

PART III
PROCEDURAL ISSUES

C. PAYMENT OF BENEFITS

2. UNDER THE 1981 AMENDMENTS TO THE ACT

e. Overpayments

Sections 725.542, 725.543, 410.560 *et seq.* govern an entitlement overpayment. The district director determines if an overpayment has occurred. If an overpayment has occurred, claimant has a right to a hearing before an administrative law judge to determine whether recovery of the waiver will be waived. 42 U.S.C. §404; ***Yamasaki v. Califano***, 442 U.S. 682 (1979). The administrative law judge must first determine whether claimant is without fault in the creation of the overpayment. 20 C.F.R. §410.561a. If claimant is not without fault, recovery cannot be waived. *Id.* If claimant is without fault, the administrative law judge must then determine whether recovery would defeat the purpose of the Act or be against equity and good conscience as defined in 20 C.F.R. §725.542 and 20 C.F.R. §410.561 *et seq.* 20 C.F.R. §410.561a.

The Office of Administrative Law Judges and the Board have jurisdiction of waiver of overpayment issues arising under 20 C.F.R. §410.560 *et seq.* See ***Jones v. Director, OWCP***, 14 BLR 1-80 (1990)(en banc)(Brown, J., dissenting); Section 204 of the Social Security Act, 42 U.S.C. §404, which is made applicable to the Federal Coal Mine and Safety Act by 30 U.S.C. §§923(b), 940; 33 U.S.C. §919.

In ***Jones, supra***, the contested issue was whether the claimant was without fault in creating an overpayment of over \$24,000.00. Although claimant accepted a lump sum payment of approximately \$23,000 and signed an application that contained the statement, "I will notify you if and when I return to work", he failed to so notify the district director, and continued working for approximately five years while also collecting Black Lung benefits. The Board vacated the administrative law judge's finding that because the district director had notice of claimant's return to work, the government bore full responsibility for creating the overpayment. The Board noted that the actions of the government are not relevant in determining whether claimant is without fault. See ***Jones, supra***; 20 C.F.R. §410.561b and c; ***Valente v. Secretary of Health and Human Services***, 733 F.2d 1037 (2d Cir. 1984). Moreover, the Board noted that a finding of "not without fault" does not connote bad faith or misrepresentation on claimant's part; and "fault" can be the result of an honest mistake. See ***Morgan v. Finch***, 423 F.2d 551 (6th Cir. 1970); ***Barone v. Bowen***, 869 F.2d 49 (2d Cir. 1989).

CASE LISTINGS

DIGESTS

An overpayment does *not* become a claim or a debt until the waiver determination process has been completed. ***Jones v. Director, OWCP***, 14 BLR 1-80 (1990)(en banc)(Brown, J., dissenting).

The \$20,000.00 limitation in the Federal Claims Collection Act does not apply until the waiver determination process has been completed. ***Jones v. Director, OWCP***, 14 BLR 1-80 (1990)(en banc)(Brown, J., dissenting).

The proper regulations for determining "waiver" are found at 20 C.F.R. §§410.560 *et seq.* and 725.540 *et seq.* ***Jones v. Director, OWCP***, 14 BLR 1-80 (1990)(en banc)(Brown, J., dissenting).

A finding of "not without fault" does *not* connote bad faith or misrepresentation on claimant's part; fault can be the result of an honest mistake. ***Jones v. Director, OWCP***, 14 BLR 1-80 (1990)(en banc)(Brown, J., dissenting).

In determining "fault," the administrative law judge must look to subjective reasonableness of claimant's actions in accepting the overpaid amount given claimant's age, intelligence, education, physical and mental conditions, and other pertinent circumstances.

Jones v. Director, OWCP, 14 BLR 1-80 (1990)(en banc)(Brown, J., dissenting).

In an overpayment case in which the administrative law judge found recovery would be against equity and good conscience pursuant to 20 C.F.R. §410.561d, the Board held that the administrative law judge's consideration of claimant's financial circumstances was erroneous and remanded for consideration pursuant to Section 410.561d. ***Hervol v. Director, OWCP***, 16 BLR 1-53 (1990).

In ***Potisek***, the parties stipulated that claimant was not at fault in the creation of an overpayment of approximately \$24,000.00, and the issue before the administrative law judge was whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. The Board vacated the administrative law judge's finding that recovery would be against equity and good conscience because claimant had relied on "erroneous information" in accepting interim benefits. The Board held that "erroneous information" as defined in 20 C.F.R. §410.561f meant misinformation, not a failure to provide information, as occurred here. See ***Morris v.***

Harris, 663 F.2d 1014 (10th Cir. 1981); **Cucuzella v. Weinberger**, 395 F. Supp. 1288 (D. Del. 1975). On remand, the administrative law judge must determine whether recovery would defeat the purpose of the Act in that it would deprive claimant of funds needed to meet ordinary and necessary living expenses or would be against equity and good conscience because claimant had relinquished a valuable right or changed her position for the worse in reliance on her receipt of the benefits. See **Potisek v. Director, OWCP**, 14 BLR 1-87 (1990)(en banc)(Brown, J., dissenting); 20 C.F.R. §§725.543, 410.561c, d.

An initial determination of entitlement does not qualify as "erroneous information" for purposes of 20 C.F.R. §410.562(f). **Weis v. Director, OWCP**, 16 BLR 1-56 (1990); **Nelson v. Director, OWCP**, 14 BLR 1-159 (1990).

Department store credit card account payments constitute "installment payments" and therefore are "ordinary and necessary expenses" under 20 C.F.R. §410.561c(a)(1). **Gordon v. Director, OWCP**, 14 BLR 1-60 (1990).

Section 410.561c(a) is drafted disjunctively, providing four alternative categories of expenses that constitute "ordinary and necessary expenses." An expense need not be for the support of others for whom claimant is "legally responsible" under subsection (a)(3) if the requirements of one of the three other subsections is met. **Gordon v. Director, OWCP**, 14 BLR 1-60 (1990).

A finding by an administrative law judge that claimant was "at fault" in generating the overpayment obviates the need for consideration of the issue regarding whether recovery of the overpayment would be against equity and good conscience or defeat the purpose of the Act. **Hampton v. Director, OWCP**, 11 BLR 1-118 (1988).

The regulations at 20 C.F.R. §725.522(c) contemplate a situation where benefit payments are commenced prior to a final determination of eligibility and where an administrative law judge, the Board, or a court subsequently determines claimant to be ineligible for those benefits, and provide that "such payments shall be considered overpayment...." See 20 C.F.R. §725.522(c). **Weis v. Director, OWCP**, 16 BLR 1-56 (1990).

Section 410.561f requires claimant's "reliance on erroneous information from an official source...with respect to the interpretation of a pertinent provision of the Act or regulations pertaining thereto...." An initial determination of entitlement is not the sort of "erroneous information" to which Section 410.561f is referring. **Weis v. Director, OWCP**, 16 BLR 1-56 (1990).

It is a general rule of statutory construction that, to the maximum extent possible, statutes are to be read in a manner "so as to be consistent and harmonious." [citation omitted]. Therefore an initial determination of entitlement is not the sort of "erroneous

information" referred to at Section 410.561f; a contrary result would render DOL's regulations at Section 725.522(c) meaningless. **Weis v. Director, OWCP**, 16 BLR 1-56 (1990).

In this overpayment case the Board reaffirmed its holding in **Weis v. Director, OWCP**, 16 BLR 1-56 (1990), that Section 410.561f makes it clear that the "erroneous information" relied on must be "with respect to the interpretation of a pertinent provision of the Act or regulation..." 20 C.F.R. §410.561f. An initial determination of entitlement to benefits, therefore, does not constitute erroneous information which triggers the provisions of Sections 410.561f and 410.561h. **Nelson v. Director, OWCP**, 14 BLR 1-159 (1990).

In this overpayment case, the Board rejected claimant's contention that because the Director conceded that he is without fault in creating the overpayment, as a matter of law, it is against equity and good conscience to recover the overpayment pursuant to 20 C.F.R. §410.561h(a). The Board held that inasmuch as the facts of the instant case reflect neither a reduction overpayment, see 20 C.F.R. §410.561e, nor reliance on erroneous information, the claimant's reliance on Section 410.561h(a) is misplaced. **Knobe v. Director, OWCP**, 16 BLR 1-59 (1990).

The Board, citing its decision in **Jones v. Director, OWCP**, 14 BLR 1-80 (1990)(en banc)(Brown, J., dissenting), rejected claimant's contention that the administrative law judge does not have subject matter jurisdiction to determine whether waiver of recovery of the overpayment is proper. **Knobe v. Director, OWCP**, 16 BLR 1-59 (1990).

In this overpayment case, the Board reaffirmed its holding in **Potisek v. Director, OWCP**, 14 BLR 1-87 (1990) (en banc)(Brown, J., dissenting), and held that the deputy commissioner's failure to inform claimant that there might be a recovery of the overpayment does not qualify under Section 410.561f as misinformation upon which waiver may be based. **Knobe v. Director, OWCP**, 16 BLR 1-59 (1990).

Waiver of recovery of overpayment does not apply in cases where the employer has paid benefits and has reimbursed the Trust Fund for all payments made. **Justice v. Knox Creek Coal Co.**, 16 BLR 1-95 (1992); see also 20 C.F.R. §725.547(a).

The Board, citing **Jones v. Director, OWCP**, 14 BLR 1-80 (1990), rejected claimant's argument that the administrative law judge erred in failing to consider the applicability of Section 725.544 since the provisions in Section 725.544 concern the collection and compromise of claims for overpayment and are thus inapplicable to determinations regarding waiver of recovery of an overpayment. **Ashe v. Director, OWCP**, 16 BLR 1-109 (1992).

The Board interpreted 20 C.F.R. 725.542 and 410.561(c) as permitting, but not necessarily requiring, the administrative law judge to consider jointly held assets of

claimant and his wife as well as assets held separately in his wife's name alone in determining whether recovery of an overpayment would defeat the purpose of the Act. **Ashe v. Director, OWCP**, 16 BLR 1-109 (1992).

The Board vacated the administrative law judge's grant of waiver, holding that recovery would not defeat the purpose of the Act pursuant to §§410.561c and 725.543. The Board held that the administrative law judge failed to consider all claimant's relevant assets and his testimony, and that the regulations pertinent to recovery of overpayment do not provide for consideration of prospective expenses. Finally, the Board noted that the purpose of the formal hearing is to establish the existence of a debt, not how it will be paid. Citing **Knope** and **Ashe**, the Board held that on remand the administrative law judge should consider the financial circumstances of the entire household and should discuss depletion of income-producing assets. **Keiffer v. Director, OWCP**, 18 BLR 1-35 (1993).

In rejecting claimant's contention that the administrative law judge erred in finding claimant to be at fault in the creation of the overpayment, the majority held that the administrative law judge permissibly found that claimant failed to produce any evidence that claimant did not realize that his state award was due at least in part to pneumoconiosis, or that he did not realize that he was required to report receipt of any state benefits attributable to pneumoconiosis. The Board also held that the administrative law judge permissibly relied upon the fact that claimant had been represented by counsel through the state and federal proceedings. Judge McGranery dissented, stating that given the administrative law judge's failure to discuss the effect of claimant's limitations on his understanding of his circumstances, the complexity of the award of benefits and the administrative law judge's erroneous inference from counsel's argument, she would remand the case to the administrative law judge to discuss claimant's varied limitations on his understanding to determine whether he was at fault in the creation of the overpayment. **Bennett v. Director, OWCP**, 18 BLR 1-48 (1994)(McGranery, J., concurring and dissenting).

The Board deferred to the Director's interpretation of Section 725.535(d) and applied the up-front method to calculate the offset claimant should receive for legal and medical fees paid in pursuit of her state claim. The Board agreed with the Director that the method of repayment, *i.e.*, monthly basis or lump sum, is irrelevant to the applicability of the month-based up-front formula for calculating the overpayment amount. The Board stated that to the extent that it is inconsistent, the Board's decision in **Scuilli v. Bethlehem Mines Corp.**, 8 BLR 1-206 (1985) is overruled. **Cadle v. Director, OWCP**, 19 BLR 1-56 (1994).

An action by the Department of Labor to recover an overpayment is not an action for money damages within the meaning of 28 U.S.C. §2415(a). Section 2415(a) provides that an action for money damages brought by the United States which is founded upon an express or implied contract is barred unless the complaint is filed within six years

after the right of action accrues. Thus, the Board held that the Department of Labor was not precluded by 28 U.S.C. §2415 from seeking recovery of the overpayment in this case. ***Nelson v. Director, OWCP***, 21 BLR 1-4 (1997).

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