

BRB No. 89-1968 BLA

THOMAS BROWN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Creany & Tulowitzki), Ebensburg, Pennsylvania, for claimant.

Maria C. Lisowski (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: BROWN and DOLDER, Administrative Appeals Judges, and CLARKE, Administrative Law Judge.*

DOLDER, Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (88-BLA-0308) of Administrative Law Judge Thomas M. Burke granting 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). The record reflects an overpayment in the amount of \$22,064.00, see Director's Exhibits 12, 13, and the administrative law judge accepted the concession of the Director that claimant was

*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).

without fault in creating the overpayment. Decision and Order at 2. The administrative law judge then found that claimant was entitled to waiver of recovery of this overpayment 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

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 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 and his failure to notify claimant of the possibility that claimant would be required to repay the overpayment if he ultimately failed to establish entitlement. See Decision and Order at 4, 5. We agree. An initial determination of entitlement does not qualify as the type of "erroneous information" to which Section 410.561f refers, and the deputy commissioner's failure to inform claimant that there might be a recovery of the overpayment does not qualify as misinformation upon which waiver may be based thereunder. 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, and his finding that waiver of recovery of the overpayment is proper, and we 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).

¹ The administrative law judge's finding that claimant was without fault in creating the overpayment is affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order granting 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.

NANCY S. DOLDER
Administrative Appeals Judge

I concur:

DAVID A. CLARKE, JR.
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