

## PART III

### PROCEDURAL ISSUES

#### A. REQUIREMENT TO FILE STATE WORKERS' COMPENSATION CLAIM; OFFSET

Section 413(c) of the Act, 30 U.S.C. §923(c), as implemented by 20 C.F.R. §410.219(a) and (b), which applies only to Part B and Section 415 transition claims, **Debusk v. Pittsburgh & Midway Coal Co.**, 12 BLR 1-15 (1988), requires that a claimant file a claim under applicable state workers' compensation law prior to filing a claim under the Act, unless such a filing would be futile. See **Marsella v. Starvaggi Industries, Inc.**, 2 BLR 1-286, 1-293 (1979); **Legrand v. Zeigler Coal Co.**, 1 BLR 1-645, 1-651-52 (1978). Section 421, 30 U.S.C. §931, applies to Part C claims. **Debusk**, 12 BLR at 1-17; see **Lewis v. Pittsburgh & Midway Coal Co.**, 6 BLR 1-643 (1983); **Perry v. Lueking Coal Co.**, 1 BLR 1-104 (1977); 20 C.F.R. §725.402, 725.403 and comments accompanying promulgation of Section 725.403, 43 *Fed. Reg.* 36772, 36790 (August 18, 1978). The Board has held that, as regards a claim filed under Part C, the filing requirement is waived as futile if the state workers' compensation law is not one of those listed by the Secretary of Labor as a qualifying state plan pursuant to Section 421(b), 30 U.S.C. §931(b). **Perry v. Lueking Coal Co.**, 1 BLR 1-104, 1-107 (1979); see also 20 C.F.R. §§725.402, 725.403. Inasmuch as the Secretary of Labor, as of that date, had determined that no state workers' compensation law provided adequate coverage for pneumoconiosis within the meaning of Section 421, see 20 C.F.R. §722.152(b), the Board held that claimant was not required to file a state claim, thereby rejecting employer's contention that it was released from liability under Part C of the Act. **Debusk**, 12 BLR at 1-17. The Board has held in cases involving lump sum awards considered under the "offset" regulation that primary emphasis is on: (1) whether periods for which payments are made run concurrently; and, if so, (2) whether the amount of benefits to which claimant is entitled during each separate month should offset one against the other. **Sculli v. Bethlehem Mines Corp.**, 8 BLR 1-206 (1985).

The Board has held that a duly executed settlement of a state workers' compensation pneumoconiosis claim does not bar the claim for federal black lung benefits, whether filed under Part B or Part C. **Honaker v. Jewell Ridge Coal Corp.**, 2 BLR 1-947, 1-949 (1980); **McCarty v. Clinchfield Coal Co.**, 1 BLR 1-914, 1-915 (1978); **Hileman v. Clinchfield Coal Co.**, 1 BLR 1-531, 1-533-34 (1978); **Murphy v. Q and G Coal Co.**, 1 BLR 1-455, 1-459-460 (1978). It should be noted, however, that the amount of the settlement or state award for disability due to pneumoconiosis will be applied to offset the federal black lung benefit. **Couch v. Shamrock Coal Co.**, 2 BLR 1-342 (1979). Concurrent state benefits for contracting pneumoconiosis are duplicative and the federal benefits must be offset, regardless of whether the state program

includes a disability requirement. 30 U.S.C. §§922(b), 932(b); **Ball v. Jewell Coal & Coke Co.**, 6 BLR 1-693 (1983); **Gray v. United States Steel Corp.**, 1 BLR 1-237, 1-240 (1977), *remanded sub nom. United States Steel Corp. v. Gray*, 588 F.2d 1022 (5th Cir. 1979).

The Board has rejected employer's contention that Section 725.435(b) is invalid and held that it provides for offset only of state payments received concurrently with federal payments; any offset provision which should diminish a federal black lung award by any amounts other than those *duplicative* of the federal black lung award would do violence to the Act's concern for the adequacy of compensation. **Ball, supra; Stewart v. Harman Mining Corp.**, 5 BLR 1-854 (1983), *aff'd sub nom. Harman Mining Co. v. Director, OWCP*, 826 F.2d 1388, 10 BLR 2-291 (4th Cir. 1987). Employers have attempted to use the principles of full faith and credit, *res judicata*, and collateral estoppel in arguing that a claim adjudicated under a state workers' compensation law should bar a federal claim. See, e.g., **Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP**, 583 F.2d 1273 (4th Cir. 1978); *but see Pettus v. American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), where employer's argument was successful.

### CASE LISTINGS

[no statutory provision in Part C for offset against black lung benefits due to receipt of unemployment compensation or for excess earnings] **Fisher v. Bethlehem Mines Corp.**, 1 BLR 1-591 (1978); *see also* 20 C.F.R. §725.535.

[in Part B claims, 30 U.S.C. §932(b), providing offset of state workers' compensation benefits against black lung benefits, and 42 U.S.C. §424(a), providing offset of state workers' compensation payments against Social Security disability benefits, may be jointly applied so long as total offset against both federal programs does not exceed 100 percent of state workers' compensation payment] **Freeman v. Harris**, 625 F.2d 1303 (5th Cir. 1980).

[questions regarding offset appropriately considered once claimant is determined entitled to benefits; issue of offset may always be raised] **Crider v. Dean Jones Coal Co.**, 6 BLR 1-606 (1983).

[Board upheld Section 725.535(d), prohibiting offset of attorney fees] **Ball v. Jewell Coal & Coke Co.**, 6 BLR 1-693 (1983); **Warren v. Harlan Fuel Co.**, 6 BLR 1-582 (1983).

[30 U.S.C. §924a, added by 1978 Amendments, strictly limited to medical services; can not be relied on by Part B beneficiaries to seek reimbursement for reduction in monthly

benefits resulting from offset for excess earnings] **Kosh v. Director, OWCP**, 8 BLR 1-168, 1-171 (1985), *aff'd* No. 85-3508 (3d Cir. May 6, 1986)(unpub.). [under "adjustment" regulation, Section 725.535(d), net state benefits are computed for each month by subtracting monthly attorney fees from monthly state benefits; net state benefits then are offset against federal black lung benefits] **Scuilli v. Bethlehem Mines Corp.**, 8 BLR 1-206 (1985).

### DIGESTS

The Board held that employer was not entitled to an offset against the federal award for black lung benefits because claimant's state award was for disability due to a back injury and the Act limits offset to compensation received because of death or disability due to pneumoconiosis. **Webb v. Blue Diamond Coal Co.**, 9 BLR 1-92 (1986).

In a case arising under the Social Security Act, the Sixth Circuit held that Part C black lung benefits could be offset against social security disability benefits since they are not subject to the 30 U.S.C. §922(b) offset prohibition which applies to Part B because Section 922 specifically provides that Part B benefits shall not be considered workers' compensation, whereas the offset provision applicable to Part C, 30 U.S.C. §932(g), makes no such provision. **McCown v. Secretary of Health and Human Services**, 796 F.2d 151 (6th Cir. 1986), *cert. denied* 479 U.S. 1037 (1986).

When state awards are paid in a lump sum, the deputy commissioner, pursuant to Section 725.535(c), must project that portion of a lump sum which represents a commutation of or a substitution for future payments, and offset future payments accordingly. **Stewart v. Harman Mining Corp.**, 5 BLR 1-854, 1-862 (1983), *aff'd sub nom. Harman Mining Co. v. Director, OWCP*, 826 F.2d 1388, 10 BLR 2-291 (4th Cir. 1987).

In a case involving claimants who were required by state law, as a condition for filing a state claim, to diligently and in good faith pursue federal Black Lung claims, the Board held that an administrative law judge cannot enter Orders of Dismissal which contain a provision allowing the Orders to be set aside at some indefinite future time if it is ever determined by the Kentucky Workers' Compensation Board that claimants did not diligently and in good faith pursue their federal Black Lung Claims. Judicial finality requires either that claimants continue to pursue their federal claims, or that the claims be unconditionally withdrawn or dismissed. **Slone v. Wolfe Creek Collieries, Inc.**, 10 BLR 1-66 (1987), *appeal dismissed, sub nom. Canada Coal Co. v. Stiltner*, 866 F.2d 153, 12 BLR 2-115 (6th Cir. 1989).

The Board vacated the administrative law judge's order of \$20,717.45 in overpayment, holding that since the State of West Virginia found claimant to be 30% disabled due to

pneumoconiosis, the offset should have been based on a 30/100 ratio (30%) of the Federal award, not 30/87 (34.5%). **Lucas v. Director, OWCP**, 14 BLR 1-112 (1990)(en banc) (McGranery, J., dissenting).

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 offset necessitated by Section 725.535(b). This offset is not stayed automatically by virtue of claimant's filing of a request for hearing or subsequent appeal to the Board. **Burnette v. Director, OWCP**, 14 BLR 1-151 (1990).

The Board vacated the administrative law judge's determination that claimant's federal black lung benefits should be offset by an amount equal to 20% of claimant's state award, holding that since the State of West Virginia found claimant to be 15% disabled due to pneumoconiosis, only 15% of the state award is attributable to pneumoconiosis, and, therefore, 15% of the award is subject to offset. **Burnette v. Director, OWCP**, 14 BLR 1-151 (1990).

The Board rejected the argument that 30 U.S.C. §924a, which provides medical benefits only under Part C to Part B beneficiaries, allows Part B beneficiaries to file for benefits under Part C where the Part B beneficiary is not receiving benefits due to the offset for excess earnings provision of Part B. **Stowers v. Director, OWCP**, 9 BLR 1-124 (1986).

Citing **Kosh, supra**, and **Stowers, supra**, in interpreting 30 U.S.C. §924a, the Fourth Circuit held that a Part B beneficiary who had his award offset under the excess earnings offset provision may not circumvent the offset by seeking cash benefits under Part C. The claimant held that claimant was a Part B recipient with an additional opportunity to receive medical benefits under Part C but not a second opportunity to seek cash benefits. **Milam v. Director, OWCP**, 874 F.2d 223, 12 BLR 2-291 (1989).

In cases where state lump sum attorney's fees are awarded without any mandate as to the required method for their disbursement, the Board holds that the proper method of calculation for purposes of Section 725.535 requires the federal benefits to be offset against the *net* state benefits for each month. Specifically, to determine the *net* state benefits amount, the portion of the attorney's fee attributable to that month is subtracted from the monthly state benefits amount. It is this amount which is then to be offset against claimant's federal black lung benefits. See **Sculli v. Bethlehem Mines Corp.**, 8 BLR 1-206 (1985). The Board therefore rejects the Director's "up front" method of delaying offset until the state attorney's fees award is satisfied. **Molnar v. Barnes and Tucker Co.**, 15 BLR 1-53 (1991).

Under Section 725.535(d), the regulation excludes *inter alia*, the amounts paid by claimants for attorney's fees pursuant to *valid* state attorney's fees awards. The Board assumes that state fee awards are valid, unless the record evidences that such awards have been voided by the proper authorities under State law. **Molnar v. Barnes and Tucker Co.**, 15 BLR 1-53 (1991).

In applying Section 725.465(d), which requires that the administrative law judge not dismiss a claim in which interim benefits have been paid "except upon the motion or written agreement of the Director", see **Sizemore v. Shamrock Coal Co., Inc.**, 16 BLR 1-1 (1991); **Palovich v. Bethlehem Mines Corp.**, 5 BLR 1-70 (1982), the Board rejected employer's argument that Section 725.465(d) was invalid under the APA because it subjects the administrative law judge to the "supervision or direction" of the Director in violation of Section 554(d) of the APA, 5 U.S.C. §554(d). The Board held that the requirements of the APA must be synthesized with the specific requirements of the Act governing the processing of claims and that Section 725.465(d) was not inconsistent with the APA inasmuch as the Director, as the Secretary's designee, oversees the proper administration of the Act, as in the instant case, in which a coal mine operator may be found liable for payment of benefits, see 30 U.S.C. §934(b)(1), but he does not supervise or direct the administrative law judge in the performance of his independent duties, or "participate or advise" the administrative law judge in rendering his decision. **Boggs v. Falcon Coal Co.**, 17 BLR 1-62 (1992).

The Board held that to allow offset during periods when claimants' Kentucky benefits were suspended, in order that the Kentucky Special Fund could be reimbursed for monies paid up-front to claimants' attorneys at the time of the state award, would wrongfully deprive claimants of their federally mandated level of compensation. The Board distinguished **Scuilli v. Bethlehem Mines Corp.**, 8 BLR 1-206 (1985), because its facts indicate that the monthly benefit claimant received from Pennsylvania minus the deduction for the legal fee was greater than the federal benefit level, whereas here claimants' state benefits were reduced to zero. **Williams v. Bethlehem Steel Corp.**, 17 BLR 1-94 (1993).

In affirming the administrative law judge's determination that employer was not entitled to offset, the Board held that the plain language of West Virginia Code §23-4-10(e) and Section 725.535 preclude offset; the purpose of the state statute is to provide limited benefits to survivors who are not eligible for ordinary statutory death benefits because the employee did not die from the disabling injury, and Section 725.535(a) states that the term "state or federal benefit" means a payment made for disability or death due to pneumoconiosis. **Kyle v. Carbon Fuel Co.**, 17 BLR 1-130 (1993)(Brown J., dissenting).

The Board rejected claimant's contention that the administrative law judge erred in offsetting benefits received from the West Virginia Workers' Compensation Fund rather than the West Virginia Occupational Pneumoconiosis Board. The Board held that although claimant was not compensated by the West Virginia Occupational Pneumoconiosis Board, claimant nonetheless received a state award of benefits partially "due to pneumoconiosis," which the administrative law judge properly found to be subject to the offset provisions of 20 C.F.R. §725.535(a)(1). **Bennett v. Director, OWCP**, 18 BLR 1-48 (1994)(McGranery, J., concurring and dissenting).

Inasmuch as it was not supported by substantial evidence in the record, the Board vacated the administrative law judge's finding that forty percent of claimant's West Virginia second injury life award was due to pneumoconiosis and remanded the case to the administrative law judge to make an appropriate finding based upon the record presented. Given the lack of clarity in the state commissioner's order, the Board noted that the administrative law judge may wish to reopen the record to receive relevant evidence on remand. **Bennett v. Director, OWCP**, 18 BLR 1-48 (1994)(McGranery, J., concurring and dissenting).

In these consolidated cases where the miners' state awards were made pursuant to Section 301(i) of the Pennsylvania Occupational Disease Act, the Board affirmed the administrative law judge's grant of offset. Because the statutory language of Section 422(g) is clear and unambiguous, the Board saw no need to go beyond that provision's plain meaning, and held that benefits paid pursuant to a law denominated by a state as a workers' compensation law are subject to offset. **O'Brockta v. Eastern Associated Coal Co.** and **Stinner v. Underkoffler Coal Service**, 18 BLR 1-71 (1994).

The Board held that receipt of benefits under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§8101-8193, does not require a reduction or offset in federal black lung benefits inasmuch as claimant's award under FECA was based on the miner's accidental death rather than death or total disability due to pneumoconiosis, see 20 C.F.R. §§725.533, 725.535; see also 20 C.F.R. §410.515. **Sammons v. Wolf Creek Collieries**, 19 BLR 1-24 (1994).

The Board deferred to the Director's interpretation of Section 725.535(d) and applied the up-front method to calculate the offset claimant should receive for legal and medical fees paid in pursuit of her state claim. The Board agreed with the Director that the method of repayment, *i.e.*, monthly basis or lump sum, is irrelevant to the applicability of the month-based up-front formula for calculating the overpayment amount. The Board stated that to the extent that it is inconsistent, the Board's decision in **Scuilli v. Bethlehem Mines Corp.**, 8 BLR 1-206 (1985) is overruled. **Cadle v. Director, OWCP**, 19 BLR 1-56 (1994).

Section 725.535(d) provides in pertinent part that amounts paid or incurred by an individual for medical, legal or related expenses in connection with a claim for state benefits for occupational pneumoconiosis are to be excluded in computing the amount by which the duplicative federal benefits must be offset. 20 C.F.R. §725.535(d). The Board held that, 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" pursuant to Section 725.535(d), *i.e.*, if claimant received, as in the instant case, a 15% state disability award for pneumoconiosis, then in the absence of a more specific accounting of claimant's attorney's fee, 15% of claimant's total attorney's fee will be subtracted from the amount claimant is obligated to repay. **Pickens v. Director**,

**OWCP**, 19 BLR 1-116 (1995).

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