BRB No. 92-0705 BLA

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| CHARLES BENNETT | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: _____ |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order of George A. Fath, Administrative Law Judge, United States Department of Labor.

Judith C. Walz (Ikner and Associates, L.C.), Lewisburg, West Virginia, for claimant.

Christian P. Barber (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 McGRANERY, Administrative Appeals Judges.

DOLDER, Acting Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (90-BLO-0245) of Administrative Law Judge George A. Fath ordering claimant to repay the Black Lung Disability Trust Fund (Trust Fund) $19,600.20 for an 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 found that 40% of claimant's state workers' compensation award was attributable to pneumoconiosis and was received at the same time he was receiving federal black lung benefits. Thus, the administrative law judge found that an overpayment existed in this case. The administrative law judge found that claimant was at fault in the creation of the overpayment, and thus determined that the overpayment was not waived. On appeal, claimant argues that the administrative law judge erred in determining that the state award should be applied to offset the federal award, in calculating the percentage of the award attributable to claimant's

pneumoconiosis, and in finding claimant to be at fault in the creation of the overpayment. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance. By Order issued August 31, 1993, the Board ordered oral argument in the instant case. The Board held oral argument in Charleston, West Virginia on October 14, 1993.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in offsetting his state award of benefits against his federal black lung award. Claimant raises several allegations in this regard. Initially, claimant argues that the administrative law judge erred in offsetting the state award, because the state award was not "due to pneumoconiosis," as defined in 20 C.F.R. §725.533(a)(1); as the award was based on the combined effects of pneumoconiosis and other factors, such as injuries, age, education and work experience. Contrary to claimant's contention, the administrative law judge did not err in offsetting the federal award against a percentage of the state award, notwithstanding the fact that the state award was only partially "due to pneumoconiosis." When a state award is premised upon a finding that a specific percentage of claimant's total disability is due to pneumoconiosis, the award is subject to offset and the percentage determines the amount of offset necessitated pursuant to Section 725.533(a). 30 U.S.C. §922(b); 20 C.F.R. §725.535; *see Burnette v. Director, OWCP*, 14 BLR 1-151 (1990); *Lucas v. Director, OWCP*, 14 BLR 1-112 (1990) (*en banc*) (McGranery, J., dissenting).

Secondly, claimant contends that the administrative law judge should not have offset the state award because he received the state award from the West Virginia Workers' Compensation Fund rather than the West Virginia Occupational Pneumoconiosis Board. Claimant's contention is without merit, because, 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 at Section 725.535(a)(1). *See Burnette, supra; Lucas, supra*.

Claimant also contends that the administrative law judge erred in offsetting the state award because it does not run concurrently with the federal award. Claimant's contention is without merit. Claimant is correct that he received benefits from the state in 1975-76 and 1977-78, and that these awards are not concurrent with

the award of federal benefits. Director's Exhibits 8, 26. However, these awards were not included in the offset calculation made by the district director,[1] which the administrative law judge accepted. Rather, the district director's overpayment calculation was based solely upon concurrent state and federal payments received from July, 1985 through September, 1988.[2] *See* Director's Exhibit 32. Thus, the administrative law judge's finding that the offset payments were concurrent with the award of federal benefits is affirmed. Moreover, inasmuch as claimant has failed to demonstrate any error in the administrative law judge's finding that claimant's state award was subject to the offset provisions

[1] The party responsible for the initial processing of a claim for benefits, formerly known as the deputy commissioner, is now known as the district director. *See* 20 C.F.R. §725.101(a)(11); 55 Fed. Reg. 28606 (July 12, 1990). This change is for procedural purposes only and has no substantive effect.

[2] Claimant contends that the administrative law judge erred in offsetting a retroactive payment from the Second Injury Life Award, arguing that concurrent benefits must only be reduced for the month in which benefits are received. This contention is without merit. An offset may be calculated by projecting a lump sum payment from the state over a period of time. *See* 20 C.F.R. §725.535(c); *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).

found at Section 725.535, that determination is affirmed as rational and supported by substantial evidence.[3]

[3] Claimant contends that one of the purposes of allowing offsets is to avoid double liability to the employer, and that this purpose is inapplicable to the state's Second Injury Life Award, which is not paid by the employer. Brief of Claimant at 10-11. We reject claimant's contention, inasmuch as, for this Part C case, Director's Exhibit 18-A; 30 U.S.C. §931 *et seq.*, the Act does not limit offset to state awards paid by an employer. *See* 30 U.S.C. §932(g); *see also* 20 C.F.R. §§725.533, 725.534, 725.535.

Claimant also avers that the administrative law judge erred in finding that the April 1, 1987 state award attributed 40% of claimant's disability to pneumoconiosis. This argument has merit. On April 1, 1987, the Commissioner of the Workers' Compensation Fund issued an order in which he recited three previous state awards received by claimant, and found "that the claimant suffers from preexisting permanent disability attributable to multiple prior injuries, and through the combined effect of these injuries and occupational pneumoconiosis is now permanently and totally disabled within the meaning of the Workers' Compensation Law...." Director's Exhibits 8, 26. In contending that the administrative law judge properly found that this award attributed 40% of claimant's disability to pneumoconiosis, the Director urges that the commissioner must have added the percentage for disability shown in claimant's previous awards because under the West Virginia second injury statute, prior permanent partial disability awards for specific percentages of disability may be added together in determining whether claimant is entitled to a Second Injury Life Award.[4] *See Gillispie v. State Workmen's Compensation Comm'n*, 205 S.E.2d 164 (W.Va. 1974). The state commissioner's order on its face, however, does not support the conclusion that the finding of 15% disability due to pneumoconiosis in 1982 became a finding of 40% disability due to pneumoconiosis in 1982 on the basis that claimant had been found to be 15% disabled due to pneumoconiosis as of 1975, 10% disabled due to pneumoconiosis as of 1977, and 15% disabled due to pneumoconiosis as of 1982. Since the Director seeks the offset, the burden is on him to demonstrate clearly the amount to which he is entitled. *See generally* 30 U.S.C. §932(g); 20 C.F.R. §§725.533, 725.535, 725.601(b); *Ball v. Jewell Coal & Coke Co.*, 6 BLR 1-693 (1983). On the basis of the record in this case as it now exists, the administrative law judge's finding that the offset is in an amount equal to 40% of the state award is not supported by substantial evidence in the record and must be vacated.

The Director also argues that the administrative law judge's finding that the Trust Fund is entitled to an offset for an amount equal to 40% of the state award was also supported by claimant's counsel's statement that the Second Injury Life Award "for pneumoconiosis was 40 percent." Director's Exhibit 27 at 22; Brief

[4] In his brief, the Director cites many cases in which this method was approved, Brief for Director at 9-10 n. 3., but none of the cases he cited has any application to the instant case, *e.g.*, *McClanahan v. State Workmen's Compensation Comm'r*, 207 S.E.2d 184 (W.Va. 1974) (previous awards for back injury, eye injury and silicosis taken together support a lifetime award). He cites no case which suggests that a finding of partial disability due to pneumoconiosis during one period should be added to a finding of partial disability due to pneumoconiosis in another period to find a greater degree of disability.

for Director at 10; Decision and Order at 3. Without supporting documentation in the record, claimant's counsel's statement is insufficient and the administrative law judge erroneously relied upon it. Therefore we remand 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 administrative law judge may wish to reopen the record to receive relevant evidence. *See generally Toler v. Eastern Associated Coal Corp.*, 12 BLR 1-49 (1988) (*en banc*).

Finally, claimant argues that the administrative law judge erred in finding claimant to be at fault in the creation of the overpayment by failing to inform the Department of Labor of his receipt of state benefits. Claimant maintains that the administrative law judge erred by failing to consider that claimant, at the time of the 1987 award, was sixty years old, had a fourth grade education, had extensive health problems, and was, according to psychological testing, in the borderline mentally retarded range. Pursuant to the regulatory criteria, the administrative law judge, in determining fault, must look to the subjective reasonableness of claimant's actions in accepting the overpaid amount given claimant's age, intelligence, education, physical and mental conditions, and other pertinent circumstances. *Jones v. Director, OWCP*, 14 BLR 1-80 (1990) (*en banc*) (Brown, J., concurring). The administrative law judge properly considered all the relevant factors and then concluded that claimant was at fault. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). We do not agree with our dissenting colleague that the administrative law judge erred in finding claimant to be at fault in light of his limitations. We note that claimant bears the burden of proof to demonstrate that he qualifies for a waiver of overpayment pursuant to 20 C.F.R. §410.561, *et seq*. *See generally Jones, supra*. In the instant case, the administrative law judge permissibly found, and the record supports, that claimant failed to produce *any* evidence that claimant did not realize that his state award was due at least in part to pneumoconiosis, or that he did not realize that he was required to report receipt of any state benefits attributable to pneumoconiosis. *See* Decision and Order at 4; *Jones, supra*. Moreover, the administrative law judge permissibly relied upon the fact that claimant had been represented by counsel throughout the state and federal proceedings in making his fault determination. Decision and Order at 4. Despite the opinion of our dissenting colleague, we do not agree that the administrative law judge was bound to conclude that claimant met his burden of proof pursuant to Section 410.561 simply by demonstrating that his counsel maintained that the state award was not duplicative. *See generally Jones, supra*. Thus, the administrative law judge's finding that claimant was at fault in the creation of the overpayment by failing to furnish material information to the Department of Labor is affirmed as rational and supported by substantial evidence. *See* 20 C.F.R. §§410.561b, 725.542, 725.543.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, J., concurring and dissenting:

I concur in my colleagues' decision that claimant's state award for permanent and total disability within the meaning of the West Virginia Workers' Compensation Law is subject to the offset provision found at 20 C.F.R. §725.535 because the payment is due in part to pneumoconiosis and payments on the state award are concurrent with payments on the federal award. I also concur with the decision that the administrative law judge erred in attributing 40% of the state's Second Injury Life Award to pneumoconiosis. I must dissent, however, from my colleagues' decision to affirm the administrative law judge's finding that claimant was at fault in the creation of the overpayment, and thus, overpayment was not waived. The determination of fault has both an objective and a subjective component. The regulations explain:

> What constitutes fault...on the part of an overpaid individual...depends upon whether the facts show that the incorrect payment to the individual resulted from...[f]ailure to furnish information which he knew or should have known to be material....

20 C.F.R. §410.561b.

In the case at bar, claimant's lifetime award was explicitly due in part to pneumoconiosis. But that statement does not end the

inquiry of whether claimant is at fault, because that determination depends upon claimant's understanding. "In determining whether an individual is at fault, the Administration will consider pertinent circumstances, including his age, education, and physical and mental condition." 20 C.F.R. §410.561b; *see Jones v. Director, OWCP*, 14 BLR 1-80 (1990) (*en banc*) (Brown, J., concurring). Although the administrative law judge noted that claimant at the time of the award was sixty years of age, had a fourth grade education, functions in the "borderline mentally retarded range" and suffers "extensive health problems," he failed to discuss the impact of these factors on claimant's ability to understand that he had an obligation to advise the Department of Labor of his West Virginia award. Decision and Order at 4. Nor did the administrative law judge discuss the ambiguity of the award which gave rise to counsel's argument. *See* 20 C.F.R. §410.561g. In light of this omission, I am surprised the majority affirms the administrative law judge's finding that claimant was at fault, since the majority declares that it cannot discern from the face of the award how much is attributable to pneumoconiosis.

Instead of analyzing the facts in light of claimant's obvious, significant limitations, the administrative law judge found that claimant must have had sufficient understanding of the duplicative nature of the West Virginia award since claimant's counsel had not argues that claimant lacked the requisite understanding. The administrative law judge failed to note that claimant's entire argument was that the West Virginia award was not in fact duplicative.[5] One cannot reasonably construe this argument as an implicit concession that claimant understood it to be duplicative.

The majority misreads this portion of my dissent when it asserts: "Despite the opinion of our dissenting colleague, we do not agree that the administrative law judge was bound to conclude that claimant met his burden of proof pursuant to Section 410.561 simply by demonstrating that his counsel maintained that the state award was not duplicative." Decision and Order at 5. My point is that the basis of the administrative law judge's decision was erroneous because he relied upon a misunderstanding of counsel's argument. The majority, moreover, compounds the error by affirming the administrative law judge's decision because the "administrative law judge permissibly relied upon the fact that claimant was

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[5] The transcript of the hearing before the administrative law judge includes the following colloquy:

> The Court: Your contention is that the award doesn't contain anything for pneumoconiosis?
>
> Counsel: Well, that's our position, yes.

Hearing Transcript at 7.

represented by counsel.... " Decision and Order at 5. The fact of claimant's representation does not relieve the administrative law judge of his responsibility under the regulations to analyze the facts, not merely recite them. Given the administrative law judge's failure to discuss the effect of claimant's limitations on his understanding of his circumstances, as required by the regulations, the complexity of the award of benefits, and the administrative law judge's erroneous inference from counsel's argument, I would remand the case for him to discuss fully claimant's many and varied limitations on his understanding to determine whether he was at fault within the meaning of the regulations.

In sum, as substantial evidence supports the administrative law judge's conclusion that the state's lifetime award was due in part to pneumoconiosis, but substantial evidence does not support his determination that the Director had established that 40% of the award was due to pneumoconiosis, I join this aspect of my colleagues' decision. However, I would vacate the administrative law judge's finding that claimant was at fault in failing to advise the Department of Labor of his lifetime award and remand the case for reconsideration of the issue in light of all the relevant factors discussed above.

REGINA C. McGRANERY
Administrative Appeals Judge