

HARVLEA CADLE)
(Widow of WALTER CADLE))
)
 Claimant-Respondent)
)
 v.)
)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED) DATE ISSUED:
 STATES DEPARTMENT OF LABOR)
)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Harvlea Cadle, Coal City, West Virginia, *pro se*.

Alan G. Paez (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, the United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs, (the Director) appeals the Decision and Order (89-BLO-0127) of Administrative Law Judge Frederick D. Neusner regarding the computation of the amount of overpayment 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). The administrative law judge, applying the regulations at 20 C.F.R. Part 725, found that the parties agreed that an overpayment of \$32,107.20 occurred, that claimant¹ was

¹Claimant is Harvlea Cadle, widow of Walter Cadle, who filed her claim for benefits on March 16, 1982. Director's Exhibit 1.

On July 12, 1991, the attorney representing claimant at that time submitted a letter to the Board, stating that his office no longer represents claimant.

without fault in causing the overpayment, and that claimant does not seek a waiver. Decision and Order at 2-3. The administrative law judge rejected the Director's overpayment calculation. Decision and Order at 6. The administrative law judge found the amount of the overpayment to be \$14,419.09; he reduced the original overpayment amount of \$32,107.20 by subtracting \$12,688.11 for attorney's fees and medical expenses and claimant's advance payment of \$5,000. Decision and Order at 6-7.

On appeal, the Director asserts that the administrative law judge's application of law in calculating the overpayment amount is contrary to both the Director's and the Board's interpretations of the regulations. Director's Brief at 6. Claimant has not responded to this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The district director² initially determined that claimant was entitled to black lung disability benefits. Director's Exhibit 1. Although employer controverted liability for payments, Director's Exhibit 17, the district director notified claimant that she was being paid interim benefits, \$6,720.20 in a lump sum to cover the period from February 1, 1982 through April 1, 1983 and thereafter monthly payments of \$457.40. Director's Exhibit 2. On August 29, 1988, the West Virginia Workers' Compensation Fund awarded claimant state benefits based on the deceased miner's total disability due to pneumoconiosis. Director's Exhibit 6. Claimant received a lump sum payment of \$101,889.18 for the period from February 1, 1982 through September 30, 1988 and monthly payments of \$1,285.41 thereafter. *Id.*

Claimant notified the United States Department of Labor of her state award and the district director informed her that she had received an overpayment in the amount of \$32,107.20, which needed to be repaid. Director's Exhibits 7-9. Claimant's counsel submitted a letter, stating that claimant was charged \$12,306.11 in attorney's fees and \$382 in medical expenses in pursuit of her state claim. Director's Exhibit 12. Further,

²Formerly "deputy commissioner," see 20 C.F.R. §725.101(a)(11); 55 *Fed. Reg.* 28606 (July 12, 1990).

claimant's counsel stated in a letter dated January 12, 1990 that the attorney's fee had been paid in accordance with West Virginia Code §23-5-5. Based on this information, the district director reduced the overpayment amount to \$27,674, and claimant contested this amount. Director's Exhibits 14, 17. On October 12, 1989, claimant sent the Department of Labor \$5,000 as partial repayment of the overpayment, which she contends should be \$19,419.09, not \$27,674. Decision and Order at 4.

The administrative law judge stated that the Director's approach to calculation of the offset was to credit all of claimant's monthly state award toward claimant's legal and medical fees until such time as claimant had been paid monthly state benefits equal to the amount of attorney's fees payable in claimant's state claim, thus delaying reduction of claimant's federal monthly benefits until that time. This calculation would reduce the state award to zero for ten months and therefore allow claimant to receive the full federal monthly benefits for those months; as a result there would be no overpayment charged for that ten month period. Decision and Order at 4.

However, the administrative law judge stated that in this case claimant seeks to repay the Director in a single lump sum. Therefore, "the Director's proposal that [c]laimant's repayments [be] computed as though they were to be strung out over nearly a year," was entitled to less weight, Decision and Order at 5, because the Director's calculations would result in a total repayment that is \$8,254.92 higher than the amount claimant would repay in a lump sum. *Id.* The administrative law judge concluded that the considerations in Section 725.535(b) and (d) and *Scuilli v. Bethlehem Mines Corp.*, 8 BLR 1-206 (1985), which concern the offset of federal benefits by state benefits on a month-by-month basis, were inapplicable because the overpayment amount would be repaid in a single lump sum. *Id.*

While the administrative law judge's concern that claimant be fully compensated for the amount of the state benefits designated for payment of attorney's fee in the state claim appears to be consistent with the emphasis placed on the remedial purpose of the Act by the court in *Director, OWCP v. Barnes and Tucker Co. [Molnar]*, 969 F.2d 1524, 16 BLR 2-99 (3d Cir. 1992), *rev'g Molnar v. Barnes and Tucker Co.*, 15 BLR 1-53 (1991), the administrative law judge's findings must nonetheless be vacated as inconsistent with the regulatory mandate of Section 725.535(b) and (c).

Section 725.535(c) provides that if a state award is paid "in a lump sum as a commutation of or a substitution for periodic benefits," the reduction is to be made in such a way as to "approximate as nearly as practicable" the methods used in

subsection (b).³ 20 C.F.R. §725.535(c). Thus, the regulation contemplates "projecting" the portion of a lump sum award which represents a commutation of or substitution for benefits. See *Stewart v. Harman Mining Corp.*, 5 BLR 1-854, 1-862 (1983) (2-1 opinion with Kalaris, J., dissenting).

Under this projection, the lump sum award of \$101,889.18, covering the period from February 1982 through September 1988, was broken down into monthly amounts. Assuming that the initial months of the state award went to pay the attorney's fee, the district director applied the first ten months of state payments toward that amount. Thus, if the lump sum is projected into monthly amounts, there would have been no state award from February through November 1982 to be offset against federal benefits, and claimant would have been entitled to full federal benefits, which had been awarded as of February 1982, for that period. Claimant in fact received federal benefits from February 1982 through September 1988.

Pursuant to Section 725.535(b) and consistent with the district director's calculations, these federal benefits would have been entirely offset by the state benefits except during the first ten months, when claimant would have received federal benefits. Thus, under the projection contemplated by the regulations, claimant was entitled only to the first ten months of federal benefits she received, while her "projected" state award was being used to pay attorney's fees. Therefore, only the amount of federal benefits due for that initial ten month period was properly paid to claimant and only that amount--\$4,433.20-- may be deducted from the total federal overpayment of \$32,107.20, making a total overpayment of \$27,674.

³Section 725.535(b) reads:

Benefit payments to a beneficiary for any month are reduced (but not below zero) by an amount equal to any payments of State or Federal benefits received by such beneficiary for such month.

20 C.F.R. §725.535(b).

As the Board stated in *Scuilli*, pursuant to "the adjustment regulation, 20 C.F.R. §725.535(d), the exclusion of the attorney fee in computing the reduction is accomplished by subtracting from the *monthly* state benefit amount the attorney's fee attributable to that *month*." *Scuilli*, 8 BLR at 1-209 n.6 (emphasis added). As the Director asserts, the issue of whether the repayment is to be made on a monthly basis or in a lump sum is irrelevant to the applicability of the month-based up-front formula⁴ for calculating the overpayment amount. See generally *Scuilli, supra*; see also *Harman Mining Co. v. Director, OWCP*, 826 F.2d 1388, 10 BLR 2-291 (4th Cir. 1987), *aff'g* 5 BLR 1-854 (1983); *Warren v. Harlan Fuel Co.*, 6 BLR 1-582 (1983).

In *Molnar*, the United States Court of Appeals for the Third Circuit stated that the up-front method "is better suited to effectuate the remedial purpose of the Black Lung Benefits Act," in that a level of benefits payments to claimants, from state and/or federal benefits, is ensured. *Molnar*, 969 F.2d at 1528, 16 BLR at 2-106. Further, the court stated that the up-front method is beneficial to claimants inasmuch as federal benefits are not offset until an amount of monthly state benefits equal to the amount of claimant's state attorney's fee has been paid on claimant's state claim; thus, this method "insures that a claimant's benefits are not diminished for reasons other than the *duplication* of benefits." *Molnar*, 969 F.2d at 1529, 16 BLR at 2-107.

For all claimants, the delay in the reduction of federal benefits under the up-front method provides an accommodation for amounts payable from state claims for attorney's fees. A dollar-

⁴The up-front method assumes, absent contrary evidence, that claimant's legal fees will be paid from claimant's initial state benefits check(s); thus, the offset of federal benefits by state benefits will be delayed until claimant has received enough state benefits to satisfy the legal fees. Director's Brief at 7; see *Molnar*, 969 F.2d at 1528, 16 BLR at 2-106. The Director contends that if a state award does not specify an amount of weekly or monthly benefits payments to be allocated for payment of legal fees, an up-front method of offset should be used. Director's Brief at 7.

for-dollar accommodation for amounts payable from state claims for attorney's fees occurs under the up-front method, however, only when the amounts of the federal monthly benefit and state monthly benefit are the same.⁵ That is not the case here.⁶ The administrative law judge, by basing his overpayment calculation on the aggregate amount paid to claimant in federal benefits less the aggregate amount paid by claimant in attorney's fees, reimbursed claimant dollar-for-dollar for her legal fees. Decision and Order at 6-7.

The United States courts of appeals have generally given special deference to the Director's position on issues involving interpretation or application of the Act because the Director is charged with administration of the Black Lung Benefits Act. See *Director, OWCP v. Palmer Coking Coal Co.* [Manowski], 867 F.2d 552, 555 (9th Cir. 1989); *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987); *Peabody Coal Co. v. Blankenship*, 773 F.2d 173 (7th Cir. 1985); *Bethlehem Mines Corp. v. Simila*, 766 F.2d 128 (3d Cir. 1985). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this

⁵For a better understanding of the differing results of application of the up-front method to scenarios involving claimants who are receiving varying amounts under their respective state programs, it must be borne in mind that the up-front method does *not* delay reduction of federal benefits until a point has been reached at which an amount of *federal* benefits has been paid to claimant that is equal to the amount of the attorney's fee to be paid in the state claim; rather, the reduction of federal benefits is delayed until a point has been reached at which the amount of *state* benefits paid equals the amount of the attorney's fee payable in the state claim. Thus, when the state and federal amounts are similar, the aggregate amount of federal benefits that claimant receives during the months in which claimant's state benefits monies are viewed as going toward payment of claimant's state attorney's fee is similar to the total amount paid by claimant for the attorney's fee in the state claim. If, however, the monthly federal benefit being paid to claimant during the up-front period is more than the state benefit that is payable during that period, the aggregate amount of federal benefits received during the up-front period will be more than the total amount paid by claimant for the attorney's fee in the state claim. Conversely, if the monthly federal benefit amount is less than the state monthly benefit, the aggregate amount of federal benefits paid during the up-front period will be less than the total amount paid for claimant's attorney's fee in the state claim.

⁶Claimant was awarded a state monthly rate of \$1,285.41 and a federal monthly rate that varied between \$344.80 and \$492.30. Director's Exhibit 8.

case arises, has held that "[t]he Director's interpretation of the regulations is entitled to substantial deference from this court." *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), citing *Bethenergy Mines v. Director, OWCP* [Pauley], U.S. _____, 111 S.Ct. 2524, 15 BLR 2-155 (1991), *aff'g* 890 F.2d 1295, 13 BLR 2-162 (3d Cir. 1989) and *Adkins v. Director, OWCP*, 878 F.2d 151, 12 BLR 2-313 (4th Cir. 1989); *cf.* *Gray v. Director, OWCP*, 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1991); *Eplion v. Director, OWCP*, 794 F.2d 935, 9 BLR 2-52 (4th Cir. 1986). In *Molnar*, the Third Circuit court gave deference to the Director's up-front method of apportioning legal fees by reasoning that the determination of how attorney's fees are to be apportioned is a policy decision and "the Director is the body within the Department of Labor authorized to make Black Lung policy." *Molnar*, 969 F.2d at 1527, 16 BLR at 2-104.

We, therefore, defer to the Director's interpretation of Section 725.535(d). To the extent that it is inconsistent, the Board's decision in *Scuilli* is hereby overruled. Thus, we vacate the administrative law judge's finding that the offset amount must be reduced by the entire \$14,419.09 (for legal services and medical expenses). Rather, we hold, based on the foregoing reasoning, that the proper amount of the overpayment is \$27,674, Director's Exhibit 14, less claimant's partial payment of \$5,000, Unmarked Exhibit, and remand this case to the district director for collection. See 20 C.F.R. §725.544.

Accordingly, the administrative law judge's Decision and Order regarding the computation of the amount of overpayment is modified, and this case is remanded to the district director for collection.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge