

BRB No. 08-0335 BLA

W.S.)
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 Claimant-Petitioner)
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 v.)
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 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 12/19/2008
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Regarding Overpayment of Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Regarding Overpayment of Benefits (07-BLO-0006) of Administrative Law judge Adele Higgins Odegard denying claimant a waiver of recovery 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). This case involves a miner's claim filed on February 5, 2001. Director's Exhibit 1. Claimant was awarded federal black lung benefits by the district director in a Proposed Decision and Order dated April 24, 2002. Director's Exhibit 2. It was later determined that on August 7, 2001, claimant had been awarded benefits for a second injury life award (SILA) under the West Virginia workers' compensation law for permanent total disability. Director's Exhibits 11, 13, 14. The district director

determined that ten percent of the award was due to occupational pneumoconiosis and that the award had been issued prior to the time that claimant had begun receiving federal benefits. Director's Exhibit 16. The district director reduced claimant's monthly federal award by the amount of the state award attributable to pneumoconiosis, and calculated that claimant was liable for an overpayment in the amount of \$12,416.00.¹ Director's Exhibits 16, 17. Claimant reimbursed the Black Lung Disability Trust Fund for this amount, but requested a hearing, contesting the finding that the state award was attributable, in part, to pneumoconiosis and that offset was appropriate.

The administrative law judge found that ten percent of claimant's state award was based on claimant's pneumoconiosis, and concluded that an offset of \$194.00 per month, constituting ten percent of claimant's state award of \$1,940.01 per month, was correct pursuant to 20 C.F.R. §725.535(b).² The administrative law judge further found that claimant was "at fault"³ in creating an overpayment in the amount of \$12,416.00 because he failed to promptly notify the district director of his state award, and thus, claimant was not eligible for waiver of recovery of the overpayment pursuant to 20 C.F.R. §725.542.

On appeal, claimant contends that the administrative law judge erred in offsetting his federal black lung benefits. Claimant argues that the West Virginia benefits were awarded for claimant's other injuries, and that no part of the award was made for any disability caused by pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, contending that the administrative law

¹ Claimant received \$1,940.01 per month under his West Virginia award. Ten percent of that amount equals \$194.00. Claimant received payments for both federal benefits and state benefits for the period between February 2001 and May 2006, resulting in an overpayment in the amount of \$12,416.00.

² 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).

³ 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).

judge's findings are reasonable, and that claimant's federal award was properly offset by the correct 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant acknowledges that he received awards totaling ten percent for state occupational pneumoconiosis claims in 1982 and 1985, but contends that when he subsequently reopened his claim, he did not go to a physician for his occupational lung disease, but rather, was awarded a one hundred percent occupational disability for other injuries. Claimant's Brief at 6-7. While the administrative law judge noted that the effective date of the state award was April 17, 1998, the date claimant obtained a fully favorable decision from the Social Security Administration (SSA) based on multiple impairments including "lung and heart disease," Claimant's Exhibit 1, claimant asserts that the SSA award letter did not indicate that any part of the award was for an *occupational* lung disease. Further, claimant contends that since the 2002 federal black lung award was based upon x-ray evidence of complicated pneumoconiosis rather than upon a functional impairment, any breathing impairment present at the time of the 1998 SSA decision was not due to pneumoconiosis. Claimant's Brief at 8-9. Claimant's arguments are without merit.

In finding that the district director had correctly offset claimant's federal benefits by ten percent of the state award, the administrative law judge determined that the 2001 West Virginia decision specifically noted that claimant's permanent partial disability awards were based in part on his pneumoconiosis, and found that claimant could not return to work due, in part, to his "compensable injuries." Director's Exhibit 14; Decision and Order at 6. The administrative law judge noted that the state decision referenced claimant's SSA decision, which cited claimant's lung disease among the justifications for its favorable determination. Decision and Order at 6-7; Director's Exhibit 14. The administrative law judge reasonably concluded that the 2001 state award for "compensable injuries" must be read to include occupational pneumoconiosis because the decision did not exclude claimant's pneumoconiosis from its discussion of his injuries in finding claimant eligible for permanent total disability,⁴ and indeed acknowledged that

⁴ The administrative law judge determined that claimant's 2001 West Virginia decision noted that claimant had previously received permanent partial disability awards totaling 50.5%, of which 10% was for pneumoconiosis, and that a previous determination that claimant had a 24% impairment was "clearly wrong," in part because it was "unclear

pneumoconiosis constituted ten percent of claimant's previous awards for permanent partial disability. Decision and Order at 7. The administrative law judge properly found that this interpretation was consistent with West Virginia law, in which all prior injuries are to be cumulated toward consideration of the claim for total disability. *Id.*; see *Director, OWCP v. Hamm*, 113 F.3d 23, 21 BLR 2-131 (4th Cir. 1997).

We also find no merit in claimant's assertion that his 2002 award of federal black lung benefits for complicated pneumoconiosis constitutes proof that he had no functional pulmonary impairment caused by pneumoconiosis in 2002, over six years after the issuance of the West Virginia awards for occupational disease, as well as proof that the 2001 state award was made for claimant's other work-related injuries but not for pneumoconiosis. Claimant's Brief at 9. Contrary to claimant's arguments, in awarding federal benefits, the district director found a "severe chronic respiratory disease [which] has caused a breathing impairment of sufficient degree to establish total disability," Director's Exhibit 9, and the Director correctly points out that claimant's 1985 state award explicitly found a ten percent functional impairment due to occupational pneumoconiosis, Claimant's Exhibit 3. Consequently, we affirm, as supported by substantial evidence, the administrative law judge's findings that ten percent of claimant's state award of benefits was based on claimant's pneumoconiosis; that an offset of \$194.00 per month, constituting ten percent of claimant's state award of \$1,940.01 per month, was correctly calculated pursuant to 20 C.F.R. §725.535(b); that claimant was at fault in the creation of an overpayment in the amount of \$12,416.00; and that claimant was not entitled to waiver of recovery of the overpayment pursuant to 20 C.F.R. §725.542.

how much of claimant's ten percent granted by the Occupational Pneumoconiosis Board was acknowledged." Director's Exhibit 14; Decision and Order at 6.

Accordingly, the administrative law judge's Decision and Order Regarding Overpayment of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge