

BRB No. 00-1044 BLA

SHIRLEY ROBINSON )  
(Widow of JAMES ROBINSON) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS,) )  
 UNITED STATES DEPARTMENT )  
 OF LABOR )  
 )  
 Respondent )

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

James M. Robinson (Robinson, Rice & Levy, L.C.), Huntington, West Virginia, for claimant.

Timothy S. Williams (Howard M. Radzely, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (99-BLA-0871) of Administrative Law Judge Donald W. Mosser (the administrative law judge) ordering an offset of benefits awarded the deceased miner 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).<sup>1</sup> The administrative law judge ordered that the benefits awarded the

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<sup>1</sup>The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at

deceased miner under the Act be offset by 20% of the second injury life award (SILA)

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20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

granted the miner by the State of West Virginia. Claimant contends that there should be no offset or overpayment charged in this case because the Workers' Compensation Commissioner for the State of West Virginia failed to determine the specific contributory effect of the miner's pneumoconiosis in awarding the SILA. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the decision below.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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).

The undisputed pertinent facts of this case are as follows: The miner filed the instant claim on December 9, 1972. Director's Exhibit 1. By Decision and Order dated April 23, 1981, Administrative Law Judge Virginia Mae Brown awarded benefits to commence June 1, 1978. Director's Exhibit 5. The record shows that the miner had received, from the State of West Virginia, a number of awards for permanent partial disability due to various injuries he suffered. Claimant's Exhibits 1-5. The record also shows that the State of West Virginia awarded the miner workers' compensation benefits for pneumoconiosis; 15% in 1973 and an additional 5% in 1976 for a total of 20% permanent partial disability due to pneumoconiosis, in connection with two state claims that the miner had filed. Director's Exhibit 6; Claimant's Exhibit 6.

On October 1, 1982, the State of West Virginia awarded the miner a SILA on the ground that he was totally and permanently disabled by the combined effect of all of his injuries and pneumoconiosis. Director's Exhibit 26. Specifically, the commissioner for the Workmen's Compensation Fund indicated that the miner "suffers from pre-existing permanent disability attributable to multiple prior injuries and occupational pneumoconiosis, and through the combined effect of these injuries and occupational pneumoconiosis is now permanently and totally disabled..." *Id.* By letter dated December 16, 1982, the Director of the State of West Virginia Coal Workers' Pneumoconiosis Fund calculated that 23.53% of the miner's SILA was the portion by which his benefits under the Act should be offset. Director's Exhibit 23 at 2. The Director of the State of West Virginia Coal Workers' Pneumoconiosis Fund later advised the district director that the state fund's policy for apportioning offset due to the SILA had been re-evaluated, namely, that the former calculation of 20% of 85% disability (or 23.53%) should be recalculated as 20% of 100% disability (or 20%). The district director sought clarification of this re-calculation. Director's Exhibit 25. In response, the Director of the State of West Virginia Workers' Compensation Coal-Workers' Pneumoconiosis Fund informed the district director that "at

the maximum 20% of Mr. Robinson's life award is due to pneumoconiosis" and thus, the appropriate offset of the miner's award of benefits under the Act would be calculated based on 20% of the SILA (or 20% of 100% disability); that the previous policy of calculating disability based on disability awards totaling at least 85%, was not correct, and was started and stopped with this miner's state claim. Director's Exhibit 26.

The miner challenged whether any offset was due and further challenged the method by which the offset was calculated. Director's Exhibit 39. On March 4, 1999, counsel for the miner requested a formal hearing on the offset issue. Director's Exhibit 29. The miner died five days later on March 9, 1999. Director's Exhibit 30. Claimant filed a Survivor's Notification of the Beneficiary's Death on April 6, 1999. Director's Exhibit 31. On April 7, 1999, the district director determined that claimant was entitled to receive benefits on her own behalf as of March 9, 1999 at the monthly rate of \$459.50, and awarded these benefits, with the Black Lung Disability Trust Fund liable for the payment thereof. *Id.* On April 14, 1999, pursuant to claimant's request, the district director transferred the case to the Office of Administrative Law Judges for resolution of the issue of whether the benefits awarded under the Act should be offset due to the SILA which was awarded to the miner by the State of West Virginia. Director's Exhibit 32. The parties thereafter agreed to a determination on the record. The administrative law judge's ensuing Decision and Order, dated June 20, 2000, is the subject of the instant appeal.

The administrative law judge found that an offset of the miner's award of benefits under the Act was required because a portion of the SILA which was awarded to the miner by the State of West Virginia was attributable to the miner's pneumoconiosis. The administrative law judge found that 20% of the SILA was attributable to the miner's pneumoconiosis, and ordered that the miner's award of benefits under the Act be offset by 20% of the SILA.

Claimant contends that because the SILA does not state the degree to which the deceased miner's pneumoconiosis contributed to his total and permanent disability, and since it was the miner's back injury and hearing loss, and not his pneumoconiosis, which actually caused him to receive the SILA, there should be no offset or overpayment<sup>2</sup> charged to claimant. Claimant asserts as follows:

[N]othing in the record developed before the [State of West Virginia]

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<sup>2</sup>The administrative law judge indicated that although the issue was not before him, there was a dispute as to the correct amount of overpayment. The administrative law judge stated that the parties would be able to resolve the matter following the issuance of his Decision and Order.

Workers' Compensation Commissioner permits a determination on the amount, if any, that occupational pneumoconiosis contributed to the [miner's award for] permanent total disability. Instead, the evidence reveals that the [miner] received a 20% permanent partial disability award **while he was working**. [The miner] did not apply for a permanent total disability award until **after** he had sustained his 1978 back injury. This back injury that he sustained was one of three back injuries – based on Dr. Mattill's opinion – that accounted for at least 20% of his impairment.

... Given the remedial purposes of the Federal Black Lung Act, if there are any doubts concerning the contributory role, if any, occupational pneumoconiosis played in a claimant's permanent total disability, then those doubts must be resolved in claimant's favor...

If [the miner] had ceased working due to his occupational pneumoconiosis, then perhaps the Department of Labor's position would be better supported. *See Director, OWCP v. Hamm*, 113 F.3d 23, [21 BLR 2-131] ([4th Cir.] 1997). But the record in this case, *when construed in the claimant's favor*, clearly reveals that occupational pneumoconiosis is not the reason [the miner] stopped working. [The miner's] back injury was the last injury that he sustained and was the proverbial straw that broke the camel's back here. Thus, this case is clearly distinguishable from *Hamm*.

Claimant's Brief at 25(emphasis provided). Claimant thus asserts that without proof as to what contribution the miner's pneumoconiosis made to his total disability, the administrative law judge simply assumed that because the miner received permanent partial disability awards for his pneumoconiosis totaling 20%, then 20% of the SILA for permanent total disability must be attributable to the miner's pneumoconiosis. Claimant's Brief at 29. The Director contends that substantial evidence supports the administrative law judge's finding that the miner's award of benefits under the Act is subject to offset and that the amount of the offset is an amount representing 20% of the SILA.

The Act provides that benefit payments shall be reduced for state benefits received "on account of the disability of such miner due to pneumoconiosis." 30 U.S.C. §922(b). The Act further provides for the reduction of benefits under the Act by the amount of state benefits received "because of death or disability due to pneumoconiosis." 30 U.S.C. §932(g). The regulations at 20 C.F.R. §725.533(a) and (a)(1) provide for the reduction of federal benefits "on account of" state benefits received "because of death or partial or total disability due to pneumoconiosis." The regulation at 20 C.F.R. §725.535(a) defines the term "State or Federal Benefit" as "a payment to an individual on account of disability or death due to pneumoconiosis only under State or Federal laws relating to workers' compensation." The

regulation at 20 C.F.R. §725.535(b) provides:

Benefit payments to a beneficiary 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).

Claimant's contention, that there should be no offset because the face of the SILA does not indicate what percent the miner's disability due to pneumoconiosis contributed to the SILA, lacks merit. The SILA expressly states that it was based on the miner's disability due to the combined effect of multiple prior injuries and occupational pneumoconiosis. Director's Exhibit 26. Therefore, *some* portion of the SILA is attributable to pneumoconiosis, and thus, the miner's award of benefits under the Act is subject to offset. See 20 C.F.R. §725.533(a), (a)(1). The total percentage of the SILA attributable to the miner's pneumoconiosis determines the portion of the state award by which benefits awarded under the Act must be offset. 20 C.F.R. §725.535(b); *Director, OWCP v. Hamm*, 113 F.3d 23, 21 BLR 2-131 (4th Cir. 1997); *Burnette v. Director, OWCP*, 14 BLR 1-151 (1990). In this regard, the United States Court of Appeals for the Fourth Circuit, in *Hamm*, rejected the claimant's argument that his benefits awarded under the Act should be reduced by only 20% because the only permanent partial disability award for pneumoconiosis explicitly mentioned in the claimant's SILA was his final 20% award, and not his prior permanent partial disability awards for pneumoconiosis which totaled an additional 30%. The court indicated that claimant's conclusion "accords with neither West Virginia law nor the evidence and would vitiate the congressional intent underlying the offset provision." *Hamm, supra*, 113 F.3d at 25, 21 BLR at 2-136.<sup>3</sup> Consistent with *Hamm*, we reject claimant's argument that

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<sup>3</sup>Citing *Carbon Fuel Co. v. Director, OWCP [Kyle]*, 20 F.3d 120, 121-22 (4th Cir. 1994)(quoting *Freeman v. Harris*, 625 F.2d 1303, 1307 (5th Cir. 1980), the United States Court of Appeals for the Fourth Circuit, in *Director, OWCP v. Hamm*, 113 F.3d 23, 21 BLR 2-131 (4th Cir. 1997), stated:

In passing the Act, however, 'Congress did not intend that the federal government would become the primary benefits provider. Rather Congress expressed 'a clear legislative desire... for state workers' compensation programs to be the primary provider of disability payments and for the federal government to be responsible only if the state program is not adequate.'

*Hamm*, 113 F.3d at 25, 21 BLR at 2-135, 136.

there should be *no* offset of benefits in this case because the SILA does not indicate, on its face, what portion of the award is attributable to the miner's pneumoconiosis. *See Hamm, supra*. We, therefore, uphold the administrative law judge's determination that the deceased miner's award of benefits under the Act is subject to being reduced by the portion of the SILA that is attributable to the miner's pneumoconiosis. Decision and Order at 7.

The issue thus remains: What percent of the SILA is attributable to the miner's pneumoconiosis? Claimant emphasizes the fact that the miner received his two state awards for permanent partial disability due to pneumoconiosis *while he was working* and argues that it was his later permanent partial disability awards for a back injury and hearing loss, and not his pneumoconiosis, that actually *caused* the miner to receive the SILA. Claimant thus argues that the case in *Hamm*, wherein the court considered the *aggregate*, as opposed to the most recent, of the claimant's state awards based on disability due to pneumoconiosis to determine the portion of the SILA by which his award of benefits under the Act would be reduced, is distinguishable from the instant case.

Claimant's contentions lack merit. We affirm the administrative law judge's finding that 20% of the SILA is attributable to the miner's pneumoconiosis, as the record contains evidence of the aggregate percentage of the miner's disability attributable to his pneumoconiosis. *See Hamm, supra*. The administrative law judge correctly noted that the SILA indicates that the award for permanent total disability is based upon the combined effect of the miner's injuries and his pneumoconiosis. Director's Exhibit 26. The administrative law judge then properly found as follows:

The evidence is clear that the state fund attributed 20 percent of the miner's disability to occupational pneumoconiosis based upon previous permanent partial disability awards. (CX 6). Even the Commissioner of the West Virginia State Worker's (sic) Compensation agrees that 20 percent is the correct percentage to use in determining the appropriate offset of federal benefits. Hence I find that the correct percentage of the SILA due to occupational pneumoconiosis is 20 percent.

Decision and Order at 9. In so finding, the administrative law judge properly relied on the Board's holding in *Burnette*, that when a state compensation award is based on a finding that a specific percentage of the claimant's award for total disability is due to pneumoconiosis, that percentage determines the amount of offset necessitated by 20 C.F.R. §725.535(b). Further, the claimant in *Hamm* argued that the amount of offset of his award of benefits under the Act should be based on the percentage of the last award of permanent partial disability due to pneumoconiosis, which was the only such award mentioned in the SILA. In rejecting claimant's argument, the court indicated that the "plain language" of the West Virginia workers' compensation statute requires the Workers' Compensation Commissioner to consider the cumulative effect of an employee's injuries. The court stated:

An employee is entitled to a SILA when the employee becomes “permanently and totally disabled *through the combined effect of [] previous injury and a second injury* received in the course of... employment.” W.Va. Code §23-3-1(d)(1)(emphasis added.). Hamm’s second injury for purposes of the statute was his additional 20 percent impairment due to pneumoconiosis. His previous injury consisted of pre-existing disability resulting from pneumoconiosis and the injuries to his finger and back. Hamm offers no suggestion as to how else one should determine the combined effect of these injuries other than by aggregating the partial disability awards. Moreover, the West Virginia Supreme Court of Appeals has explicitly held that “all prior injuries are to be cumulated toward consideration of the claim for total disability.” *Gillespie v. State Workmen’s Compensation Comm’r*, 157 W.Va. 829, 205 S.E.2d 164, 168 (1974).

*Hamm, supra*, 113 F.3d at 25, 21 BLR at 2-136, 137. Accordingly, claimant’s attempt to distinguish *Hamm* from the instant case, based on his assertions concerning which injury actually precipitated the SILA, is unavailing.

Based on the foregoing, we affirm the administrative law judge’s finding that the miner’s award of benefits under the Act is subject to offset in an amount equal to 20% of the SILA. We, therefore, affirm the administrative law judge’s Decision and Order ordering that the benefits awarded the miner under the Act be offset by 20% of the SILA awarded the miner by the State of West Virginia.

Accordingly, the administrative law judge’s Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge



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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge