

# Chapter 18

## Overpayment, Waiver, and Recovery

---

### I. "Overpayment" defined

#### A. The regulation

The provisions at 20 C.F.R. § 725.522(b)<sup>1</sup> state, if benefit payments are commenced prior to the final adjudication of the claim and it is later determined by an Administrative Law Judge, the Benefits Review Board ("Board"), or a court of appeals that a claimant was ineligible to receive such payments, then the payments shall be considered overpayments pursuant to 20 C.F.R. § 725.540, and may be recovered. Subsection 725.540(a) provides the following additional means by which an overpayment may be created:

a) General. As used in this subpart, the term "overpayment" includes:

- (1) Payment where no amount is payable under this part;
- (2) Payment in excess of the amount payable under this part;
- (3) A payment under this part which has not been reduced by the amounts required by the Act (see § 725.533);
- (4) A payment under this part made to a resident of a State whose residents are not entitled to benefits (see §§ 725.402 and 725.403);
- (5) Payment resulting from a failure to terminate benefits to an individual no longer entitled thereto;

---

<sup>1</sup> Formerly 20 C.F.R. § 725.522(c) (2000).

(6) Duplicate benefits paid to a claimant on account of concurrent eligibility under this part and parts 410 or 727 of this title or as provided in § 725.309.

20 C.F.R. § 725.540(a).

## **B. Oversight of recovery efforts by OWCP**

The amended regulations provide, "No operator or carrier may recover, or make an adjustment of, an overpayment without prior application to, and approval by, the Office which shall exercise full supervisory authority over the recovery of or adjustment of all overpayments." 20 C.F.R. § 725.547(b). Pursuant to 20 C.F.R. § 725.101(a)(21), the word "Office" refers to the Department of Labor's Office of Workers' Compensation Programs.

## **II. Jurisdiction**

### **A. Federal Claims Collection Act<sup>2</sup>**

Under *Jones v. Director, OWCP*, 14 B.L.R. 1-80 (1990), the Administrative Law Judge and Board have subject matter jurisdiction over the issue of waiver and recovery of overpayment. 33 U.S.C. §921(b); 20 C.F.R. §§ 725.450 and 725.481. The Board stated the Federal Claims Collection Act's (FCCA) \$20,000 ceiling on agency discretion (with respect to the compromise and collection of claims) does not affect the jurisdiction of the Office of Administrative Law Judges or Board to determine whether overpayments should be waived. The provisions of the FCCA, as amended by the Debt Collection Act of 1982, are not triggered until a collectible claim or debt to the government exists. An overpayment does not become a claim or debt within the meaning of the Debt Collection Act until a determination that it will not be waived is made. The FCCA's \$20,000 limitation does not come into effect until the waiver process is complete; thus, it does not affect the Administrative Law Judge's, or the Board's, jurisdiction in waiver determinations. See also *Potisek v. Director, OWCP*, 14 B.L.R. 1-87 (1990).

### **B. Six-year statute of limitations inapplicable**

A claim for recovery of an overpayment pursued by the District Director is not time-barred by the six-year statute of limitations. In *Nelson*

---

<sup>2</sup> Reference to the FCCA at 20 C.F.R. § 725.544(a) (2000) was deleted in the amended regulations, and replaced by citation to 31 U.S.C. § 3711.

*v. Director, OWCP*, 21 B.L.R. 1-5 (1997), Claimant argued that a 1993 overpayment claim filed by the Department of Labor was untimely pursuant to the six year statute of limitations contained at 28 U.S.C. § 2415(a). Claimant argued the Department had "enough information in 1979 to seek recovery." The Board held, however, the action to recover an overpayment "is not an action for money damages within the meaning of § 2415(a)," the claim was not time-barred.

### **III. Waiver of recovery of overpayment**

Recovery of overpayments may be waived under certain circumstances.<sup>3</sup> There shall be no adjustment or recovery of an overpayment in any case where an incorrect payment has been made with respect to an individual: (a) who is without fault; *and* where (b) adjustment or recovery would either: (1) defeat the purpose of title IV of the Act, or (2) be against equity and good conscience. 20 C.F.R. § 725.542.<sup>4</sup>

Also, the provisions at 20 C.F.R. § 410.561h require waiver of adjustment or recovery of an overpayment under 20 C.F.R. §§ 410.561e(a), (b), and (c), and 410.561f. Pursuant to 20 C.F.R. § 725.543, the standards for determining the applicability of the criteria of 20 C.F.R. § 725.542 shall be the same as those applied by the Social Security Administration under 20 C.F.R. §§ 404.506 through 404.512.

Under the prior version of the regulations at 20 C.F.R. § 725.543 (2000), standards at utilized by the Social Security Administration at 20 C.F.R. §§ 410.561 - 410.561h applied. In its comments to the regulatory amendments, the Department noted 20 C.F.R. Part 404 better reflected the current state of the law as the criteria at 20 C.F.R. Part 410 had not been revised since 1972. 65 Fed. Reg. 80,016 (Dec. 20, 2000).

At the time of printing of this edition of the *Benchbook*, there were no published Board or circuit court cases interpreting the amended overpayment regulations. The provisions at 20 C.F.R. § 404.506 provide "there shall be no adjustment or recovery in any case where an

---

<sup>3</sup> Prior to applicability of the amendments to the regulations, the waiver provisions at 20 C.F.R. §§ 725.541-725.544 (2000) were *inapplicable* where the overpayment was made by an employer or insurance carrier. 20 C.F.R. § 725.547 (2000). The amended regulations provide that the foregoing waiver provisions *are applicable* to overpayments made by responsible operators. 20 C.F.R. § 725.547(a).

<sup>4</sup> The Board holds that the provisions at 20 C.F.R. § 725.544, addressing the claimant's ability to pay the "full amount of the claim within a reasonable time," are inapplicable to the issue of waiver. *Ashe v. Director, OWCP*, 16 B.L.R. 1-1-109 (1992).

overpayment under title II has been made to an individual who is without fault if adjustment or recovery would either defeat the purpose of title II of the Act, or be against equity and good conscience." The standards under 20 C.F.R. Parts 404 and 410 (*i.e.* determining whether the claimant is without fault and assessing whether recovery would be defeat the purpose of title IV or be against equity and good conscience) are the same. As a result, citations to 20 C.F.R. Part 410, and case law interpreting those provisions, remain.

### **A. Entitlement to a hearing**

If a claimant seeks waiver of the recovery of an overpayment paid by the Trust Fund, s/he is entitled to request and receive a hearing prior to attempts at recouping the overpayment by the District Director. *See Jones, supra; Potisek, supra.*<sup>5</sup>

In *Nelson v. Director, OWCP*, 21 B.L.R. 1-5 (1997), the Board reiterated, "prior to the recovery of an overpayment, a (claimant) has a right to an oral hearing on the issues of fault and whether recovery would defeat the purpose of the Act or be against equity and good conscience." Because no hearing had been held with regard to these issues, the claim was remanded.

### **B. "Without fault" defined**

If the fact-finder concludes a claimant is at fault, there is no need to consider whether recovery would be against equity and good conscience or defeat the purpose of the Act, as waiver is prohibited. 20 C.F.R. § 725.542. The amended regulations make reference to 20 C.F.R. § 404.507 to define "fault."

#### **1. Honest mistake**

A finding of "without fault" does not necessarily involve a finding of no bad faith or misrepresentation on claimant's part, as "fault" can be the result of an honest mistake. *Barone v. Bowen*, 869 F.2d 49 (2<sup>nd</sup> Cir. 1989);

---

<sup>5</sup> In the pre-amendment claim of *Justus v. Knox Creek Coal Co.*, 16 B.L.R. 1-95 (1992), the Board held, where an overpayment is made by an employer/carrier, "the administrative law judge properly found that the hearing requested by claimant was not within his jurisdiction and could serve no purpose."

However, the waiver provisions apply to overpayments made by the responsible operator under the amended regulations such that the Board's *Justus* decision is inapplicable. 20 C.F.R. § 725.547(a).

*Morgan v. Finch*, 423 F.2d 551 (6<sup>th</sup> Cir. 1970). Further, the actions of the government are not relevant in determining whether a claimant is "without fault" under 20 C.F.R. § 410.561(b). *Valente v. Secretary of Health & Human Services*, 733 F.2d 1037 (2<sup>nd</sup> Cir. 1984); *Morgan, supra*; *Jones v. Director, OWCP*, 14 B.L.R. 1-80 (1990). See also *Hampton v. Director, OWCP*, 11 B.L.R. 1-118 (1988) (the Board affirmed an Administrative Law Judge's finding that Claimant was at fault when she remarried, and failed to inform the Department of Labor, even though un-contradicted testimony established Social Security Administration employees misinformed her and asserted the remarriage would not affect her eligibility for black lung benefits).

## 2. Erroneous information

### a. For claims filed on or before January 1, 2001

- Erroneous information supports waiver

Under 20 C.F.R. § 410.561h, adjustment or recovery of an overpayment will be waived if a claimant relies on "erroneous information" as described in 20 C.F.R. § 410.561f. If a claimant relies on erroneous information, s/he is without fault, and will not have to undergo further analysis under 20 C.F.R. § 410.561a.

- Agency misinformation

*Potisek v. Director, OWCP*, 14 B.L.R. 1-87 (1990) (Claimant did not rely on "erroneous information" under 20 C.F.R. § 410.561(f) where Department of Labor failed to advise Claimant of the possibility she would have to repay interim benefits if claim was ultimately denied; rather, 20 C.F.R. § 410.561(f) contemplates situation where agency official provides misinformation, not a failure to provide information). See also *Bracher v. Director, OWCP*, 14 F.3d 1157 (7<sup>th</sup> Cir. 1994); *McConnell v. Director, OWCP*, 993 F.2d 1454, 1458 (10<sup>th</sup> Cir. 1993); *Napier v. Director, OWCP*, 999 F.2d 1032, 1035 (6<sup>th</sup> Cir. 1993).

- Stipulations

A stipulation that Claimant is "without fault" in the creation of the overpayment under 20 C.F.R. § 410.461(b) is not a concession that Claimant is without fault by relying on "erroneous information" within the meaning of 20 C.F.R. § 410.561f. *Freedline v. Director, OWCP*, BRB No. 89-0329 BLA (Sept. 20, 1991)(unpub.).

- Change in award status

In *Weiss v. Director, OWCP*, 16 B.L.R. 1-56 (1990), an initial determination of entitlement is not the sort of "erroneous information" to which 20 C.F.R. § 410.561f is referring. The Board noted 20 C.F.R. § 410.561f refers to erroneous information "with respect to the interpretation of a pertinent provision of the Act or regulations," not a factual finding regarding claimant's entitlement to benefits under the Act. See generally *Potisek, supra*; *McConnell v. Director, OWCP*, 993 F.2d 1454 (10<sup>th</sup> Cir. 1993).

In *Bracher v. Director, OWCP*, 14 F.3d 1157 (7<sup>th</sup> Cir. 1994), the Seventh Circuit agreed with the Tenth Circuit's holding in *McConnell v. Director, OWCP*, 993 F.2d 1454, 1458 (10<sup>th</sup> Cir. 1993), and held the District Director's initial award of benefits does not constitute the type of "erroneous information" contemplated in the Act in determining whether to waive an overpayment. In this vein, the *Bracher* court held interim black lung payments to a miner, who is ultimately found not to be entitled to benefits, are recoverable under the overpayment and recoupment provisions of the Act. See also *Benedict v. Director, OWCP*, 29 F.3d 1140 (7<sup>th</sup> Cir. 1994).

- Remand overpayment claim for consideration of autopsy evidence

In *Napier v. Director, OWCP*, 999 F.2d 1032 (6<sup>th</sup> Cir. 1993), the Sixth Circuit remanded an overpayment claim to permit the widow to offer an autopsy report indicating the miner died due to pneumoconiosis. The court determined it would be inequitable "to require his estate to disgorge the money" if the record supports entitlement to benefits.

**b. For claims filed after January 19, 2001**

- Final award later modified, recovery waived

Under certain circumstances, the amended regulations provide an overpayment shall not be subject to collection where the claimant is without fault. The amended language at 20 C.F.R. § 725.310(d) reads as follows:

An order issued following the conclusion of modification proceedings may terminate, continue, reinstate, increase or decrease benefit payments or award benefits. Such order shall not affect any benefits previously paid, except that an order increasing the amount of benefits payable based on a finding of a mistake in a determination of fact may be made effective on the date from which benefits were determined payable by the terms of an earlier award. In the case of an award which is

decreased, no payment made in excess of the decreased rate prior to the date upon which the party requested reconsideration under paragraph (a) of this section shall be subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which is decreased following the initiation of modification by the district director, no payment made in excess of the decreased rate prior to the date upon which the district director initiated modification proceedings under paragraph (a) shall be subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which has become final and is thereafter terminated, no payment made prior to the date upon which the party requested reconsideration under paragraph (a) shall be subject to collection or offset under subpart H of this part. In the case of an award which has become final and is thereafter terminated following the initiation of modification by the district director, no payment made prior to the date upon which the district director initiated modification proceedings under paragraph (a) shall be subject to collection or offset under subpart H of this part.

20 C.F.R. § 725.310(d).

In its comments, the Department notes subsection (d) was revised "with the stated purpose of prohibiting the recovery, by either the Trust Fund or a responsible operator, of benefits paid pursuant to a final award of benefits that is later modified." 65 Fed. Reg. 79,975 (Dec. 20, 2000). The Department also made clear the District Director must initiate a modification proceeding in order to preclude collection of any payments made pursuant to the prior final award. 65 Fed. Reg. 79,975 (Dec. 20, 2000).

- Waiver against responsible operator and carrier

The amended regulations provide the waiver provisions at 20 C.F.R. §§ 725.541-725.544 are applicable to overpayments made by responsible operators as well as payments made from the Trust Fund. 20 C.F.R. § 725.547(a). In its comments, the Department stated the following:

The Department concluded that the opportunity to obtain a waiver or adjustment of a debt should be made available to all claimants regardless of their benefits' source.

. . .

The Department also rejected the position that waiver of an overpayment owed an operator amounted to the unconstitutional deprivation of property, citing caselaw upholding overpayment recoveries under the more restrictive Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 914(j), 922, as incorporated by 30 U.S.C. § 932(a).

65 Fed. Reg. 80,016 (Dec. 20, 2000).

### **C. "Defeat the purpose of title IV of the Act" defined**

#### **1. Generally**

The provisions at 20 C.F.R. § 410.561c state the phrase, "defeat the purpose of title IV," means to "deprive a person of income required for ordinary and necessary living expenses." Similarly, the provisions at 20 C.F.R. § 404.508 (as referenced in the amended regulations) define the phrase as "to deprive a person of income required for ordinary and necessary living expenses." The regulation further provides, "This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs." 20 C.F.R. § 404.508(a). The regulation sets forth examples of expenses to be considered, including fixed living expenses (such as food, clothing, rent, mortgage, health insurance), medical hospitalization, and expenses for support of others for whom a claimant is legally responsible. 20 C.F.R. § 404.508(a)(1)-(4).

#### **2. Prospective expenses excluded**

In *Keiffer v. Director, OWCP*, 18 B.L.R. 1-35 (1993), the Board held the overpayment regulation does not "provide for consideration of prospective expenses"; rather, "the administrative law judge's decision and order must be based on the evidence of [current income and] current expenses in the record before him, 20 C.F.R. § 725.477(b), not on what could happen in the future." Thus, the fact that the miner's wife will someday need full-time nursing care cannot be considered. However, the Board noted a claimant may seek modification at any time based on changed financial circumstances. See also *Rosimos v. Director, OWCP*, BRB No. 89-2527 BLA (Apr. 30, 1991)(unpub.) (Claimant's age and unexpected medical costs relating to Claimant's health are not properly considered).

### **3. Spouse's income considered**

In *McConnell v. Director, OWCP*, 993 F.2d 1454 (10<sup>th</sup> Cir. 1993), the income of Claimant's wife could be considered in determining whether recovery of overpayment would defeat the purpose of the Act, despite arguments that the income was the wife's property.

### **4. Installment and credit card payments considered**

In *Gordon v. Director, OWCP*, 14 B.L.R. 1-60 (1990), "installment payments" under 20 C.F.R. § 410.561c(a)(1), as incorporated into the regulations at 20 C.F.R. § 725.543, include department store credit card accounts and are "ordinary and necessary expenses." The Board further held the different subsections under 20 C.F.R. § 410.561a are separate categories, and must be considered independently of each other.

### **5. Gifts to others**

Payments in the form of "gifts" may be considered even if a claimant is not "legally responsible" for the recipient of the gift. As an example, gifts to a claimant's granddaughter were "ordinary and necessary expenses." But, in *Smith v. Director, OWCP*, BRB No. 89-3561 BLA (Feb. 26, 1991) (unpub.), the Board cited the Tenth Circuit's *Gordon* decision, and upheld Administrative Law Judge's finding that annual expenses for gifts, landscaping, and restaurant meals "perhaps went beyond those costs which are considered as ordinary and necessary expenses under the Act."

### **6. Child support, considered only if legally required**

In *McConnell v. Director, OWCP*, 993 F.2d 1454 (10<sup>th</sup> Cir. 1993), expenses paid by Claimant's wife in support of her 43-year-old daughter and other children could not be considered in absence of evidence that Claimant and his wife were legally responsible for such support.

## **D. "Against equity and good conscience" defined**

### **1. Generally**

Twenty C.F.R. § 410.561d states it is "against equity and good conscience" to recover an overpayment when a claimant relinquishes a valuable right, or changes his or her position for the worse based on notice that a payment would be made or by reason of an incorrect payment.

A claimant must demonstrate the money was spent in such a manner that would not have occurred but for receipt of the overpayment.

Similarly, the amended regulations make reference to 20 C.F.R. § 404.509, which sets forth the same standard. There are several useful examples where recovery of an overpayment would be "against equity and good conscience" listed in the regulation. 20 C.F.R. § 404.509.

## **2. Factors considered**

### **a. Financial circumstances irrelevant**

Twenty C.F.R. § 410.561d specifically states a claimant's financial circumstances are irrelevant in determining whether recovery would be against equity and good conscience. See also 20 C.F.R. § 404.509(b); *Hervol v. Director, OWCP*, 16 B.L.R. 1-53 (1990).

### **b. Extended vacation**

*McConnell v. Director, OWCP*, 993 F.2d 1454 (10th Cir. 1994) (money spent on extended vacation could not be recovered).

### **c. Resignation prior to receipt of benefits, no waiver**

In *Strickland v. Director, OWCP*, BRB No. 89-2963 BLA (Sept. 24, 1991) (unpub.), recovery of an overpayment is not against equity and good conscience where Claimant, expecting to receive benefits, resigns from employment six years prior to the award of interim benefits. The Board concluded Claimant did not relinquish a valuable right, or change his position for the worse, in reliance on an overpayment pursuant to 20 C.F.R. § 410.561d since he resigned prior to a determination that he was entitled to benefits.

### **d. Purchase camper, no waiver**

*Smith v. Director, OWCP*, BRB No. 89-3561 BLA (Feb. 26, 1991)(unpub.) (overpayment should not be waived on the basis of detrimental reliance where Claimant purchased items like a camper vehicle, and the evidence failed to establish the "claimant would not have been able to undertake those financial obligations without the income from the benefits").

**e. Relinquish savings for lump sum payment, no waiver**

In *Benedict v. Director, OWCP*, 29 F.3d 1140 (7<sup>th</sup> Cir. 1994), the court held the lump sum recovery of an overpayment was not against equity and good conscience as:

Benedict admits that he neither relinquished a valuable right nor changed his position for the worse because of the overpayment. Instead he argues that recovery of the overpayment would simply be unfair because it would force him and his wife to relinquish a large portion of their savings accumulated over the course of their lives. While we are not unsympathetic to Benedict's position, we also recognize that Benedict's receipt of the interim benefits enabled him, at a minimum, to maintain his high level of savings. Had Benedict not received the interim benefits, he may well have spent whatever savings he accumulated in precisely the same way that he spent the interim benefits, thus reducing his life savings by a corresponding amount.

**V. Amount of the overpayment**

In calculating the amount of the overpayment, 20 C.F.R. § 725.535(d) provides an exclusion for legal, medical, or related expenses incurred in connection with a state or federal claim for black lung benefits.

**A. Federal overpayment reduced due to expenses incurred for pursuit of state award**

In *Pickens v. Director, OWCP*, 19 B.L.R. 1-116 (1995), Claimant was liable for an overpayment of Black Lung benefits because he received a concurrent state award for permanent total disability, 15% of which was due to pneumoconiosis. Claimant paid \$7,600 in attorney's fees in order to obtain the state award.

The Board held, in determining the extent to which the overpayment should be reduced in light of the legal expenses incurred in connection with the state award as required by 20 C.F.R. § 725.535(d), the burden is on Claimant to establish the amount of legal expenses related to obtaining the state award attributable to pneumoconiosis. Mere submission of payment receipts, without any indication the time charged was spent obtaining the pneumoconiosis portion of the state award, is insufficient. The Board concluded, in the absence of more specific evidence supplied by Claimant,

the percentage of the state award due to pneumoconiosis is an acceptable form of "other evidence" under 20 C.F.R. § 725.535(d) in determining the portion of attorney's fees to be excluded from the amount of the overpayment.

## **B. Lump sum state award, apportionment of**

Depending on how fees or expenses are apportioned, the regulatory exclusion can provide a significant reduction in the amount of the overpayment for which a claimant is liable. For example, in *Cadle v. Director, OWCP*, 19 B.L.R. 1-56 (1994), the Board set forth the method for apportioning legal fees and medical expenses incurred in connection with the state claim, where the attorney's fees and costs are awarded by the state in a lump sum without any mandate for their disbursement.

If the state award is in a lump sum, it is divided into monthly payments. Then, the monthly state award is credited toward a claimant's legal fees and expenses, thereby delaying the reduction of Claimant's federal monthly benefits on account of his concurrent state award until he has received an amount of state benefits equal to the attorney's fees and costs. See also *Director, OWCP v. Barnes and Tucker Co.*, 969 F.2d 1524 (3<sup>rd</sup> Cir. 1992).

In *Cadle*, the Board overruled *Scuilli v. Bethlehem Mines Corp.*, 8 B.L.R. 1-206 (1985) to the extent it was inconsistent with *Cadle*. In *Scuilli*, the Board held attorney's fees and expenses should be spread evenly over the life of a benefit award on a monthly basis, and then subtracted on a monthly basis from the state monthly benefit; the net state benefit amount is then used to determine the offset. Since most state benefit awards are more generous than federal awards, the effect of this *pro rata* method would have eliminated any exclusion for attorney's fees and expenses from the amount of the overpayment.

## **VI. Recovery of the overpayment**

### **A. Entitlement to a hearing**

Citing to *Califano v. Yamasaki*, 442 U.S. 682 (1979), the Board held, in cases where the *waiver of recovery* of overpayment is *not* an issue, the District Director may begin recoupment prior to a hearing and decision concerning the amount of the overpayment. *Burnette v. Director, OWCP*, 14 B.L.R. 1-152 (1990).

## B. Repayment amount and schedule

If it is determined an overpayment cannot be waived (in the case of a responsible operator under the pre-January 2001 amendments to the regulations), or will not be waived (in the case of the Director, OWCP or responsible operator under the amended regulations), then there are two issues presented regarding the overpayment: (1) the actual overpayment amount the claimant received, and (2) the amount that may be recovered by the Director, OWCP or employer.

In *Keiffer v. Director, OWCP*, 18 B.L.R. 1-35 (1993), the Board held the Administrative Law Judge must consider the "financial circumstances of the entire household, including the combined income and expenses of both claimant and spouse as well as jointly and separately owned assets in determining claimant's ability to repay and (the amount of) overpayment." The Board further held the Administrative Law Judge should "discuss the impact of depletion of an income-producing asset on claimant's future monthly income relative to his monthly expenses as well as how claimant's other assets would enhance his repayment ability." In the event a claimant's financial circumstances change, the Board noted s/he may seek modification:

[T]he purpose of the formal hearing is to establish the existence of the debt, not how it will be paid. (citations omitted). The administrative law judge's inquiry is merely whether claimant is in a financial position to assume repayment of the debt created by the overpayment. Once the debt is established as owing, and collection efforts begin . . . claimant has the right to seek modification if his financial circumstances change, see 4 C.F.R. § 104.2(b); 20 C.F.R. § 725.310.

*Id.* at 1-40. See also *Ashe v. Director, OWCP*, 16 B.L.R. 1-109 (1992) (it is within the Administrative Law Judge's discretion to consider assets of Claimant's spouse in determining the repayment amount); *McConnell, supra*.

After issuance of *Keiffer*, the Board issued an unpublished decision in *Jennings v. Director, OWCP*, BRB No. 97-1537 BLA (May 27, 1998) (unpub.), and upheld an Administrative Law Judge's finding that, because Claimant's monthly income exceeded his monthly expenses, "recovery of the overpayment would not deprive claimant of funds needed to meet ordinary and necessary living expenses."

The Board further affirmed the Administrative Law Judge's conclusion that Claimant was entitled to a partial waiver of the overpayment amount based on a finding Claimant "changed his position for the worse and relinquished a valuable right by both paying . . . toward his daughter's college tuition and by paying . . . for house repairs."

However, the Board concluded an Administrative Law Judge does not have the authority to determine a repayment schedule in a case involving a claim for repayment of overpayment. Rather, the Administrative Law Judge is limited to determining the amount of the overpayment, and whether the overpayment should be partially or totally waived. The Board cited to its decision in *Kieffer v. Director, OWCP* 18 B.L.R. 1-35 (1993), and concluded "[t]he purpose of the formal hearing is to establish the existence of debt, not how it will be repaid."

### **C. Offset of a state benefit award**

Often an overpayment stems from the fact that a claimant is receiving benefits both from a state award as well as a federal award. The regulations require that federal benefits be offset by any state benefits awarded to a claimant. 30 U.S.C. § 932(g); 20 C.F.R. § 725.535. See *O'Brockta v. Eastern Assoc. Coal Co.*, 18 B.L.R. 1-71 (1994), *aff'd.*, 54 F.3d 141 (3<sup>rd</sup> Cir. 1995). Subsection 725.535(b) provides only concurrent state awards may offset federal awards, and it precludes offset of a prior state award against subsequent federal black lung benefits as the state award covers benefits for a period ending before a claimant becomes entitled to federal benefits. 20 C.F.R. § 725.535(b). See also *Harmon Mining Co. v. Director, OWCP*, 826 F.2d 1388 (4<sup>th</sup> Cir. 1987).

One example of offset is *Lucas v. Director, OWCP*, 14 B.L.R. 1-112 (1990). Here, the State of West Virginia found that 15% of the claimant's disability was due to pneumoconiosis. As a result, only 15% of the state award was attributable to the disease for the purposes of determining the amount of overpayment and offset. See *Burnette, supra*.

In *Director, OWCP v. Hamm*, 113 F.3d 23 (4<sup>th</sup> Cir. 1997), the court noted the Act's offset provisions are "designed to supplement, but not duplicate, state benefits for pneumoconiosis." As a result, the Board's determination that Claimant's "federal benefits . . . be offset by only 20 percent of his total state benefits because only 20 percent of those benefits could be attributable to pneumoconiosis," was in error. In this vein, the Fourth Circuit stated the following:

Hamm receives lifetime benefits from West Virginia for total disability. Prior to obtaining his total disability award, Hamm

received a number of permanent partial disability (PPD) awards from the state. In 1974, 1977, and 1988, he obtained PPD awards of 15, 15, and 20 percent respectively for pneumoconiosis. His second and third awards were based on increases in his total impairment due to pneumoconiosis to 30 percent and finally 50 percent.

Consequently, the court determined the aggregate prior awards resulted in the state's determination "that Hamm suffers 50 percent permanent disability on account of pneumoconiosis," and his federal benefits "should be offset by 50 percent of the amount of his second injury award."

### **1. The "up-front" method; attorney fees**

In *Director, OWCP v. Barnes & Tucker Co.*, 969 F.2d 1524 (3<sup>rd</sup> Cir. 1992), the Third Circuit upheld the Director's interpretation of the method of offset under 20 C.F.R. § 725.535 to allow the "up-front" method of calculating offset, which assumes a claimant will use as much of his or her initial benefits payments as is necessary to pay attorney fees. As a result, federal benefits are not offset until a claimant's state attorney's fees are paid. In so holding, the court reasoned the position of the Director, OWCP, as the policymaker under the Black Lung Benefits Act, is entitled to deference to the extent the position is neither unreasonable nor inconsistent with the regulations.

### **2. Survivors' benefits**

In *Carbon Fuel Co. v. Director, OWCP*, 20 F.3d 120 (4<sup>th</sup> Cir. 1994), the court held Section 932(g) of the Act requires an offset of state workers' compensation benefits, which are conditioned on "death or disability due to pneumoconiosis," such that the "survivor's federal black lung benefits must be offset by a state workers' compensation award where both awards depended upon a showing that the decedent had been totally disabled due to pneumoconiosis, although pneumoconiosis was not the cause of death."

### **D. The Federal Employees Compensation Act**

In *Sammons v. Wolf Creek Collieries*, 19 B.L.R. 1-24 (1994), the Board held, in the event benefits are awarded, an employer is not entitled to offset for Federal Employee Compensation Act (FECA) benefits received by a claimant-federal mine inspector, which totaled \$ 1,500.00 a month, because the miner's FECA award was for his accidental death, and not for total disability due to pneumoconiosis.

In *Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4<sup>th</sup> Cir. 1999), Claimant, who worked as a federal employee, was not required to "seek recourse against the federal government under FECA before seeking recourse against a private employer under the Black Lung Benefits Act." The court reiterated, "if an individual were entitled to benefits both from his private employer under the Black Lung Benefits Act and from the federal government under FECA, the FECA benefits would offset the amount owed by the private employer." The court concluded the miner was "free" to choose to pursue benefits under both FECA and the Black Lung Benefits Act, or to "seek compensation first, or even exclusively, under the more generous (black lung) statutory scheme."

**E. Collection and reimbursement,  
no jurisdiction to consider**

In *Director, OWCP v. Peabody Coal Co.*, 330 F.3d 830 (6<sup>th</sup> Cir. 2003), the Administrative Law Judge has "decision-making authority over the determination of whether a black lung benefits claim exists," but jurisdiction for the enforcement of agency orders lies in the district courts pursuant to 30 U.S.C. § 934(B)(4)(A). Under the facts of the case, the miner was overpaid black lung benefits during his lifetime as the result of falsifying his receipt of state benefits. Upon his death, his spouse was automatically entitled to survivor's benefits. The survivor and Employer negotiated an agreement "to the effect that any future survivor's benefits owed (to the spouse) by Peabody Coal would be setoff against the amount of overpayment . . . ." The District Director subsequently reinstated survivor's benefits, and Employer objected to the payment of these benefits.

The claim was subsequently referred to this Office for adjudication, but the Administrative Law Judge determined he was without jurisdiction to decide the matter of "collection and reimbursement." The court agreed, stating Employer did not challenge the survivor's entitlement to benefits; rather, Employer sought enforcement of the negotiated agreement, which provided that survivor's benefits would be offset by the amount of overpaid benefits in the living miner's claim.

In *Itmann Coal Co. v. Scalf*, 662 F.Supp.2d 582 (S.D.W. Va. 2009), the district court dismissed Employer's petition, under 33 U.S.C. § 927(b), for judicial enforcement of an order directing Claimant's repayment of an overpayment of black lung benefits. Notably, the District Director found Claimant received state black lung benefits, and was overpaid \$50,913.60 in federal benefits by Employer. As a result, the District Director issued a "Certification of Facts," which Employer attached to its petition for judicial enforcement.

The district court held it did not have subject matter jurisdiction to order repayment of the overpaid black lung benefits. Specifically, the court found:

Section 927(b) requires the federal agency to ‘certify the facts *to the district court.*’ This places responsibility of seeking enforcement of the administrative order on the relevant administrative agency, not the parties. While Itmann certainly has a stake in the matter—it claims to be owed over \$50,000—§ 927(b) appears concerned with providing a mechanism by which a federal agency can ensure that its rulings are complied with through judicial action. In this case, the only entity with such an interest is the DOL. The statute is silent regarding private enforcement. There is no indication that Congress intended § 927(b) to create an army of private attorneys general to enforce administrative orders.

(italics in original).