

BRB No. 92-1978 BLA

SAMUEL PICKENS)

Claimant-Respondent)

v.)

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

DATE ISSUED:

Petitioner) *En Banc*

) DECISION and ORDER

Appeal of the Decision and Order of Eric Feirtag, Administrative Law Judge, United States Department of Labor.

Samuel Pickens, Bim, West Virginia, *pro se*.

Rodger Pitcairn (Thomas S. Williamson, Jr., 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: HALL, Chief Administrative Appeals Judge, SMITH, BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (91-BLO-84) of Administrative Law Judge Eric Feirtag ordering claimant to repay the Black Lung Disability Trust Fund (the Trust

Fund) for overpayments received on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The pertinent procedural history is as follows. On October 5, 1977, the West Virginia Workmen's Compensation Fund granted claimant a fifteen percent permanent partial disability award, equal to sixty weeks of compensation, for occupational pneumoconiosis. Director's Exhibits 6, 12. The West Virginia Workmen's Compensation Fund additionally

granted claimant a forty-five percent permanent partial disability award for a leg injury, with a later increase to fifty percent permanent partial disability. Director's Exhibit 12. Subsequently, on December 19, 1979, the West Virginia Workmen's Compensation Fund further increased claimant's permanent partial disability award for his leg injury to seventy percent, and additionally found that the combined effects of claimant's leg injury and his fifteen percent permanent partial disability due to occupational pneumoconiosis had rendered claimant permanently and totally disabled and therefore granted claimant a second injury life award, which provides compensation on a permanent total disability basis.¹ Director's Exhibit 12. In October of 1980, claimant was awarded federal black lung benefits, with payments commencing as of June of 1978.² Director's Exhibit 1. By letter dated November 21, 1980, the Department of Labor informed claimant of his obligation to notify the Department of any change in his marital status or dependency status or "any award for Black Lung benefits through any other Federal or State Agency." Director's Exhibit 31. Claimant's subsequent failure to inform the Department of Labor that fifteen percent of his second injury life award was due to pneumoconiosis resulted in claimant being overpaid federal black lung benefits. Director's Exhibit 31. The district director's finding that claimant was at fault in the creation of the overpayment was affirmed by Administrative Law Judge Robert J. Shea on November 20, 1990, who remanded the case to the district director for re-computation of the overpaid amount.³ Director's Exhibits 19, 26, 31. After re-computation, the overpayment

¹ Under West Virginia law, a claimant is presumed totally (one hundred percent) disabled upon establishing a minimum of eighty-five percent permanent partial disability. See W.Va. Code §23-4-6(d)(West Supp. 1986); *Linville v. State Workmen's Compensation Commissioner*, 236 S.E.2d 41 (W.Va. 1977).

² By Decision and Order dated April 5, 1982, F and F Mining Corporation was dismissed under the transfer provisions of the Act, and claimant's federal black lung benefits became the responsibility of the Black Lung Disability Trust Fund. Director's Exhibit 3.

³ The Director had originally calculated the overpayment to be \$11,041.99, using a formula in which the total percentage of disability considered by the state (eighty-five percent) was divided into the percentage of the award attributable to occupational pneumoconiosis (fifteen percent). Director's Exhibit 26, at pp. 28-9. On remand, the Director recalculated the overpayment, consistent with *Lucas v. Director, OWCP*, 14 BLR 1-112 (1990)(*en banc* with McGranery, J. dissenting), using a new formula in which the overpayment is computed to be fifteen percent of the one hundred percent total. Director's Exhibits 31, 33.

totalled \$9,652.88, representing that portion of the state second injury life award benefits received as compensation for disability due to occupational pneumoconiosis. Director's Exhibit 33. The district director then noted that claimant had paid \$7,599.98 in attorney's fees in order to obtain the second injury life award. Applying the regulations at 20 C.F.R. §725.535(d), the district director determined that as fifteen percent of claimant's state award was attributable to pneumoconiosis, therefore fifteen percent of claimant's attorney's fees should be credited towards his overpayment, and thus the district director reduced the award by fifteen percent, or \$1,139.99, resulting in an adjusted overpayment of \$8,512.89.⁴ Director's Exhibit 33. Claimant contested the district director's determination and on April 4, 1991, this case was referred to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 34, 35.

The sole issue presented for adjudication before the administrative law judge was the extent to which the sum which claimant is obligated to repay to the Trust Fund should be reduced in light of the legal expenses he incurred in connection with obtaining his state awards, as required by the regulations at 20 C.F.R. §725.535(d). The administrative law judge found that, pursuant to Section 725.535(d), the total amount of claimant's legal expenses should be deducted from his overpayment, and thus ordered claimant to repay the Trust Fund \$2,053.00, rather than the \$8,512.89 which the Director seeks to recover. On appeal, the Director contends that the administrative law judge erred in failing to defer to the Director's method of calculating the overpayment pursuant to Section 725.535(d). Claimant has not participated on appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

⁴ Fifteen percent of \$7,599.98 (the amount spent on attorney's fees) is \$1,139.99. The district director subtracted \$1,139.99 from the total overpayment amount of \$9,652.88 for an adjusted overpayment of \$8,512.89. Director's Exhibit 33.

Initially, we note that under the Act, concurrent state and federal benefits for contracting pneumoconiosis are duplicative and the federal benefits must be reduced, or offset, by the amount of the state benefits.⁵ 30 U.S.C. §§922(b), 932(g);

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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....

30 U.S.C. §932(g).

20 C.F.R. §§725.533(a)(1), 725.535(b); *Ball v. Jewell Coal & Coke Co.*, 6 BLR 1-693 (1983). However, any offset provision which would diminish federal black lung benefits by any amounts other than those duplicative of the federal black lung benefits would do violence to the Act's concern for the adequacy of compensation. *Ball, supra*; *Stewart v. Harman Mining Co.*, 5 BLR 1-854 (1983), *aff'd sub nom. Harman Mining Co. v. Director, OWCP*, 826 F.2d 1388, 10 BLR 2-291 (4th Cir. 1987). When a state compensation award is premised upon a finding that a percentage of claimant's total disability is due to pneumoconiosis, that percentage determines the amount of the offset necessitated by Section 725.535(b). *Lucas v. Director, OWCP*, 14 BLR 1-112 (1990)(*en banc* with McGranery, J. dissenting). Furthermore, Section 725.535(d) provides in pertinent part that amounts paid or incurred by an individual for medical, legal, or related expenses in connection with a claim for state benefits for occupational pneumoconiosis are to be excluded in computing the amount by which the duplicative federal benefits must be offset. 20 C.F.R. §725.535(d). The regulations further set forth the means for establishing the amount of legal or medical expenses to be excluded:

Such medical, legal, or other related expenses may be evidenced by the State or Federal benefit awards, compromise agreement, or court order in the State or Federal benefit proceedings, or by such other evidence as the Office may require.⁶ Such other evidence may consist

The companion regulation similarly states:

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.

20 C.F.R. §725.535(b).

⁶ The "Office" means the Office of Workers' Compensation Programs, United States Department of Labor. 20 C.F.R. §725.101(a)(8).

of:

- (1) A detailed statement by the individual's attorney, physician, or the employer's insurance carrier; or:
- (2) Bills, receipts, or cancelled checks; or:
- (3) Other evidence indicating the amount of such expenses; or:
- (4) Any combination of the foregoing evidence from which the amount of such expenses may be determinable. Such expenses shall not be excluded unless established by evidence as required by the Office.

20 C.F.R. §725.535(d)(1)-(4).

In his analysis of the instant case pursuant to the regulations at Section 725.535(d), the administrative law judge initially found that claimant had paid a total of \$7,599.98 in attorney's fees in connection with obtaining his state second injury life award. Decision and Order at 2. The administrative law judge then rejected the Director's position that because fifteen percent of claimant's state second injury life award was attributable to pneumoconiosis, then fifteen percent of claimant's total attorney's fees should be excluded in calculating claimant's federal overpayment, stating that the Director did not cite to any legal authority in support of placing this limitation on the application of Section 725.535(d). Decision and Order at 2. The administrative law judge further noted that no reason was given by the Director for her assumption that only fifteen percent of the attorney's services were related to securing the occupational pneumoconiosis portion of claimant's state award. Decision and Order at 2. Noting that legal services provided in connection with obtaining an award are commonly interrelated and do not conveniently lend themselves to segregated evaluation, the administrative law judge therefore found it appropriate to reduce claimant's overpayment (\$9,652.88) by the entire amount of attorney's fees paid (\$7,599.98), thus reducing the amount claimant is obligated to repay the Director to approximately \$2,053.00. Decision and Order at 2-3.

The Director primarily asserts that her method of calculating the exclusion under Section 725.535(d), in cases such as the instant one, is neither plainly erroneous nor inconsistent with the Act or the regulations, and that therefore the administrative law judge erred in failing to defer to the Director's reasonable method. Petition for Review at 5. The Director's argument has merit. Initially, we note that Section 725.535(d)(4), on its face, places on claimant the burden of establishing the amount of legal expenses related to obtaining a state award for pneumoconiosis,

and specifically provides that "[s]uch expenses shall not be excluded [from computing the reduction of federal benefits] unless established by evidence as required by the Office [of Workers' Compensation Programs]." 20 C.F.R. §725.535(d)(4). Thus, in cases such as the instant one where claimant has submitted documents evidencing payments to his attorney, but where the payment receipts do not indicate whether the time charged was spent obtaining the pneumoconiosis portion of claimant's state award, Director's Exhibit 18, strict interpretation of the regulations could deprive claimant of the exclusion altogether. We further note, however, that Section 725.535(d) also permits the Director to accept "other evidence" indicating the amount of such legal, medical or related expenses. 20 C.F.R. §725.535(d). Therefore, we hold that, in the absence of more specific evidence supplied by claimant, the Director's designation of the percentage of the state award due to pneumoconiosis as an acceptable form of "other evidence" pursuant to Section 725.535(d) is reasonable and consistent with both the regulations and the benevolent purpose of the Act. 20 C.F.R. §725.535(d); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), citing *BethEnergy Mines, Inc. v. Pauley*, 501 U.S. 680, 15 BLR 2-155 (1991), *aff'g* 890 F.2d 1295, 13 BLR 2-162 (3d Cir. 1989) and *Adkins v. Director, OWCP*, 878 F.2d 151, 12 BLR 2-313 (4th Cir. 1989); see *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Consequently, we vacate the administrative law judge's Decision and Order and remand this case for further consideration. On remand, the administrative law judge may find it appropriate to re-open the record to allow claimant the opportunity to submit additional evidence responsive to the requirements of Section 725.535(d).

See 20 C.F.R. §725.456(e); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989)(*en banc* Motion for Recon.)(McGranery, J., concurring); *Toler v. Eastern Associated Coal Corp.*, 12 BLR 1-49, 1-51 (1988); *White v. Director, OWCP*, 7 BLR 1-348, 1-351 (1985); see also *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989).

Accordingly, the administrative law judge's Decision and Order is vacated and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge