

BRB No. 90-0894 BLA

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

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

Frank C. Mascara, Fairmont, West Virginia, for claimant.  
Cathryn Celeste Helm (Robert P. Davis, 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: STAGE, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and FEIRTAG, Administrative Law Judge.\*

STAGE, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (89-BLO-0079) of Administrative Law Judge Frank J. Marcellino denying waiver of recovery of overpayment of interim benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal

Mine \*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). The record reflects an overpayment of \$36,951.19, and the administrative law judge accepted the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant was without fault in creating the overpayment. The administrative law judge also found that the evidence of record failed to demonstrate that recovery of the overpayment would either defeat the purpose of Title IV of the Act or be against equity or good conscience, and thus found that waiver of recovery of the overpayment was not proper. See 20 C.F.R. §410.561 et seq. Claimant appeals, contending that the administrative law judge erred in denying waiver of recovery of the overpayment. The Director responds, urging affirmance.

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 this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant's sole argument on appeal is that recovery of the overpayment would

be against equity and good conscience pursuant to Section 410.561f, as the overpayment resulted from claimant's reliance upon "erroneous information" from the deputy commissioner's office, i.e., the deputy commissioner's initial determination of entitlement to benefits. See Director's Exhibits 1, 2. We disagree. An initial determination of entitlement does not qualify as the type of "erroneous information" to which Section 410.561f refers. See Knope v. Director, OWCP, BLR , BRB No. 88-3313 (Dec. 27, 1990); Nelson v. Director, OWCP, 14 BLR 1-159 (1990); Weis v. Director, OWCP, BLR , BRB No. 88-2827 BLA (Nov. 28, 1990); Potisek v. Director, OWCP, 14 BLR 1-87 (1990)(en banc)(Brown, J., dissenting). As claimant does not challenge the administrative law judge's finding that the evidence of record is insufficient to establish that recovery would either defeat the purpose of Title IV of the Act or be against equity and good conscience, we hereby affirm this finding as unchallenged on appeal. 20 C.F.R. §410.561a et seq. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order denying waiver of recovery of overpayment of interim benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief  
Administrative Appeals Judge

I concur:

ERIC FEIRTAG  
Administrative Law Judge

BROWN, Administrative Appeals Judge, dissenting:

I must respectfully dissent, for the reasons expressed in my dissenting opinion in Potisek v. Director, OWCP, 14 BLR 1-87 (1990)(en banc)(Brown, J., dissenting), i.e., that the Benefits Review Board does not have subject matter jurisdiction over the issues of waiver and recovery of overpayments in instances such as this.

JAMES F. BROWN  
Administrative Appeals Judge