

BRB No. 00-0528 BLA

BERTHA LUCILLE HELM)
(Widow of HARTLEY E. HELM))

Claimant-Petitioner)

v.)

FREEMAN UNITED COAL MINING)
COMPANY)

Employer-Respondent)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Bertha Lucille Helm, Frienswood, Texas, *pro se*.

Helen H. Cox (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLO-16) of Administrative Law Judge James W. Kerr, Jr. denying waiver of the recovery of an overpayment of interim benefits awarded claimant 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).¹ The record reflects an overpayment in the amount of \$11,698.50. The administrative law judge found that claimant was at fault in the creation of the overpayment, and further that recovery of the overpayment would not defeat the purpose of Title IV of the Act or be against equity and good conscience, and thus found that waiver of the overpayment was not proper. *See* 20 C.F.R. §§725.540, 725.547, 410.561 (2000); Decision and Order at 2-4. Accordingly, the administrative law judge denied waiver of recovery of the overpayment. On appeal, claimant generally contends that the administrative law judge erred in finding that she was at fault and in failing to grant waiver of the overpayment. Employer has not responded on appeal. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the denial of the waiver of recovery of the overpayment.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on May 2, 2001, to which the Director has responded asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant and employer have not responded to the Board's order.² Based on the

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on May 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

brief submitted by the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and consistent with applicable 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 cases involving an overpayment, the administrative law judge must determine whether claimant is without fault in the creation of the overpayment. 20 C.F.R. §§410.561a, 410.561b (2000). If claimant is not without fault, recovery cannot be waived. 20 C.F.R. §§410.561a, 410.561b (2000); *Hampton v. Director, OWCP*, 11 BLR 1-118 (1988). If the administrative law judge determines that claimant is without fault, the administrative law judge must then consider whether recovery of the overpayment would defeat the purpose of Title IV of the Act,³ or be against equity and good conscience.⁴ 20 C.F.R. §§410.561a,

³“Defeat the purpose of Title IV” means to deprive a person of income required for ordinary and necessary living expenses. The administrative law judge must determine whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. 20 C.F.R. §410.561c (2000).

⁴“Against equity and good conscience” means that adjustment or recovery of an incorrect payment will be considered inequitable if an individual, because of a notice

410.561c, 410.561d (2000); *Ashe v. Director, OWCP*, 16 BLR 1-109 (1992).

that such payment would be made or by reasons of the incorrect payment, relinquished a valuable right or changed his position for the worse. In reaching such a determination, the individual's financial circumstances are irrelevant. 20 C.F.R. §410.561d (2000); *Hervol v. Director, OWCP*, 16 BLR 1-53 (1990).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error therein. In reaching his conclusion that waiver of the recovery of the overpayment was unavailable, the administrative law judge properly concluded that claimant was at fault. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 2-3. Claimant bears the burden of proof to demonstrate that she qualifies for a waiver of overpayment pursuant to 20 C.F.R. §410.561, *et seq.* (2000). *See Jones v. Director, OWCP*, 14 BLR 1-80 (1990) (*en banc*) (Brown, J., concurring). In the instant case, the administrative law judge permissibly found, and the record supports, that claimant candidly admitted that she was aware of receiving excess funds. *See* 20 C.F.R. §410.561b(c) (2000); Decision and Order at 2-3; Hearing Transcript at 27; Director's Exhibit 26. Contrary to claimant's assertion, the actions of employer in this case are not relevant in determining whether claimant is at fault. *See* 20 C.F.R. §410.561b (2000); *Jones, supra*. Further, a finding of at fault does not connote bad faith or misrepresentation on the claimant's part, as fault can be the result of an honest mistake. *See Jones, supra*. We therefore affirm the administrative law judge's finding that claimant was at fault and the denial of waiver of recovery of the overpayment as it is supported by substantial evidence and is in accordance with law.⁵ *See* 20 C.F.R. §410.561b(c) (2000); *Jones, supra*; *Hampton, supra*; *Kuchwara, supra*.

Accordingly, the Decision and Order of the administrative law judge denying claimant's request for waiver of the recovery of the overpayment is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

⁵As the administrative law judge's finding that claimant was at fault obviates the need for consideration of whether recovery of the overpayment would be against equity and good conscience or defeat the purpose of the Act, we will not address the administrative law judge's findings thereunder. *See Hampton v. Director, OWCP*, 11 BLR 1-118 (1988).

NANCY S. DOLDER
Administrative Appeals Judge