



BRB Nos. 18-0504 BLA
and 18-0505 BLA

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| NANCY BAILEY |) | |
| (o/b/o and Widow of CHARLES BAILEY) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: 11/20/2019 |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order - Calculation of Offset of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis) and Robert S. Seer (Ellis Legal, P.C.), Chicago, Illinois, for claimant.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Calculation of Offset (2017-BLA-05786 and 2017-BLA-05787) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) rendered pursuant to the Black Lung Benefits Act, as amended,

30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on November 21, 2011¹ and a survivor's claim filed on June 21, 2016.² The sole issue is whether the administrative law judge erred in finding benefits the miner received under a lump sum settlement agreement of his state claim for compensation benefits were reasonably and permissibly deducted from his federal black lung benefits award.³

The procedural history of these proceedings is as follows. On July 18, 2002, the miner reached a settlement with Arch of Illinois, Incorporated (Arch of Illinois) in resolution of his state claim for occupational benefits for disability due to pneumoconiosis. Miner's Claim (MC) Director's Exhibit 8. The parties agreed to a lump sum payout of \$35,000.00, of which \$27,677.50 went to the miner, and the remainder went to his attorney for fees and expenses. Director's Exhibit 2.

On November 21, 2011, the miner filed for federal black lung benefits, which the district director awarded on October 10, 2013, beginning in November 2011. MC Director's Exhibits 1, 3, 4. The miner died on June 8, 2016. MC Director's Exhibit 6. By letters dated July 7, 2016 and January 30, 2017, the Office of Workers' Compensation Programs (OWCP) informed claimant the miner's state claim settlement contract contained timeframes and conditions that duplicated periods of eligibility for federal black lung benefits. MC Director's Exhibits 7, 8, 9. Consequently, the miner's federal benefits should have been offset by \$135.67 per month from November 2011 through May 2016,⁴ the last

¹ The district director awarded benefits to the miner on October 10, 2013. Due to the bankruptcy of the responsible operator, Arch of Illinois, Incorporated (Arch of Illinois), the Black Lung Disability Trust Fund assumed liability for the payment of benefits. Miner's Claim (MC) Director's Exhibits 4, 5.

² Claimant is the widow of the miner, who died on June 8, 2016. MC Director's Exhibit 6. The district director awarded derivative survivor's benefits to her on July 7, 2016. Survivor's Claim Director's Exhibit 4; *see* 30 U.S.C. §932(l). She is pursuing the miner's claim on behalf of his estate and her survivor's claim. MC Director's Exhibit 6.

³ By letter dated September 28, 2018, the Director, Office of Workers' Compensation Programs (OWCP) (the Director), withdrew controversion to the \$5,000.00 paid to claimant in connection with the miner's state workers' compensation settlement contract, which the district director initially sought to offset against her survivor's benefits.

⁴ The offset period for the miner's federal black lung benefits begins with the month in which he filed his federal claim, November 2011, and runs through the month before the month in which he died, May 2016. *See* 20 C.F.R. §§725.203(b)(1), 725.503(b). Based on a \$135.67 monthly offset, the total amount of federal benefits offset for this period was

full month of the miner's eligibility for federal benefits. *See* 20 C.F.R. §725.203(b)(1); MC Director's Exhibits 7, 8, 9.

At claimant's request, the case was transferred to the Office of Administrative Law Judges for further review.⁵ The administrative law judge found the district director's offset determination reasonable and consistent with the regulations.

On appeal, claimant argues the administrative law judge erred in affirming the district director's offset determination, asserting it is not reasonable and appropriate. She therefore asserts the case should be remanded to the district director for recalculation of federal benefits without the offset. The Director, OWCP (the Director), responds in support of the administrative law judge's finding that the district director's offset calculation is reasonable and consistent with the regulations. Claimant filed a reply brief, reiterating her contentions.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order - Calculation of Offset if it is rational, supported by substantial evidence, and in accordance with applicable law.⁶ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Act requires that federal black lung benefits be reduced (but not below zero) by the amount of state workers' compensation benefit payments paid to a claimant for total or partial disability or death due to pneumoconiosis for periods during which federal benefits

\$7,461.85 ($\$135.67 \times 55 \text{ months} = \$7,461.85$). For the period from October 2013 through May 2016, benefits were paid in the amount of \$30,507.70. MC Director's Exhibit 7. As these benefits were not reduced by the \$135.67 offset, the district director calculated an overpayment of \$4,341.44 for this period ($\$135.67 \times 32 \text{ months} = \$4,341.44$). *Id.* For the period from November 2011 to September 2013, the district director calculated benefits in the amount of \$18,460.49, which took into account the \$135.67 monthly offset ($\$938.30 - \$135.67 = \802.63; $\$802.63 \times 23 \text{ months} = \$18,460.49$). *Id.* Because back benefits for this period had not yet been paid, the district director reduced that award by the overpayment of \$4,341.44, leaving a remaining balance of \$14,119.05. *Id.*

⁵ Claimant initially requested a hearing but the parties subsequently agreed to a decision on the record. MC Director's Exhibit 10.

⁶ The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as the miner's last coal mine employment occurred in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 8.

are also awarded. 30 U.S.C. §932(g), as implemented by 20 C.F.R. §§725.533(a)(1), 725.535(b); *see Harman Mining Co. v. Director, OWCP [Stewart]*, 826 F.2d 1388, 1389-90 (4th Cir. 1987). The district director is to determine any offset upon proof that the state compensation payments were for disability due to pneumoconiosis and for periods concurrent with federal benefit payments. *See* 20 C.F.R. §§725.533(a)(1), 725.535(b); *Stewart*, 826 F.2d at 1390.

We reject claimant's assertion that the miner never received state benefits concurrently with federal benefits because he was paid a lump sum state award in July 2002 before his eligibility for federal benefits began.⁷ Claimant's Brief at 7-13; Claimant's Reply Brief at 8-11. The state settlement contract provided for a lump sum payment to the miner of "\$35,000 that represents approximately 15% [man as a whole] or 75.16 weeks of compensation at the [permanent partial disability] rate of \$465.67 per week based on the date of last exposure" of July 28, 1998.⁸ MC Director's Exhibit 8 at 6. The contract further provided "the said lump sum amount is not a substitute for periodic payments," but represents:

- (1) Payment of Attorney's fees to Petitioner's counsel in the sum of \$7,000;
- (2) Reimbursement of court costs and expenses to Petitioner's counsel in the sum of \$322.50;
- (3) The balance of the settlement proceeds [of] \$27,677.50 . . . represents a compromise agreement of the weekly or monthly benefit of petitioner from the date the contract was entered into, July 17, 2002 [sic], over his life expectancy. The life expectancy of the petitioner during this period is 17 years. . . . [P]ro rata payments over the period contemplated by this agreement are based on a weekly payment rate of \$31.31 and a monthly payment rate of \$135.67 as and for petitioner's alleged incapacity to pursue his usual and customary line of employment. Said payments, however, shall be made in a lump sum.

Id. at 7.

⁷ There is no dispute the settlement contract between the miner and Arch of Illinois was to settle his state claim for disability due to pneumoconiosis.

⁸ The miner's last day of work for Arch of Illinois was July 28, 1998. MC Director's Exhibit 8.

Where a state award is paid in lump sum, the district director is responsible for “approximat[ing] as nearly as practicable the reduction required” if the benefits had been paid monthly.”⁹ 20 C.F.R. §§725.535(c); Decision and Order at 3. In making that approximation, the district director relied on the express language of the settlement contract that “[p]ro rata payments over the [seventeen year] period contemplated by this agreement are based on a . . . monthly payment rate of \$135.67” beginning with “the date the contract was entered into,” but payable as a lump sum. Director’s Brief at 6; MC Director’s Exhibits 8, 9. As the settlement contract began on July 18, 2002, the seventeen year period would have run through June 2019. MC Director’s Exhibit 9. The miner’s federal black lung benefits began in November 2011 and ended in May 2016 due to his death. Thus, substantial evidence supports the administrative law judge’s determination the district director acted reasonably in determining the periods the miner’s state and federal awards covered ran concurrently from November 2011 through May 2016 and, therefore, that offset was appropriate.¹⁰ See *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888,

⁹ The applicable regulation 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 OWCP determines will approximate as nearly as practicable the reduction required under paragraph (b) of this section....

20 C.F.R. §725.535(c).

¹⁰ We reject claimant’s contention that even if offset is appropriate, the district director erred in failing to calculate the period of state benefits as running for 75.16 weeks beginning July 1998, in which case it would have expired prior to the miner’s federal award. Claimant’s Brief at 6-19; Reply Brief at 4-15. Claimant relies on the language in the settlement agreement that the \$35,000 lump sum “represents approximately 15% [man as a whole] or 75.16 weeks of compensation at the [permanent partial disability] rate of \$465.67 per week based on the date of last exposure” of July 28, 1998. MC Director’s Exhibit 8 at 6. As the Director asserts, however, it is not clear whether this statement refers to the method by which the state award was calculated as opposed to the date from which the state award would commence. Director’s Brief at 8-9; MC Director’s Exhibit 8 at 6. Moreover, while this language is “seemingly in tension” with the later contract provision specifying periodic payments over seventeen years, we agree with the Director that the district director and the administrative law judge reasonably relied on this later “much more detailed and specific” language. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111,

893-94 (7th Cir. 1990); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Nor is there merit to claimant's assertion that the plain language of the settlement contract stating that the "lump sum amount is not a substitute for periodic benefits" precludes the use of the lump sum payment to offset federal benefits. Claimant's Brief at 13. In computing the reduction of federal benefits due to the receipt of state benefits, amounts paid or incurred for medical, legal or related expenses in connection with a state award must be excluded. 20 C.F.R. §725.535(d). We agree with the Director that because the full amount of \$35,000 specifically includes attorney's fees and expenses, which must be excluded from the offset computation, it is reasonable to construe the language stating the lump sum "is not a substitute for periodic benefits" as relating only to the full \$35,000 amount. Director's Brief at 7-8. It does not preclude a finding that at least a portion of the full amount of \$35,000 was intended as a substitute for periodic payments, as expressly stated in the contract. *Id.* Thus, the administrative law judge rationally determined the settlement contract "makes clear" that it is the remaining sum of \$27,677.50 that was intended as a substitute for monthly benefits. *See Poole*, 897 F.2d at 893-94; *Anderson*, 12 BLR at 1-113. We therefore affirm his determination that the district director acted reasonably in approximating the deduction required to be \$135.67 a month for seventeen years. Decision and Order at 4.

Finally we reject claimant's assertion that because the Act should be liberally construed to effectuate its purpose of improving the well-being of coal miners, it is improper to base an offset on language "written by an employer attorney" that results in the miner being deprived of his minimum federal benefits. Claimant's Brief at 17-19; Claimant's Reply Brief at 11-15. Particularly as the miner was represented by counsel when he entered into the settlement contract, we find no error in the administrative law judge's reliance on the settlement contract language as representative of the parties' agreement. *See* MC Director's Exhibit 8 at 8. We therefore affirm the administrative law judge's finding that the district director's offset calculation was reasonable and consistent with the regulations.¹¹ *See* 20 C.F.R. §725.535(c); *Stewart*, 826 F.2d at 1390 (observing the date benefits are received is not dispositive for determining the amount of offset).

1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94 (7th Cir. 1990); Director's Brief at 8-9.

¹¹ Because we affirm the district director's offset calculation, we find no merit in claimant's assertion that the miner received less than the federally-mandated amount of monthly benefits. *See Harman Mining Co. v. Director, OWCP [Stewart]*, 826 F.2d 1388, 1391 (4th Cir. 1987) (noting any offset provision that would diminish a federal award by

Accordingly, the administrative law judge's Decision and Order – Calculation of Offset is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

any amount *other than those duplicative* of the federal award would do violence to the adequacy of compensation for total disability due to pneumoconiosis) (emphasis in original).