

BRB Nos. 07-0523 BLA
and 07-0523 BLA-A

M.E.G.)
(Widow of H.E.G.))
)
Claimant-Petitioner)
)
v.)
)
BRYANT MINING COMPANY,)
INCORPORATED)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 04/29/2008
PNEUMOCONIOSIS)
FUND/BRICKSTREET)
)
Employer/Carrier-)
Respondents)
Cross-Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for carrier.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, Chief Administrative Appeals Judge, SMITH and HALL,
Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and carrier cross-appeals, the Decision and Order (2005-BLO-0002) of Administrative Law Judge Daniel F. Solomon denying waiver of recovery of overpayment of benefits on a survivor's 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 determined that the record reflected an overpayment in the amount of \$23,681.20 resulting from claimant's receipt of federal benefits under the Act concurrent with her receipt of a duplicative amount of state workers' compensation benefits. The administrative law judge found that claimant was "not without fault" in creating the overpayment, and further found that the overpayment amount must include a credit of \$15,406.15 for legal expenses incurred with regard to claimant's state award of benefits. Decision and Order at 3; *see* 20 C.F.R. §§725.542, 725.543. Finding claimant financially capable of repaying carrier, the administrative law judge directed the district director to negotiate a reasonable and equitable repayment plan with claimant and carrier. Decision and Order at 3.

On appeal, claimant contends that the administrative law judge erred in finding claimant at fault in the creation of the overpayment, and challenges the Department of Labor's (DOL) "up-front" method for calculating the amount of the overpayment. Claimant also argues that the administrative law judge miscalculated the amount of the overpayment by failing to credit all of the legal expenses sought by claimant's counsel. Carrier responds, urging affirmance of the administrative law judge's finding that claimant was not without fault in the creation of the overpayment, and cross-appeals, contending that the amount of the overpayment, as calculated by the district director, already reflects full credit for claimant's legal expenses. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the "up-front" method of deducting legal expenses is consistent with 20 C.F.R. §725.535(b), and was properly utilized by the district director in his calculation of the overpayment amount.

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

Initially, claimant contends that the administrative law judge erroneously determined that claimant was not without fault in the creation of the overpayment in this case. Specifically, claimant argues that the overpayment was created by the retroactive payment of state benefits, and that claimant was without fault since she could not have predicted that she would receive a state award until it was granted. Thus, claimant asserts that this case must be remanded for an evaluation as to whether claimant has shown that she is entitled to waiver of recovery of the overpayment. Claimant's arguments are without merit.

Section 422(g) of the Act, 30 U.S.C. §932(g), as implemented by 20 C.F.R. §725.535(b), provides for offset of state payments received for concurrent periods for which federal benefits are awarded, *see Harman Mining Co. v. Director, OWCP*, 826 F.2d 1388, 10 BLR 2-291 (4th Cir. 1987), *aff'g Stewart v. Harman Mining Co.*, 5 BLR 1-854 (1983). In cases involving an overpayment, the administrative law judge must determine whether claimant is without fault in the creation of the overpayment. 20 C.F.R. §§410.561a, 410.561b. No showing of bad faith is required; rather, an honest mistake may be sufficient to constitute fault. *Barone v. Bowen*, 869 F.2d 49 (2d Cir. 1989). If claimant is not without fault, recovery cannot be waived. 20 C.F.R. §§410.561a, 410.561b; *Hampton v. Director, OWCP*, 11 BLR 1-118 (1988).

In the present case, the record reflects that claimant was awarded benefits under the Act on May 18, 2001, payable from May 2000, *see* Director's Exhibit 2, and that claimant was awarded state benefits on October 2, 2002, payable retroactive to May 26, 2000, *see* Director's Exhibit 4. As claimant did not notify DOL that she had been awarded state benefits until August 11, 2004, *see* Director's Exhibit 3, we affirm the administrative law judge's finding that claimant failed to meet her burden of proof and persuasion to show that she was without fault in the creation of the overpayment, and further affirm his denial of waiver of recovery.¹ *See* 20 C.F.R. §410.561b; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Claimant next challenges the amount of the overpayment, arguing that because counsel was paid a total of \$16,259.21 in attorney fees, the administrative law judge erred in finding that "the \$23,681.20 amount of the overpayment must include a credit of

¹ 20 C.F.R. §410.561b provides, in pertinent part, that what constitutes fault on the part of the overpaid individual depends upon whether the facts show that the incorrect payment resulted from failure to furnish information which the individual knew or should have known to be material, or acceptance of a payment which s/he either knew or could have been expected to know was incorrect. 20 C.F.R. §410.561b(b), (c).

\$15,406.15 for legal expenses,” Decision and Order at 3. Contrary to claimant’s arguments, however, the administrative law judge accurately determined that no evidence was proffered in support of counsel’s bare assertion that “[o]ur attorney fees in this matter total \$16,159.21,” Director’s Exhibit 3. Consequently, the administrative law judge permissibly relied upon the district director’s finding that claimant was entitled to a credit of \$15,406.15 in expenses for legal representation at the state level, in calculating the amount of the overpayment. Decision and Order at 3; Director’s Exhibit 4; *see* 20 C.F.R. 725.535(d).

Claimant also maintains that there is no regulatory basis or authority for DOL’s “up-front” method of calculating the amount of the overpayment, which claimant asserts is used in an attempt to maximize the overpayment. Claimant’s Brief at 4-5. Claimant’s arguments lack merit. In *Director, OWCP v. Barnes & Tucker Co. [Molnar]*, 969 F.2d 1524, 16 BLR 2-99 (3d Cir. 1992), the United States Court of Appeals for the Third Circuit held that the Director’s “up-front” offset method was entitled to deference because it effectuated the remedial purpose of the Act by ensuring “that a claimant will receive *some* federal compensation during a period when he would otherwise receive no state compensation,” and because “the up-front method ensures that legal expenses will actually be excluded, rather than ‘averaged out’ of the calculation.” *Molnar*, 969 F.2d at 1528-1529, 16 BLR at 2-106-107. Further, the court stated that the “up-front” method is beneficial to claimants because federal benefits are not offset until an amount of monthly state benefits equal to the amount of a claimant’s state attorney fees has been paid on claimant’s state claim, thereby ensuring that claimant’s benefits are not diminished for reasons other than the duplication of state and federal benefits. *Id.* Finding the court’s reasoning to be compelling, the Board deferred to the Director’s interpretation of Section 725.535(d) in *Cadle v. Director, OWCP*, 19 BLR 1-56, 1-61 (1994). As the “up-front” method is consistent with the provisions of Section 725.535(d), we reject claimant’s argument that there is no regulatory basis or authority for its application under the facts of this case.

Lastly, carrier and the Director maintain that the administrative law judge was incorrect in finding that the district director failed to deduct claimant’s legal expenses in computing the amount of the overpayment. We agree. A review of the record reveals that the district director credited claimant’s legal expenses in the amount of \$15,406.15, at the rate of \$52.91 per day, between May 26, 2000, the date from which state benefits commenced, and March 14, 2001, when benefits were first offset. Director’s Exhibit 4. As claimant received \$23,681.20 in federal benefits from March 2001 through November 2004, we modify the administrative law judge’s Decision and Order to reflect that the full amount of the overpayment owed by claimant to carrier is \$23,681.20. We reject, however, carrier’s request that the Board direct the administrative law judge to issue specific repayment instructions to claimant, and instead remand this case to the district director for his determination of a repayment plan consistent with the administrative law

judge's instructions. While the administrative law judge has subject matter jurisdiction over the issues of waiver and recovery of overpayments, *see Knope v. Director, OWCP*, 16 BLR 1-59 (1990), enforcement decisions are within the purview of the district director. *See generally* 31 U.S.C. §952(a); 20 C.F.R. §725.544.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and modified in part, and this case is remanded to the district director to determine a reasonable and equitable repayment plan consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge