

BRB No. 01-0696 BLA

JOHN BABYAK)	
)	
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 on Reconsideration of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Mary Forrest-Doyle (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Reconsideration (2000-BLO-6) of Administrative Law Judge Richard A. Morgan granting waiver of the recovery of an overpayment of interim benefits awarded claimant 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 record reflects an

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726

overpayment in the amount of \$58,547.80. Decision and Order on Reconsideration at 5; Director's Exhibits 12, 29. The administrative law judge found, and the Director concedes, that claimant was without fault in the creation of the overpayment. Decision and Order on Reconsideration at 2. Considering the evidence of record, including claimant's testimony, the administrative law judge concluded that recovery of the overpayment would defeat the purpose of Title IV of the Act and would be against equity and good conscience, and thus found that waiver of the overpayment was proper. *See* 20 C.F.R. §§725.540, 725.547, 410.561 (2000); Decision and Order on Reconsideration at 3-5. Accordingly, the administrative law judge granted waiver of recovery of the overpayment. On appeal, the

(2001).

Pursuant 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 in 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 issued an order on May 31, 2001 requesting supplemental briefing in the instance 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). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

Director contends that the administrative law judge erred in granting waiver of recovery of the overpayment. Claimant has not responded in the instant appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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).

In cases involving an overpayment, the administrative law judge must determine whether claimant is without fault in the creation of the overpayment. 20 C.F.R. §§410.561a, 410.561b (2000). If claimant is not without fault, recovery cannot be waived. 20 C.F.R. §§410.561a, 410.561b (2000); *Hampton v. Director, OWCP*, 11 BLR 1-118 (1988). If the administrative law judge determines that claimant is without fault, the administrative law judge must then consider whether recovery of the overpayment would defeat the purpose of Title IV of the Act,² or would be against equity and good conscience.³ 20 C.F.R.

² "Defeat the purpose of Title IV" means to deprive a person of income required for ordinary and necessary living expenses. The administrative law judge must determine whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. 20 C.F.R. §410.561c (2000).

³ "Against equity and good conscience" means that adjustment or recovery of an incorrect payment will be considered inequitable if an individual, because of a notice that such payment would be made or by reasons of the incorrect payment, relinquished a valuable right or changed his position for the worse. In reaching such a determination, the individual's financial circumstances are irrelevant. 20 C.F.R. §410.561d (2000); *Hervol v. Director, OWCP*, 16 BLR 1-53 (1990).

§§410.561a, 410.561c, 410.561d (2000); *Nelson v. Director, OWCP*, 21 BLR 1-4 (1997); *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992). Claimant bears the burden of proof to demonstrate that he qualifies for a waiver of overpayment pursuant to 20 C.F.R. §410.561, *et seq.* (2000). *See Bennett v. Director, OWCP*, 18 BLR 1-48 (1994); *Ashe, supra*; *Jones v. Director, OWCP*, 14 BLR 1-80 (1990) (*en banc*) (Brown, J., concurring).

The Director contends that the administrative law judge erred in granting waiver of the overpayment on the basis that in this case recovery would defeat the purpose of Title IV of the Act. Director's Brief at 19-21. Relying on the documentary evidence and formal hearing testimony, the administrative law judge found that claimant has sufficient assets from which to repay the total amount of the overpayment and noted that claimant's monthly income exceeds his monthly expenses by \$124.⁴ Decision and Order on Reconsideration at 3; Director's Exhibits 11, 12, 29, 36; Hearing Transcript 9-10, 42-43. The administrative law judge further concluded that repayment of the funds, however, would deprive claimant of income required for ordinary and necessary living expenses as claimant appears to have no cushion for emergencies and occasional, unexpected expenses that arise. The administrative law judge consequently found that recovery would defeat the purpose of Title IV of the Act. *See* 20 C.F.R. §410.561c; *Ashe, supra*; Decision and Order on Reconsideration at 3-4.

The Director's assertion that recovery of the overpayment in the instant case would not defeat the purpose of the Act, has merit. The Director correctly argues that the administrative law judge erred in finding that recovery would deprive claimant of income required for ordinary and necessary living expenses based upon the lack of cushion for emergencies, because the regulations pertaining to overpayments do not provide for consideration of future or speculative expenses. *Keiffer v. Director, OWCP*, 18 BLR 1-35 (1993). Director's Brief at 19-21. Therefore, the administrative law judge incorrectly considered claimant's future, unexpected expenses at Section 410.561c. Decision and Order on Reconsideration at 3-4; *Keiffer, supra*. Moreover, since claimant has maintained in the proceedings before the district director and at the hearing before the administrative law judge that he is not seeking a waiver on the ground that he lacks the financial means to repay the overpayment, this issue was improperly considered by the administrative law judge. Decision and Order on Reconsideration at 3; Director's Exhibits 13, 19, 36; Letter dated April 12, 2000; Hearing Transcript at 5-8; *Derry v. Director, OWCP*, 6 BLR 1-553 (1983). Accordingly, we reverse the administrative law judge's finding pursuant to Section 410.561c and hold that recovery of the overpayment would not defeat the purpose of Title IV of the Act.

⁴ The miner's assets include approximately \$64,307 in cash, savings and a certificate of deposit after subtracting \$6000 for home repairs and \$600 for a new television. Director's Exhibit 36; Hearing Transcript at 42- 43.

The Director further contends that the administrative law judge erred in finding that the waiver of the overpayment would be against equity and good conscience. Director's Brief at 14-18. We agree. The administrative law judge, in the instant case, found that recovery of the overpayment would be against equity and good conscience as claimant forfeited his pension payment in order to apply for and receive benefits.⁵ Decision and Order on Reconsideration at 4-5. In order to be against equity and good conscience, however, claimant must establish that he permanently relinquished a valuable right or changed his position for the worse. The record indicates that the pension benefits relinquished by claimant could be recouped if claimant had to repay the amount of the overpayment. Hearing Transcript at 27-28. Accordingly, he has not relinquished a permanent right. Thus, we reverse the administrative law judge's finding in this respect.

⁵The relevant portion of the pension plan in question states under the heading "Possible Deductions and Limitations," that "[u]nder some circumstances, the amount of pension otherwise payable under the 1977 Salaried Plan is subject to reduction because of other benefit payments such as public pension, other pension, severance allowance and disability payments." Claimant's Exhibit 1.

Accordingly, the Decision and Order on Reconsideration of the administrative law judge granting waiver of the recovery of the overpayment is reversed and the case is remanded to the district director to set up a repayment schedule.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge