

BRB No. 90-1869 BLA

SEIGHARDT KLAUS)
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Martin J. Linnet and Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Priscilla Anne Schwab (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, SMITH, Administrative Appeals Judge, and NEUSNER, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (89-BLO-6) of Administrative Law Judge Donald W. Mosser denying waiver of recovery of overpayment of interim benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal

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*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 \$29,442.20, 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 recovery of the overpayment would neither defeat the purpose of Title IV of the Act nor 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. 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 first contends 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 Nelson v. Director, OWCP, 14 BLR 1-159 (1990); Weis v. Director, OWCP, BLR , BRB No. 88-2827 BLA (Nov. 28, 1990). As the record does not reflect that claimant relinquished a valuable right or changed his position for the worse in reliance upon his receipt of interim benefits, we hereby affirm the administrative law judge's finding that recovery would not be against equity and good conscience. See Knope v. Director, OWCP, BLR , BRB No. 88-3313 (Dec. 27, 1990); Potisek v. Director, OWCP, 14 BLR 1-87 (1990)(en banc, Brown, J., dissenting).

Claimant next argues that because he spends substantially all of his monthly income on necessary living expenses, it would defeat the purpose of Title IV of the Act to require recovery of the overpayment.¹ The administrative law judge, however,

¹ Claimant additionally maintains that the method of reimbursement recommended by the deputy commissioner would defeat the purpose of Title IV of the Act by depriving claimant of funds needed to meet ordinary and necessary living expenses. See Director's Exhibit 15. The administrative law judge noted, however, that claimant had not directly challenged the recommended method of repayment, and thus the administrative law judge did not make a specific ruling on this issue.

properly considered claimant's most recent Overpayment Recovery Questionnaire and hearing testimony, and determined that after the elimination of nonrecurring expenses, claimant's monthly income exceeded his monthly expenses by at least \$533.26. Decision and Order at 3, 6. Additionally, the administrative law judge found that claimant had assets on hand in checking and savings accounts and Certificates of Deposit which totalled \$22,513.69. Decision and Order at 3. The administrative law judge's findings are supported by substantial evidence, and we therefore affirm his finding that recovery would not defeat the purpose of Title IV of the Act. 20 C.F.R. §410.561c; see Knope, supra.

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

ROY P. SMITH
Administrative Appeals Judge

Decision and Order at 7. Consequently, this issue is beyond the Board's scope of review. See generally Lyon v. Pittsburgh & Midway Coal Co., 7 BLR 1-199 (1984).

FREDERICK D. NEUSNER
Administrative Law Judge