

BRB No. 00-1161 BLA

LEWIS HURST)
)
 Claimant-)
 Petitioner)
) DATE ISSUED:
 v.)
)
 DIRECTOR, OFFICE OF)
 WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR) DECISION AND ORDER

Respondent

Appeal of the Order on Remand Denying Petition for Adjustment of Overpayment of Stuart A. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Howard M. Radzely, Acting 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: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order on Remand Denying Petition for Adjustment of Overpayment (97-BLO-0025) of Administrative Law Judge Stuart A. Kaplan 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). Claimant was awarded federal black lung benefits on September 28, 1983. Director's Exhibit 9. On March 24, 1991, claimant received an award of benefits for permanent total disability from the West Virginia Workers' Compensation Fund (WCF), sixty percent of which was designated as compensation for disability caused by pneumoconiosis. Director's Exhibits 54, 55. Claimant received a lump sum payment from the WCF in the amount of \$75,000.35, from which claimant's attorney deducted \$14,809.60 for legal fees and \$111.25 in medical expenses. Director's Exhibit 58. On May 24, 1991, the district director informed claimant that an overpayment of federal benefits existed in the amount of \$23,073.80 and that claimant was at fault in the creation of the overpayment. In calculating the amount claimant owed, the district director used what has been termed the "up-front" method. He began by determining that pursuant to 20 C.F.R. §725.535(d) (2000), claimant is entitled to receive sixty percent of the attorney fee award allowed under West Virginia law and sixty percent of the medical expenses without having this amount treated as a payment by which claimant's federal benefits must be offset.¹ Accordingly, the district director subtracted a total of \$8,902.01 from the overpayment and credited this sum against the amount of federal benefits that claimant received from April 8, 1987, the effective date of claimant's state award, through January 31, 1988. The total

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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven 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. 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

amount of overpayment that existed subsequent to these calculations is \$23,073.80 and covered the period from February 1, 1988 through March 31, 1991.

In the Board's most recent Decision and Order, the Board cited its decision in *Cadle v. Director, OWCP*, 19 BLR 1-56 (1994), and affirmed the administrative law judge's determination that the district director correctly calculated the amount of the overpayment claimant received as a result of an award of state workers' compensation benefits.² *Hurst v. Director, OWCP*, BRB No. 99-0674 BLA (Mar. 8, 2000)(unpub.). The Board vacated the administrative law judge's finding that claimant did not establish the prerequisites for waiver of recovery of the overpayment, however, and remanded the case to the administrative law judge for reconsideration of this issue. *Id.* On remand, the administrative law judge received documents establishing that claimant does not contest that he must repay a portion of the federal benefits that he has received; he only takes issue with the amount of the overpayment. The administrative law judge relied upon the Board's decision in *Cadle* and found that the district director's application of the "up-front" method is appropriate and that the amount of the overpayment is \$23,046.80.

In the present appeal, claimant urges the Board to reconsider its holding in *Cadle*, arguing that the method of calculation employed by the district director is not consistent with Section 725.535 and has the effect of increasing the amount of the overpayment by \$2,987.01. Claimant maintains that rather than determining the amount of the state award attributable to attorney fees and/or medical expenses and then dividing that figure by the monthly state benefit payments to determine the number of months in which claimant legitimately received concurrent federal benefits, the district director should subtract the attorney fees/medical expenses directly from the total of the concurrent federal benefits. The Director, Office of Workers' Compensation Programs, has responded and urges the Board to reject claimant's arguments on the ground that the Board's prior disposition of this issue constitutes the law of the case.

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 applicable law. 33 U.S.C.

²A complete recitation of the procedural history of this case is set forth in the Board's Decision and Order in *Hurst v. Director, OWCP*, BRB No. 99-0647 BLA (Mar. 8, 2000)(unpub.), slip op. at 1-4.

§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).

Pursuant to 20 C.F.R. §§725.533(a)(1) and 725.535(b), concurrent state and federal benefits for disability caused by pneumoconiosis are duplicative and federal benefits must be reduced, or offset, by the amount of state benefits. Section 725.535(c) provides that if a state award is paid “in a lump sum in commutation of or a substitution for periodic benefits,” the reduction in federal benefits is to be made so as to “approximate as nearly as practicable” the month-by-month method set forth in Section 725.535(b). Under Section 725.535(d), the amount received in payment for legal or medical expenses incurred in procuring the state award is not treated as concurrent state benefits. In *Cadle*, the decision in which the Board held that the “up-front” method is permissible, the miner received a lump sum payment of state workers’ compensation benefits, a portion of which was attributable to attorney fees. The district director used the “up-front” method of calculating the amount of the overpayment of federal benefits. The administrative law judge found that the district director’s calculations were not consistent with the remedial purpose of the Act, as they increased the amount of the overpayment for which the miner was liable. The administrative law judge instructed the district director to deduct the attorney fee portion of the lump sum award directly from the total of the concurrent federal black lung benefits payments that the miner received. On appeal, the Director contended that the “up-front” method is rational and consistent with the terms of Section 725.535. The Board held that the Director’s interpretation of the pertinent regulation is entitled to deference, as the Director is responsible for the administration of the Act and the implementing regulations. The Board also noted that the United States Court of Appeals for the Third Circuit held in *Director, OWCP v. Barnes and Tucker Co. [Molnar]*, 969 F. 2d 1524, 16 BLR 2-99 (3d Cir. 1992), that the “up-front” method is consistent with the Act and the regulations. Accordingly, the Board vacated the administrative law judge’s Decision and Order and remanded the case to the district director for collection of the overpayment as calculated under the “up-front” method. *Cadle*, 19 BLR at 1-59-1-60.

In the present case, claimant acknowledges that the administrative law judge did not err in relying upon *Cadle* to affirm the district director’s assessment of the amount of the overpayment. Claimant asserts that it is the Board’s responsibility to now overturn the holding in *Cadle*, as the Director’s interpretation of the overpayment provisions is not entitled to deference as the “up-front” method does not comport with the language of the Act or the regulations and conflicts with the remedial purpose of the Act. The allegations set forth by claimant amount to a reiteration of the contentions raised in his prior appeal.

Inasmuch as claimant has advanced no new argument in support of altering the Board's disposition of the issue presented in claimant's appeal and no intervening case law has contradicted the Board's resolution of the issue, it constitutes the law of the case and will not be disturbed. See *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Accordingly, the administrative law judge's Order on Remand Denying Petition for Adjustment of Overpayment is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge