

BRB No. 93-1346 BLA

CONRAD PRICHARD)
Claimant-Petitioner)
v.) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
Party-in-Interest/) DECISION and ORDER
Respondent)

Appeal of the Decision and Order on Reconsideration of
Robert G. Mahony, Administrative Law Judge, United States
Department of Labor.

Charles W. Ellis, Esq. (Robinson and Rice, L.C.), Huntington, West Virginia, for claimant.

Barry H. Joyner (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge,
SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, Conrad Prichard, appeals from the Decision and Order on Reconsideration of Administrative Law Judge Robert G. Mahony denying claimant's Petitions for Waiver of Overpayment and for fees arising from a claim filed pursuant to 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 filed a claim for benefits under the Act on April 14, 1980. See Director's Exhibit 4. He was found to be entitled to benefits by the district director,¹ and the Black Lung

¹Formerly titled "deputy commissioner," see 20 C.F.R. §725.101(a)(11); 55 Fed. Reg. 28606 (July 12, 1990).

Disability Trust Fund was ruled liable for the payment of benefits. *Id.* Claimant also was the recipient of an award from the West Virginia Workers' Compensation Fund for a 20% permanent partial disability award, and received a Second Injury Life Award (SILA) from the state on January 24, 1984. This SILA award was based on claimant's total disability due to the "combined effect" of various preexisting injuries and hearing loss. See Director's Exhibits 5, 9, 21, 22, 31, 31A.

This case involves an overpayment of benefits due to claimant's receipt of concurrent state and federal awards. The district director determined that claimant's federal benefits should be offset by the percentage of his West Virginia award that was due to claimant's pneumoconiosis. Director's Exhibit 29. As a result, an overpayment of benefits resulted, and reimbursement was requested. *Id.*; see Director's Exhibit 23.

Claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 31. In his initial Decision and Order, the administrative law judge ruled that claimant was not obligated to repay the overpaid benefits, because the administrative law judge had found that the Director failed to establish what percentage of claimant's West Virginia Second Injury Life Award was due to claimant's pneumoconiosis award. As a result, the administrative law judge ruled that the Director had demonstrated no basis for an offset of federal benefits or the resulting overpayment. Decision and Order at 6.

On the Director's Motion for Reconsideration, the administrative law judge reversed his initial ruling, and decided that the record established that a percentage certain of claimant's state Second Injury award was attributable to pneumoconiosis, and could thus serve as the basis for an offset.

Accordingly, claimant was overpaid, and was thus liable to the Director for its recovery. Decision and Order on Reconsideration at 2-3. This appeal followed.

On appeal, claimant initially asserts that his 20% permanent partial disability pneumoconiosis award is not concurrent with his federal black lung award, and thus may not offset his federal benefits. Claimant's Brief at 11.² Claimant also contests the administrative law judge's determination as to the offset in this case.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of

²Claimant does not challenge the administrative law judge's recovery of overpayment finding. This finding can thus be affirmed. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Upon consideration of the arguments of counsel, the Decisions and Orders of the administrative law judge, and of the record as a whole, we hold that the administrative law judge's determination of the nature and amount of the offset and overpayment in this case is supported by substantial evidence and accords with applicable law. Accordingly, we will affirm the Decision and Order on Reconsideration.

Initially, we reject claimant's assertion that his 20% permanent partial disability pneumoconiosis award is not concurrent with his federal black lung award, and thus may not offset his federal benefits. Claimant's Brief at 11. Section 422(g) of the Act provides that Federal Black Lung Benefits shall be reduced "by the amount of any compensation received under or pursuant to any Federal or State workmen's compensation law because of death or disability due to pneumoconiosis." 30 U.S.C. §932(g). Section 725.535(b) states that the offset of only those state payments received concurrently with federal payments. 20 C.F.R. §725.535(b); *Stewart v. Harman Mining Corp.*, 5 BLR 1-854, 1-859-61 (1983), aff'd sub nom. *Harman Mining Co. v. Director, OWCP*, 826 F.2d 1388, 10 BLR 2-291 (4th Cir. 1987). Contrary to claimant's contention, the offset which is the subject of this appeal is based on the receipt of claimant's Second Injury Life Award (SILA), which constitutes a payment of benefits concurrent to the receipt of his federal award and which is premised in part on claimant's permanent partial disability due to pneumoconiosis.

See Director's Exhibits 5, 14, 22.

We also hold that there is sufficient evidence of record to support the administrative law judge's determination that the federal benefits should be offset in this case in the amount corresponding to the 20% permanent partial disability award due to pneumoconiosis upon which claimant's life award is in part based.³

³To the extent claimant urges the Board to rule that a SILA award may never support an offset, his argument is without merit.

The permanent total disability SILA award constitutes a compensation award cognizable under Section 725.535(a), because it is premised in part upon a finding that a percentage of claimant's total disability is due to pneumoconiosis. See *Bennett v. Director, OWCP*, ___ BLR ___, BRB No. 92-0705 BLA, slip op. 2-3 (Feb. 28, 1994). The SILA is not dissimilar to a permanent total disability award subject to Special Fund relief under Section 8(f) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.

Under West Virginia law, a claimant will be entitled to a compensation award for permanent total disability where he or she suffers from

definitely ascertainable physical impairment caused by a previous injury, irrespective of its compensability, [and] sustains a subsequent injury ... the combined effect of which renders him totally and permanently disabled ...

§908(f). See generally *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192, 206-07 (1993).

Smith v. Workers' Compensation Commissioner, 179 W.Va. 782, ___, 373 S.E.2d 495, 498 (1988); *Cline v. State Workmen's Compensation Commissioner*, 156 W.Va. 647, 196 S.E.2d 296 (1973); see W.Va. Code §23-3-1 (1990).⁴ Pursuant to the West Virginia Second Injury Fund Statute, W.Va. Code §23-3-1 (1990), the employer would be responsible only for compensation for the employee's second injury, with the balance of the permanent total disability award to be paid out of a Second Injury Reserve. *Id.*; *Linville, supra*; *Gillespie, supra*; see generally 2 LARSON, WORKMEN'S COMPENSATION LAW §59.34(a)(1) at 10-528 and n. 33 (1992).

The Board, in *Lucas v. Director, OWCP*, 14 BLR 1-112, 1-114 (1990) (*en banc*) (McGranery, J., dissenting), held that when a state compensation award is premised upon a finding that a specific percentage of claimant's total disability is due to pneumoconiosis, that percentage determines the amount of the overpayment. *Accord Burnette v. Director, OWCP*, 14 BLR 1-151 (1990).

Because claimant received a 20% permanent partial disability award for pneumoconiosis, and the record shows that the pre-existing permanent partial disability was raised before the workmen's compensation Commissioner in conjunction with the permanent total disability SILA proceedings, see Director's

⁴The West Virginia Supreme Court of Appeals, in interpreting the disability statute, has held that

"awards for permanent total disability are to be ascertained by utilizing and aggregating all prior ascertainable impairments to determine [whether a claimant has met a threshold disability level to be considered totally disabled]."

Linville v. State Workmen's Compensation Commissioner, 160 W.Va. 549, ___, 236 S.E.2d 41, 46 (1977); *Gillespie v. Workman's Compensation Commission*, 157 W.Va. 829, ___, 205 S.E.2d 164, 169 (1974).

Exhibit 14, the administrative law judge could rationally have ascertained from this record that claimant's current Second Injury Life Award was premised in part upon a specific percentage of permanent disability due to pneumoconiosis, and that his federal black lung benefits were thus subject to an offset equal to the benefits attributable thereto. Director's Exhibits 5, 14, 22; see 30 U.S.C. § 932(g); 20 C.F.R. §725.535(b); *Bennett*, slip op. at 2; *Lucas*; *Burnette*.

Inasmuch as the administrative law judge's inference regarding the percentage of claimant's total disability award that is due to pneumoconiosis is not patently unreasonable, see *Cordero v. Triple A Machine Shop*, 580 F.2d 1335, 8 BRBS 744 (9th Cir. 1978), cert. denied 440 U.S. 911 (1979), and is supported by substantial evidence, we must affirm the administrative law judge's finding that the payment of claimant's federal black lung benefits is subject to an offset due to claimant's receipt of a state award based in part on his 20% permanent partial disability due to pneumoconiosis, and that claimant accordingly received an overpayment.

Accordingly, the Decision and Order on Reconsideration denying waiver of recovery of overpayment and fees is affirmed.

SO ORDERED

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge