

BRB No. 04-0324 BLA, O

ARRETTA M. THACKER	)	
(Widow of GROVER C. THACKER)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED: 12/22/2004
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (03-BLO-0006) of Administrative Law

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<sup>1</sup> Claimant, Arretta M. Thacker, filed a survivor's claim for benefits on August 30, 1993. Director's Exhibit 1. By Decision and Order dated July 12, 1995, Administrative Law Judge Edith Barnett found that claimant established entitlement to benefits. Director's Exhibit 3. Judge Barnett also issued an Order Denying Motion for Reconsideration on August 18, 1995. Director's Exhibit 4. The Director, Office of Workers' Compensation Programs (the Director), appealed Judge Barnett's dismissal of Black Bear Mining Company as the responsible operator. On appeal, the Board affirmed the award of survivor's benefits as unchallenged. However, the Board vacated other parts of the decision concerning the responsible operator issue pursuant to 20 C.F.R. §725.492 (2000) and remanded the case for

Judge Richard A. Morgan regarding the computation of an overpayment 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). Adjudicating this claim pursuant to 20 C.F.R. Part 725, the administrative law judge found that the only contested issue was the amount of overpayment because claimant was awarded federal and state benefits based upon findings that the death of her husband was due to pneumoconiosis. Applying the "up-front" method of offsetting claimant's attorney fees incurred in obtaining benefits from the state of West Virginia, the administrative law judge found that the total overpayment subject to offset was the amount of \$39,915.80. Further, the administrative law judge concluded that the net overpayment due from claimant was the sum of \$12,273.12 in light of claimant's previous partial repayment of \$27,622.68. Accordingly, the administrative law judge ordered claimant to repay the remaining overpayment of \$12,273.12.<sup>2</sup>

On appeal, claimant contends that there is no statutory or regulatory basis for the "up-front" method of calculating the amount that an overpayment may be offset by a claimant's legal and medical expenses incurred in obtaining a state award of benefits. Claimant challenges the administrative law judge's application of the "up-front" method, which was created by the Director, Office of Workers' Compensation Programs (the Director), because deference to the Director's interpretation of his own regulations is not required when the Department of Labor (DOL) has an interest in the outcome of the litigation, *i.e.*, increasing the amount of an overpayment. Hence, claimant asserts that, the amount of federal benefits offset by the state award was \$43,332.66 and this amount should be reduced by claimant's combined attorney fees and medical expenses incurred in both the federal and state claims, which was a total sum of \$18,168.58. Accordingly, claimant asserts that the actual overpayment is \$25,164.08; because she had rendered a previous repayment of \$27,622.68, claimant requests a refund from DOL in the amount of \$2,458.60. The Director responds, seeking affirmance of the decision below.

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further consideration. *Thacker v. Norman Lester, et. al.*, BRB No. 95-2091 BLA (Mar. 28, 1996); Director's Exhibit 8. On remand, Judge Barnett dismissed Big Bear Mining Company as a party to the case and reiterated that claimant was entitled to survivor's benefits commencing as of May 1, 1993, the month in which the miner died. Director's Exhibit 9. Although the Director subsequently filed a Notice of Appeal, he later filed a Motion to Dismiss the appeal. Director's Exhibits 10, 11. The Clerk of the Board granted the Director's motion and dismissed the appeal on May 22, 1997. Director's Exhibit 12.

<sup>2</sup> The administrative law judge noted that, although claimant clearly contested the amount of the overpayment and the finding that she was at fault in its creation, she did not raise the issue of waiver of recovery of the overpayment. Decision and Order at 5 n.3. Further, the Director correctly notes that waiver of recovery of the overpayment is not at issue in this case.

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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The facts of this case, which are undisputed, are provided *seriatim*. By Decision and Order dated July 12, 1995, Administrative Law Judge Edith Barnett found that claimant established entitlement to benefits, with benefits commencing as of May 1993, the month in which the miner died. Director's Exhibit 3. The Director appealed and, although the Board vacated Judge Barnett's decision concerning the responsible operator issue, the panel affirmed the award of survivor's benefits as unchallenged on appeal. *Thacker v. Norman Lester, et. al.*, BRB No. 95-2091 BLA (Mar. 28, 1996), *slip op.* at 2 n.1. In addition to pursuing a federal black lung claim, claimant filed a workers' compensation claim with the state of West Virginia for black lung benefits. By Order dated January 18, 2000, the Supreme Court of Appeals of West Virginia reversed the November 26, 1997 order of the Workers' Compensation Board and entered an order granting claimant dependent's benefits beginning May 25, 1993. Director's Exhibit 13. Pursuant to that Order, the state of West Virginia issued claimant a check in the amount of \$53,582.06 dated March 23, 2000. After deducting attorney's fees totaling \$6,616.49 and medical expenses totaling \$437.41, claimant's counsel issued a check to claimant in the sum of \$46,528.16. Director's Exhibit 13. Consequently, on March 28, 2000, claimant telephoned the district director's office to inform that office that she had received a dependent life award of benefits from her state claim.

On July 25, 2000, the district director determined that claimant received an overpayment in the amount of \$33,030.90 and that claimant was "with fault" in its creation due to her failure to furnish information which she knew or should have reasonably known was material and due to her acceptance of cash payments which she knew was incorrect. Director's Exhibit 16. Claimant's counsel challenged the district director's finding of fault and his application of the "up-front" method for calculating the overpayment. Director's Exhibit 17. By letter dated February 27, 2001, the district director found that waiver of recovery of the overpayment would not be granted because repayment would not cause claimant any financial hardship by depriving her of necessary and ordinary living expenses, and therefore, ordered her to remit the overpayment of \$33,030.90. Director's Exhibit 19. Subsequently, the district director unequivocally found, after a telephone discussion with claimant's counsel and further review of this case, that claimant was "without fault" in creating the overpayment and claimant accepted the district director's recommendation to repay the undisputed portion of the overpayment in the amount of \$27,622.68 and to refer the disputed amount of \$5,408.22 to the Office of Administrative Law Judges for resolution. Director's Exhibits 23, 24.

In the meanwhile, claimant received a supplemental check from the state of West Virginia for the sum of \$120,599.24 as a result of an ongoing dispute with the state of West Virginia regarding the benefit amount of claimant's state award. After deduction of the attorney's fee of \$11,114.68, claimant received a total of \$109,484.56. Director's Exhibit 25. Following multiple requests by claimant's counsel for a new decision in light of the additional attorney fees incurred in pursuit of the state claim, the district director determined that claimant's monthly state benefit rate had increased, resulting in additional state benefits. The district director then recalculated the overpayment as \$39,915.80, subtracted claimant's previous payment of \$27,622.68, and concluded that the net overpayment was \$12,273.12. Director's Exhibit 29. Claimant challenged the district director's order and requested a formal hearing; however, claimant later requested that the formal hearing be cancelled. In the ensuing Decision and Order, which is the subject of the instant appeal, the administrative law judge determined that the district director correctly calculated the amount of the overpayment, ordering claimant to reimburse the Black Lung Disability Trust Fund in the sum of \$12,273.12.

Under the Act, federal black lung benefits are reduced (but not below zero) by an amount equal to any benefits that a claimant receives under any state workers' compensation law because of death or partial or total disability due to pneumoconiosis. 30 U.S.C. §§922(b), 932(g); 20 C.F.R. §§725.533(a)(1), 725.535. In computing the reduction of federal benefits due to receipt of state benefits, amounts paid or incurred by claimant for medical, legal or related expenses in connection with his or her state award must be excluded. 20 C.F.R. §725.535(d). Inasmuch as neither the Act nor the regulations provide guidance in excluding these state expenses from that reduction calculation, the Director developed a method of calculation known as the "up-front" method. Under this method, these expenses are charged against the claimant's initial monthly state benefit payments until the monthly benefits exceed the amount of the legal and medical expenses incurred by a claimant. Concurrent federal benefit payments would not be considered duplicative, and subject to reduction, until state benefit payments exceed the state expenses. In *Director, OWCP v. Barnes and Tucker Co. [Molnar]*, 969 F.2d 1524, 16 BLR 2-99 (3d Cir. 1992), the United States Court of Appeals for the Third Circuit found that the Director's "up-front" method was entitled to deference. The Third Circuit held, "...by requiring that state benefits be applied to satisfy a claimant's obligations for attorney's fees at the beginning of the state benefits award, the up-front method ensures that a claimant will receive *some* federal compensation during a period when he would otherwise receive no state compensation ... because federal benefits would not be offset for the first several months of the state benefit award while the fee is being paid." *Molnar*, 969 F.2d at 1528, 16 BLR at 2-106 [emphasis in original]. Noting the remedial purpose of the Act, the Third Circuit noted, "the up-front offset 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 [emphasis in original]. Relying on *Molnar*, the Board deferred to the Director's interpretation of Section 725.535(d) and accepted the up-front method in *Cadle v. Director, OWCP*, 19 BLR 1-57 (1994), a case

which, like the case *sub judice*, arose within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. The Board in *Cadle* stated, "...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.'" *Cadle*, 19 BLR at 1-62, citing *Molnar*, 969 F.2d at 1527, 16 BLR at 2-104.

Claimant argues that the Director's "up-front" offset method is not entitled to deference because it has no statutory or regulatory authority. Claimant avers that the administrative law judge erred in calculating the overpayment because the actual amount of federal benefits offset by claimant's state award was \$43,332.66, and when attorney's fees and expenses totaling \$18,168.58 are subtracted, the overpayment is \$25,164.08. Therefore, in light of her previous reimbursement of \$27,622.68, claimant contends that she is entitled to a refund in the amount of \$2,458.60, plus interest.

Claimant's argument lacks merit. The administrative law judge properly applied *Cadle* to the instant case, which represents the Board's interpretation of Section 725.535(d), and permissibly found that *Molnar* was persuasive authority on the issue of the calculation of the overpayment. The administrative law judge correctly calculated the overpayment based on the Director's up-front method, finding that the overpayment subject to offset was in the amount of \$39,915.80. See *Molnar*, 969 at 1529, 16 BLR at 2-107; *Cadle*, 19 BLR at 61; Decision and Order at 5. The administrative law judge's application of the up-front method correctly resulted in claimant's legal fees and medical expenses incurred in her pursuit of her state award, being paid out of claimant's initial state compensation benefits, effective retroactively as of May 26, 1993. The administrative law judge determined that these expenses, totaling \$18,168.58, resulted in 297 days of federal payments that were not subject to offset due to the credit for expenses; consequently, the state offset only became effective as of March 20, 1994. Decision and Order at 4-5. Accordingly, we affirm the administrative law judge's finding that claimant is liable for an overpayment of benefits under the Act in the amount of \$39,915.80, reduced by claimant's previous repayment of \$27,622.68, resulting in a net overpayment due in the sum of \$12,273.12 as this determination is rational, supported by substantial evidence and is consistent with law. See 20 C.F.R. §725.535(d); *Molnar*, 969 at 1529, 16 BLR at 2-107; *Cadle*, 19 BLR at 61; Decision and Order at 5.<sup>3</sup> We thus affirm the administrative law judge's determination that, subject to Section 725.535(d), claimant must reimburse the Black Lung Disability Trust Fund in the sum of \$12,273.12 for overpayments made.

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<sup>3</sup> We need not address claimant's assertion that she was without fault in the creation of the overpayment. Both the administrative law judge in his Decision and Order and the district director in his letter to claimant dated May 29, 2001, found that claimant was "without fault" in the creation of the overpayment. Decision and Order at 5; Director's Exhibit 23.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge