

BRB No. 99-0473 BLO

FRANK J. NORMAN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denying Deuction of Fees of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle), Pineville, West Virginia, for claimant.

Sarah M. Hurley (Henry L. Solano, 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, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLO-0002) of Administrative Law Judge Lawrence P. Donnelly denying deduction of fees to offset an overpayment 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 procedural history in this case is as follows: Claimant received a Second Injury Life Award from the state of West Virginia, effective March 15, 1975, of which 15% of the award was for occupational pneumoconiosis. Director's Exhibits 3, 8. Claimant also received federal black lung benefits effective December 1, 1976. Director's Exhibits 4 - 7. On September 11, 1991, the Department of Labor issued an Amended Award of Benefits reducing claimant's federal black lung benefits by an amount equal to 15% of the state award and requested repayment of an overpayment of \$17,821.20 due to the receipt of duplicative state and federal benefits from December 1976 to August 1991. Director's Exhibit 9, 11. Claimant requested a hearing.

Administrative Law Judge Holmes determined that claimant was capable of repaying the overpayment, and declined to consider the issue of offsetting medical and legal expenses incurred in pursuing the state claim because claimant raised the issue for the first time in his post-hearing brief. Director's Exhibit 22. Claimant appealed to the Board. In *Norman v. Director, OWCP*, BRB No. 93-1330 BLA (Aug.30, 1995), the Board vacated the administrative law judge's determination that the amount of overpayment is \$17,821.20 and remanded the case to determine whether a reduction in the overpayment was warranted. Director's Exhibit 35. On remand, the administrative law judge found that the language of 20 C.F.R. 725.535(d) was clear in stating that amounts incurred for medical, legal, or related

expenses with respect to the state claim should be reduced in computing the overpayment. He further determined that contrary to the Director's position, the regulations contained no exception for cases where the state award preceded the federal award. The administrative law judge remanded the case to the district director to reinstate his initial decision and order, as modified by a reduction in the amount of overpayment as determined by the district director. Director's Exhibit 38.

The district director issued his decision on January 31, 1996, noting that the Director had properly used the "up-front" method of computing the offset of the state award. The district director also determined that because the state award began so much earlier than the federal award, even with a full credit for the attorney and medical fees, the state award date shifted from March 1975 to November 23, 1976, eight days before the federal award began. Thus, claimant was ordered to repay the Black Lung Disability Trust Fund the full amount of overpayment. Director's Exhibit 38. Claimant requested a hearing. Director's Exhibit 40. On April 7, 1997, Administrative Law Judge Levin issued his Decision and Order remanding the case to the district director again. The administrative law judge found that the district director had "virtually ignored Judge Holmes' findings and instructions." The administrative law judge stated that he would not consider the Director's arguments regarding the validity of the up-front method and that the district director must comply with the previous remand order. Thus, the administrative law judge remanded the case to the district director again to comply with Administrative Law

Judge Holmes' instructions. Director's Exhibit 48. On remand, the district director calculated that claimant was entitled to a reduction of \$1030.87, which reflects 15% of claimant's legal and medical expenses incurred in pursuing his state claim. The district director further determined, however, that it is contrary to case law and the regulations to directly subtract this amount from the federal overpayment amount, and that in properly crediting these expenses, the state offset shifts from March 15, 1975 to February 19, 1976. The district director further found, however, since the federal benefits did not commence until December 1976, there was no duplication of benefits. Thus, the credit did not affect the amount of overpayment, and claimant was ordered to pay \$17, 803.50. Director's Exhibit 49. Claimant requested a hearing. Director's Exhibit 50, 51.

The administrative law judge affirmed the district director's determination that only 15% of the fees could be deducted from the overpayment because only 15% of the state award offsets the federal benefits. The administrative law judge next found that the Director properly deducted \$1030.87, or 15% from the state award, before offsetting the remaining amount from the federal award. The administrative law judge then found that the district director properly utilized the "up-front" method to subtract the fees from the first months of state benefits and found that by the time the federal benefits commenced, there were no longer any fees to be deducted to offset. The administrative law judge therefore determined that the district director's calculations were correct, that no amount is to be deducted from the offset, and

ordered claimant to repay the Black Lung Disability Trust Fund \$17,803.50. On appeal, claimant contends that the administrative law judge failed to comply with the actual language of 20 C.F.R. 725.535 and should have been granted a reduction for the full amount of his expenses, \$6,872.48, directly against the overpayment, to yield a total overpayment amount of \$10,948.72. The Director, Office of Workers' Compensation Programs, (the Director), responds, urging affirmance.

On appeal, claimant challenges the findings of the administrative law judge at Section 718.204(c)(4). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not participate in this 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 supported by substantial evidence, are rational, 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).

We reject claimant's contention that the administrative law judge erred in reducing the offset amount by only 15% and should have excluded the entire amount of claimant's expenses incurred in pursuing his state claim. The record does not contain specific evidence regarding the amount of expenses incurred by claimant in pursuit of the pneumoconiosis portion of his state award. The Director,

therefore, may properly consider the portion of the state award due to pneumoconiosis to be evidence of the amount of fees attributable to the state pneumoconiosis award, and may subtract only this amount from the offset amount. See 20 C.F.R. 725.535(d)(3); *Pickens v. Director, OWCP*, 19 BLR 1-116 (1995). Thus, we affirm the administrative law judge's finding that 15% of claimant's legal fees should be excluded from the offset amount.

Claimant's contention that his expenses should be directly credited against the overpayment amount is also without merit. Neither the Act nor the regulations specify the method by which fees and expenses are to be excluded from the offset amount; therefore, the Director's implementation of the "up-front" method is entitled to deference as it is neither a plainly erroneous nor an inconsistent interpretation of Section 725.535(d). *Director, OWCP v. Barnes and Tucker [Molnar]*, 969 F.2d 1524, 16 BLR 2-99 (3d Cir. 1992). While in the instant case the "up-front" method did not affect the offset amount, we agree with the Director that administrative efficiency requires that the Director develop a method based on a reasonable interpretation of the regulation resulting in fairness in the majority of cases. As the administrative law judge permissibly deferred to the Director's "up-front" method of determining how the fees are to be excluded and rationally determined that the amount to be excluded from the offset is 15% of the total legal fees expenses, we affirm the administrative law judge's findings.

Accordingly, the administrative law judge's Decision and Order Denying Deduction of Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge