

BRB No. 90-1009 BLA

LELIA NAPIER)
 (Administratrix of the)
 Estate of JOHN NAPIER))
)
 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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor, and the Proposed Decision and Order of Daryl E. Ratliff, Deputy Commissioner, United States Department of Labor.

Leonard H. Brashear, Hyden, Kentucky, for claimant.

Ronald G. Ray, Sr. (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, McGRANERY, Administrative Appeals Judge, and LIPSON, Administrative Law Judge.*

PER CURIAM:

Claimant, the surviving spouse and administratrix of the Estate of the

deceased miner, appeals the Decision and Order (88-BLO-101) of Administrative Law Judge Donald W. Mosser denying

*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)(1988).

waiver of recovery of overpayment of interim benefits 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 additionally appeals the Proposed Decision and Order of No Material Change in Condition of Deputy Commissioner Daryl E. Ratliff denying benefits on a duplicate claim filed on May 27, 1988, pursuant to 20 C.F.R. §725.309. Regarding the original claim, the record reflects an overpayment in the amount of \$20,848.20. See Director's Exhibits 4, 5, 7-9. The administrative law judge accepted the concession of the Director, Office of Workers' Compensation Programs (the Director), that the miner was without fault in creating the overpayment, but 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 et seq. Claimant appeals, contending that the administrative law judge erred in denying waiver of recovery of the overpayment. The Director responds, urging affirmance. Regarding the duplicate claim, claimant maintains that new evidence submitted in support thereof is sufficient to establish entitlement to

benefits.

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).

Initially we note that following issuance on November 10, 1988, of the deputy commissioner's Proposed Decision and Order denying benefits on the miner's duplicate claim, which was appealed directly to the Board, we adopted the holding of the United States Court of Appeals for the Tenth Circuit in Lukman v. Director, OWCP, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990), i.e., that a claimant is entitled to a hearing before an administrative law judge to examine, de novo, whether claimant has established both a material change in conditions pursuant to Section 725.309, and entitlement to benefits. See Dotson v. Director, OWCP, 14 BLR 1-10 (1990). Consequently, we must remand the miner's duplicate claim to the Office of Administrative Law Judges for further proceedings in light of Lukman, supra.

Turning to the issue of overpayment with regard to the original claim, claimant

first contends that it would defeat the purpose of Title IV of the Act to require recovery of the overpayment. Specifically, claimant asserts that the miner's lack of representation by counsel at the hearing concerning the merits of his claim resulted in an inadequate inquiry into the issue of entitlement. Claimant therefore maintains that since the purpose of the Act is to provide benefits to miners who are totally disabled due to pneumoconiosis, and as the miner's death certificate and autopsy evidence submitted in support of the miner's duplicate claim are sufficient to establish entitlement, it would defeat the purpose of the Act to require repayment of interim benefits received by the miner prior to the final denial of his original claim. Claimant's arguments are without merit. In order to defeat the purpose of the Act, recovery of an overpayment must deprive a claimant of the income required for ordinary and necessary living expenses. 20 C.F.R. §§725.542(b)(1), 410.561a, 410.561c. See Knope v. Director, OWCP, 16 BLR 1-159 (1990). As the miner was represented by counsel on appeal to the Board, and as counsel did not allege any error with respect to the miner's pro se status below, or further appeal the Board's affirmance of the administrative law judge's Decision and Order denying benefits, we do not have jurisdiction to consider claimant's arguments concerning the miner's pro se status, as they were not timely raised. See generally Kurcaba v. Consolidation Coal Co., 9 BLR 1-73 (1986); Lyon v. Pittsburgh & Midway Coal Co., 7 BLR 1-199 (1984). Moreover, the new evidence submitted in support of the miner's duplicate claim must be reviewed pursuant to Section 725.309(d), see Lukman, supra, and is

not relevant to the overpayment issue, which stems from the original claim that has been finally denied. See 20 C.F.R. §§410.560, 725.522(c), 802.406; Decision and Order at 5-7. The administrative law judge properly reviewed all of the relevant evidence of record and determined that the miner was not indebted at the time of his death, and that his estate assets totalled approximately \$77,593.65. The administrative law judge further determined that the miner and his widow had jointly-owned assets which included a home, thirty-five acres of hillside land, an automobile, and a savings account of approximately \$100,000.00; that the miner's widow was not indebted; and that her monthly income exceeded her monthly expenses. Decision and Order at 3-5; Claimant's Exhibit 1; Hearing Transcript at 9, 11-14, 19, 20. As the administrative law judge's findings are supported by substantial evidence, we hereby 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.

Claimant also contends that recovery of the overpayment would be against equity and good conscience within the meaning of Section 410.561d, because the miner relinquished a valuable right or changed his position for the worse in reliance upon his receipt of interim benefits. Specifically, claimant maintains that the miner terminated his coal mine employment in anticipation of his receipt of Black Lung benefits. The administrative law judge determined, however, that the miner retired on February 2, 1980, and was not notified of the interim award of benefits until

September 17, 1980. Consequently, the administrative law judge rationally concluded that the evidence of record did not support claimant's assertions, but rather supported the inference that the miner retired because he had reached the age of sixty-five and was eligible for Social Security and civil service retirement benefits. Decision and Order at 6; Director's Exhibits 1, 2, 6. As the administrative law judge's findings are supported by substantial evidence, we affirm his finding that recovery would not be against equity and good conscience pursuant to Section 410.561d. See Knope, supra; Potisek v. Director, OWCP, 14 BLR 1-87 (1990)(en banc, Brown, J., dissenting).

Accordingly, the administrative law judge's Decision and Order denying waiver of recovery of overpayment of interim benefits is affirmed. The miner's duplicate claim is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge