

BRB No. 92-0478 BLA

JOSEPH STONEBRAKER)	
)	
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Donald J. McCue (McCue & Husband), Connellsville, Pennsylvania, for claimant.

Edward Waldman (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 and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (90-BLO-0190) of Administrative Law Judge Thomas M. Burke denying waiver of the recovery of an overpayment of benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal

¹ Claimant is Joseph Stonebraker, the miner, whose claim for benefits filed on August 22, 1979 was granted on April 10, 1980. Director's Exhibits 1, 4.

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found pursuant to stipulation that from November 19, 1979, through December 1980, claimant received benefits both from the Black Lung Disability Trust Fund (Trust Fund) and under a state workers' compensation award. Applying the regulations at 20 C.F.R. Part 725, the administrative law judge

concluded that claimant had received an overpayment of \$5,353.70,² which was later reduced to \$2,119.20 when employer paid part of claimant's reinstated federal black lung benefits directly to the Department of Labor (DOL). In making this finding, the administrative law judge rejected claimant's contention that the overpayment was completely offset by the \$6,481.80 in attorney's fees that he incurred in securing his state benefits.

The administrative law judge found that claimant could not be "considered to be without fault" in creating the overpayment, because he knew or should have known that some of his federal benefits were duplicative. Decision and Order at 3-4. Assuming *arguendo* that claimant was without fault, the administrative law judge found that claimant failed to establish that recovery of the overpayment would either defeat the purpose of the Act or be against equity and good conscience. Accordingly, he denied waiver of the recovery of the overpayment.

On appeal, claimant challenges the administrative law judge's finding that his state attorney's fee does not completely offset the overpayment, asserting that the amount of the attorney's fee excluded from the offset calculation is incorrect and that he is entitled to the funds that employer paid directly to DOL. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

² From the \$5,449.80 duplicate payment, the administrative law judge subtracted \$96.10 to reflect that claimant's state award did not take effect until November 19, 1979; thus, claimant had only twelve days of offset for that month, or \$284.90. Decision and Order at 3; Director's Exhibit 42 at 1. Since claimant's federal award for November 1979 was \$381, the administrative law judge found, as did the claims examiner, that claimant was entitled to an exclusion of \$96.10 (\$381 - \$284.90). *Id.*

Employer has not participated in this appeal.³

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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 (1965).

The deputy commissioner initially determined that claimant was entitled to benefits and notified him that he was being paid interim benefits from the Trust Fund. Director's Exhibits 3, 4. Claimant was also informed that he had to notify DOL immediately of "any award" of benefits from any other state or federal agency. Director's Exhibit 4. DOL paid claimant a lump sum to cover the period from August 1979 through February 1980 and commenced monthly benefits of \$381.00 in March 1980. Director's Exhibit 4. However, on May 1, 1980, employer accepted responsibility for the payment of benefits, paid claimant a lump sum to cover the period from August 1979 through April 1980, and began paying monthly benefits of \$381.00. Director's Exhibit 6. DOL stopped paying benefits to claimant in December 1980. Director's Exhibit 11.

On January 22, 1982, claimant was awarded state benefits based on his partial disability due to pneumoconiosis. Director's Exhibit 9. The state award required employer to pay claimant \$207.75 per week, effective November 19, 1979, for 500 weeks, deducting twenty percent of each payment for the first three years to be paid directly to claimant's attorney. Director's Exhibit 9 at 4. Employer suspended the payment of federal benefits, paid claimant a lump sum for state benefits retroactive to November 19, 1979, deducted the amount of the federal benefits that it paid to claimant from November 19, 1979 through January 1982, and

³ Claimant does not challenge the administrative law judge's findings regarding the amount of the overpayment, the issue of fault, or his conclusion that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience. Therefore, we affirm these findings as unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

commenced bi-weekly payments of state benefits. Director's Exhibit 18 at 2.

Thereafter, DOL notified claimant that an overpayment of \$5,844.45 had occurred as a result of his receipt of both federal and state benefits from November 19, 1979 through December 1980. Director's Exhibit 11. Claimant agreed, but contended that the overpayment was completely offset by the attorney's fee that he incurred in obtaining the state award. Director's Exhibit 12 at 1.

When his state award expired in June 1989, claimant requested reinstatement of his federal benefits. Director's Exhibits 16-18. In response, DOL again informed claimant that he had incurred an overpayment of \$5,353.70 by receiving both federal and state benefits from November 19, 1979 through December 1980. Director's Exhibit 19. Claimant responded that he repaid the full amount of the overpayment when employer deducted from the initial payment of his state award the amount of federal benefits that it paid to him from November 19, 1979, through January 1982. Director's Exhibit 22 at 1, 4. DOL replied that while claimant repaid the duplicate payment owed to employer, he had not reimbursed DOL for the federal benefits the Trust Fund paid to him from November 19, 1979 through December 1980, during which time he also received state benefits. Director's Exhibit 23 at 1.

On January 11, 1990, DOL ordered employer to resume payment of claimant's federal benefits retroactive to June 19, 1989, but requested that employer pay directly to DOL the retroactive portion of the resumed benefits, a lump sum of \$3,234.50 representing the amount due claimant from June 19, 1989 through December 1989. Director's Exhibits 25 at 3, 26; see Section 725.546. Employer's payment of \$3,234.50 reduced the outstanding overpayment to \$2,119.20. Director's Exhibit 28.

Claimant's main contention on appeal is that the attorney's fee incurred in obtaining his state award completely offsets the overpayment and thus he owes DOL nothing. Claimant's Brief at 2. Claimant compares his \$6,481.80 state attorney's fee with the \$5,353.70 overpayment and concludes that since the attorney's fee is greater, it cancels the overpayment. See Claimant's Brief at 2. We disagree. As the Director correctly asserts, the administrative law judge properly deducted claimant's attorney's fee to arrive at the \$5,353.70 overpayment figure. Director's Brief at 9-10.

Where the state award provides a method for paying legal fees, the Director uses that method for calculating the exclusion of legal fees from offset. Coal Mine (BLBA) Procedure Manual, Chapter 2-1403, ¶ 11(c); *Director, OWCP v. Barnes and Tucker Co. [Molnar]*, 969 F.2d 1524, 1526, 16 BLR 2-99, 2-102 (3d Cir. 1992). Here,

the state award provided that employer was to deduct twenty percent from each of claimant's weekly checks for the first three years. Director's Exhibit 9 at 4. The administrative law judge applied this "pro-rata" method and correctly determined that the net monthly amount of the state award to be offset against the federal award was \$720.00.⁴ Decision and Order at 3. Because the net monthly state benefit exceeded the \$381.00 federal award, the administrative law judge found that the federal award was totally offset and must be repaid. *Id.* Inasmuch as the administrative law judge accurately applied the correct calculation method, we affirm his finding.⁵

⁴ Specifically, the administrative law judge determined that claimant's monthly state award was \$900.25 (\$207.75 a week x 52 divided by 12). Decision and Order at 3. The monthly attorney fee excluded was \$180.05 (\$900.25 x 20%). *Id.* Thus, the net monthly state award was \$720.20 (\$900.25 - \$180.05). *Id.* DOL's claims examiner reached the same result. Director's Exhibit 42.

⁵ The administrative law judge applied the "pro-rata" method pursuant to the Board's holding in *Molnar v. Barnes and Tucker Co.*, 15 BLR 1-53 (1991). Decision and Order at 2. Subsequent to his Decision and Order, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), vacated the Board's *Molnar* decision and adopted the "up-front" method of apportioning attorney's fees pursuant to Section 725.535(d). *Director, OWCP v. Barnes and Tucker Co. [Molnar]*, 969 F.2d 1524, 16 BLR 2-99 (3d Cir. 1992). The administrative law judge's use of the

"pro-rata" method is proper, however, because the Third Circuit's holding in *Molnar* does not require the use of the "up-front" method where, as here, the state award specifies a method for determining how the attorney's fees are to be paid. *Molnar*, 969 F.2d at 1526, 16 BLR at 2-102.

Claimant also contends that, by obtaining state benefits, he saved DOL thousands of dollars in federal benefits. Claimant's Brief at 2. Thus, he argues, "Third Party Beneficiary Theory and Principals [sic] of Equity overwhelmingly suggest that the Claimant should not be penalized for creating a benefit to the Department." *Id.* We reject claimant's argument.

Section 725.533 specifically provides that a reduction in the amount of benefits paid monthly shall be made on account of any benefits received under a state workers' compensation law. 20 C.F.R. §725.533(a)(1); *Carbon Fuel Co. v. Director, OWCP [Kyle]*, 20 F.3d 120, 18 BLR 2-228 (4th Cir. 1994). Claimant was informed that he had to notify DOL if he received additional benefits, Director's Exhibit 4, and he admitted that he received both federal and state benefits for the relevant time period, Claimant's Brief at 2, which created the overpayment in the first place. See Sections 725.540; 725.535(b). Thus, the issue is not the amount that claimant may have saved DOL by obtaining state benefits, but rather, the amount that he cost DOL by receiving benefits from the Trust Fund for the same time period also covered by his state benefits.

Claimant further asserts that the administrative law judge erred in concluding that only \$96.10 of claimant's attorney's fee is excluded from the offset. Claimant's Brief at 2. We reject this assertion. This figure is not the amount of attorney's fee that the administrative law judge found to be excluded from the offset. The \$96.10 to which claimant refers is the amount excluded from the offset to reflect that in November 1979 claimant received state benefits for only twelve days. See n.2, *supra*; Director's Exhibit 42 at 1.

Lastly, claimant contends that he is entitled to the \$3,234.50 that employer paid directly to DOL on claimant's account. Claimant's Brief at 2. We disagree. The \$3,234.50 figure represents retroactive federal benefits owed claimant from June 19, 1989, through December 1989, when employer resumed payment of federal benefits. Director's Exhibits 25, 26. Because an overpayment existed, DOL requested, pursuant to Section 725.546, that employer remit this amount directly to DOL on claimant's account, which employer did. Director's Exhibit 42 at 2. Thus, the \$3,234.50 was permissibly adjusted against the overpayment, resulting in a net overpayment of \$2,119.20. Director's Exhibit 42; See Section 725.546; see generally *Justus v. Knox Creek Coal Co.*, 16 BLR 1-95 (1992).

Accordingly, the administrative law judge's Decision and Order denying waiver of recovery of the overpayment of benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

_____NANCY S.
DOLDER
Administrative Appeals Judge