

BRB No. 91-1071 BLA

JOHN TURIFY)
)
 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 Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Eileen McCarthy (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.

Before: SMITH and BROWN, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director) appeals the Decision and Order (89-BLO-0223) of Administrative Law Judge Joan Huddy Rosenzweig 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) (Supp. V 1987).

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 for benefits on August 24, 1977. The deputy commissioner made an initial determination of entitlement to benefits on July 1, 1980, and claimant was consequently paid interim benefits by the Black Lung Disability Trust Fund. Employer thereafter controverted the claim, and on May 4, 1982, a hearing was held before Administrative Law Judge Reid C. Tait who denied benefits by Decision and Order dated October 21, 1982. On appeal, the administrative law judge's denial was affirmed by the Board. See Turify v. Rochester and Pittsburgh Coal Co., BRB No. 82-2071 BLA (April 25, 1985)(unpublished). Claimant then requested a full waiver of repayment, and if denied, an informal conference. An informal conference was held and the deputy commissioner determined that claimant was able to repay the overpayment. Claimant then requested a hearing before an administrative law judge. At the hearing, the administrative law judge noted that claimant is without fault in receiving the overpayment. The administrative law judge also determined that claimant had not proved that repayment would deprive him of ordinary and necessary living expenses, and as such, repayment would not defeat the purposes of the Act. The administrative law judge next found that claimant has changed his position for the worse and that repayment of the overpayment would, therefore, be against equity and good conscience. See Decision and Order at 5, 6. Accordingly, the administrative law judge waived recovery of the overpayment. On appeal the Director contends that the administrative law judge erred in determining that recovery of the overpayment would be against equity and good conscience as claimant in fact used the overpayment to change his position for the better.¹

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

¹The administrative law judge's findings that claimant is without fault in receiving the overpayment and that claimant had not proved that repayment would defeat the purposes of the Act are not challenged on appeal and therefore are affirmed. Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

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 determining that recovery of the overpayment would be against equity and good conscience, the administrative law judge noted the testimony of claimant and his wife that the black lung benefits were used to repair their residence so that it would be in usable condition until their deaths. See Decision and Order at 6. The administrative law judge then stated that "[b]ut for these interim benefits, claimant and his wife would not have remodeled their house using their retirement savings." See Decision and Order at 6. Accordingly, the administrative law judge found that claimant changed his position for the worse and that repayment would be against equity and good conscience.

The Director contends that claimant has not changed his position for the worse, but has, in fact, changed his position for the better by using the overpayment money to remodel his home. See Director's Brief at 7. After review of the evidence of record and the applicable regulations, we agree with the Director that claimant has not established that he has changed his position for the worse and thus has not established that repayment of the overpayment would be against equity and good conscience. In determining whether repayment of an overpayment would be against equity and good conscience, guidance is provided by the regulations. 20 C.F.R. §410.561d.² The evidence in the instant case indicates that claimant used his black

²In defining the term "against equity and good conscience", Section 410.561d provides an example of changing one's position for the worse. The regulation reads in pertinent part:

§410.561d Against equity and good conscience; defined

"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 that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (example 1); or changed his position for the worse (example 2). In reaching such a determination, the individual's financial circumstances are irrelevant...

Example 2. A widow, having been awarded benefits for herself and daughter, entered her daughter in college because the monthly benefits made this possible. After the widow and her daughter received payments for almost a year, the deceased worker was found not to have had pneumoconiosis and all payments to the widow and child were incorrect. The widow has no other funds with which to pay the

lung benefits to "put a new roof on the house, new porches, new doors, new windows on the house and [he] put [in] a family room, air conditioning." Decision and Order at 4. While the evidence very clearly indicates that claimant incurred expenses which were paid for by his interim black lung benefits, claimant has not established a situation where claimant changed his position for the worse as anticipated by the regulations. See 20 C.F.R. §410.561d, Example 2. Consequently, the administrative law judge's finding that recovery of the overpayment would be against equity and good conscience is not supported by the evidence of record and is therefore reversed. See 20 C.F.R. §§410.561d; 725.542 and 725.543.

Accordingly, the Decision and Order granting waiver of overpayment is reversed.

SO ORDERED.

ROY P. SMITH, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge

daughter's college expenses. Having entered the daughter in college and thus incurred a financial obligation toward which the benefits had been applied, she was in a worse position financially than if she and her daughter had never been entitled to benefits. In this situation, the recovery of the incorrect payments would be inequitable. 20 C.F.R. §410.561d