



BRB Nos. 18-0610 BLO  
& 19-0068 BLO

JOHNNY P. CLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LAKE ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS'	)	DATE ISSUED: 05/27/2020
PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Order Finding Claimant is Without Fault in Creating Overpayment and Order for Position Statements, Decision and Order Granting Waiver of Adjustment and Overpayment, and Supplemental Decision and Order Award of Attorney's Fee and Costs of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Kathy L. Snyder and Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Alyssa George (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, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Order Finding Claimant is Without Fault in Creating Overpayment and Order for Position Statements, Decision and Order Granting Waiver of Adjustment and Overpayment, and Supplemental Decision and Order Award of Attorney's Fee and Costs (2016-BLO-00003) of Administrative Law Judge Carrie Bland rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves the administrative law judge's findings with respect to an offset and overpayment of federal black lung benefits. The relevant procedural history is as follows.

Claimant filed this claim on November 15, 2011. After the district director issued a Proposed Decision and Order awarding benefits, employer requested a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibits 4, 5. Because employer disputed claimant's entitlement, the Black Lung Disability Trust Fund (Trust Fund) paid interim benefits in the amount \$938.30 per month beginning in October 2012. 20 C.F.R. §725.522(a); Director's Exhibits 4-6. Subsequently Administrative Law Judge Pamela J. Lakes issued a Decision and Order Awarding Benefits on May 12, 2015. Director's Exhibit 7. Employer did not appeal and the award subsequently became final.

Because claimant established entitlement to benefits, the district director issued a pay notice to employer. Employer's Brief at 1-2. The district director indicated claimant's monthly federal black lung benefits should be offset by \$456.20 because of concurrent state workers' compensation benefits awarded to claimant on account of his being disabled in part due to pneumoconiosis. 20 C.F.R. §§725.533(a)(1), 725.535(b); Employer's Brief at 1-2. Taking account of the offset, the district director informed employer it must pay claimant future benefits in the amount of \$501.00 per month starting in September 2015 and retroactive benefits in a lump sum of \$5,785.20 for the period from November 2011 to October 2012. Employer's Brief at 1-2. The latter figure represented payment for the time period from entitlement to when the Trust Fund began paying interim benefits.

Independent of the pay notice issued to employer, the district director also sought recovery of the interim benefits paid from the Trust Fund to claimant from November 2012 to August 2015. Because the payments made to claimant during this interim period

erroneously were not offset by the amount of claimant's state workers' compensation benefits, the district director informed claimant that he was overpaid \$15,510.80 and initiated overpayment proceedings. Director's Exhibit 9. Further, the district director instructed employer to reimburse the Trust Fund in the amount of \$16,655.40 for the portion of the interim benefits claimant was entitled to receive after applying the offset. Employer's Brief at 1-2.

Employer made all its required payments. Claimant sought waiver of the overpayment, which the district director denied. Director's Exhibit 11. Claimant then requested a hearing which was held before Administrative Law Judge Bland (the administrative law judge).<sup>1</sup> Director's Exhibit 16.

The administrative law judge subsequently issued the three decisions and orders that are the subject of this appeal. In an Order Finding Claimant is Without Fault in Creating Overpayment and Order for Position Statements issued on February 13, 2018, she found claimant was not at fault in creating the overpayment.<sup>2</sup> In a Decision and Order Granting Waiver of Adjustment and Overpayment issued on May 4, 2018, she found recovery of the overpayment would defeat the purpose of the Act. Thus she granted claimant's request for a waiver of recovery of the \$15,510.80 overpayment. Moreover, she agreed with claimant that reducing his monthly federal black lung benefits by \$456.20 based on his state workers' compensation benefits would defeat the purpose of the Act. Thus she waived the offset and ordered the district director to reinstate claimant's federal black lung benefits in full. Finally, on August 28, 2018, she issued a Supplemental Decision and Order Award of Attorney's Fee and Costs awarding claimant's attorney's fees totaling \$4,821.72 related to the overpayment proceedings against the Director, Office of Workers' Compensation Programs (the Director); the attorney's fees were to be paid by the Director.

The district director subsequently issued a second pay notice to employer on September 10, 2018, implementing the administrative law judge's findings. Employer's Brief at 2-3. The district director informed employer it must pay claimant additional future benefits and retroactive benefits, and further reimburse the Trust Fund because the offset for claimant's state workers' compensation benefits no longer applied. *Id.*

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<sup>1</sup> Employer was not named as a party in the overpayment claim and thus did not receive notice of the proceeding, appear at the hearing, or otherwise participate in adjudication of the issue. *See* Hearing Transcript.

<sup>2</sup> The administrative law judge found the issue of whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience was not adequately briefed, and thus deferred a finding on this issue until issuing her second Decision and Order.

On appeal, employer argues the administrative law judge exceeded the scope of her authority in finding the offset of claimant's state workers' compensation award against his federal black lung benefits can be waived. Thus it urges reversal of that finding. Employer also argues its due process rights were violated because it did not receive notice to participate in the overpayment proceedings. In addition, it challenges the award of attorney's fees. Claimant responds, urging affirmance of the administrative law judge's waivers of the offset against claimant's federal black lung benefits and of the recovery of the overpayment. The Director responds, agreeing with employer that the administrative law judge erred in waiving the offset for state workers' compensation benefits. Further, the Director does not challenge the administrative law judge's waiver of the recovery of the overpayment.<sup>3</sup> Finally, the Director notes that employer lacks standing to challenge the award of attorney's fees.

The Board's scope of review is defined by statute. The administrative law judge's decisions and orders must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</sup> 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 administrative law judge erred as a matter of law in waiving the offset of claimant's federal black lung benefits for state workers' compensation benefits he concurrently received.<sup>5</sup> The Act requires federal black lung benefits be reduced (but not

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<sup>3</sup> In its initial brief, employer also argues the administrative law judge erred in waiving recovery of the overpayment created due to the district director's failure to apply the offset for claimant's state workers' compensation benefits. In her response, the Director notes that if the Board reverses the administrative law judge's waiver of the offset, then no other adverse findings remain with regard to employer. She asserts reversing this finding nullifies the district director's September 10, 2018 pay order instructing employer to pay claimant increased future benefits and retroactive benefits, and to further reimburse the Trust Fund. Employer filed a reply brief, agreeing with the Director that reversing the administrative law judge's waiver of the offset nullifies the district director's September 10, 2018 pay order and thus the only remaining issue is whether the administrative law judge properly waived recovery of the overpayment.

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1; August 21, 2006 Director's Exhibit 3.

<sup>5</sup> We also agree that the administrative law judge erred in considering the offset issue. Director's Brief at 5 n.2. In any case referred to the Office of Administrative Law

below zero) by the amount of state workers' compensation benefits paid to a claimant for disability, or death due to pneumoconiosis, for periods during which federal benefits are also awarded. 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); *Bennett v. Director, OWCP*, 18 BLR 1-48, 1-49-51 (1994). The reduction of federal benefits "shall be required" on account of a state workers' compensation claim award. 20 C.F.R. §725.533(a)(1). Thus the Act and the regulations are clear that an offset for concurrent state workers' compensation benefits paid on account of partial disability due to pneumoconiosis is mandatory.

In waiving this offset, the administrative law judge erroneously applied the regulations related to the adjustment of monthly federal black lung benefits. 20 C.F.R. §§725.540, 725.542. As the Director notes, once an overpayment is established, those regulations set forth the mechanisms by which an overpayment can be recovered. Director's Brief at 4-5. If a miner "to whom an overpayment was made is living at the time of a determination of such overpayment" and "is entitled to benefits at the time of the overpayment," the regulations authorize an adjustment of his or her entire monthly federal benefits "until an amount equal to the amount of the overpayment has been withheld or refunded." 20 C.F.R. §725.540(b). Under certain circumstances, a partial adjustment of those federal benefits is authorized by withholding only a part of the miner's monthly payments.<sup>6</sup> 20 C.F.R. §725.540(c). Further, the regulations authorize waiver of the

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Judges (OALJ) for a hearing, the district director must provide a "statement . . . of contested and uncontested issues in the claim." 20 C.F.R. §725.421(b)(7). Thus, "the hearing shall be confined to those contested issues which have been identified by the district director . . . or any other issue raised in writing before the district director." 20 C.F.R. §725.463(a). An administrative law judge may consider a new issue "only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director" and the administrative law judge gives the parties notice prior to issuing her decision. 20 C.F.R. §725.463(b). The only issue claimant raised before the district director was the waiver of the overpayment due to the district director's failure to apply the offset. Claimant did not argue before the district director that the offset itself must be waived, nor did the district director indicate this was a contested issue when sending this case to OALJ. 20 C.F.R. §725.463; Director's Exhibit 16. Claimant also does not assert that this issue was not reasonably ascertainable before the district director.

<sup>6</sup> A partial withholding is authorized when withholding the full amount each month would deprive the beneficiary of income required for ordinary and necessary living expenses; the overpayment was not caused by the beneficiary's intentionally false statement or representation, or willful concealment of, or deliberate failure to furnish, material information; and recoupment can be effected in an amount of not less than \$10 a

adjustment, as there shall be no adjustment of monthly federal benefits “with respect to an individual who is without fault and where adjustment or recovery would either defeat the purpose of the Act or be against equity and good conscience.” 20 C.F.R. §725.542. The administrative law judge erroneously characterized the mandatory offset of federal black lung benefits based on the concurrent payment of state workers’ compensation benefits as an adjustment that can be waived. May 4, 2018 Decision and Order at 8-9.

Thus recovery of the \$15,510.80 overpayment due to the district director’s failure to apply the offset provision to the interim benefits the Trust Fund paid claimant from November 2012 to August 2015, can be waived. 30 USC §932(g); 20 C.F.R. §725.542. Consequently, in light of the Director’s concession, we affirm the administrative law judge’s waiver of that overpayment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9. The offset as applied to future federal black lung benefits, however, cannot be waived. 20 C.F.R. §§725.533(a)(1), 725.535(b). We therefore reverse the administrative law judge’s waiver of the offset of claimant’s federal black lung benefits in the amount of \$456.20 per month against future benefits.

We also agree with the Director’s position that employer lacks standing to challenge the award of claimant’s attorney’s fees the administrative law judge issued against the Director in the amount of \$4,821.72 related to the overpayment proceedings. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 742 (6th Cir. 1997); *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193, 1-197 (2002)(en banc); 20 C.F.R. §802.201(a); Director’s Brief at 6. Because the Director did not appeal the August 28, 2018 Order, the award of attorney’s fees is final.

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month and at a rate which would not unreasonably extend the period of adjustment. 20 C.F.R. §725.540(c).

Accordingly, the administrative law judge's Order Finding Claimant is Without Fault in Creating Overpayment and Order for Position Statements and Decision and Order Granting Waiver of Adjustment and Overpayment are affirmed in part and reversed in part, the Supplemental Decision and Order Award of Attorney's Fee and Costs is affirmed, and this case is remanded to the district director for application of the offset of claimant's federal black lung benefits for his concurrent state workers' compensation benefit payments for partial disability due to pneumoconiosis.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge