

BRB No. 01-0709 BLA

PEGGY MOSLEY)
(Widow of JAMES E. MOSLEY))

Claimant-Petitioner)

v.)

M & H COAL COMPANY,)
INCORPORATED)

and)

WEST VIRGINIA COAL-WORKERS')
PNEUMOCONIOSIS FUND)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,))
UNITED STATES DEPARTMENT)
OF LABOR)

Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, 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.

Helen H. Cox (Eugene Scalia, Solicitor of Labor; Donald S. Shire, 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 McGRANERY,
Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow,¹ appeals the Decision and Order (OO-BLO-0024) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) directing claimant to reimburse employer for an overpayment in the amount of \$17,608.21, arising in connection with 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).² The administrative law judge found that the district director presented sufficient evidence to establish an overpayment in the amount of \$17,608.21. He then determined that claimant was "at fault" in the creation of the overpayment and thus, waiver of recovery of the overpayment would be prohibited. *See* 20 C.F.R. §§410.561b(b), 725.542. Accordingly, the administrative law judge ordered claimant to reimburse employer the \$17,608.21 overpayment.

¹Claimant filed a claim for survivor's benefits on March 28, 1997, indicating that the miner died on March 6, 1997. Director's Exhibit 14.

²The 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.

On appeal, claimant challenges the amount of the overpayment she owes to employer and asserts that she was not given credit for attorney's fees paid in pursuit of the deceased miner's state claim. Claimant argues that the \$17,608.21 overpayment should be reduced by \$4,012.81 for an actual overpayment of \$13,055.40.³ Claimant further contends that since reimbursement of the overpayment is payable to employer and not to the Black Lung Disability Trust Fund, the administrative law judge erred in determining whether or not claimant was "at fault" in the creation of the overpayment. Claimant also asserts that the administrative law judge did not mention claimant's closing argument submitted to the administrative law judge by cover letter dated March 15, 2001. In her closing argument before the administrative law judge, claimant raised the issue of whether she received a credit against the overpayment for the amount of attorney's fee paid in pursuit of the deceased miner's state claim. Claimant attaches to her appellate brief this closing argument, as well as copies of (1) a document indicating claimant's receipt of a check in the amount of \$68,680.09 from the West Virginia Workers' Compensation Division; (2) the workers' compensation award from the State of West Virginia dated September 18, 1998; (3) claimant's counsel's February 18, 1999 letter to the district director informing him of the state payment made to claimant and of attorney's fees in the amount of \$13,736.09; and (4) the district director's response dated February 25, 1999, in which he acknowledges receipt of counsel's letter dated February 18, 1999 and in which he discusses the attorney fee credit issue.⁴ Claimant ultimately requests that the case be remanded to the "Department of Labor" for a finding (1) that the actual overpayment to be reimbursed to employer is \$13,055.40; and (2) that claimant was not "at fault" in the creation of the overpayment.

Carrier responds to claimant's appeal, and contends that the district director properly credited thirty percent of claimant's attorney fee expenses paid in pursuit of the state award, against the overpayment. Carrier thus urges the Board to affirm the administrative law judge's order directing claimant to pay employer an overpayment in the sum of \$17,608.21.

The Director, Office of Workers' Compensation Programs (the Director) responds, and contends that claimant received credit for the attorney's fees in question. Specifically, the Director asserts that thirty percent of the total attorney's fee of \$13,376.02, or \$4,012.81,

³The sum of \$4,012.81 constitutes thirty-percent of the total attorney's fee, which sum correlates with the percent of the state award attributable to the miner's pneumoconiosis, or thirty percent.

⁴The file before the Board contains the original closing argument dated March 15, 2001 and these above-described attachments. The closing argument is stamped as "Received" on March 19, 2001. The document is also stamped as received on June 26, 2001 by "US/DOL/ESA/OWCP/DCMWC Mailroom." The document is further stamped as "Received" on June 28, 2001.

was credited against the state benefits claimant received during the first eleven months of state benefits payments. The Director thus argues that there was no attorney's fee credit remaining when the duplicative benefits payments occurred and, thus, there is no basis for reducing the amount of the overpayment. The Director thus urges the Board to uphold the administrative law judge's order that claimant repay employer the \$17,608.21 overpayment. The Director further agrees with claimant's contention that since the overpayment is owed to employer, the administrative law judge's analysis of "fault" and waiver was unnecessary as the waiver provisions are not applicable.

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

Under the Act, benefits payable by a liable party may be offset or reduced by the amount of benefits that a claimant receives under any state workers' compensation law because of death or partial or total disability due to pneumoconiosis. 30 U.S.C. §§922(b), 923(g); 20 C.F.R. §§725.533(a)(1),⁵ 725.535. The regulations further provide that amounts

⁵The regulation at 20 C.F.R. §725.533 has been substantially revised. The Department of Labor deleted from the regulation provisions concerning Section 415 "transition claims." See 30 U.S.C. §925. The Department of Labor explained:

Although the Department does not intend to alter the rules applicable to any section 415 claim that may remain in litigation, parties have adequate access to these rules in earlier editions of the Code of Federal Regulations.

for medical, legal or related expenses incurred by a claimant in connection with his state claim are excluded in computing this reduction. 20 C.F.R. §725.535(d).

65 Fed. Reg. 80015. This revision does not impact the instant claim.

We first consider claimant's contention that the administrative law judge failed to address her argument that she did not receive a credit for attorney's fees paid in pursuit of the deceased miner's state claim. Claimant thus requests that the decision below be "set aside." In the Decision and Order from which claimant now appeals, the administrative law judge initially determined that the district director presented sufficient evidence to establish that an overpayment in the amount of \$17,608.21 existed.⁶ The administrative law judge then determined that claimant was "at fault" in the creation of the overpayment. *See* 20 C.F.R. §410.561b(b). He indicated that there was thus no need to consider whether recovery of the overpayment would be against equity and good conscience or defeat the purpose of the Act, as waiver would be prohibited. *See* 20 C.F.R. §725.542.⁷ Accordingly, the administrative law judge ordered claimant to pay employer the \$17,608.21 overpayment.

We vacate the administrative law judge's order directing claimant to reimburse employer an overpayment in the amount of \$17,608.21 inasmuch as the administrative law judge did not address claimant's closing argument and supporting evidence.⁸ By Order dated February 7, 2001, the administrative law judge, *inter alia*, indicated that the parties could submit closing briefs on or before March 14, 2001. Claimant submitted her closing argument and evidence by cover letter dated March 15, 2001, asserting therein that she had not received credit for the attorney's fee paid in pursuit of the deceased miner's state claim and was due a reduction in the overpayment amount. Claimant correctly contends that the administrative law judge made no reference to claimant's closing argument and supporting evidence. The regulations provide that briefs or other written statements or allegations as to facts or law may be filed by any party with the permission of the administrative law judge.

⁶Based on representations made by carrier, the administrative law judge found that claimant had reimbursed the Department of Labor for the overpayment in the sum of \$445.10. Decision and Order at 4. The administrative law judge thus addressed the \$17,608.21 overpayment due employer. On appeal, carrier indicates that claimant sent a check to the Department of Labor on February 6, 2001 in satisfaction of the overpayment due to the Department of Labor. Carrier's Brief at 3.

⁷The administrative law judge further found that, assuming that claimant had established that she was "without fault" in the creation of the overpayment, she would still not be entitled to a waiver of recovery of the overpayment because she did not present any evidence that recovery would either defeat the purpose of Title IV of the Act or be against equity and good conscience.

⁸We also vacate the administrative law judge's waiver analysis. The waiver provisions are not applicable because the overpayment at issue is owed to employer and not to the Department of Labor. *See* 20 C.F.R. §725.547(a).

20 C.F.R. §725.455(d). The regulations also provide that the administrative law judge's Decision and Order shall be based upon the record made before him. 20 C.F.R. §725.477. Further, the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §§919(d) and 30 U.S.C. §932(a), requires the administrative law judge to set forth the reasons or bases for his findings and conclusions on all issues of fact and law. We, therefore, remand the case for the administrative law judge to consider the timeliness of claimant's closing argument and attached evidence and the merits of that argument as well as the probative value of the evidence, if reached. Should the administrative law judge, on remand, reach the merits of claimant's contentions put forth in her closing argument, he must determine whether or not the district director actually applied the claimed credit. Conversely, should the administrative law judge decline to reach the merits of claimant's contentions on the ground that her closing argument was untimely filed, then the administrative law judge's Decision and Order would stand, as issued. If claimant is dissatisfied with the administrative law judge's decision on remand, she must file a timely appeal with the Board. 20 C.F.R. §725.481.

Accordingly, the administrative law judge's Decision and Order is vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge