

BRB No. 01-0438 BLA

HERBERT FRED COOK)
)
 Claimant-Petitioner)
)
 v.)
)
 LIBERTY BELL FUEL, INCORPORATED)
)
 and) DATE ISSUED:
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

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

Robert Weinberger (State of West Virginia Employment Programs Litigation Unit), Charleston, West Virginia, for carrier.

Rita A. Roppolo (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.
PER CURIAM:

Claimant appeals the Decision and Order Denying Request for Modification (00-BLA-0754) of Administrative Law Judge Daniel L. Leland 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).¹ Claimant filed a claim for benefits on August 25, 1986. In a Decision and Order dated May 5, 1989, Administrative Law Judge Henry W. Sayrs found that claimant established all elements of entitlement to benefits pursuant to 20 C.F.R. Part 718 (2000). Accordingly, benefits were awarded. Subsequently, in an Amended Award of Benefits and Order for Repayment of Overpayment dated July 8, 1991, the district director determined that claimant received an overpayment of benefits in his federal claim in the amount of \$4,370 because he received a Second Injury Life Award from the State of West Virginia, ten percent of which was attributable to pneumoconiosis, with benefits commencing on May 17, 1988. Director's Exhibit 4. Claimant requested a hearing before an administrative law judge, challenging the district director's calculation of the amount of the overpayment. In a Decision and Order dated January 14, 1993, Administrative Law Judge John C. Holmes determined that the district director's calculation of the overpayment was proper, and ordered claimant to pay employer/ carrier \$4,370. Claimant appealed. The Board rejected claimant's contention that the district director incorrectly calculated the amount of overpayment, and affirmed Judge Holmes' finding that an overpayment of \$4,370 existed in this case. *Cook v. Liberty Bell Fuel, Inc.*, BRB No. 93-0967 BLA (May 24, 1994)(unpublished), slip op. at 2-3. The Board also declined to address claimant's

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. Employer and The Director, Office of Workers' Compensation Programs, responded to the Board's order by contending that the amended regulations would not impact this case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot the contentions of the parties with regard to the impact of the challenged regulations.

contention that Judge Holmes erred by failing to find that carrier improperly reduced the amount of claimant's federal award by \$100 per month unilaterally, without authorization, and that, therefore, a twenty percent penalty should be enforced against carrier pursuant to 20 C.F.R. §725.607 for carrier's failure to pay benefits.² *Id.*, slip op. at 4. In declining to address claimant's contention, the Board noted that claimant failed to raise the issue before Judge Holmes. *Id.*

Claimant filed a Motion for Reconsideration with the Board, requesting that the Board consider his arguments with regard to the alleged unilateral withholding of benefits by carrier. The Board denied the relief requested in a Decision and Order on Reconsideration dated July 15, 1997. *Cook v. Liberty Bell Fuel, Inc.*, BRB No. 93-0967 BLA (July 15, 1997)(unpublished Decision and Order on Reconsideration). Claimant thereafter filed a request for Modification with the district director, who denied modification in a Proposed Decision and Order dated April 20, 2000. Claimant requested a hearing before an administrative law judge. In his Decision and Order dated January 23, 2001, Administrative Law Judge Daniel L. Leland (the administrative law judge), found that, contrary to claimant's contention, 20 C.F.R. §725.607 (2000) did not apply to carrier's actions in the instant case, and determined that, accordingly, the twenty percent penalty sought by claimant against carrier should not be assessed. Claimant challenges this finding on appeal. Carrier and the Director, Office of Workers' Compensation Programs, respond urging affirmance of the administrative law judge's Decision and Order.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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 sole contention on appeal, *i.e.*, that the administrative law judge erred in failing to assess a twenty percent penalty against carrier pursuant to Section 725.607 in light of carrier's withholding of \$100 in monthly benefits to recoup the \$4,370 overpayment made to claimant by carrier in this case. As the administrative law judge correctly stated, Section 725.607 imposes a twenty percent penalty on a party who fails to pay benefits under the terms of an award. *See* 20 C.F.R. §725.607. In the instant case, it is undisputed that a \$4,370 overpayment existed because claimant received state benefits in addition to his federal award. Contrary to claimant's contention that carrier did not have approval to recoup the overpayment, the district director ordered that the overpayment be repaid, and although the district director did not set up a schedule for repayment, the administrative law judge reasonably determined that carrier's withholding of \$100 in the

²While the regulation at 20 C.F.R. §725.607 (2000) is among those regulations which were revised effective January 19, 2001, no substantive change was made to this provision. *See* 20 C.F.R. §§725.607 and 725.607 (2000).

monthly benefits it was paying claimant did not constitute a default mandating a penalty under Section 725.607 (2000). Decision and Order at 3; *see* 20 C.F.R. §725.607.

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge