

BRB No. 91-1784 BLA

ARVIL W. DIMMETT)
)
 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 of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

David O. Kelley, Boonville, Indiana, for claimant.

Helen H. Cox (Thomas S. Williamson, 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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (90-BLO-0003) of Administrative Law Judge G. Marvin Bober denying 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 of \$24,503.30. See Director's Exhibits 6-9. After noting that the district director had determined that claimant was without fault in creating the overpayment and that claimant did not contest the issue of whether

recovery of the overpayment would defeat the purpose of the Act, the administrative law judge, citing *Weis v. Director, OWCP*, 16 BLR 1-56 (1990), found that recovery of the overpayment would neither defeat the purpose of Title IV of the Act nor be against equity and good conscience. See 20 C.F.R. §410.561a *et seq.* Accordingly, the administrative law judge denied waiver of recovery of the overpayment. Claimant appeals, contending that the Board should overrule *Weis*, and that the administrative law judge lacks jurisdiction to order repayment. The Director, Office of Workers' Compensation Programs, responds, asserting that the administrative law judge properly applied *Weis*, and that the administrative law judge has proper jurisdiction.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).

Claimant initially contends that recovery of the overpayment would be against equity and good conscience pursuant to Section 410.561f, as the overpayment resulted from claimant's detrimental reliance upon the "erroneous information" from the district director's office that claimant was entitled to benefits. Claimant's argument is without merit. Section 410.561f, in conjunction with Section 410.561h, provides that recovery of overpayment will be waived when claimant has accepted overpayment because of reliance upon erroneous information from an official source within the administration with respect to the interpretation of a pertinent provision of the Act or regulations pertaining thereto. Claimant maintains that the entire function of the district director is to interpret the pertinent provisions of the Act, which in and of itself requires a factual finding with regard to entitlement. Claimant therefore challenges the Board's holding in *Weis, supra*, that an initial determination of entitlement is not the type of "erroneous information" to which Section 410.561f refers.

¹The administrative law judge's finding that recovery would not defeat the purpose of Title IV of the Act is affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

As the Board noted in *Weis*, the provisions at 20 C.F.R. §725.522(c)² necessarily presuppose an initial determination of entitlement that is subsequently reversed; thus, if said finding of entitlement constituted an erroneous interpretation of the Act or regulations, then Section 410.561f would nullify Section 725.522(c). Such a result would be contrary to basic principles of statutory construction. *Weis, supra*; see also *Nelson v. Director, OWCP*, 14 BLR 1-159 (1990). We decline to depart from our position in *Weis* and *Nelson*, and therefore affirm the administrative law judge's denial of waiver pursuant to Section 410.561f and h. Inasmuch as claimant did not assert, and the record does not reflect, that claimant relinquished a valuable right or changed his position for the worse in reliance upon his receipt of interim benefits, we also affirm the administrative law judge's finding that recovery would not be against equity and good conscience pursuant to Section 410.561d. See *Knope v. Director, OWCP*, 16 BLR 1-59 (1990); Decision and Order at 4-6; Hearing Transcript at 6.

Lastly, claimant contends that the administrative law judge has no statutory or regulatory authority to order repayment. The Board has held that the Office of Administrative Law Judges has subject matter jurisdiction over issues of waiver and recovery of overpayments. *Knope, supra*; *Jones v. Director, OWCP*, 14 BLR 1-80 (1990) (*en banc*, Brown, J., concurring); *Potisek v. Director, OWCP*, 14 BLR 1-87 (1990) (*en banc*) (Brown, J., dissenting). In the instant case, since the administrative law judge denied waiver, he properly ordered recoupment of the overpayment owed by claimant to the Department of Labor in the sum of \$24,503.30. See *generally* 42 U.S.C. §404(a), as incorporated 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); 20 C.F.R. §725.544.

²20 C.F.R. §725.522(c) authorizes recovery of interim benefit payments where it is later determined that claimant was ineligible to receive such payments.

Accordingly, the administrative law judge's Decision and Order denying waiver of recovery of overpayment of interim benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge