

BRB No. 90-2295 BLA

HAROLD D. GRALEY)
)
 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 and Decision and Order on Claimant's Motion for Reconsideration of Samuel B. Groner, Administrative Law Judge, United States Department of Labor.

Michelle S. Gerdano (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.

F. Winston Polly, III (District 17, U.M.W.A.), Charleston, West Virginia, for claimant.

Before: DOLDER and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order and Decision and Order on Claimant's Motion for Reconsideration (88-BLO-0132) of Administrative Law Judge

Samuel B. Groner denying waiver of
recovery of overpayment on a claim filed pursuant to the provisions

*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).

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). Claimant filed a claim for benefits on October 24, 1978 and received an initial award of benefits on November 7, 1979. On September 30, 1982, Administrative Law Judge Virginia Lee Brown issued a Decision and Order denying benefits, and on appeal the denial was affirmed by the Benefits Review Board on May 13, 1985. On November 22, 1982, claimant was notified that the amount paid constituted an overpayment which must be repaid. On November 29, 1989, a formal hearing was held on the overpayment issue and, on May 11, 1990, the administrative law judge issued a Decision and Order in which he determined that claimant was overpaid in the amount of \$25,346.00 and that claimant was without fault in causing the overpayment. The administrative law judge then determined that as of July 1992, claimant will have a monthly surplus of income over expenses of \$1,037.25 and that there is no reason in necessity or equity why recovery of the overpayment should be waived. Accordingly, waiver was denied. Claimant then filed a motion for reconsideration of the first Decision and Order and submitted a new statement of income and expenses. In his Decision and Order on reconsideration, the administrative law judge found that the evidence showed a reduced ability to pay (a surplus of \$353.85), but concluded that this evidence does not support waiver of recovery. Accordingly, waiver was again denied. On appeal, claimant contends that his reliance upon the initial determination of entitlement to benefits was a reliance on erroneous information, and that, as a result, the administrative law judge erred in denying waiver. Claimant further contends that recovery would be against equity and good conscience and defeat the purpose of the Act because he changed his position for the worse by purchasing a car in 1980 in reliance upon the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's Decision and Order and Decision and Order on Reconsideration.

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 Weis v. Director, OWCP, 16 BLR 1-56 (1990), and Nelson v. Director, OWCP, 14 BLR 1-159 (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. Thus, claimant's contention regarding his reliance upon erroneous information is without merit, and is therefore rejected.

Claimant further contends that he changed his position for the worse by

purchasing a car in reliance upon the award of benefits. Claimant's argument is without merit. The administrative law judge properly considered the evidence of record and the record of claimant's purchases of cars in 1980, 1984 and 1989 to reject this argument. Further, the administrative law judge considered the evidence of record and permissibly determined that recovery of the overpayment would not be against equity and good conscience or defeat the purpose of the Act. See Potisek v. Director, OWCP, 14 BLR 1-87 (1990)(Brown, J., dissenting); Kuchwara v. Director, OWCP, 7 BLR 1-167 (1984). As a result, the administrative law judge's finding that recovery of the overpayment would not be against equity and good conscience or defeat the purpose of the Act pursuant to 20 C.F.R. §410.561a is affirmed as it is supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Claimant's Motion for Reconsideration denying waiver of recovery of overpayment are affirmed.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge