

BRB No. 89-0846 BLA

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

Appeal of the Decision and Order of Michael F. Colligan, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Creany & Tulowitzki), Ebensburg, Pennsylvania, for claimant.
Rodger Pitcairn (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: SMITH and BROWN, Administrative Appeals Judges, and NEUSNER, Administrative Law Judge.*

SMITH, Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director) appeals the Decision and Order (87-BLA-3791) of Administrative Law Judge Michael F. Colligan denying in part and granting in part a waiver of recovery of overpayment

of interim benefits on a claim filed pursuant to the provisions of Title IV

*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).

of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). The record reflects an overpayment of \$40,840.80. See Director's Exhibits 9-13. The administrative law judge determined that claimant was at fault in creating an overpayment subsequent to February 1, 1982, in the amount of \$18,915.60, and found that waiver of recovery of this overpayment was not proper. See 20 C.F.R. §§725.542, 410.561a, 410.561b(c). The administrative law judge further found, however, that claimant was without fault in creating the overpayment prior to February 1, 1982, in the amount of \$21,925.20, and that claimant was entitled to waiver of recovery of this overpayment as a matter of law pursuant to 20 C.F.R. §§410.561f and 410.561h. The Director appeals, challenging the administrative law judge's findings pursuant to Sections 410.561f and 410.561h. Claimant responds, urging affirmance.¹

¹ The administrative law judge's denial of waiver of recovery of overpayment of benefits paid to claimant after February 1, 1982, pursuant to Sections 725.542,

410.561a, and 410.561b(c), is affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

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).

The Director contends that the administrative law judge erred in finding that the overpayment of interim benefits, paid to claimant prior to February 1, 1982, 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 Decision and Order at 4, 5; Director's Exhibits 3, 5. We agree. 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). We therefore vacate the administrative law judge's findings pursuant to Sections 410.561f and 410.561h(a), and his finding that waiver of recovery of the overpayment is proper, and remand this case for the administrative law judge to determine whether repayment would either defeat the purpose of Title IV of the Act or be against equity and good conscience pursuant to Section 410.561a et seq. See Knope, supra; Potisek v. Director, OWCP, 14 BLR 1-87 (1990)(en banc)(Brown, J.,

dissenting). The Director notes that no evidence relevant to these issues was developed in the record, and that the administrative law judge did not rule on the Director's Motion to Compel Discovery. Consequently, on remand, the administrative law judge must respond to the Director's Motion to Compel Discovery, and should take further action as he deems necessary in order to determine whether waiver of recovery is appropriate.

Accordingly, the administrative law judge's Decision and Order denying in part and granting in part a waiver of recovery of overpayment of interim benefits is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

FREDERICK D. NEUSNER
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