally linked to the award of benefits. *McConnell*, 993 F.2d at 1461, 18 BLR at 2-182-83.

Claimant testified that he made several improvements, but stated that some projects would not have been done absent his receipt of the benefits. Hearing Transcript at 12. The administrative law judge failed to determine which improvements would have been made without the benefits, and which would not have been made and thus could be considered as changes in position for the worse. Therefore, we instruct the administrative law judge on remand to determine which improvements were changes in position for the worse and the specific cost of each of these improvements. If the administrative law judge determines on remand that the available evidence is inadequate to make these findings, it is within his power to re-open the record, see *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989)(*en banc*); *Toler v. Eastern Associated Coal Corp.*, 12 BLR 1-49 (1988)(*en banc*), or remand the case to the district director for further evidentiary development, see 20 C.F.R. §725.456(e). It is claimant's burden to establish that he changed his position for the worse. See *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992); *Valente v. Secretary, Health and Human Services*, 733 F.2d 1037 (2d Cir. 1984); *Sierakowski v. Weinberger*, 504 F.2d 831 (6th Cir. 1974).

We reject the Director's argument that, absent evidence that a claimant's home has decreased in value, expenditures for home improvements cannot constitute changes in position for the worse pursuant to Section 410.561d. The equity and good conscience inquiry is a factual inquiry which requires the administrative law judge to consider the facts and circumstances of each case. See *Groseclose v. Bowen*, 809 F.2d 502 (8th Cir. 1987); *Quinlivan v. Sullivan*, 916 F.2d 524 (9th Cir. 1990); *McConnell, supra*. Thus, we decline the Director's invitation to construe Section 410.561d in a way that would, as a matter of law, exclude most home improvement expenditures from the equity and good conscience waiver provision.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

_____NANCY S.
DOLDER
Administrative Appeals Judge

_____REGINA C.
McGRANERY
Administrative Appeals Judge