

BRB No. 91-0584 BLA

MARY TIMKO)
(Widow of ANDREW TIMKO))
))
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Sue Anne Howard, Wheeling, West Virginia, for claimant.

Elizabeth J. Shapiro (Marshall J. Breger, 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: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and LIPSON, Administrative Law Judge.*

PER CURIAM:

*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).

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (90-BLO-0146) of Administrative Law Judge Gerald M. Tierney granting waiver of recovery of an overpayment made 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). Claimant, the miner's widow, applied for benefits and the Deputy Commissioner made an initial finding that claimant was entitled to benefits. Claimant was notified that she would

receive interim benefits pending the final disposition of her claim. See Director's Exhibit 1. Employer controverted claimant's entitlement to benefits and a hearing was held before Administrative Law Judge Melvin Warshaw. Judge Warshaw issued a Decision and Order denying benefits on March 25, 1983, see Director's Exhibit 2, which was affirmed by the Board on January 28, 1985. See Timko v. North American Coal Co., BRB No. 83-0835 BLA (Jan. 28, 1985)(unpub.); Director's Exhibit 3. Claimant was then notified by the Deputy Commissioner that the amount paid as interim benefits constituted an overpayment that must be refunded. See Director's Exhibit 5. Claimant then requested a hearing concerning her benefits. See Director's Exhibit 8. A hearing was held before Administrative Law Judge Tierney, who found that claimant is without fault in causing the overpayment and claimant relied on "erroneous information" involving the interpretation of the Act and regulations. The "erroneous information" identified by the administrative law judge was the Deputy Commissioner's initial determination of entitlement. See Decision and Order at 5. Thus, the administrative law judge found that recovery of the overpayment must be waived pursuant to 20 C.F.R. §410.561f and h. On appeal, the Director contends that the administrative law judge erred in determining that the Deputy Commissioner's finding of entitlement to benefits constituted "erroneous information" under Section 410.561f. The Director further states that the administrative law judge erred in failing to make a finding as to whether the recovery of overpayment would defeat the purpose of the Act or be against equity and good conscience. Thus, the Director seeks remand for such a determination. Claimant responds urging affirmance of the administrative law judge's Decision and Order.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 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).

In Nelson v. Director, OWCP, BLR , BRB No. 88-4077 BLA (Dec. 10, 1990), and Weis v. Director, OWCP, BLR , BRB No. 88-2827 BLA (Nov. 28, 1990), the Board held that an initial determination of entitlement does not qualify as "erroneous information" for purposes of 20 C.F.R. §410.561f. Thus, the administrative law judge's finding that the overpayment must be waived pursuant to 20 C.F.R. §410.561f is vacated. Further, as the administrative law judge failed to determine whether recovery would defeat the purpose of the Act, as defined in 20 C.F.R. §410.561c, or be against equity and good conscience, as defined in 20 C.F.R. §410.561d, the case is remanded for the administrative law judge to make such a determination.

Accordingly, the administrative law judge's Decision and Order granting waiver of overpayment is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.
SO ORDERED.

Administrative Appeals Judge

BETTY J. STAGE, Chief

ROY P. SMITH
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge