



BRB No. 14-0152 BLA

DREMA G. HANNAH)	
(Widow of SHERMAN G. HANNAH))	
)	
Claimant-Respondent)	
)	
v.)	
)	
HANSFORD COAL COMPANY)	DATE ISSUED: 04/07/2015
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	
PNEUMOCONIOSIS FUND)	
)	
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 in Miner's and Survivor's Claims of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for carrier.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BUZZARD, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Carrier appeals the Decision and Order Awarding Benefits in Miner's and Survivor's Claims (2011-BLA-06038 and 2011-BLA-00004) of Administrative Law Judge Lystra A. Harris (the administrative law judge), rendered on claims filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). Specifically, carrier challenges the administrative law judge's decision that employer, not the Black Lung Disability Trust Fund (Trust Fund), is liable for payment of compensation resulting from an underpayment of benefits to the miner. The administrative law judge directed employer to pay all benefits owed to the miner. Carrier does not challenge the administrative law judge's decision in the survivor's claim directing employer to pay claimant¹ survivor's benefits pursuant to amended Section 932(l) because the miner was entitled to receive black lung benefits at the time of his death.²

On appeal, carrier asserts that the administrative law judge's decision to hold employer liable for the payment of benefits resulting from the underpayment of benefits to the miner, in the amount of \$114,760.80,³ covering the period between August 1, 1990 and February 1, 2010, constituted a violation of employer's due process rights. Carrier maintains that employer was not at fault for the underpayment, which resulted from a calculation error made by the Office of Workers' Compensation Programs (OWCP) in 1993. Claimant has not filed a response brief. The Director, OWCP (the Director), has filed a response, urging the Board to reject carrier's due process argument and affirm the administrative law judge's decision directing employer to pay claimant the amount of the underpayment. Carrier has filed a reply brief, reiterating its position.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in

¹ Claimant is the surviving spouse of the miner, who died on March 29, 2010. Survivor's Claim Director's Exhibit 1.

² Amended Section 932(l) provides that an eligible survivor of a miner who was entitled to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. We affirm, as unchallenged on appeal, the administrative law judge's award of survivor's benefits under amended Section 932(l), 30 U.S.C. §932(l). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ The administrative law judge reported that the amount of the underpayment was \$114,760.08. 2014 Decision and Order at 3. However, the district director calculated the underpayment as totaling \$114,760.80. Miner's Claim Director's Exhibits 34, 36.

accordance with applicable law.⁴ 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, 361-62 (1965).

The procedures governing the computation and payment of benefits, and the assessment of an underpayment, are set forth in 20 C.F.R. §§725.502, 725.533 and 725.548. The regulation at 20 C.F.R. §725.502(b)(1) provides, “[w]hile an effective order requiring the payment of benefits remains in effect, monthly benefits, at the rates set forth in [20 C.F.R.] §725.520, shall be due on the fifteenth day of the month following the month for which benefits are payable.” Pursuant to 20 C.F.R. §725.502(b)(2), “[w]ithin 30 days after the issuance of an effective order requiring the payment of benefits, the district director shall compute the amount of benefits payable for periods prior to the effective date of the order, in addition to any interest payable for such periods (*see* [20 C.F.R.] §725.608), and shall so notify the parties.” An administrative law judge’s Decision and Order awarding benefits constitutes an effective order, even when the award is appealed to the Board, provided that the Board does not issue a stay. 20 C.F.R. §725.502(a)(1). Under 20 C.F.R. §725.533(a)(1), a reduction in the amount of benefits paid is required when a claimant receives “[a]ny compensation or benefits . . . under any [s]tate workers’ compensation law because of death or partial or total disability due to pneumoconiosis.” The regulation at 20 C.F.R. §725.545(a) defines an underpayment of benefits as “nonpayment where some amount of such benefits is payable.” In a case in which the claimant dies before the underpayment is adjusted, “such payment shall be distributed” to the claimant’s survivors in the order of priority mandated by regulation. 20 C.F.R. §725.545(c). When the OWCP recognizes that an underpayment has occurred, it “may take any necessary action, and district directors may issue appropriate orders to protect the rights of the parties.” 20 C.F.R. §725.548(a).

In this case, the miner filed a claim for federal black lung benefits on August 8, 1990. Before this claim came before an administrative law judge, the West Virginia Workers’ Compensation Fund notified the miner, in a letter dated October 28, 1991, of an adjustment to the October 17, 1978 award of state benefits, explaining:

It appearing [the miner] has suffered a 15% permanent partial disability as a result of occupational pneumoconiosis, and it appearing further that [the miner] suffers from pre-existing permanent disability attributable to multiple prior injuries, and through the combined effect of these injuries is

⁴ The record reflects that the miner’s coal mine employment was in West Virginia. Miner’s Claim Director’s Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

now permanently and totally disabled within the meaning of the Workers' Compensation Law.

Miner's Claim Director's Exhibit 33. On July 30, 1993, Administrative Law Judge Robert J. Feldman issued a Decision and Order Awarding Benefits in the miner's federal claim and designated August 1, 1990 as the date on which benefits should commence. 1993 Decision and Order at 4. Judge Feldman acknowledged that the miner had been "awarded State Workers' Compensation on October 17, 1978, based upon a finding of occupational pneumoconiosis in advanced stage with 15% pulmonary functional impairment," and noted that the "State award may be relevant . . . in considering the possible offset of [federal black lung] benefits herein." *Id.* at 2. Carrier appealed the award of federal black lung benefits to the Board.

Pursuant to Judge Feldman's award of benefits, the district director calculated the amount of benefits to which the miner was entitled and, in a letter dated November 30, 1993, advised the miner:

The West Virginia Workers' Compensation Division has sent an update to your claim . . . which states your entitlement to a permanent total disability award of 15% beginning May 19, 1991. Your award was assessed against the Second Injury Reserve carrying payments for life at the benefit rate provided by statute of West Virginia.

Therefore, [employer] and [the] West Virginia Workers' Compensation Fund[,] which was requested to assume responsibility for the payment of your benefits[,] has only to pay you for the period August, 1990 through April, 1991. Then continue your monthly rate of West Virginia compensation because it is higher than the federal rate of \$627.30 which is total offset (no duplicate payments).

Miner's Claim Director's Exhibit 23. The district director further concluded that employer was liable for \$5,110.20 in back benefits, covering the period from August 1990 to April 1991. *Id.* Employer also received a copy of this letter.

Subsequently, carrier filed a motion with the Board, dated December 14, 1993, requesting dismissal of its appeal, after "carefully reviewing the evidence." Miner's Claim Director's Exhibit 25. By Order dated December 30, 1993, the Board dismissed the appeal in the miner's claim and Judge Feldman's award of benefits became final. *Hannah v. Hansford Coal Co.*, BRB No. 93-2333 BLA (Dec. 30, 1993) (unpub. Order); Miner's Claim Director's Exhibit 26.

On April 27, 1994, the OWCP mailed a Federal Black Lung Benefits Verification form to the miner. Miner's Claim Director's Exhibit 24. The miner indicated on the form that he was receiving monthly payments of \$1,600.07 pursuant to his state workers' compensation claim, based on his disability from black lung disease. *Id.* The miner died on March 29, 2010. Survivor's Claim Director's Exhibit 1. On April 21, 2010, claimant, the miner's surviving spouse, filed a claim for federal black lung survivor's benefits. *Id.*

The district director determined that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l), and issued a Proposed Decision and Order on June 14, 2010, awarding survivor's benefits to claimant. Carrier requested modification of the miner's claim and a hearing in the survivor's claim, disputing all issues related to entitlement. Survivor's Claim Director's Exhibits 15, 30.

On March 4, 2011, claimant asked the OWCP to confirm that the miner had been paid all of the monthly federal black lung benefits that he was entitled to receive during his lifetime. Miner's Claim Director's Exhibit 32. Pursuant to claimant's request, the district director reviewed the miner's claim and discovered that the initial calculation of the miner's benefits was incorrect. On March 17, 2011, the district director issued an Amended Award of Benefits, modifying the terms of the miner's award of benefits pursuant to 20 C.F.R. §725.310. Miner's Claim Director's Exhibit 34. The district director found that only 15% of the miner's state workers' compensation award was for pneumoconiosis, which should have resulted in only a partial offset of his federal black lung benefits. *Id.* Consequently, the district director determined that the error in the initial calculation of the amount of state black lung benefits that the miner was receiving when he was awarded federal black lung benefits resulted in an underpayment of \$114,760.80 in federal benefits from May 1991 through February 2010. *Id.* The district director also concluded that carrier was liable for the underpayment. *Id.*

Carrier submitted a response, and the district director issued a Revised Amended Award of Benefits on April 20, 2011, in which he reiterated his findings. Miner's Claim Director's Exhibit 36. Following the issuance of the district director's revised award, carrier requested a hearing to determine its liability for the underpayment. The district director subsequently consolidated carrier's modification request in the miner's claim, its request for hearing in the survivor's claim, and carrier's challenge to employer's liability for the underpayment, and forwarded the case to the Office of Administrative Law Judges. At the hearing, which was held on August 20, 2013, carrier withdrew its modification request in the miner's claim, but continued to challenge its liability for the underpayment of \$114,760.80 in federal benefits in the miner's claim.

Before the administrative law judge, carrier argued that, because the OWCP was responsible for the error in the calculation of the miner's federal black lung benefits, due process required that liability for the underpayment be transferred to the Trust Fund. The

administrative law judge observed that the Director correctly stated that “the amount of [employer’s] liability for payment of benefits to [the miner] was established by Judge Feldman’s 1993 Decision And Award.” 2014 Decision and Order at 4, *quoting* Director’s Closing Brief at 4. The administrative law judge determined that the district director’s Revised Amended Award constituted a “ministerial correction of an admittedly egregious calculation error,” but it did not alter Judge Feldman’s 1993 final determination of employer’s liability. 2014 Decision and Order at 4. The administrative law judge rejected, as “purely speculative,” carrier’s assertion that it likely relied on the OWCP’s erroneous determination of a complete offset of the miner’s federal benefits in deciding to withdraw its appeal of the award of benefits in the miner’s federal claim. *Id.* The administrative law judge also found that employer was not deprived of an opportunity to defend itself, because it received notice of the state workers’ compensation award, including the 15% allocation to pneumoconiosis, and the district director’s November 30, 1993 letter containing the erroneous offset determination. *Id.* at 4-5. The administrative law judge concluded, therefore, that the underpayment assessment designating employer as the responsible party did not deprive employer of its right to due process.⁵ *Id.* at 5.

On appeal, carrier alleges that the administrative law judge erred in rejecting its argument that “[b]ecause the OWCP’s error in 1993 caused [the miner] not to receive \$114,760.80 in benefits, due process prevents holding [employer] liable for the OWCP’s mistake over 17 years later.” Carrier’s Brief in Support of Petition for Review at 6. Carrier states:

[H]ad the OWCP calculated the monthly benefits amounts correctly, the \$114,760.[80] now being assessed as a huge, lump-sum payment would have been spread out over a period of nearly 20 years. Had the amount been so spread out, payment would have been much easier for the operator to bear as part of its ongoing liabilities and its insurer could have considered the award in adjusting future rates for continued coverage. The OWCP’s failure to act in accord with the regulatory responsibilities has prevented [employer] and its insurer from knowing and considering the real potential liability for this claim.

⁵ The administrative law judge’s finding, that the six-year statute of limitations for collecting payments owed to the Black Lung Disability Trust Fund, set forth in 20 C.F.R. §725.603(c)(6), does not preclude employer’s liability for the underpayment of benefits, is unchallenged on appeal and is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4.

Id. at 10. In addition, carrier contends that the administrative law judge should not have dismissed, as speculative, its argument that the OWCP's erroneous determination of a complete offset of the miner's federal benefits was possibly a factor in its decision to withdraw its appeal of the award of benefits in the miner's federal claim. Carrier's Brief in Support of Petition for Review at 10-11. Carrier further maintains that the transfer of liability to the Trust Fund is the appropriate remedy for the violation of employer's right to due process. *Id.* at 7-9, citing *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

Carrier also argues that liability should be transferred to the Trust Fund, based on the administrative law judge's finding that the 2011 revised amended award constituted a "ministerial correction" of the OWCP's calculation error. Carrier's Brief in Support of Petition for Review at 14-15, quoting 2014 Decision and Order at 4. In support of this contention, carrier cites cases in which courts have considered the propriety of ministerial corrections made by the Department of Commerce to certain administrative decisions, and by the Environmental Protection Agency to a published regulation. Carrier's Brief in Support of Petition for Review at 14, citing *NTN Corp. v. U.S.*, 587 F. Supp. 2d 1313 (Ct. Int'l Trade 2008); *Util. Solid Waste Activities Group v. E.P.A.*, 236 F.3d 749 (D.C. Cir. 2001); *Zenith Elecs. Corp. v. U.S.*, 699 F. Supp 296 (Ct. Int'l Trade 1988).

The Director responds, maintaining that carrier has not established that employer's right to due process was violated in this case. Director's Letter Brief at 8. The Director contends that the procedures used to find that employer was liable for the award of federal black lung benefits to the miner, and to correct the mistake in the amount of such benefits, were fair and reliable. *Id.* He further alleges that carrier's allegations that employer has been prejudiced in this case are "nothing more than bare assertions." *Id.* The Director also observes that carrier "cannot claim that [employer] was surprised by the offset calculation error," as employer received copies of the state award and the district director's initial calculation of benefits. *Id.* Lastly, the Director asserts that the holdings in the ministerial correction cases cited by carrier are limited to their facts and do not create rules of general application. *Id.* at 9.

After reviewing the administrative law judge's Decision and Order, and the parties' arguments on appeal, we hold that carrier's allegations of error are without merit. Whether we consult the constitutional guarantee of due process of law, or common law principles of equity, the central issue before us is the propriety of the administrative law judge's determination that the OWCP's actions did not unfairly prejudice employer. *Grigg v. Director, OWCP*, 28 F.3d 416, 420 n.7, 18 BLR 2-299, 2-307 n.7 (4th Cir. 1994); *Borda*, 171 F.3d at 183, 21 BLR at 2-559-60. As an initial matter, carrier does not dispute that employer received notice of, and had the opportunity to defend against, the

miner's August 8, 1990 claim for federal black lung benefits before the district director and Judge Feldman. Although carrier alleges that it may have withdrawn the appeal of Judge Feldman's award of benefits in reliance on the OWCP's erroneous determination of a total offset of the miner's federal black lung benefits, we hold that the administrative law judge rationally found that carrier's allegation is speculative. Carrier concedes that "present counsel cannot know for sure exactly why [carrier] withdrew its appeal 20 years ago," and that carrier's "present counsel cannot speak with an exact degree of certainty to the 21-year-old motivations of [carrier's] prior counsel."⁶ Carrier's Brief in Support of Petition for Review at 10; Carrier's Reply Brief at 3.

Additionally, we are not persuaded by carrier's argument that "the circumstances illustrate that [the] OWCP's finding that the miner's state benefits totally offset his federal benefits played a part in [carrier's] decision to withdraw its appeal of the Decision awarding benefits to the Benefits Review Board." Carrier's Reply Brief at 3. In a letter dated December 14, 1993, carrier did not make any reference to the offset determination, which the OWCP communicated in a letter issued on November 30, 1993, but stated, "[a]fter carefully reviewing the evidence," it wished to withdraw its appeal before the Board.⁷ Miner's Claim Director's Exhibit 25. Based on the contents of carrier's letter, the administrative law judge permissibly determined that carrier did not establish that the circumstances surrounding its withdrawal of the appeal of the award of federal benefits establish that it was motivated by the OWCP's erroneous offset determination.⁸ See

⁶ Carrier also alleges that the erroneous offset information provided by the district director is responsible for its lack of documentation, as the records pertaining to its defense of the miner's claim were either lost or destroyed pursuant to its file-retention policies. Carrier's Reply Brief at 11. But the district director cannot be blamed for carrier's implementation of an office practice which proved unwise in this case. In addition, carrier's filing of a request for modification on behalf of employer in the miner's claim indicates that carrier understood that a claim in pay status is not closed and, therefore, should have realized that the destruction of those records would be premature.

⁷ In Administrative Law Judge Robert J. Feldman's July 30, 1993 Decision and Order, he determined that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(1), as the sole x-ray readings of record were positive for pneumoconiosis. 1993 Decision and Order at 2. Judge Feldman found that the miner established that he was totally disabled due to pneumoconiosis, based on the uncontradicted opinion of Dr. Rasmussen, which the administrative law judge credited as well reasoned and well documented. *Id.* at 3-4.

⁸ Additionally, a party is bound by the litigation decisions of its former counsel, even if they were made in error. See *Link v. Wabash*, 370 U.S. 626, 634 (1962); *Howell v. Director, OWCP*, 7 BLR 1-259, 1-262 (1984).

Mabe v. Bishop Coal Co., 9 BLR 1-67, 1-68 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-169 (1984); 2014 Decision and Order at 4.

Regarding the procedures by which the underpayment was created and remedied, as observed by the administrative law judge, carrier received notice of the miner's state workers' compensation award allocating 15% of his total disability to occupational pneumoconiosis, and the OWCP's November 30, 1993 letter.⁹ 2014 Decision and Order at 4. Carrier further received the Amended Award of Benefits issued by the district director, filed a request for reconsideration of that decision, received the Revised Amended Award of Benefits from the district director, and was granted a hearing before the administrative law judge to contest the district director's determination that it was liable for the underpayment of the miner's federal black lung benefits. Miner's Claim Director's Exhibits 34, 35, 36, 39.

With respect to carrier's allegation that employer suffered financial harm by having to make a lump sum payment on the miner's federal claim, rather than making monthly remittances, we hold that carrier has not supported its assertion with any evidence establishing that employer and/or carrier will incur greater monetary liability than if the miner's federal black lung benefits had been paid to him on a monthly basis during his lifetime.¹⁰ We reject, therefore, carrier's contention in this regard. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-1-121 (1987). In sum, we hold that carrier has failed to establish that employer suffered actual prejudice as a result of the OWCP's mistaken computation of the amount of federal black lung benefits offset by the state award. We further hold, therefore, that requiring employer to pay now all compensation it owes to the miner does not constitute

⁹ Carrier also argues that employer's receipt of the state award and the letter from the Office of Workers' Compensation Programs containing the offset calculation error does not establish that employer should have known that only 15% of the miner's federal benefits should have been offset. Carrier maintains that, because the state award indicated that the miner was totally disabled by a combination of pneumoconiosis and unspecified "multiple prior injuries," it is possible that a greater proportion of the miner's state award was attributable to pneumoconiosis. Carrier's Brief in Support of Petition of Review at 13, *quoting* Miner's Claim Director's Exhibit 33. We reject carrier's contention because it has cited no support for its hypothesis that the state would specifically attribute 15% of the miner's total disability to pneumoconiosis, while including an additional injury from pneumoconiosis in the general category of "prior injuries." *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-1-121 (1987).

¹⁰ Indeed, it is quite possible that employer benefited from having the use of the \$114,760.80 for the seventeen-year period that the underpayment accrued.

a violation of employer's right to due process of law. See *Holdman*, 202 F.3d at 883-84, 22 BLR at 2-44-45; *Borda*, 171 F.3d at 184, 21 BLR at 2-560-61; *Lockhart*, 137 F.3d at 807, 21 BLR at 2-320.

Finally, the “ministerial correction” cases cited by carrier in support of its argument, that liability for the underpayment must be transferred to the Trust Fund, do not support a finding that that carrier and/or employer suffered actual harm as a consequence of the OWCP's error. In each of the decisions cited by carrier, the court interpreted the scope of the statutory authority explicitly granted to an agency to correct errors in adjudications and/or rulemaking, without following a formal procedure. *NTN Corp.*, 587 F. Supp. 2d at 1315; *Util. Solid Waste Activities Group*, 236 F.3d at 753-54; *Zenith Elecs. Corp.*, 699 F. Supp. at 298. In the present case, the OWCP did not attempt to correct an error in the computation of the offset of claimant's federal black lung benefits without following a formal procedure. Rather, as indicated *supra*, the OWCP complied with the regulations governing the recovery of an underpayment set forth in 20 C.F.R. §§725.502, 725.533, and 725.548. Moreover, in two of the cases cited by employer, the courts held that the objecting parties proved that allowing the ministerial correction by the agency would cause a specific harm, or would violate a specific procedural requirement.¹¹ *Util. Solid Waste Activities Group*, 236 F.3d at 753-54; *Zenith Elecs. Corp.*, 699 F. Supp. at 298. In contrast, we have held that carrier has not established that employer suffered actual harm as a consequence of the OWCP's offset determination. Therefore, as carrier has failed to demonstrate error in the administrative law judge's order, we affirm the administrative law judge's decision holding employer, rather than the Trust Fund, liable for the compensation owed as a result of the underpayment in this case in the amount of \$114,760.80. See *England v. Island Creek*

¹¹ In *NTN Corp. v. U.S.*, 587 F. Supp. 2d 1313 (Ct. Int'l Trade 2008), the court ruled that parties opposing the Commerce Department's ministerial correction in the calculation of a packing cost adjustment must establish, *inter alia*, that the agency's action would cause unnecessary delay or expense. *NTN*, 587 F. Supp. 2d at 1316. The court allowed the Commerce Department to make the correction because, *inter alia*, the parties failed to meet this standard. *Id.* at 1318. The court in *Util. Solid Waste Activities Group v. E.P.A.*, 236 F.3d 749, 753-54 (D.C. Cir. 2001), held that the Environmental Protection Agency's alteration of an administrative rule must be made in accordance with the notice and comment procedures set forth in the Administrative Procedure Act, 30 U.S.C. §553(b), as the change represented more than a ministerial correction. In *Zenith Elecs. Corp. v. U.S.*, 699 F. Supp. 296, 298 (Ct. Int'l Trade 1988), the court ruled that, once judicial review of a Department of Commerce adjudication began, the Department is required to apply to the court for permission to make ministerial corrections to its final determination.

Coal Co., 17 BLR 1-141, 1-144 (1993); *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354, 1-357 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur.

REGINA C. McGRANERY
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring:

In this case, a calculation error by the Department of Labor resulted in an underpayment of federal black lung benefits to the claimant's late husband, amounting to \$114,760.80 over a period of seventeen years, from 1993 to 2010. If this miscalculation had not occurred, the payments at issue would have been made on a monthly basis by the West Virginia Coal Workers' Pneumoconiosis Fund, the insurance carrier for the coal operator who was determined to be liable for those benefits. Because the error was not discovered until well after the miner's initial award of benefits, and in fact was not discovered until after his death, his wife (claimant) is entitled to the full amount of the underpayment. The insurance carrier argues that the principles of due process require that it, and the operator, be relieved of liability for these overdue payments, and that the federal Black Lung Disability Trust Fund should instead pick up the tab. In setting forth its argument, the insurance carrier places emphasis on the size of the payment (\$114,760.80), and the length of time it accrued (seventeen years), to establish that it would be harmed if it is required to pay.

I concur with my colleagues' decision to affirm the administrative law judge's determination that the operator, and by extension its insurance carrier, is liable for the underpayment. I write separately, however, to underscore the absence of precedential support in black lung case law for the insurance carrier's argument. In an analogous situation – the recovery of excess payments made to claimants – the Board has consistently affirmed administrative law judge decisions requiring claimants to repay large sums of money, including payments that accumulated over several years. *See B.C. v. Director, OWCP*, BRB No. 08-0571 BLA (Mar. 26, 2009) (unpub.) (affirming the administrative law judge's finding that recovery of an overpayment of \$160,744 from a claimant did not defeat the purpose of the Act, and was not against equity and good conscience); *McGar v. Director, OWCP*, BRB No. 98-1552 BLA (Sept. 7, 1999) (unpub.) (affirming the administrative law judge's finding that recovery of an overpayment of \$55,444 from a claimant, for benefits that were awarded on a claim filed over ten years before the claimant was notified of the overpayment, did not defeat the purpose of the Act, and was not against equity and good conscience, despite the claimant's contention that it would take him forty-three years to repay the debt); *Tucker v. Director, OWCP*, BRB No. 99-1168 BLA (Aug. 16, 2000) (unpub.) (affirming the administrative law judge's finding that recovery of an overpayment of \$73,178 from a claimant, for benefits that were awarded on a claim filed over nineteen years before the claimant was notified of the overpayment, did not defeat the purpose of the Act, and was not against equity and good conscience); *Osborne v. West Virginia CWP Fund*, BRB No. 99-1142 BLA (Oct. 21, 2000) (unpub.) (affirming the administrative law judge's finding that a claimant is liable to an employer/insurance carrier for an overpayment of \$55,650, for benefits that began accruing more than six years before the claimant was notified of the overpayment due to his receipt of a Second Injury Life Award (SILA) under West Virginia law); *Lambert v. West Virginia CWP Fund*, BRB Nos. 02-0126 BLA and 02-0126 BLA-A (Oct. 21, 2002) (unpub.) (affirming the administrative law judge's finding that a claimant is liable to an employer/insurance carrier for an overpayment of \$36,146, for benefits that began accruing seven years before the claimant would have been aware of the overpayment due to his receipt of a SILA under West Virginia law); *Shiflar v. Director, OWCP*, BRB No. 97-0332 BLA (Feb. 23, 1998) (unpub.) (having previously affirmed the administrative law judge's finding that recovery of the overpayment was not against equity and good conscience, the Board affirmed the administrative law judge's determination that recovery of an overpayment of \$30,000 from a claimant, for benefits that began accruing at least five years before the claimant was notified of the existence of the overpayment, did not defeat the purpose of the Act).

In none of the aforementioned cases did the Board hold that recovery of an overpayment would violate a claimant's right to due process, even when the claimant was

not represented by counsel. The United States Circuit Courts of Appeals have ruled in a similar fashion. *See Sharpe v. Director, OWCP*, 495 F.3d 125, 132, 24 BLR 2-56 (4th Cir. 2007) (indicating that a coal miner’s estate could be held liable for an overpayment of benefits that accrued over a period of eleven years during the miner’s lifetime); *Benedict v. Director, OWCP*, 29 F.3d 1140, 1144, 18 BLR 2-309 (7th Cir. 1994) (affirming the administrative law judge’s finding that recovery of an overpayment of \$19,078, requested from a claimant more than six years after he began receiving benefit payments, would not defeat the purpose of the Act, or be against equity and good conscience). Thus, the “harm” alleged by the insurance carrier in this case, i.e., being required to pay a large sum of money that accumulated over a long period of time, is no greater than the “harm” that claimants held liable for overpayments routinely experience, with the assertion of a due process violation having no validity in the eyes of administrative law judges, the Board, and the United States Courts of Appeals.

Accordingly, I agree that the administrative law judge’s decision should be affirmed for the reasons identified in the majority opinion, as well as the case law weighing against the insurance carrier’s position that holding it, and the operator, liable for the underpayment constitutes a violation of their due process rights.

GREG J. BUZZARD
Administrative Appeals Judge