

BRB No. 03-0161 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:
09/26/2003

DECISION and ORDER

Appeal of the Decision and Order on Remand 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 employer/carrier.

Helen H. Cox (Howard M. Radzely, Acting 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 on Remand (2000-BLO-0024) of Administrative Law Judge Michael P. Lesniak directing claimant to reimburse employer/carrier (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 This case is before the Board for the second time.

Initially, 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 Aat fault@ in the creation of the overpayment and thus, waiver of recovery of the overpayment was 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.

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

² The 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Upon consideration of claimant=s appeal, the Board vacated the administrative law judge=s Decision and Order because he did not consider claimant=s argument that she was entitled to a credit for an attorney=s fee paid in pursuit of the deceased miner=s state claim, and was therefore due a reduction in the overpayment amount. *Mosley v. M & H Coal Co.*, BRB No. 01-0709 BLA, slip op. at 4-5 (May 30, 2002)(unpub.). The Board also vacated the administrative law judge=s waiver analysis, because under the regulations governing this claim, the waiver provisions are inapplicable because the overpayment at issue is owed to employer and not to the Department of Labor.³ *Mosley*, slip op. at 5 n.8. Consequently, the Board remanded the case to the administrative law judge for further consideration.

On remand, the administrative law judge considered claimant=s argument that the portion of state attorney=s fees attributable to the state claim, \$4,012.81, should have been deducted from the amount of duplicative federal benefits, thereby reducing the amount of the federal benefits overpayment to \$13,055.40. The administrative law judge rejected claimant=s argument, because he found that under the district director=s Aup-front@ calculation method, the \$4,012.81 attorney=s fee was credited against the state benefits that claimant received during the first eleven months of state benefits payments. The administrative law judge noted that the state benefits began in August 1993, while the federal benefits payments did not begin until August 1994, after the \$4,012.81 attorney=s fee had already been fully credited against the state benefits award. Therefore, the administrative law judge found, there was no attorney=s fee credit remaining when the duplicative federal benefits payments occurred, and thus, there was no basis for reducing the amount of the overpayment. Accordingly, the administrative law judge ordered claimant to reimburse employer the \$17,608.21 overpayment.

On appeal, claimant contends that there is no statutory or regulatory basis for the Aup-front@ method of calculating the amount by which an overpayment may be reduced by the legal and medical expenses incurred in obtaining a state award of benefits. Employer and the Director, Office of Workers= Compensation Programs (the Director), respond, urging affirmance.

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 into the Act by 30

³ For claims such as this one, filed on or before January 19, 2001, waiver of overpayments is available only if the claimant owes the overpayment to the Black Lung Disability Trust Fund (the Trust Fund). 20 C.F.R. ' 725.547(a)(2000). The Department has amended the regulations to make waiver of the recovery of overpayments available to all claimants who owe overpaid benefits, regardless of whether the creditor is the Trust Fund or an employer. 20 C.F.R. ' 725.547(a). The amended regulation applies only to claims filed after January 19, 2001. 20 C.F.R. ' 725.2(c).

U.S.C. § 932(a); *O'Keefe 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), 725.535. The regulations further provide that amounts for medical, legal, or related expenses incurred by a claimant in connection with a state claim are excluded in computing this reduction. 20 C.F.R. § 725.535(d).

Neither the Act nor the regulations provide guidance as to how such expenses are to be excluded from the offset calculation. However, the Director developed a method of excluding legal or medical expenses known as the Aup-front method. This method provides that absent evidence that a state benefits award or state law requires a particular method for paying attorney's fees or medical expenses, or that the parties have agreed to a different method of payment, the Director will presume that a claimant will use as much of his or her initial state benefit payments as is necessary to pay the fees and expenses. *See Cadle v. Director, OWCP*, 19 BLR 1-56, 1-61 n.4 (1994). The Board has deferred to the Director's Aup-front method as a reasonable interpretation of Section 725.535(d). *Cadle*, 19 BLR at 1-62-63. Similarly, the United States Court of Appeals for the Third Circuit, the only circuit court to consider the issue to date, has deferred to the Director's choice of the Aup-front method because it reasonably promotes the remedial purposes of the Black Lung Benefits Act. *Director, OWCP v. Barnes and Tucker Co. [Molnar]*, 969 F.2d 1524, 1530, 16 BLR 2-99, 2-109 (3rd Cir. 1992), *rev'g Molnar v. Barnes and Tucker Co.*, 15 BLR 1-53 (1991).

Claimant asserts that there is no basis whatsoever for the Director's Aup-front method of excluding legal or medical expenses. Claimant's Brief at 3. Claimant's contention lacks merit. As noted above, neither the Act nor the regulations set forth a method for determining how state legal or medical expenses are to be excluded from the federal offset calculation. Therefore, the Director's interpretation of the regulations is entitled to substantial deference from this court. *Cadle*, 19 BLR at 1-62 (internal quotation marks and citation omitted); *Molnar*, 969 F.2d at 1527, 16 BLR at 2-104 (A[T]he choice of method to use is a pure policy decision--one that is left to the Director, and not the Board, because the Director . . . make[s] Black Lung policy.). Therefore, we reject claimant's contention.

Claimant argues further that she was denied any credit whatsoever for the attorney fees paid in connection with her State award. Claimant's Brief at 3. Contrary to claimant's contention, as the administrative law judge found, claimant was credited \$4,012.81 in attorney's fees against her initial state benefit payments. The record reflects that claimant received monthly state benefit payments beginning in August 1993 of \$1,217.63, of which thirty percent, or \$365.28, was attributable to total disability due to

pneumoconiosis. Director's Exhibits 22, 23; Claims Examiner Letter dated February 25, 1999 (unstamped exhibit attached to claimant=s brief of March 15, 2001.)⁴ After eleven months of state benefit payments, the \$4,012.81 attorney=s fee was fully credited. ($\$365.28 \times 11 = \$4,018.08$). Claimant=s duplicative federal benefit payments commenced in August 1994, by which time no attorney=s fee credit remained to reduce the amount of the federal overpayment. Thus, the real reason that claimant=s overpayment was not reduced in this specific case is that her state and federal awards did not overlap until August 1994.

Consequently, we reject claimant=s contentions and affirm the administrative law judge=s use of the Aup-front@ method in this case. Because claimant alleges no additional error in the administrative law judge=s analysis or findings, we affirm the administrative law judge=s finding that claimant is liable to employer for an overpayment in the amount of \$17,608.21. See 20 C.F.R. ' ' 802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Cox v. Benefits Review Board*, 791 F. 2d 445, 446-47, 9 BLR 2-46, 2-48 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711-12 (1983).

Accordingly, the administrative law judge=s Decision and Order on Remand ordering claimant to reimburse employer the \$17,608.21 overpayment is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

⁴ Claimant=s March 15, 2001 brief and associated submissions were admitted into the record on remand. Decision and Order on Remand at 2.

REGINA C. McGRANERY
Administrative Appeals Judge