



File Number:

BLBA BULLETIN NO. 09-01

Issue Date: February 18, 2009

Expiration Date: February 18, 2010

Subject: Liability for Attorney Fees in Overpayment Cases

Background: Previously, the Division of Coal Mine Workers' Compensation policy concerning the liability of attorney fees for work performed in overpayment cases was that the claimant was liable for fees incurred prior to the issuance of a Denial of Waiver and, if s/he was successful in obtaining a waiver or compromise of collection, the Trust Fund was liable for fees incurred after the Denial of Waiver. DCMWC's position was that no adversarial relationship between claimant and OWCP was established unless waiver was denied.

However, the Benefits Review Board has ruled in an unpublished decision, *BRB No. 05-0836 BLA*, that the language of the initial letter notifying the claimant of an overpayment is sufficient to create an adversarial relationship, and the Trust Fund is thus liable for any attorney fees ultimately awarded. The Board's position is that the adversarial relationship is independent of and precedes any denial of waiver.

DCMWC considered changing the language of the initial notice of overpayment, but much of the language contained in the notice is required by the US Treasury, and it was determined that the Board's position that any notice of overpayment triggers TF liability is absolute. Therefore, we see no reason to modify the notice.

The referenced claim was filed prior to January 19, 2001 and was adjudicated under the prior regulations. In claims filed after the effective date of the revised regulations, the TF or Responsible Operator may be liable for fees prior to the creation of an adversarial relationship. Also, the preamble to 20 CFR 725.367 is clear that the Department intended to "encourage attorney involvement in the adjudicatory process..." Because the "successful defense of an overpayment recovery action is, in effect, the successful prosecution of a contested claim..." (Decision and Order, page 3, *BRB No. 05-0836 BLA*), 725.367 applies to overpayment cases as well.

References: PM Chapter 2-1404 §9; 20 CFR 725.367

Purpose: To provide guidance concerning a change in DCMWC procedures in assessing liability for legal fees in claims where overpayments have been made from the Black Lung Disability Trust Fund.

Applicability: Appropriate DCMWC Personnel.

Action: 1) Any attorney fees awarded for successfully representing claimants in overpayment cases where recovery was sought by the Trust Fund should be awarded from the Black Lung Disability Trust Fund.

2) Pen-and-ink changes to BLBA PM 2-1404 §9 should be made as follows, beginning on Page 11 (underlined portions are new):

The Trust Fund also is liable for payment of an attorney fee for services performed to assist a claimant to prevail in any Trust Fund overpayment or other post-entitlement case in which the DD issued a proposed adverse decision or Notice of Overpayment which was finally reversed to the financial advantage of the claimant. ~~Preliminary overpayment notices are not considered adverse decisions.~~

Overpayment recovery or other post-entitlement adverse decisions which could result in Trust Fund liability for payment of attorney fees include, but are not limited to, the following: Notice of overpayment ~~Waiver denial~~, compromise, disputes over onset of benefits, amount of state offset, or dependency augmentation. Examples of typical situations under consideration here are the following:

A beneficiary employs an attorney who helps him to establish an earlier disability onset date.

An attorney helps a beneficiary to establish entitlement to augmentation benefits that were previously denied.

With an attorney's assistance, an ~~previously denied~~ overpayment waiver is granted.

Potential Trust Fund liability in these types of situations attaches on the date of the adverse proposed decision or, in the case of an overpayment, with the initial notice. For example, if a ~~waiver denial subsequently is finally reversed~~, Trust Fund liability for payment of attorney fees ~~commences on the date of the proposed waiver denial~~. If the proposed decision in an onset date dispute is later overturned in the beneficiary's favor, Trust Fund liability attaches on the date the proposed decision was issued and may include necessary work performed by the attorney prior to that date.

Please contact Michael McClaran in BSRP (mcclaran.michael@dol.gov) if you have any questions.

Disposition: Retain this Bulletin until its expiration date or its incorporation into the Black Lung Benefits Procedure Manual.



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Distribution: List No. 3

(All supervisors, claims examiners, and workers' compensation specialists)