

BRB No. 89-0161 BLA

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

Appeal of the Decision and Order of Michael F. Colligan, Administrative Law Judge, United States Department of Labor.

Rodger Pitcairn (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.

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

Before: STAGE, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

STAGE, Chief Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director) appeals the Decision and Order (89-BLA-3532) of Administrative Law Judge Michael

F. Colligan waiving recovery of overpayment on a claim filed pursuant to the provisions of Title

*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).

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 May 9, 1979 and received an initial award of benefits on April 15, 1980. On October 23, 1981, Administrative Law Judge Theodor P. Von Brand issued a Decision and Order denying benefits. On December 22, 1981 claimant was notified that the amount paid constituted an overpayment which must be repaid. On August 8, 1987, the case was referred to the Office of Administrative Law Judges for a hearing. On October 26, 1988, claimant filed a motion for summary judgment and on October 31, 1988, the administrative law judge, without holding a hearing, determined that claimant relied on erroneous information and that repayment of the overpayment must be waived pursuant to 20 C.F.R. §§410.561f and 410.561h. The administrative law judge found that the erroneous information relied upon by claimant was the initial determination of entitlement to benefits. On appeal, the Director contends that the administrative law judge erred in determining that the initial determination of entitlement to benefits constituted erroneous information. The Director further contends that the case must be remanded for a hearing on the issues pertaining to waiver of recovery of the overpayment as the Director was not given the opportunity to respond to claimant's motion for summary judgment. Claimant responds¹ requesting, in accordance with the Director's brief, that the case be remanded for a Decision and Order on the merits of the overpayment claim.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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 Nelson v. Director, OWCP, 14 BLR 1-159 (1990), and Weis v. Director, OWCP, 16 BLR 1-56 (1990), the Board held that an initial determination of entitlement does not qualify as "erroneous information" for purposes of 20 C.F.R. §410.561f. The administrative law judge's finding that the overpayment must be waived pursuant to 20 C.F.R. §410.561f is therefore vacated. Further, as the Director was not given the opportunity to respond to claimant's motion for summary judgment, and as the administrative law judge did not hold a hearing to determine whether recovery would defeat the purpose of the Act as defined in 20 C.F.R. §410.561c, or be against equity and good conscience as defined in 20 C.F.R. §410.561d, this case is remanded to the administrative law judge so that he may hold a formal hearing on those issues. See 20 C.F.R. §§725.450, 725.452.

¹Claimant has submitted a Motion for Remand. We accept this as claimant's response brief.

Accordingly, the administrative law judge's Decision and Order granting waiver of overpayment is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

I Concur:

LEONARD N. LAWRENCE
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