

BRB Nos. 91-1716 BLA

DOMINIC CHERO)
)
 Claimant-Petitioner)
)
 v.)
) Date Issued:
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Waiver of G. Marvin Bober,
Administrative Law Judge, United States Department of Labor.

Barry A. Roth (Cohen & Roth, P.A.), Fort Myers, Florida, for claimant.

Christian P. Barber (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge and
SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (90-BLA-81) of
Administrative Law Judge G. Marvin Bober denying waiver of recovery of
overpayment of 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 filed a claim for benefits on July 10, 1975 and was initially determined to be entitled to benefits. A hearing was held before the administrative law judge and claimant was awarded benefits. This award of benefits was affirmed by the Board on appeal. See *Chero v. Florence Mining Co.*, BRB No. 86-2799 BLA (Feb. 28, 1989)(unpub.). An overpayment of \$1,728.90 was created when the Board determined that the administrative law judge had previously determined the improper onset date. See Director's Exhibit 9; *Chero, supra*. An additional overpayment of \$12,828.80 was created when claimant received payments from both the Trust Fund and employer from January, 1987 through February, 1989. After a hearing on the overpayment issue, the administrative law judge noted that the parties stipulated that claimant was without fault in causing the initial overpayment of \$1,728.90. However, the administrative law judge found that claimant was not without fault as to the \$12,828.80 overpayment. The administrative law judge then found that recovery of the overpayment would not defeat the purposes of the Act pursuant to 20 C.F.R. §410.561c. The administrative law judge also found that a repayment amount of \$200 per month would be reasonable. Accordingly, waiver of recovery of the overpayment was denied and the administrative law judge ordered claimant to repay the overpayment in the amount of \$200 per month. On appeal, claimant contends that the administrative law judge erred in denying waiver of recovery of the overpayment. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's Decision and Order.

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).

Claimant first contends that, as the Director has conceded that claimant is without fault in the creation of the overpayment of \$1,728.90, the Director should not seek recovery of this portion of the overpayment. We reject this argument. A finding that claimant is without fault in the creation of an overpayment does not preclude the Director from recouping the overpayment. See 20 C.F.R. §410.561a; *Knoppe v. Director, OWCP*, 16 BLR 1-59 (1990).

Next, claimant asserts that his testimony that he was unaware of the overpayment of \$12,557.70, which was created between January, 1987 and March, 1989, was uncontradicted at the hearing. Claimant's Brief at 2. Although claimant's argument here is not specific, he implies that the administrative law judge erred in determining that claimant was not without fault in the creation of the overpayment. We note that it is undisputed here, as at the hearing, that the overpayment occurred as the result of claimant receiving benefits from both the employer and the Trust Fund simultaneously. See Hearing Transcript at 17, 24-25. The administrative law judge permissibly found that claimant had ample notice that he would receive a

monthly benefits check from only one source. See Decision and Order at 3; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Specifically, the administrative law judge found that this notice consisted of a letter from the Department of Labor to claimant, dated February 11, 1982, explaining that because employer failed to commence the payment of benefits, the Trust Fund would make the appropriate payments. See Decision and Order at 3; Director's Exhibit 33. The administrative law judge also pointed out that the letter from employer to claimant, dated December 12, 1986, stated specifically that the Trust Fund would pay benefits through December, 1986, and that thereafter the employer would commence paying the monthly benefits. See Director's Exhibit 20. The administrative law judge permissibly stated that claimant should have questioned the fact that he continued to receive benefits from the Trust Fund after December, 1986 in light of the communications that he received. See Decision and Order at 3; *Lafferty, supra*. As a result, the administrative law judge's finding that claimant is not without fault in the creation of the \$12,828.80 overpayment is affirmed. As the administrative law judge's finding that claimant is not without fault is affirmed, waiver of recovery or adjustment of the \$12,828.80 overpayment is precluded. See 20 C.F.R. §725.542; *Jones v. Director, OWCP*, 14 BLR 1-80, 1-85 (1990).

Next, claimant contends that the administrative law judge erred in finding that recovery of the overpayment would not defeat the purposes of the Act. In making this finding, the administrative law judge considered the expenses and income

statements submitted by claimant, as well as the documentation submitted along with those statements, and permissibly determined that claimant has the resources available to repay the overpayment.¹ See Decision and Order at 4-6; *Lafferty, supra*.

In his brief, claimant merely restates his testimony as to his expenses and states that the administrative law judge erred in weighing this evidence. Claimant does not demonstrate that the administrative law judge abused his discretion in making his findings. Absent an abuse of discretion, the Board will not disturb the credibility determinations of the administrative law judge. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-114 (1988). As a result, the administrative law judge's finding that recovery of the overpayment would not defeat the purposes of the Act pursuant to 20 C.F.R. §410.561c is affirmed as it

¹ Given that claimant is without fault only as to the creation of the overpayment of \$1,728.90, the discussion of claimant's ability to repay the overpayment pertains solely to this portion of the total amount owed. As noted above, the overpayment of \$12,828.80, for which claimant was not without fault, is not subject to waiver or adjustment.

is supported by substantial evidence.²

Finally, claimant requests that if the Board affirms the Decision and Order directing repayment to the Trust Fund, the amount of the overpayment be compromised pursuant to 20 C.F.R. §725.544. We must decline this request. The compromise of an overpayment requires that certain findings of fact regarding repayment be made prior to such a determination. See 20 C.F.R. §725.544(b)-(e). These findings of fact are not germane to the issue of waiver, which is the focus of this appeal. The question of compromise is considered by the Office of Workers' Compensation Programs under the Federal Claims Collection Act of 1966, as amended, 31 U.S.C. §3701, *et seq.*, only after it is determined that the overpayment will not be waived. See *Jones v. Director, OWCP*, 14 BLR 1-80, 1-83 (1990). Further, we hold that inasmuch as the administrative law judge denied waiver, he properly ordered recoupment of the overpayment owed by claimant to the Trust Fund in the sum of \$14,557.70. See *generally* 42 U.S.C. §404(a), as incorporated

²The administrative law judge does not make a finding as to whether recovery of the overpayment would be against equity and good conscience pursuant to 20 C.F.R. §410.561d, however, any error is harmless as claimant did not raise this issue on appeal. See *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

into the Act by 30 U.S.C. §923(b). We recognize, however, that enforcement decisions are within the purview of the district director, and thus the matter will now be forwarded to that office. See *generally* 31 U.S.C. §952(a); 29 C.F.R. Part 20; 4 C.F.R. Parts 101-104; 20 C.F.R. §725.544. We, therefore, vacate that portion of the administrative law judge's Decision and Order which sets forth the method and manner of reimbursement of the overpaid amount.

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge