

BRB No. 07-0504 BLA

B.B.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
DOUBLE B MINING, INCORPORATED)	
)	DATE ISSUED: 03/31/2008
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Overpayment and Reimbursement of the Trust Fund of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Overpayment and Reimbursement of the Trust Fund (2004-BLA-06428) of Administrative Law Judge Alice M. Craft rendered 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). On July 18, 1988, claimant filed a claim for federal black lung benefits, and Double B Mining Company

(employer) was named as the responsible operator. Claimant's Exhibit 1. The issue presented in this appeal is the calculation of state workers' compensation offset and an overpayment. On August 21, 2002, Administrative Law Judge Thomas M. Burke issued a Decision and Order on Third Remand awarding benefits, which was affirmed by the Board and has become final. *[B.B.] v. Double B Mining Co.*, BRB No. 02-0868 BLA (Sept. 30, 2003) (unpub.); Director's Exhibit 43. Judge Burke determined that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and awarded benefits commencing June 1, 1986,¹ the month in which claimant was first diagnosed with complicated pneumoconiosis, subject to offset of state workers' compensation benefits.² On March 5, 2004, the Office of Workers' Compensation Programs (OWCP) requested that employer reimburse the Black Lung Disability Trust Fund (the Trust Fund) for interim benefits paid to claimant from June 1986 to February 2004, in the amount of \$99,228.10, and to further provide benefits to claimant, beginning March 2004, at the monthly rate of \$823.50. Director's Exhibit 45.³ By letter dated March 8, 2004, OWCP advised claimant that he had received an

¹ Judge Burke specifically determined that claimant established the existence of complicated pneumoconiosis, based on positive x-ray readings for complicated pneumoconiosis of a film dated June 26, 1986. Director's Exhibit 43.

² In June 1986, claimant filed a workers' compensation claim for black lung benefits with the Virginia Industrial Commission (VIC). Director's Exhibit 1. On July 26, 1988, the VIC issued a Final Order approving a settlement agreement reached between claimant and Bounty Mining Company (a prior coal mine operator) on June 27, 1988 in the amount of \$50,000, of which \$4,500.00 was to be paid to claimant's counsel for attorney fees. *Id.* The settlement agreement dated June 27, 1988 is not of record, although the record does contain the Final Order approving that settlement agreement.

³ In a Memo to the File dated March 1, 2004, the Office of Workers' Compensation Programs (OWCP) explained how offset was to be calculated in this case. As noted by OWCP, claimant's state workers' compensation claim was settled for \$50,000, of which \$4,500.00 was paid in attorney fees. Based on information provided by VIC, the memo reported that state benefit rates in 1986 were calculated as two-thirds (2/3) of the worker's average weekly earnings, to a maximum of \$311.00, with compensation beginning with the date the claimant is notified of the disease, and the normal duration of the award extending for 50 weeks for Stage I pneumoconiosis, 100 weeks for Stage 2 pneumoconiosis, and 300 weeks for Stage 3 pneumoconiosis. Director's Exhibit 44. Because the record indicated that claimant filed his state claim after being diagnosed with Stage 4 pneumoconiosis, based on a June 26, 1986 x-ray, and since the Final Order of settlement did not specify the terms of the agreement between the parties to the state claim, OWCP determined that state offset began on June 26, 1986 and extended for 300 weeks, until March 26, 1992, at the rate of \$23.81 per day. *Id.*

overpayment of black lung benefits in the amount of \$15,326.80, based on his receipt of workers' compensation benefits for the period of June 1988 through March 1992.⁴ Director's Exhibit 46. Claimant was advised of his right to challenge the amount of the overpayment and/or request a waiver of the overpayment. *Id.* By letter dated March 12, 2004, employer requested reconsideration, asserting that the offset calculations by OWCP were incorrect. Director's Exhibit 47. On March 16, 2004, claimant requested a hearing. Director's Exhibit 48. The district director denied employer's request for reconsideration on March 17, 2004, Director's Exhibit 49, and employer also requested a hearing. The case was forwarded to the Office of Administrative Law Judges, and following a telephone conference conducted with the administrative law judge on November 10, 2004, the parties agreed to a decision on the record. Director's Exhibit 50.

On January 30, 2007, the administrative law judge issued her Decision and Order – Overpayment and Reimbursement of the Trust Fund (Decision and Order). The administrative law judge rejected employer's assertion that offset must begin on July 26, 1988, the date of the Final Order approving a settlement agreement in the state claim, as opposed to June 1986, the month in which claimant filed his state claim and was diagnosed with Stage 3 pneumoconiosis. The administrative law judge also approved the method by which OWCP calculated the amount of monthly state payments for offset against the federal payments, specifically deferring to his application of a 300 week divisor for Stage 3 pneumoconiosis. Using this method, the administrative law judge found that while OWCP calculated an overpayment to claimant, from June 1988 through March 1992, in the amount of \$15,326.80, that calculation failed to account for a suspension of benefits in the amount of \$23,577.00 from March 1995 to February 1998, which mitigated the overpayment and resulted in an additional amount due, instead, to claimant in the amount of \$8,250.20 ($\$23,577.00 - \$15,326.80 = \$8,250.20$). Because she determined that claimant was still owed benefits, the administrative law judge directed employer to pay claimant the amount of \$8,250.20. In addressing the amount owed by employer to the Trust Fund, the administrative law judge concurred with OWCP's finding that the state award was exhausted in March 1992 and that employer owed the Trust Fund \$99,228.10 for benefits paid to claimant through February 2004, taking into account that the state workers' compensation offset ceased in March 1992. Notwithstanding, the administrative law judge also found that the amount of \$99,228.10 did not account for the suspension of payments to claimant in the amount of \$23,577.00 and, therefore, she determined that employer owed the amount of \$75,651.10 to the Trust

⁴ OWCP calculated that, in total, claimant was paid \$114,554.90 in benefits by the Black Lung Disability Trust Fund (the Trust Fund) from June 1988 through February 2004, but that the actual benefits payable for that period, after application of a state award offset, was \$99,228.10. Director's Exhibit 46. Thus, OWCP determined that claimant received an overpayment of \$15,326.80 ($\$114,554.90 - \$99,228.10 = 15,326.80$). *Id.*

Fund (\$99,228.10 - \$23,577.00 = \$75,651.10) for payment of interim benefits to claimant. Accordingly, employer was directed to pay \$8,250.20 to claimant and \$75,651.00 to the Trust Fund.

Employer appeals, asserting that the administrative law judge erred in applying the district director's method of calculating offset for claimant's state award, beginning from June 1986, as opposed to July 26, 1988, the date of the Final Order approving a settlement agreement in the state claim. Employer also argues the administrative law judge erred in directing employer to pay claimant the amount of \$8,250.20. Employer's Brief at 12. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Board to reject employer's arguments with respect to the date of onset of state benefits. The Director, however, agrees with employer that the administrative law judge erred in reducing the overpayment calculation and directing employer to pay claimant the amount of \$8,250.20.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Under the Act, federal black lung benefits are reduced (but not below zero) by an amount equal to any benefits that a claimant receives under any state workers' compensation award because of death or partial or total disability due to pneumoconiosis. 30 U.S.C. §§922(b), 932(g); 20 C.F.R. §§725.533(a)(1), 725.535. In computing the reduction of federal benefits due to receipt of state benefits, amounts paid or incurred by claimant for medical, legal or related expenses in connection with his or her state award must be excluded. 20 C.F.R. §725.535(d).

In this case, the Director argues that employer owes the Trust Fund \$99,228.10 for benefits paid to claimant once the state offset ceased in March 1992. Employer maintains that it owes the Trust Fund only \$79,269.70. Employer contends that the state offset was improperly calculated as beginning in June 1986, as opposed to July 26, 1988, when claimant and his former employer, Bounty Mining Company, reached a settlement agreement on the state claim. Employer's figure of \$79,269.70 is based on employer's calculation of claimant's state offset beginning on July 26, 1988 and extending until total offset of the \$45,500 award to claimant by the settlement agreement is exhausted in December 1995. Employer's Brief at 13-14. Employer's method of calculating the offset reduces the settlement award each month by the total monthly rate of federal benefits.

Employer asserts that the administrative law judge's offset calculations result in a "windfall to claimant and do not give employer the benefit of the full settlement amount paid in the [s]tate claim." Employer's Brief at 8. Employer specifically contends that the administrative law judge erred in adopting the Director's position on the starting date for offset of the state award. Employer maintains that because the settlement between the parties did not become effective until the July 26, 1988 Final Order, claimant is not entitled to have his state award retroactively applied for purposes of offset back to June 1986.

We agree with the administrative law judge, however, that employer's argument as to the proper onset date is unavailing.⁵ As noted by the administrative law judge, since the settlement agreement was paid in a lump sum, OWCP was responsible under 20 C.F.R. §725.535(c) to calculate which months were covered by the lump sum settlement for purposes of offset. Decision and Order at 7. Section 725.535(c) provides:

Where a State or Federal benefit is paid periodically but not monthly, or in a lump sum as a commutation of or a substitution for periodic benefits, the reduction under this section is made at such time or times and in such amounts as the Office determines will approximate as nearly as practicable the reduction required under paragraph (b) of this section....

20 C.F.R. §725.535(c).

The administrative law judge properly determined that the district director's method of calculating the period of coverage for offset, beginning with the date of June 26, 1986, was reasonable, since that date reflects the onset date of claimant's disease under both the federal and state compensation schemes. The administrative law judge noted that since the Final Order did not explicitly address the onset date, "the date upon which the [c]laimant actually received payment has no significance whatsoever in terms of the time period that the settlement agreement was meant to cover." Decision and

⁵ Employer argues that the administrative law judge erred in applying Section 65.2-403 of the Virginia Code, which states that benefit payments commence from the date an occupational disease is first communicated to a claimant, as opposed to Virginia Code Section 65.2-701, dealing with settlement agreements. *See* Va. Code Ann. §§ 65.2-403, 65.2-701. We disagree. Because the settlement agreement is not of record, and the Final Order dated July 26, 1988 is silent as to the onset date for state benefits, we refuse to construe the Final Order as precluding OWCP from determining the onset date of state benefits in accordance with Section 65.2-403. Director's Brief at 3-4.

Order at 7; *see* Director's Exhibit 1. The administrative law judge also found that two rationales support an onset date beginning in June 1986:

First, in a case of federal black lung benefits involving complicated pneumoconiosis such as this one, the onset date is the month during which complicated pneumoconiosis was first diagnosed. . . . Moreover, and more to the point, the [c]laimant contends that Virginia Code Section 65.2-403 holds that benefit payments commence from the date an occupational disease is first communicated to a claimant. This is an especially compelling reason to construe the onset date in this case as June 1986. To that end, OWCP states that it is unaware of any other instance where a 'start date' other than a date of filing or communication of the disease to the [c]laimant is ever used in this regard. [Director's Exhibit] 49.

Decision and Order at 7.

After determining the onset date, the administrative law judge deferred to OWCP's method of calculating the daily/weekly benefit amount of state offset as she found it to be reasonable. The administrative law judge found that claimant's state award covered a period of five years and nine months, from June 1986 through March 1992, during which time claimant's federal benefits should have been completely offset by his state award. Decision and Order at 8-10.

Since the Director is charged with the administration of the Act, special deference is generally given to the Director's reasonable interpretation of a regulation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Freeman United Coal Mining Co. v. Director, OWCP [Taskey]*, 94 F.3d 384, 387, 20 BLR 2-348, 2-355 (7th Cir. 1996); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). Because we agree with the administrative law judge that OWCP's method of calculating the state offset in this case was reasonable, we reject employer's argument that the administrative law judge erroneously applied an onset date beginning in June 1986, or that she erred in deferring to the Director's method of calculating the duration and monthly amount of the offset in accordance with Section 725.535(c). Thus, we reject employer's general assertion that employer has not received the benefit of the full settlement amount paid in the state claim.⁶ Decision and Order at 8.

⁶ The record indicates that from July 1988 through March 1992 claimant was paid \$25,038.60 by the Trust Fund, which the administrative law judge correctly recognized was an overpayment to claimant. Decision and Order at 10; Director's Exhibit 46. The administrative law judge also correctly found that the overpayment amount was reduced by OWCP to \$15,326.80, because claimant was given a credit of \$9,711.80, which

However, we agree with employer and the Director that the administrative law judge erred in ordering employer to pay claimant an additional \$8,250.20 in benefits. As noted by the Director, the administrative law judge's calculation of \$8,250.20 was based on her erroneous belief that claimant was entitled to a credit for \$23,577.00 when his benefits were suspended. Decision and Order at 10-11; Directors' Brief at 2. Contrary to the administrative law judge's finding, however, the record indicates that while OWCP suspended payment of benefits to claimant in March 1995, Director's Exhibit 22, those benefits were reinstated in February 1998, resulting in claimant failing to receive \$23,622.00⁷ in benefits during the suspension period. OWCP, however, did not reimburse claimant for the full amount of suspension benefits (\$23,622.00) because OWCP was in the process of calculating the offset of state benefits. Claimant later received a lump sum payment of \$13,910.20 in December 2002 to cover the suspension payment. Director's Exhibit 46. OWCP then subtracted the lump sum payment of \$13,910.20 from the suspension amount of \$23,622.00 and concluded that claimant was entitled to a credit of \$9,711.80. *Id.* Applying the \$9,711.80 credit and subtracting that amount from the original overpayment calculation of \$25,038.60, OWCP determined that claimant was overpaid \$15,326.80, as reported in the March 8, 2004 notice of overpayment sent to claimant ($\$25,038.60 - \$9,711.80 = \$15,326.80$). *Id.* Because the record supports the position of the Director and employer that claimant is not entitled to an additional benefit amount of \$8,250.20, we vacate the administrative law judge's finding that employer owes claimant \$8,250.20 and further vacate her determination that no overpayment occurred in this case. Based on OWCP's calculations, claimant must reimburse OWCP for an overpayment in the amount of \$15,326.80.

Additionally, based on her finding that claimant did not receive a credit for the suspension period in the amount of \$23,577.00, the administrative law judge reduced the amount employer owed the Trust Fund from to \$75,651.10 ($\$99,228.10 - \$23,577.00 = \$75,651.10$). However, as we explained *supra*, claimant received a lump sum payment to cover the suspension period; therefore, the administrative law judge erred in reducing employer's liability to the Trust Fund by that amount. We, therefore, vacate the administrative law judge's finding as to the amount employer owes the Trust Fund, and conclude that employer must reimburse the Trust Fund in the amount of \$99,228.10 for payment of interim benefits to claimant, as originally calculated by OWCP.

amount had been withheld from a lump sum payment issued to claimant by the Trust Fund on December 11, 2002. *Id.*

⁷ We note that the administrative law judge reported that claimant failed to receive \$23,577.00 for the period of suspension, but that figure is incorrect, as it is based on the amount set forth at Director's Exhibit 24, which contains a mathematical error. The proper amount of suspension benefits is \$23,622.00. *See* Director's Brief at 4.

Accordingly, the Decision and Order – Overpayment and Reimbursement of the Trust Fund of the administrative law judge is affirmed in part and vacated in part, and the case is remanded to the district director for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge