

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 19-0428 BLA

ANTHONY L. ST. CLAIR)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BREM COAL COMPANY, LLC)	
)	
and)	
)	
KENTUCKY EMPLOYERS MUTUAL)	DATE ISSUED: 08/31/2020
INSURANCE)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville,
Kentucky, for employer/carrier.

Rebecca Azhdam (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner,
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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge John P. Sellers, III's Decision and Order Awarding Benefits (2018-BLA-05435) rendered on a claim filed on July 28, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). The sole issue in this appeal is whether the administrative law judge erred in finding Claimant's benefits under the Act are not subject to offset.

The procedural history of these proceedings is as follows. On April 6, 2015, Claimant reached a settlement with Hubble Mining Co., LLC, Kentucky Employers Mutual Insurance, and the Kentucky Coal Workers' Pneumoconiosis Fund that resolved his state claim for occupational benefits. Employer's Exhibit 1. The parties agreed to a lump-sum payout of \$18,000, which included \$14,400 specifically allocated as payment for occupational lung disease or coal workers' pneumoconiosis. *Id.*

On July 28, 2016, Claimant filed a claim for federal black lung benefits, which the district director awarded in a proposed decision and order dated August 17, 2017. Director's Exhibits 2, 49. The district director found Claimant's "Kentucky State Worker's Compensation Award is paid out and, therefore, no offset exists." Director's Exhibit 49. Employer submitted a letter on September 6, 2017, asking the district director to "check on" Claimant's state workers' compensation award and issue a revised proposed decision and order including an offset for his state award. Director's Exhibit 61. The district director replied on September 7, 2017, indicating the issue had been "thoroughly researched" and, as Claimant's state award had been received and paid out prior to the filing date for his current federal black lung claim, it did not affect his present federal black lung claim. Director's Exhibit 62. On October 5, 2017, Employer again requested the district director revisit its determination regarding offset. Director's Exhibit 69. The district director responded on October 13, 2017, reiterating that no offset should be charged. Director's Exhibit 70.

At Employer's request, the case was transferred to the Office of Administrative Law Judges for further review. The administrative law judge found the record did not support a conclusion that Claimant's state award was intended to cover any period concurrent with any month in which Claimant received benefits in connection with his federal black lung claim. Therefore, he found Claimant's federal black lung benefits were not subject to offset by his state award.

On appeal, Employer argues the administrative law judge erred in not applying Kentucky state law to find Claimant's federal black lung benefits subject to offset by his state award. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's determination that offset is precluded. Claimant has not filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.¹ 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 Act requires that a claimant's federal black lung benefits be reduced (but not below zero) by the amount of state workers' compensation benefit payments paid to the claimant for total or partial disability or death due to pneumoconiosis for periods during which the claimant is also awarded federal benefits. 30 U.S.C. §932(g), as implemented by 20 C.F.R. §§725.533(a)(1), 725.535(b); *see Harman Mining Co. v. Director, OWCP [Stewart]*, 826 F.2d 1388, 1389-90 (4th Cir. 1987). The district director is to determine any offset upon proof that the state compensation payments were for disability due to pneumoconiosis and for periods concurrent with federal benefit payments. *See* 20 C.F.R. §§725.533(a)(1), 725.535(b); *Stewart*, 826 F.2d at 1390. Where a state award is paid out in a lump sum "as a commutation of or a substitution for periodic benefits," the district director is responsible for "approximat[ing] as nearly as practicable the reduction required" if the state benefits had been paid monthly. 20 C.F.R. §725.535(c).

Employer contends Claimant's state lump sum payment is subject to 20 C.F.R. §725.535(c), and should be divided over the statutory compensable period set forth by Kentucky Revenue Statute, KRS § 342.730.² Employer argues Kentucky law prescribes

¹ The Board will apply the law of the Sixth Circuit because Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

² The statute provides:

For permanent partial disability, if an employee has a permanent disability rating of fifty percent (50%) or less as a result of a work-related injury, the compensable permanent partial disability period shall be four hundred twenty-five (425) weeks, and if the permanent disability rating is greater than fifty percent (50%), the compensable permanent partial disability period

exactly when and how often state workers' compensation benefits must be disbursed and therefore the administrative law judge "ignored applicable law and did not apply the appropriate state law that governs the state award of benefits" in finding Claimant's lump-sum state award and his federal benefits were not concurrent. Employer's Brief at 8.

We reject Employer's assertions. The settlement agreement provided for a lump-sum payment of \$18,000, which included \$14,400 specifically paid to Claimant for an occupational lung condition and coal workers' pneumoconiosis. Director's Exhibit 7 and Employer's Exhibit 1. As the administrative law judge accurately noted, the settlement agreement is silent as to how the award for coal workers' pneumoconiosis benefits was calculated. Decision and Order at 5. The settlement was paid out prior to Claimant's filing his present claim for federal black lung benefits and does not reflect any payment terms. *Id.* It provides no benefit period or approximation of a monthly award of state benefits, and does not indicate the extent of Claimant's disability that is related to pneumoconiosis. *Id.*

We agree with the Director's argument that Employer has not shown on appeal which Kentucky statute is applicable to this case since the settlement agreement itself provides no information regarding the degree of Claimant's permanent or partial disability rating for occupational pneumoconiosis or that the funds were to cover a set time frame. Director's Brief at 5. Moreover, the settlement agreement "provides absolutely no guidance regarding how the lump sum was to be construed under Kentucky law."³ *Id.*

shall be five hundred twenty (520) weeks from the date the impairment or disability exceeding fifty percent (50%) arises.

KRS § 342.730(1)(d).

³ The Director notes "KRS § 342.730 is the general income benefits statute for permanent, partial occupational disability, whereas a second statute - KRS § 342.732 - deals specifically with income benefits for coal workers' pneumoconiosis." Director's Brief at 6 n.1. We agree with the Director that Employer has not explained which statute is applicable, and the settlement agreement "signed by both parties appears to be a broad template which contemplates the application of either or both sections of the statute." *Id.*; see Director's Exhibit 7 or Employer's Exhibit 1 (settlement agreement stating that the lump sum settlement amount is to be paid "[i]n consideration of any claim under KRS 342.732, KRS 342.730, and/or KRS 342.316 in connection with this claim for occupational lung condition/coal workers' pneumoconiosis").

We also reject Employer's assertion that the administrative law judge should have divided Claimant's state lump-sum award by 425 or 520 in order to "approximate as nearly as practicable the reduction required" by 20 C.F.R. §725.535(c). Employer's Brief at 4. As the Director points out, the settlement encompassed more than cash benefits. Director's Brief at 9-10. Employer's contention that its simple formula should be adopted thus would overstate the amount of any cash benefit Claimant would have received. Employer's Brief at 6. Employer failed to submit any evidence as to the value of the other benefits Claimant relinquished that then could have established the value of the cash benefits.

Further, substantial evidence supports the administrative law judge's determination that the record fails to show Claimant was receiving benefits from his lump-sum state award for any month concurrent with his federal award of black lung benefits. *Id.*; see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm his determination that offset of Claimant's federal black lung benefits by his state award is precluded. Decision and Order at 5.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge