

BRB No. 89-0329 BLA

JAY FREEDLINE)
)
 Claimant-Respondent)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order of Summary Judgment of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Creany & Tulowitzki), Ebensburg, Pennsylvania, for claimant.

Jeffrey S. Goldberg (David S. Fortney, Deputy 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, the United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and FEIRTAG, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order of Summary Judgment (87-BLA-2976) of Administrative Law Judge Gerald M. Tierney granting waiver of recovery of overpayment of interim benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal

*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).

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 \$20,489.80, see Director's Exhibit 9, and the administrative law judge accepted the concession of the Director that claimant was without fault in creating the overpayment. At the conclusion of the hearing, the administrative law judge granted claimant's request and issued an Order to Show Cause, directing the Director to show why summary judgment should not be granted. The administrative law judge subsequently issued his Decision and Order of Summary Judgment granting waiver of recovery of the overpayment, as he found that the Director, having conceded that claimant was without fault pursuant to Section 410.561f, had not timely submitted any evidence indicating why summary judgment should not be granted. Moreover, the administrative law judge concluded that claimant had shown that recovery would be against equity and good conscience pursuant to 20 C.F.R. §§410.561f and 410.561h. The Director appeals, challenging the administrative law judge's findings pursuant to Sections 410.561f and 410.561h. Claimant responds, urging affirmance.

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 maintains that, contrary to the administrative law judge's finding, the Director merely conceded that claimant was without fault in creating the overpayment pursuant to Section 410.561b, but he did not concede that claimant was "without fault" within the meaning of Section 410.561f. A claimant is deemed to be "without fault" pursuant to Section 410.561f if he relied on erroneous information from an official source when he accepted the overpayment, and a finding that claimant is "without fault" thereunder automatically triggers a waiver of recovery pursuant to Section 410.561h. The Director, therefore, contends that the administrative law judge's Decision and Order of Summary Judgment is not supported by substantial evidence, as claimant has not established that recovery of the overpayment would be against equity and good conscience pursuant to Sections 410.561f and 410.561h. We agree. A deputy commissioner's initial determination of entitlement does not qualify as the type of "erroneous information" to which Section 410.561f refers, and the record does not otherwise contain any evidence sufficient to support a finding that claimant relied on erroneous information from an official source with respect to the interpretation of a pertinent provision of the Act or regulations. 20 C.F.R. §410.561f. See Knope v. Director, OWCP, BLR , BRB No. 88-3313 (Dec. 27, 1990); Nelson v. Director, OWCP, 14 BLR 1-159 (1990); Weis v. Director, OWCP, BLR , BRB No. 88-2827 BLA (Nov. 28, 1990); Potisek v. Director, OWCP,

14 BLR 1-87 (1990)(en banc)(Brown, J., dissenting). Further, although the Director has conceded that claimant is "without fault" pursuant to Section 410.561b, waiver of recovery is not appropriate unless claimant additionally establishes that recovery would either defeat the purpose of Title IV of the Act, or be against equity and good conscience. See 20 C.F.R. §§410.561a, 410.561c, 410.561d. We therefore vacate the administrative law judge's Decision and Order of Summary Judgment, his findings pursuant to Sections 410.561f and 410.561h, and his finding that waiver of recovery of the overpayment is proper, and we remand this case for the administrative law judge to take such further action as he deems necessary in order to determine whether waiver of recovery is appropriate pursuant to Section 410.561a et seq.¹

¹ We note that claimant declined to introduce evidence concerning his financial status at the hearing, in reliance upon the administrative law judge's expressed intention to grant summary judgment. See Hearing Transcript at 11.

Accordingly, the administrative law judge's Decision and Order of Summary Judgment granting waiver of recovery of overpayment of interim benefits is vacated, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ERIC FEIRTAG
Administrative Law Judge