

BRB No. 03-0442 BLA

FRANK J. NORMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/29/2004
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Waiver of Overpayment of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Waiver of Overpayment (01-BLO-0962) of Administrative Law Michael P. Lesniak on a miner's 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).<sup>1</sup> The administrative law judge found that

---

<sup>1</sup>The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

claimant was at fault in the creation of the overpayment pursuant to 20 C.F.R. §410.561b(c).<sup>2</sup> Decision and Order at 2-3. Therefore, the administrative law judge concluded that there was no need to address whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience pursuant to 20 C.F.R. §725.542. *Id.* at 3. Accordingly, the administrative law judge denied claimant's request for waiver of recovery of the overpayment.

On appeal, claimant contends that he is without fault in the creation of the overpayment because it arose from retroactive increases in benefits. Claimant's Brief at 3-4. Claimant also asserts that the administrative law judge erred in permitting the Director, Office of Workers' Compensation Programs (the Director), to raise the issue of fault when the Director failed to identify that issue as being in controversy when the claim was forwarded to the Office of Administrative Law Judges (OALJ). *Id.* at 4. In response, the Director has filed a Motion to Remand, asserting that the administrative law judge's finding that claimant was at fault must be vacated and the case remanded for the administrative law judge to determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. Director's Motion to Remand at 7-8.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

A brief procedural history of this case follows. Claimant received a Second Injury Life Award from the State of West Virginia, effective March 15, 1975, of which fifteen percent was for occupational pneumoconiosis. Claimant also received black lung benefits, commencing December 1, 1976. In 1991, the Department of Labor (DOL) informed claimant that he had been overpaid by \$17,821.20 and requested repayment of

---

effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup>The administrative law judge erroneously applied 20 C.F.R. §410.561b(c) in determining that claimant was at fault in the creation of the overpayment inasmuch as revisions to 20 C.F.R. §725.543 (2000) incorporated by reference the Social Security Administration's waiver criteria found at 20 C.F.R. §§404.506-404.512. *See* 20 C.F.R. §725.543.

this amount. Thereafter, claimant requested a hearing before the OALJ. In 1993, Administrative Law Judge John C. Holmes found that claimant was not entitled to a waiver of the overpayment, but did not address claimant's contentions regarding the amount of the overpayment. Claimant appealed Judge Holmes's decision to the Board. In 1995, the Board affirmed, as unchallenged, Judge Holmes's finding that claimant was not entitled to a waiver of recovery of the overpayment. The Board also held that Judge Holmes erred in failing to address whether claimant is entitled to a reduction in the amount of overpayment and remanded the case for him to do so. On remand, Judge Holmes found that the overpayment amount should be reduced by the amounts incurred for medical and legal expenses and remanded this case to the district director. The district director found that claimant was required to repay \$17,803.50. Claimant appealed, and Administrative Law Judge Lawrence P. Donnelly determined that the district director's calculations were correct. Claimant again appealed to the Board, and the Board affirmed Judge Donnelly's decision.

In October of 2000, the district director sent a letter to claimant notifying him that a preliminary finding established that he was without fault in creating the overpayment in the amount of \$17,803.50. In the letter, the district director stated that DOL must recover the overpayment unless claimant could prove that recovery would defeat the purpose of the Act or be against equity and good conscience. Director's Exhibit 1. Claimant was also instructed to complete a questionnaire, which he submitted to DOL on November 2, 2000. Director's Exhibits 1, 3. On June 1, 2001, the district director sent another letter to claimant in which he stated that claimant was at fault in creating the overpayment because claimant had accepted duplicate benefits, which he knew or should have known he was not entitled to receive. Director's Exhibit 5. In addition, the district director determined that claimant failed to show that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience and that claimant had the financial capability to repay the overpayment. *Id.* Claimant disagreed with the district director's findings and requested a hearing before the OALJ. Director's Exhibit 2. The case was transferred to the OALJ where a decision was made on the record pursuant to the parties' request.

The regulations regarding the issue of waiver pursuant to 20 C.F.R. §725.542 state:

There shall be no adjustment or recovery of an overpayment in any case where an incorrect payment has been made with respect to an individual:

- (a) Who is without fault, and where
- (b) Adjustment or recovery would either:
  - (1) Defeat the purpose of title IV of the Act, or
  - (2) Be against equity and good conscience.

20 C.F.R. §725.542. The revised regulation at 20 C.F.R. §725.543 provides that “[t]he standards for determining the application of the criteria listed in §725.542 shall be the same as” the Social Security Administration waiver criteria found at 20 C.F.R. §404.506-404.512.

Claimant asserts that the administrative law judge erred in permitting the Director to raise the issue of fault because the Director failed to identify that issue as being in controversy when the claim was forwarded to the OALJ. Claimant’s Brief at 4. The administrative law judge found “the fact that the [fault] issue was not marked at DX 7” does not “represent the Director’s withdrawal of the issue.” Decision and Order at 2. Therefore, the administrative law judge addressed this issue and found that claimant was at fault in the creation of the overpayment because he accepted a payment that he either knew or could have been expected to know was incorrect. *Id.* at 2-3.

In his Motion to Remand, the Director states that when the case was referred to the OALJ the district director effectively conceded the issue of whether claimant was at fault in creating the overpayment by failing to mark it as a contested hearing issue on the Form CM-1025, which identifies the contested issues to be addressed at the hearing. Director’s Motion to Remand at 6. The Director further states that he did not move to amend the hearing issues after the claim was referred for a hearing and that claimant did not waive the concession by any conduct. *Id.* at 6. Therefore, the Director asserts that the administrative law judge erred in treating the issue of fault as a contested issue and requests that the Board vacate the administrative law judge’s Decision and Order and remand this case for the administrative law judge to render “the necessary factual findings on whether recover would violate the purpose of the Act or contravene against equity and good conscience.” *Id.* at 7-8; 20 C.F.R. §§725.542, 725.543.

We grant the Director’s Motion to Remand this case and hold that the administrative law judge erred in treating the issue of fault as a contested issue. We therefore reverse the administrative law judge’s finding that claimant was at fault in creating the overpayment. We instruct the administrative law judge to determine on remand whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. 20 C.F.R. §§725.542, 725.543.

Accordingly, the administrative law judge's Decision and Order – Denying Waiver of Overpayment is vacated in part and reversed in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge