

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

**NANCY BAILEY, on behalf of  
CHARLIE BAILEY**  
Petitioner

v.

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR**  
Respondent

---

**On Petition for Review of an Order of the Benefits  
Review Board, United States Department of Labor**

---

**BRIEF FOR THE FEDERAL RESPONDENT**

---

**KATE O'SCANNLAIN**  
Solicitor of Labor

**BARRY H. JOYNER**  
Associate Solicitor

**JENNIFER L. FELDMAN**  
Deputy Associate Solicitor

**SEAN G. BAJKOWSKI**  
Counsel for Appellate Litigation

**JEFFREY S. GOLDBERG**  
Attorney  
U. S. Department of Labor  
Office of the Solicitor  
Suite N2117, 200 Constitution Ave. NW  
Washington, D.C. 20210  
(202) 693-5650

**Attorneys for the Director, Office of  
Workers' Compensation Programs**

---

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION.....	1
STATEMENT OF THE ISSUE.....	3
STATEMENT OF THE CASE.....	3
I. Statutory and regulatory background.....	3
II. Factual background.....	4
A. Illinois workers’ compensation settlement.....	4
B. The Bailey’s BLBA claims are awarded on the merits.....	6
C. Decisions below regarding the offset of Mr. Bailey’s state workers’ compensation settlement against his BLBA benefits .....	7
1. The district director’s offset calculation.....	7
2. ALJ Solomon adopts the district director’s offset calculation .....	8
3. The Benefits Review Board affirms .....	9
SUMMARY OF THE ARGUMENT .....	10
ARGUMENT .....	10
I. Standard of review .....	10
II. \$7,461.85 of Bailey’s lump-sum settlement was properly offset against his federal black lung benefits .....	11
A. A portion of the miner’s lump-sum settlement was a substitution for or commutation of periodic state workers’ compensation benefits. ....	13

B. A portion of the period covered by the state settlement overlapped  
with the miner’s entitlement to federal black lung benefits .....14

C. The offset is consistent with the purpose of the BLBA .....17

CONCLUSION ..... 22

STATEMENT REGARDING ORAL ARGUMENT ..... 23

CERTIFICATE OF COMPLIANCE.....24

CERTIFICATE OF SERVICE ..... 25

## TABLE OF AUTHORITIES

### CASES

<i>BedRoc Ltd, LLC v. United States</i> , 541 U.S. 176 (2004).....	17
<i>Burnette v. Director, OWCP</i> , 14 Black Lung Rep. 1-151, 1990 WL 284113 (Ben. Rev. Bd. Nov. 20, 1990) (en banc).....	21
<i>Consolidation Coal Co. v. Director, OWCP</i> , 490 F.3d 609 (7th Cir. 2007) .....	11
<i>Director, OWCP v. Barnes &amp; Tucker Co.</i> , 959 F.2d 1524 (3d Cir. 1998) .....	15
<i>Director, OWCP v. Hamm</i> , 113 F.3d 23 (4th Cir. 1997) .....	16, 17
<i>Freeman v. Harris</i> , 625 F.2d 1303 (5th Cir. 1980) .....	18, 19
<i>Giallianetti v. Indus. Comm'n of Illinois</i> , 315 Ill. App. 3d 721, 734 N.E.2d 482 (2000).....	6
<i>Harman Mining Co. v. Director, OWCP</i> , 826 F.2d 1388 (4th Cir. 1987) .....	8, 15
<i>Lucas v. Director, OWCP</i> , 14 Black Lung Rep. 1-112, 1990 WL 284124 (Ben. Rev. Bd. Aug. 30, 1990) (en banc).....	21
<i>Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.</i> , 984 F.2d 223 (7th Cir. 1993) .....	13
<i>Peabody Coal Co. v. Spese</i> , 117 F.3d 1001 (7th Cir. 1997) (en banc) .....	10

**CASES (cont'd)**

*Rasnake v. Barrenshe Coal, Inc.*,  
2002 WL 34706836 (Ben. Rev. Bd. Nov. 20, 2002)..... 15

*Roberts & Schaefer Co. v. Director, OWCP*,  
400 F.3d 992 (7th Cir. 2005) ..... 10

*Williams v. Bethlehem Steel Corp.*,  
1993 WL 121431 (Ben. Rev. Bd. Mar. 8, 1993)..... 15

*Zeigler Coal Co. v. Director, OWCP*,  
326 F.3d 894 (7th Cir. 2003) (en banc) ..... 10, 11

**STATUTES**

Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-944

Section 401, 30 U.S.C. § 901.....3

Section 401(a), 30 U.S.C. § 901(a)..... 18

Section 422(a), 30 U.S.C. § 932(a).....2

Section 422(f), 30 U.S.C. § 932(g)..... 3, 11, 12

Section 422(l), 30 U.S.C. § 932(l).....7

Illinois Compiled Statutes Annotated

805 Ill. Comp. Stat. 305/8(d)(2) .....6

Longshore and Harbor Workers’ Compensation Act, as amended,  
33 U.S.C. §§ 901-950

33 U.S.C. § 921(a) .....2

33 U.S.C. § 921(b)(3) .....2

33 U.S.C. § 921(c) .....2

**REGULATIONS**

20 C.F.R. § 725.101(a)(18).....2

20 C.F.R. § 725.101(a)(21).....4

20 C.F.R. § 725.203(b)(1).....8

**Regulations (cont'd)**

20 C.F.R. §§ 725.401-421.....2  
20 C.F.R. § 725.420.....8  
20 C.F.R. § 725.502(a)(2).....2  
20 C.F.R. § 725.502(b)(1).....8  
20 C.F.R. § 725.503(b) .....6  
20 C.F.R. § 725.535.....4  
20 C.F.R. § 725.535(b) ..... 4, 11, 15  
20 C.F.R. § 725.535(c) ..... 4, 9, 12, 13, 15  
20 C.F.R. § 725.535(d) .....7

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

---

**No. 20-1075**

---

NANCY BAILEY, on behalf of CHARLES BAILEY,

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent

---

On Petition for Review of an Order of the Benefits Review  
Board, United States Department of Labor

---

BRIEF FOR THE FEDERAL RESPONDENT

---

**STATEMENT OF APPELLATE AND SUBJECT  
MATTER JURISDICTION**

The jurisdictional summary in the appellant's brief is correct and complete. This case involves a claim for disability benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44, filed by former coal miner Charles Bailey (the miner). His right to BLBA benefits is not contested; the only dispute concerns the amount of those benefits. After Mr. Bailey's claim was awarded, an Office of

Workers' Compensation Programs (OWCP) district director determined that the miner's BLBA benefits should be offset by the amount of a lump-sum settlement he received in a state workers' compensation claim.<sup>1</sup> Petitioner Nancy Bailey, on her deceased husband's behalf, disagreed and the matter was referred to the Office of Administrative Law Judges.

On June 18, 2018, Administrative Law Judge Daniel Solomon (the ALJ) issued a decision agreeing with the district director's offset calculation. Mrs. Bailey timely appealed to the Benefits Review Board (Board) on July 14, 2018, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision under 33 U.S.C. § 921(b)(3), as incorporated. On November 20, 2019, the Board affirmed the ALJ's decision.

Mrs. Bailey petitioned this Court for review on January 13, 2020. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated, allows an aggrieved party sixty days to seek review of a final Board decision in the Court of Appeals in which the injury occurred. The injury here—the miner's occupational exposure to coal-mine dust during his employment—occurred in Illinois, within this Court's territorial jurisdiction.

---

<sup>1</sup> OWCP district directors are responsible for administering BLBA claims, collecting evidence, and making recommendations that become binding only if the parties accept them. *See* 20 C.F.R. §§ 725.101(a)(18), 725.401-421, 725.502(a)(2). They often act through claims examiners, as happened in this case. *See, e.g.*, RSA 15, 30-31.

## STATEMENT OF THE ISSUE

The BLBA generally requires that workers' compensation benefits paid for pneumoconiosis be used to offset federal black lung benefits. Charles Bailey settled a state workers' compensation claim related to his pneumoconiosis against his former employer for a lump-sum payment of \$35,000. The settlement agreement states that the lump-sum payment is not a substitute for periodic payments. But it goes on to state that \$27,677.50 of that lump-sum payment (the amount paid to Mr. Bailey himself rather than his attorney) represents benefits at a monthly rate of \$135.67 for seventeen years starting in July 2002 (*i.e.*, until June 2018).

Mr. Bailey was later awarded federal black lung benefits for the 55-month period from November 2011 to May 2016. Because this overlapped with the period covered by the state award, Mr. Bailey's black lung benefits were offset by \$135.67 per month, for a total offset of \$7,461.85.

The question presented is whether Mr. Bailey's black lung benefits were properly reduced by \$7,461.85 due to his state workers' compensation settlement.

## STATEMENT OF THE CASE

### **I. Statutory and regulatory background**

The BLBA provides disability and medical benefits to coal miners who are totally disabled by pneumoconiosis. 30 U.S.C. § 901(a) ("It is . . . the purpose of [the BLBA] to provide benefits . . . in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis[.]"). If a miner receives benefits for disabling pneumoconiosis under a state workers' compensation law, those state benefits are offset against the federal award. 30 U.S.C. § 932(g) ("The amount of

benefits payable under this section shall be reduced, on a monthly or other appropriate basis, by the amount of any compensation received under or pursuant to any Federal or State workmen's compensation law because of death or disability due to pneumoconiosis.”).

The Department has promulgated a regulation, 20 C.F.R. § 725.535, implementing the BLBA's offset provision. Under that regulation, “[b]enefit payments to a beneficiary for any month are reduced (but not below zero) by an amount equal to any payments of State or Federal benefits received by such beneficiary for such month.” 20 C.F.R. § 725.535(b).

The regulation also describes the procedure for determining the proper offset when the state benefits are not paid on a monthly basis: “Where a State or Federal benefit is paid periodically but not monthly, or in a lump sum as a commutation of or a substitution for periodic benefits, the reduction under this section is made at such time or times and in such amounts as the Office [OWCP, *see* 20 C.F.R. § 725.101(a)(21)] determines will approximate as nearly as practicable the reduction required under paragraph (b) of this section.” 20 C.F.R. § 725.535(c).

## **II. Factual background**

### **A. Illinois workers' compensation settlement**

In 2000, Charles Bailey filed a claim under Illinois's workers' compensation law against his former employer, Arch of Illinois (Arch), alleging disability due to his inhalation of coal-mine dust. Appx. 51, 53. On July 17 or 18, 2002, he reached a settlement with Arch. Appx. 51-55.<sup>2</sup> The parties agreed that the miner had

---

<sup>2</sup> The settlement agreement states that it was entered into on July 17, 2002, but is dated the following day. RSA 26, 27. At various points, the decisions below

suffered a fifteen percent impairment and agreed to a lump-sum payment of \$35,000.00. Appx. 51. Of this, \$27,677.50 went to Mr. Bailey, with the remainder representing attorney's fees and expenses. Appx. 52.

The settlement breaks down the \$35,000 payment into three categories:

The parties expressly state and the Industrial Commission having reviewed the medical evidence being otherwise fully advised in the premises finds that the said lump sum amount is not a substitute for periodic payments, but represents:

- (1) Payment of Attorney's fees to Petitioner's counsel in the sum of \$7,000.00;
- (2) Reimbursement of court costs and expenses to Petitioner's counsel in the sum of \$312.50;
- (3) The balance of the settlement proceeds \$27,677.50, after deducting Attorney's fees, court costs and expenses, and medical expenses, represents a compromise agreement of the weekly or monthly benefit of Petitioner from the date the contract was entered into, July 17, 2002, over his life expectancy. The life expectancy of the Petitioner during this period is 17 years. (U.S. Department of Labor, Bureau of Labor Statistics, Revised Work Life Tables) pro rata payments over the period contemplated by this agreement are based on a weekly payment rate of \$31.31 and a monthly payment rate of \$135.67 as and for Petitioner's alleged incapacity to pursue his usual and customary line of employment. Said payments, however, shall be made in a lump sum.

Appx. 54-55, 59-60.

---

describe the agreement as becoming effective on both days. This inconsistency has no impact on this case. For clarity, the remainder of this brief uses the July 17 date because that is the date used in the section of the agreement most relevant to this case.

At another point, the settlement agreement states that the lump-sum payment of \$35,000.00 “represents approximately 15% MAW [man-as-a-whole] or 75.16 weeks of compensation at the PPD [permanent partial disability] rate of \$465.67 per week based on the date of last exposure.” Appx. 57-62.<sup>3</sup> The agreement also notes that the miner’s last day of coal-mine dust exposure was July 28, 1998. Appx. 59.<sup>4</sup>

### **B. The Baileys’ BLBA claims are awarded on the merits**

Mr. Bailey filed this claim for federal black lung benefits on November 21, 2011. Appx. 1-4. On October 10, 2013, an OWCP district director proposed awarding benefits, payable by Arch, commencing as of November 2011. Appx. 20-33.<sup>5</sup> Arch initially contested its liability but, after the company filed for bankruptcy protection, the federally administered Black Lung Disability Trust Fund assumed liability for the claim. Appx. 34-35. The Trust Fund did not

---

<sup>3</sup> Person-as-a-whole is a form of permanent partial disability compensation that generally applies to injuries that “partially incapacitate” workers from performing their “usual and customary” employment duties but do not cause “an impairment in earning capacity.” *Gallianetti v. Indus. Comm’n of Illinois*, 315 Ill. App. 3d 721, 728-89, 734 N.E.2d 482, 488 (2000) (citing 805 Ill. Comp. Stat. 305/8(d)(2)).

<sup>4</sup> Nancy Bailey also settled her potential claims under Illinois law based on her husband’s employment with Arch (including any death claim) for a lump-sum payment of \$5,000. Appx. 56. OWCP initially offset that amount against her BLBA benefits. *See* RSA 15. Before the ALJ, the Director agreed with Mrs. Bailey that her survivors’ benefits under the BLBA should not be offset by this lump-sum payment. RSA 9. That settlement is therefore not relevant to this appeal.

<sup>5</sup> BLBA disability benefits are awarded from the date a miner becomes totally disabled by pneumoconiosis which, in the absence of other evidence, is assumed to be “the month during which the claim was filed.” 20 C.F.R. § 725.503(b).

challenge the miner's entitlement to benefits, so the ALJ remanded the case to the district director for payment from the Trust Fund. *Id.*

The miner died on June 8, 2016, shortly after his claim was remanded to the district director. Appx. 36. His widow, petitioner Nancy Bailey, filed a claim for survivor's benefits later that month. Appx. 37-38. The district director awarded benefits pursuant to 30 U.S.C. § 932(I), which allows certain qualifying survivors of miners who are awarded BLBA disability benefits to obtain survivor's benefits without proving that pneumoconiosis caused or hastened the miner's death. Appx. 152-164.

**C. Decisions below regarding the offset of Mr. Bailey's state workers' compensation settlement against his BLBA benefits.**

**1. The district director's offset calculation.**

On remand, the district director determined that the miner's BLBA benefits should be offset by a portion of his state workers' compensation settlement. Required Short Appendix (RSA) at 15-19, 30-34. This determination was based primarily on the language of the settlement agreement. The district director explained that, under the agreement, Bailey's \$27,677.50 lump-sum payment covered the period from July 17, 2002 (when the settlement was executed) through June 2018 (based on Bailey's 17-year life expectancy at that time).<sup>6</sup> RSA 30; *see also* RSA 26 (text of the agreement). The agreement also provided that the lump-sum award was based on a "specific monthly rate of \$135.67[.]" *Id.*

---

<sup>6</sup> The portion of Bailey's lump-sum settlement attributable to attorney's fees and costs was not offset against his BLBA benefits. *See* 20 C.F.R. § 725.535(d) (excluding "[a]mounts paid or incurred or to be incurred by the individual for medical, legal, or related expenses" from offset against BLBA awards).

The district director next pointed out that Bailey was entitled to BLBA benefits from November 2011 (when his BLBA claim was filed) to May 2016 (the month before he passed away).<sup>7</sup> RSA 30. Because those 55 months overlapped with the period covered by the state settlement, the district director reduced each of Mr. Bailey's monthly BLBA benefits by \$135.67. *Id.* The total amount of the offset was therefore \$7,461.85.<sup>8</sup> Mrs. Bailey did not accept the district director's offset calculation and the matter was referred to the ALJ.

## **2. ALJ Solomon adopts the district director's offset calculation.**

The ALJ held that the district director had properly reduced Mr. Bailey's BLBA benefits by \$135.67 per month, explaining that the offset calculation was both reasonable and consistent with the regulations. RSA 10. The ALJ rejected Mrs. Bailey's reliance on *Harman Mining Co. v. Director, OWCP*, 826 F.2d 1388 (4th Cir. 1987), which rejected an employer's argument that state benefits should be offset against a federal award. He distinguished that case on the ground that the state and federal awards in *Harman Mining* were for entirely different periods of

---

<sup>7</sup> BLBA benefits for a given month are not due until the fifteenth day of the following month. 20 C.F.R. § 725.502(b)(1). A miner's entitlement to benefits ends "the month before the month during which the miner . . . dies." 20 C.F.R. § 725.203(b)(1).

<sup>8</sup> The Trust Fund had already paid Mr. Bailey his full monthly BLBA benefits, without offset, on an interim basis from October 2013 (when the district director issued the proposed decision awarding the claim) through May 2016. Appx. 5-33; *see generally* 20 C.F.R. § 725.420. The \$4,341.44 offset for the 32-month interim benefit period was recovered by reducing the Trust Fund's still-outstanding obligation to pay back benefits (i.e., benefits for the period from November 2011 through September 2013) by that amount. Benefits owed for the 23-month back-benefit period itself were also reduced by \$135.67 per month, for a total offset of \$7,461.85.

time, explaining that “no part of” the *Harman Mining* claimant’s “state award was concurrent with claimant’s federal award[.]” RSA 11. In this case, by contrast, “the sum of \$27,677.50 represented an agreement on the amount of weekly or monthly benefits Mr. Bailey was entitled to from July 17, 2002, when the agreement was entered into, over his life expectancy of 17 years.” *Id.* Because this substantially overlapped with Mr. Bailey’s period of entitlement to federal BLBA benefits, an offset was required. RSA 15-19, 30-34.

### **3. The Benefits Review Board affirms.**

Mrs. Bailey timely appealed to the Benefits Review Board, which affirmed the ALJ’s decision. The Board rejected Mrs. Bailey’s argument that her husband’s state award did not overlap with his period of federal entitlement, holding that the settlement agreement described the lump-sum payment as representing seventeen years of benefits beginning in July 2002. RSA 5. It also held that the settlement agreement’s disclaimer that the full \$35,000 “lump sum amount is not a substitute for periodic payments” did not mean that the \$27,677.50 directly awarded to Mr. Bailey was not a substitute for monthly payments for purposes of 20 C.F.R. § 725.535(c). RSA 6. Finally, the Board rejected Mrs. Bailey’s argument that offset should be denied because it contravened the BLBA’s purpose of providing compensation to disabled miners and the settlement agreement had been written by counsel for Arch. The Board noted that the miner received all the compensation he was entitled to under the BLBA and that the miner had been represented by an attorney when he signed the agreement. RSA 6 and n.11. This appeal followed.

## SUMMARY OF THE ARGUMENT

The BLBA and its implementing regulations required the district director and ALJ to offset any state workers' compensation benefits awarded due to pneumoconiosis from a miner's federal black lung award. These rules were properly applied below. Mr. Bailey's settlement agreement states that \$27,677.50 of the \$35,000 lump-sum payment "represents a compromise agreement" of Bailey's "weekly or monthly benefits" from July 17, 2002, "over his life expectancy" of 17 years. Appx. 60. It further specifies that "pro rata payments over the period contemplated by this agreement are based on . . . a monthly payment rate of \$135.67." *Id.* Because 55 months of that 17-year period overlapped with Bailey's entitlement to federal BLBA benefits, those benefits were properly reduced by \$7,461.85 (135.67 x 55). The decisions below should be affirmed.

## ARGUMENT

### **I. Standard of review**

The issues addressed in this brief are both legal and factual in nature. The Court reviews legal questions *de novo*. *Roberts & Schaefer Co. v. Director, OWCP*, 400 F.3d 992, 996 (7th Cir. 2005) (citations omitted). The Director's interpretation of the BLBA and its implementing regulations is, however, entitled to deference. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 901 (7th Cir. 2003) (en banc); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1007 (7th Cir. 1997) (en banc).

In reviewing an ALJ's factual findings, the Court cannot overturn the ALJ's decision if it is "rational, supported by substantial evidence and consistent with

governing law.” *Consolidation Coal Co. v. Director, OWCP [Bailey]*, 721 F.3d 789, 793 (7th Cir. 2013) (citation omitted). “Substantial evidence is that which a reasonable mind might accept as adequate to support a particular conclusion.” *Zeigler Coal Co. v. Director, OWCP*, 490 F.3d 609, 614 (7th Cir. 2007) (internal citations omitted).

## **II. \$7,461.85 of Bailey’s lump-sum settlement was properly offset against his federal black lung benefits.**

As the ALJ and Board held, the district director correctly offset \$7,461.85 of Mr. Bailey’s \$35,000 Illinois workers’ compensation settlement against his federal black lung benefits. This result was compelled by the plain language of the BLBA, its implementing regulations, and the agreement settling Mr. Bailey’s state workers’ compensation claim.

The BLBA provides that benefits “shall be reduced, on a monthly or other appropriate basis, by the amount of any compensation received under or pursuant to any Federal or State workmen’s compensation law because of death or disability due to pneumoconiosis.” 30 U.S.C. § 932(g). Mrs. Bailey does not dispute that \$27,677.50 of that \$35,000 settlement was compensation her husband received under Illinois law because of his disabling pneumoconiosis.

The decisions below correctly recognized that only a portion of that \$27,677.50 should be offset because the regulation implementing section 932(g) limits offsets to concurrent awards. *See* 20 C.F.R. § 725.535(b) (“Benefit payments to a beneficiary *for any month* are reduced (but not below zero) by an amount equal to any payments of State or Federal benefits received by such beneficiary *for such month.*”) (emphasis added). Mr. Bailey’s state settlement

covered the period from July 2002 to June 2018. Appx. 60; *see supra* at 3. His entitlement to federal BLBA benefits ran from November 2011 to May 2016. *Id.* Therefore, only the 55 months of concurrent benefits were subject to offset. Because the state settlement was based on a payment rate of \$135.67 per month for those 55 months, the total offset was correctly calculated at \$7,461.85.

The fact that Mr. Bailey received his state settlement payment in a lump sum rather than periodically does not change this result. The statute does not limit offsets to state workers' compensation payments that are received periodically. 30 U.S.C. § 932(g). And the implementing regulation expressly provides that lump-sum payments are subject to offset:

Where a State or Federal benefit is paid . . . in a lump sum as a commutation of or a substitution for periodic benefits, the reduction under this section is made at such time or times and in such amounts as the Office [OWCP, *see* 20 C.F.R. § 725.101(a)(21)] determines will approximate as nearly as practicable the reduction required under paragraph (b) of this section.

20 C.F.R. § 725.535(c).

Mrs. Bailey alleges three main errors in this analysis. First, she argues that the miner's lump-sum settlement was not "a commutation of or a substitution for periodic benefits" for purposes of 20 C.F.R. § 725.535(c). Second, she argues that the lump-sum settlement was not concurrent with the miner's receipt of federal black lung benefits because he actually received the lump sum long before he received any federal benefits. Finally, she argues that the offset is inconsistent with the purpose of the BLBA. As explained below, these arguments are without merit.

**A. A portion of the miner's lump-sum settlement was a substitution for or commutation of periodic state workers' compensation benefits.**

Petitioner's primary argument is that the miner's lump-sum settlement cannot be offset against his BLBA benefits because it was not a "a commutation of or a substitution for periodic benefits" as allegedly required by section 725.535(c). Pet. bf. 14-17. This claim is based on a disclaimer in the settlement agreement itself, which states that the \$35,000 lump-sum payment "is not a substitute for periodic payments[.]" Appx. 54. This, in petitioner's view, means that the entire \$35,000 lump-sum payment is ineligible for offset.

Interpreted this way, the "not a substitute for periodic payments" disclaimer simply defies reality. The agreement specifically states that \$27,677.50 of the lump-sum payment "represents a compromise agreement of the weekly or monthly benefit of Petitioner from the date the contract was entered into" for 17 years (his projected life expectancy). Appx. 54. It then goes on to explain that the \$27,677.50 figure is "based on a weekly payment rate of \$31.30 and a monthly payment rate of \$135.67" but that "[s]aid payments, however, shall be made in a lump sum." *Id.* There is no way to reasonably interpret this as anything other than a commutation or substitution of periodic benefits into a lump-sum payment—and that is how the ALJ interpreted it. The disclaimer cannot change the fundamental nature of this transaction, which is eligible for offset under 20 C.F.R. § 725.535(c).

If there was an irreconcilable conflict between the disclaimer language and the section of the agreement detailing the basis for Mr. Bailey's \$27,677.50 payment, the latter, more detailed provision should control. *See Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 984 F.2d 223, 227 (7th Cir. 1993) ("It is

a well-settled principle of contract construction that where a contract contains both general and specific provisions relating to the same subject, the specific provision controls”). But there is no need to excise the disclaimer from the settlement contract on absurdity grounds. As the district director, ALJ, and Board all pointed out, there is a perfectly reasonable way to interpret the document that gives meaning to both the disclaimer and the computation of the lump-sum owed to Mr. Bailey.

Immediately after the disclaimer stating that the \$35,000 lump-sum payment is not a substitute for periodic payments, the agreement breaks down the three components of that figure: \$7,000 in attorney’s fees; \$312.50 in costs; and the \$27,677.50 “compromise” payment described above. Appx. 54. Reading these provisions in concert, the disclaimer is true: the full \$35,000 lump-sum payment is not a substitute for periodic payments. Only \$27,677.50 of that payment is a substitute for periodic payments and therefore eligible for offset against the miner’s federal BLBA award. The remainder, representing attorney’s fees and costs, is not a substitute for periodic payments and therefore not subject to offset. The decisions below are based on this reasonable construction of the settlement agreement and should be affirmed.

**B. A portion of the period covered by the state settlement overlapped with the miner’s entitlement to federal black lung benefits.**

Mrs. Bailey next argues that the settlement was paid out before the miner’s federal benefits were awarded and thus cannot be deemed concurrent with the miner’s federal award. It is true that “Mr. Bailey never *received* payments for

federal and state benefits in the same month.” Pet. bf. 19 (emphasis added). But that fact is irrelevant. The plain language of the regulation shows that concurrency is concerned with the period for which benefits are paid, not when those benefits are actually received. And those periods did overlap here.

Under 20 C.F.R. § 725.535(b), BLBA benefits “for” a given month are offset by state benefits received “for”—not “in”—that same month.<sup>9</sup> This language is fatal to Petitioner’s concurrency argument. The miner may have received the \$27,677.50 lump-sum payment in 2002, but that amount represented benefit payments for the period from July 2002 through June 2018. *See supra* at 3. Fifty-five months of that period were concurrent with his entitlement to federal BLBA benefits. *Id.*

Mrs. Bailey’s reliance on *Harman Mining v. Director, OWCP*, 826 F.2d 1388 (4th Cir. 1987), is misplaced for the same reason. In *Harman Mining*, the court affirmed an ALJ’s decision not to offset the miner’s federal benefits because “no part of claimant’s . . . state award was concurrent with claimant’s federal award, since that award covered benefits for a period ending before claimant became entitled to federal benefits[.]” 826 F.2d at 1389. We do not dispute that holding. But it has no bearing on this case, because there was a 55-month period where Mr. Bailey’s entitlement to state and federal benefits overlapped.<sup>10</sup> State

---

<sup>9</sup> 20 C.F.R. § 725.535(b) speaks directly to offsets of monthly state benefits. But 20 C.F.R. § 725.535(c) directs OWCP to calculate offsets of lump-sum payments in a way that “will approximate as nearly as practicable the reduction required under paragraph (b) of this section.”

<sup>10</sup> Mrs. Bailey also cites *Director, OWCP v. Barnes & Tucker Co.*, 959 F.2d 1524 (3d Cir. 1998); *Rasnake v. Barrenshe Coal, Inc.*, 2002 WL 34706836 (Ben. Rev. Bd. 2002); and *Williams v. Bethlehem Steel Corp.*, 1993 WL 121431 (Ben. Rev.

benefits for that period were properly offset against his federal award.

Mrs. Bailey further maintains that the Director has adopted inconsistent positions regarding concurrent payments in this case by relying on *Director, OWCP v. Hamm*, 113 F.3d 23 (4th Cir. 1997), before the ALJ, then not citing it before the Board. Pet. bf. at 19-20. Petitioner cites no authority for the proposition that a party must not only maintain consistent positions in a case, but also maintain consistent *case citations* in support of those positions to every tribunal that hears a case. And there is no inconsistency in the Director's position here: she has consistently argued that \$7,461.85 of Mr. Bailey's state workers' compensation settlement should be offset against his BLBA award.

In *Hamm*, the Fourth Circuit affirmed the district director's decision to (1) aggregate all four of the miner's state awards (three for partial disability, one for total disability) and (2) offset fifty percent of the combined award (the portion attributable to pneumoconiosis) against his federal BLBA award. The court agreed, reversing the Board and holding that the district director acted in accordance with both West Virginia and federal law in calculating the offset. 113 F.3d at 25.

In any event, the Director cited *Hamm* for two propositions in the "Legal Standard" section of her brief before the ALJ:

---

Bd. 1993) for the proposition that claimants should not be "deprived of the federally-secured minimum benefit level[.]" Pet. bf. 19. These cases are irrelevant because, as explained *infra* at 18, Mr. Bailey actually received more compensation than he would have been entitled to under either the BLBA or Illinois workers' compensation law alone.

- “‘Congress did not intend that the federal government would become the primary benefits provider’ when it passed the Black Lung Benefits Act. Instead, the Act contemplates that state programs will remain the primary providers of disability payments and that the Act will only pay benefits ‘if the state program is not adequate.’” Appx. 94 (quoting *Hamm*, 113 F.3d at 25) (citations omitted).
- “The offset provisions of the Act are sensible and ensure that the monies set aside in the [Black Lung Disability Trust] Fund are protected and directed towards miners who are not already receiving state benefits.” Appx. 94 (citing *Hamm*, 113 F.3d at 25).

The Director stands by both points.

**C. The offset is consistent with the purpose of the BLBA.**

Finally, Mrs. Bailey argues that the district director’s computation of the offset, adopted by the ALJ and affirmed by the Board, is contrary to Congressional intent in enacting the BLBA. Pet. bf. at 21-25. As an initial matter, there is no need to appeal to the purpose of the Act because the offset here is supported by the plain language of the statute and its implementing regulations. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (Statutory interpretation “begins with the statutory text, and ends there as well if the text is unambiguous.”). In any event, the decisions below are entirely consistent with the BLBA’s purpose.

The purpose of the statute is “to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure

that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.” 30 U.S.C. § 901(a). This is exactly what the district director and ALJ did here. They awarded federal benefits, offset by the amount the miner received from his employer in the state settlement that covered the same period of time.

Petitioner suggests at multiple points that, because of the offset, Mr. Bailey received less than the amount he was entitled to under either the BLBA or Illinois workers’ compensation law. *See* Pet. bf. at 13, 18-19, 21-26. But he actually received more than he would have gotten under either law alone. Under state law, he received the amount of the settlement, \$27,677.50.<sup>11</sup> Absent the offset, he would have been entitled to a total of \$52,088.60 in BLBA benefits. RSA 16-18. The \$7,461.85 offset reduced his BLBA entitlement to \$44,626.75. Still, the total amount he received (\$72,304.25) substantially exceeded the amount he was entitled to under either federal or state law.

This fact undermines Mrs. Bailey’s reliance on *Freeman v. Harris*, 625 F.2d 1303 (5th Cir. 1980). *Freeman* held that the Social Security Administration (which was then administering certain BLBA claims) erred by offsetting a state workers’ compensation award against both a social security disability award and a BLBA award. As a result of this double offset, the amount Freeman received from the three programs in total (\$479.70 per month) was lower than the \$601.70 per month he would have received if he had never filed the state workers’

---

<sup>11</sup> Of course, he may have been entitled to more under state law had he successfully litigated that claim rather than settling it. But there is no justification for assuming that he would have for purposes of evaluating the offset.

compensation claim. *Id.* at 1305. The court reasoned that this result would discourage future claimants from filing for state benefits, thereby contravening Congress' intent "to insure that state workers' compensation programs are the primary providers and to insure that the federal government is involved only when state programs are not sufficient." *Id.* at 1307-09.

In contrast to *Freeman*, the instant case involves a single offset rather than a double offset. And, despite the offset, Mr. Bailey received more disability compensation than he would have under either the BLBA or Illinois law alone. In short, the miner received all benefits to which he was entitled.

Finally, Mrs. Bailey argues that, if an offset was required, it should have been calculated differently. Pet. bf. 26-30. She proposes three alternative computation methods that would have the effect of significantly reducing or entirely eliminating the offset. These arguments should be rejected as they were by the ALJ and Board.

The first two alternatives are based on language in the settlement agreement stating that "[t]he amount of \$35,000.00 represents approximately 15% MAW or 75.16 weeks of compensation at the PPD rate of \$465.67 per week based on the date of last exposure." From this, Mrs. Bailey argues that the lump-sum payment (1) represented benefits that would have been owed over a period of 75 weeks starting in July 1998 (when her husband was last exposed to coal-mine dust in Arch's employ) rather than 17 years beginning in July 2002; and (2) should have been eroded at a rate of \$456.67 per week rather than \$135.67 per month. Pet. bf. 26-27.

The problem with these arguments is that the quoted language from the

agreement is vague, particularly when compared to the detailed explanation of what the settlement represents given later in the document. For example, the import of the statement that the permanent partial disability rate was “based on” the last exposure date is far from clear. It could easily mean that was the date from which the payment rate was determined (perhaps based on Bailey’s salary or the state’s maximum compensation rate), rather than the date from which any award would commence. And if there was evidence substantiating the Mrs. Bailey’s theories, it was not produced below.

In any event, given this lack of clarity, the Board permissibly relied on the more detailed section of the settlement contract that divides the \$35,000 lump sum into \$7,312.50 for attorney’s fees and expenses (which are wholly unaccounted for in the ‘\$456.67 per week for 75.16 weeks’ formulation) and a \$27,677.50 payment to Mr. Bailey. RSA 5 (Board). That section intelligibly explains that the \$27,677.50 “represents a compromise agreement of the weekly or monthly benefit of Petitioner from the date the contract was entered into, July 27, 2002, over his life expectancy” of 17 years and “based on . . . a monthly payment rate of \$135.67[.]” Appx. 55. To the extent that there is a conflict between the two sections of the agreement, the tribunals reasonably relied on the more specific and detailed one.

Mrs. Bailey’s third alternative--that only 15% of the \$7,461.85 portion of the lump-sum settlement that overlapped with the miner’s BLBA entitlement should have been offset against his federal black lung benefits because the settlement was based on a 15% permanent partial disability due to pneumoconiosis—cannot withstand even minimal scrutiny. Pet bf. 27-29. Notably, both of the cases she

relies on for this claim, *Lucas v. Director, OWCP*, 14 Black Lung Rep. 1-112, 1990 WL 284124 (Ben. Rev. Bd. Aug. 30, 1990) (en banc), and *Burnette v. Director, OWCP*, 14 Black Lung Rep. 1-151, 1990 WL 284113 (DOL Ben. Rev. Bd. Nov. 20, 1990), involved claimants who received combined state workers' compensation awards for partial disability due to both pneumoconiosis and unrelated workplace injuries. In that circumstance, it makes sense to offset only the portion of the state award attributable to pneumoconiosis against the miner's federal benefits. But this case presents a different situation. Mr. Bailey's state settlement was not based on him being 15% disabled by pneumoconiosis and 85% disabled by other injuries. It was based solely on a 15% disability due to pneumoconiosis. The \$7,461.85 portion of the settlement representing benefits that overlapped with his entitlement to BLBA benefits was therefore properly offset against his federal black lung award.

**CONCLUSION**

The decision below should be affirmed.

Respectfully submitted,

KATE S. O'SCANLAIN  
Solicitor of Labor

BARRY H. JOYNER  
Associate Solicitor

JENNIFER L. FELDMAN  
Deputy Associate Solicitor

SEAN G. BAJKOWSKI  
Counsel for Appellate Litigation

/s/ Jeffrey S. Goldberg  
JEFFREY S. GOLDBERG  
Attorney  
U.S. Department of Labor  
Office of the Solicitor  
Suite N-2117  
Frances Perkins Building  
200 Constitution Ave., N.W.  
Washington, D.C. 20210  
Telephone: (202) 693-5650  
Facsimile: (202) 693-5687  
E-mail: [blils-sol@dol.gov](mailto:blils-sol@dol.gov)

Attorneys for the Director, Office  
of Workers' Compensation Programs

**STATEMENT REGARDING ORAL ARGUMENT**

The Director does not believe that oral argument is necessary to resolve this case, but stands ready to present argument if the Court believes it will be helpful.

## **CERTIFICATE OF COMPLIANCE**

This brief was produced using Microsoft Word, in Times New Roman font, 14-point typeface, and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief also complies with the word limitation set forth in 7th Cir. R. 32(c) because it contains 5601 words.

/s/ Jeffrey S. Goldberg  
JEFFREY S. GOLDBERG  
Attorney

## CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2020, an electronic copy of this brief was served through the CM/ECF system on the following:

Robert S. Seer, Esq.  
ELLIS LEGAL, P.C.  
200 W. Madison St., Suite 2670  
Chicago, IL 60606  
(312) 767-3279  
rseer@ellislegal.com

s/ Jeffrey S. Goldberg  
JEFFREY S. GOLDBERG  
Attorney