

BRB No. 91-0338 BLA

GEORGE ROBINSON)
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 Claimant)
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 v.)
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 BETHENERGY MINES INCORPORATED)
)
 Employer-Respondent)
)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)
 Petitioner)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Daniel J. Iler (Ceisler Richman Smith Law Firm), Washington, D.C., for employer.

Christian P. Barber (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order and the Order Denying Motion for Reconsideration (90-BLO-45) issued by Administrative Law Judge Daniel L. Leland in this case involving an 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 in the amount of \$3,078.60, representing the total sum

received by claimant from the Black Lung Disability Trust Fund (Trust Fund) between October 1981 and March 1982, while employer was making duplicate payments to claimant. See Director's Exhibit 12. Upon employer's refusal to comply with the district director's instructions pursuant to an Amended Award of Benefits issued on October 2, 1989, see Director's Exhibits 19, 20, the administrative law judge found that the district director lacked authority to order employer to withhold monthly benefit payments from claimant and to forward the withheld amounts to the Department of Labor until full recovery of the overpayment and interest had been made. Accordingly, the administrative law judge dismissed employer as a party to this action, and remanded this case to the district director to determine whether waiver of recovery of the overpayment was appropriate. On appeal, the Director contends that the administrative law judge erred in finding that the district director exceeded his authority, and in remanding this case for further consideration. Employer responds, urging affirmance. Claimant has not participated in this appeal.

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).

The Director first contends that the administrative law judge erred in finding that the district director lacks authority to order employer to withhold benefit payments from claimant and to forward those sums to the Department of Labor until the full amount of the overpayment made by the Trust Fund has been refunded. The Director maintains that the absence of specific regulatory provisions addressing this situation is not conclusive that no such authority exists; rather, the entire regulatory scheme provides the district director with the authority to take any necessary action in order to effectuate recovery of overpayments. The Director further argues that in exercising its "full supervisory authority over the adjustment of overpayments," 20 C.F.R. §725.547(b), the district director may deem it a "necessary action," 20 C.F.R. §725.547(c), to require employer to withhold an amount equal to the amount of the overpayment and refund it to the Department of Labor, see 20 C.F.R. §725.540(b); that this action follows from the district director's authority to suspend, reduce or terminate the payment of benefits by a responsible operator in the event of overpayment pursuant to 20 C.F.R. §725.532(a); and that the burden imposed on employer by this action is slight and follows incidentally from employer's general and continuing obligation to pay benefits to claimant pursuant to 30 U.S.C. §932, 20 C.F.R. §725.530. We are not persuaded by the Director's arguments, but agree with employer and the administrative law judge that since the Trust Fund made the

overpayment to claimant, the district director

must initiate recovery proceedings against claimant rather than employer pursuant to the provisions at 20 C.F.R. §§725.540 - 725.544. The broader discretion accorded to the district director by Section 725.547 only applies to overpayment disputes between a claimant and a responsible operator, and the provisions at 20 C.F.R. §725.502(a) mandate that employer pay directly to claimant all benefits to which he is entitled under the Act. 20 C.F.R. §§725.502, 725.547. Consequently, we affirm the administrative law judge's finding that the district director lacks authority to direct employer to act as a collection agent for the Trust Fund and to withhold payments from claimant and remit them to the Department of Labor until the overpayment made by the Trust Fund is collected. We also affirm the administrative law judge's dismissal of employer as a party to this action.

The Director further contends that the administrative law judge erred in remanding this case to the district director for consideration of whether waiver of recovery is appropriate. Specifically, the Director asserts that the district director already determined that an overpayment exists, that claimant was not without fault in the creation of the overpayment, and that waiver is not appropriate, and since claimant did not request a hearing or otherwise appeal that determination, the district director's findings are final. The Director's arguments are without merit. The record reflects that on October 29, 1987, the district director made a preliminary determination that claimant was not without fault, see Director's Exhibit 12, to which claimant responded by submitting a completed Overpayment Recovery Questionnaire on November 2, 1987, including an explanation as to why he was without fault. Director's Exhibit 13. The district director requested further documentation from claimant on February 11, 1988, see Director's Exhibit 15, and advised claimant on June 29, 1989 to submit an updated Overpayment Recovery Questionnaire, or a decision would be made on the evidence in the file if the information was not received within thirty days. See Director's Exhibit 16. Claimant complied with the district director's request on July 14, 1989. See Director's Exhibit 17. The district director did not render a final determination as to whether claimant was at fault or whether waiver was appropriate, however; rather, on August 25, 1989, he issued an Order to Show Cause as to why benefit payments should not be suspended, see Director's Exhibit 18, and when claimant failed to respond, issued an Amended Award of Benefits on October 2, 1989, directing employer to withhold monthly benefit payments until recovery of the overpayment plus interest had been made. See Director's Exhibit 19. Inasmuch as the district director exceeded his authority, we agree with the administrative law judge that this case must be remanded for the district director to determine whether claimant was without fault in the creation of the overpayment, see 20 C.F.R. 410.561b, and whether claimant is entitled to waiver of recovery of the overpayment. See 20 C.F.R. §410.561a *et seq.*

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed, and this case is remanded to the district director for further findings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge