

BRB No. 08-0242 BLA

F.E.L.)
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 Claimant-Respondent)
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 v.)
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 NO COAL, INCORPORATED) DATE ISSUED: 01/29/2009
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 and)
)
 WEST VIRGINIA CWP FUND)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Calculation of Claimant's Credit Regarding Overpayment of Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

F.E.L., Pineville, West Virginia, *pro se*.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for carrier.

Rita Roppolo (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 HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

West Virginia CWP Fund (carrier), appeals the Decision and Order - Calculation of Claimant's Credit Regarding Overpayment of Benefits (2006-BLO-7) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) with respect to 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 is before the Board for the second time. Claimant was awarded benefits under the Act commencing on April 1, 1991. On October 4, 1996, the State of West Virginia granted claimant a twenty-five percent permanent partial disability award due to occupational pneumoconiosis. Subsequently, claimant was awarded a Second Injury Life Award (SILA), under West Virginia law, based upon the combined effect of injuries and occupational pneumoconiosis, with benefits commencing as of May 8, 1991.

In August 1998, claimant became aware that an overpayment of black lung benefits had occurred due to his receipt of compensation for a retroactive SILA covering periods for which he had already received federal benefits. Director's Exhibit 5. In January 1999, employer stopped paying benefits to claimant. Director's Exhibit 32. On March 29, 1999, the district director notified claimant that because twenty-five percent of his SILA was based on pneumoconiosis, his federal compensation would be reduced by an amount equal to twenty-five percent of his state benefits, effective April 1999, and that the amount of the overpayment would be determined at a later date. Director's Exhibit 11. The district director ordered employer to pay the reduced amount beginning in April 1999. *Id.* In an Order dated October 12, 1999, the district director advised claimant that he had been overpaid by employer in the amount of \$35,158.00 and that he was required to reimburse the amount of the overpayment to employer. Director's Exhibit 14. Following claimant's request for a hearing, the case was forwarded to the Office of Administrative Law Judges. *Id.* In a Decision and Order dated October 1, 2001, Administrative Law Judge Jeffery Tureck determined that claimant was required to repay the overpayment, which he calculated to be \$36,146.10, but further found that claimant is entitled to a credit for the federal payments withheld by employer beginning in January 1999. Claimant appealed, and carrier cross-appealed, Judge Tureck's decision to the Board.

The Board affirmed Judge Tureck's finding that claimant was required to reimburse employer in the amount of \$36,146.10 for its overpayment of federal benefits through December 31, 1998, and remanded the case to the district director for a computation of the credit owed to claimant due to employer's withholding of benefits starting in January 1999. [*F.E.L.*] *v. No Coal, Inc.*, BRB Nos. 02-0126 BLA and 02-0126 BLA-A (Oct. 21, 2002) (unpub.). Additionally, the Board declined to address claimant's request for a twenty percent penalty, pursuant to 20 C.F.R. §725.607, for all federal benefits payments withheld by employer beginning in January 1999, as this issue had not

been raised below.¹ *Id.*, slip op. at 3 n.2. On October 18, 2004, the carrier filed a Department of Labor (DOL) payment form entitled “Notice of Termination, Suspension, Reduction or Increase in Benefits Payments,” stating that it had suspended payments in January 1999, and that it would resume payments when the debt for overpayment was satisfied.² Director’s Exhibit 49. Subsequently, the district director issued an award to claimant of a twenty percent penalty against employer for the non-payment of benefits beginning in January 1999. Director’s Exhibit 54. In a Decision and Order dated November 8, 2007, the administrative law judge determined that the twenty percent penalty was properly assessed against employer by the district director pursuant to Section 725.607(a), because employer had unilaterally stopped all payments to claimant without seeking an order staying payments until the issue of the overpayment could be resolved.

On appeal, carrier contests the imposition of the twenty percent penalty pursuant to Section 725.607(a), asserting that the suspension of benefits payments was authorized by the district director’s October’s 12, 1999 Order. Director’s Exhibit 14. Specifically, carrier argues:

[Employer] immediately began benefits payments as ordered initially, and only suspended payments when the [Office of Workers’ Compensation Programs] calculated the overpayment and stated no benefits were to be paid to an overpaid beneficiary until the amount equal to the overpayment had been recovered . . . This order from the [Office of Workers’

¹ The regulation at 20 C.F.R. §725.607(a) provides, in pertinent part:

If any benefits payable under the terms of an award by a district director ... are not paid by an operator or other employer ordered to make such payments within 10 days after such payments become due, there shall be added to such unpaid benefits an amount equal to 20 percent thereof, which shall be paid to the claimant at the same time as, but in addition to, such benefits, unless review of the order making such award is sought as provided in section 21 of the LHWCA and an order staying payments has been issued.

20 C.F.R. §725.607(a).

² In the section of the form entitled “Reason why action taken,” employer reported: “Benefit payment has been suspended since 1/5/99: miner is overpaid \$36,146.10. Payment will be resumed when overpayment is satisfied.” Director’s Exhibit 49.

Compensation Programs] provided [employer] the authority needed to suspend [claimant's] payment of benefits, even in the offset amount, to recoup overpayment.

Carrier's Brief at 7-8. Carrier submits that the administrative law judge's imposition of the twenty percent penalty is inappropriate, because "without application of the penalty, claimant has completely repaid the overpayment to employer, benefits in the offset amount have been reinstated, and neither party owes additional funds to the other." *Id.* at 9.

Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has responded, urging affirmance of the twenty percent penalty award. Specifically, the Director asserts that pursuant to 20 C.F.R. §725.532(a), an operator or carrier may suspend benefits only if such action is authorized by the district director and, further, in the case of an overpayment, an operator is required to obtain the approval of the district director before adjusting benefits payments pursuant to 20 C.F.R. §725.547(b) (1999).³ Accordingly, because carrier failed to obtain the proper approval, the Director urges the Board to reject, as meritless, carrier's position that employer had authority to suspend the payment of benefits, based on the October 1999 Order issued by the district director.

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).

Upon review of the administrative law judge's Decision and Order, the facts of this case, and the relevant law, we hold that carrier's arguments on appeal are without merit. Pursuant to 20 C.F.R. §725.601(b), it is the "policy and intent of the Department [of Labor] to vigorously enforce" the regulations governing the payment of benefits, "through the use of the remedies provided by the Act."⁴ 20 C.F.R. § 725.601(b). Specifically, a number of regulations "subject an operator or other employer, claimants

³ Although the Department of Labor has made substantial revisions to 20 C.F.R. §725.547, these revisions only apply to claims filed after January 19, 2001. 20 C.F.R. §725.2.

⁴ The Debt Collection Act of 1982 (Pub. L. 97-365), 5 U.S.C. §5514, entrusts administrative agencies with the authority and responsibility for collection of overpayments that arise as a result of their actions.

and others to penalties for failure to comply with certain provisions of the Act, or failure to commence and continue prompt periodic payments to a beneficiary.” 20 C.F.R. §725.601(a). Pursuant to 20 C.F.R. §725.601(b):

If an operator unlawfully suspends or terminates the payment of benefits to a claimant, the district director shall declare the award in default and proceed in accordance with §725.605. *In all cases* payments in addition to compensation (see §725.607) and interest (see §725.608) shall be sought by the Director or awarded by the district director.

20 C.F.R. §725.601(b) (emphasis added).

In matters adjudicated under the Act, responsible operators or employers may seek alterations of payment obligations in instances, among others, of purported or actual overpayment of benefits to a claimant. *See generally* 20 C.F.R. §725.548. Overpayments resulting under the black lung regulatory scheme are those payments that exceed the lawful amount of benefits awarded. 20 C.F.R. §725.540. When an overpayment has been created, it must be recovered in compliance with procedures designed to secure the rights of all parties. In accordance with the decision of the United States Supreme Court in *Califano v. Yamasaki*, 442 U.S. 682 (1979), DOL has promulgated regulations providing that an overpayment cannot be collected without an agency decision informing claimant of his right to an informal conference or hearing, and of the time period within which to request the same.⁵ 20 C.F.R. §§725.419(c); 725.605(b). The regulations also mandate that “no suspension, termination or other failure to pay benefits awarded to a claimant is permitted.” 20 C.F.R. §725.605(a). Any failure to remit benefits payments, as ordered, is subject to investigation, notice and hearing and the entry of appropriate orders. *See* 20 C.F.R. §725.605(b). In addition, 20 C.F.R. §725.532 provides, in pertinent part:

(a) No suspension, reduction, or termination in the payment of benefits is permitted unless authorized by the district director, administrative law judge, Board, or court . . .

(b) Any unauthorized suspension in the payment of benefits by an operator or carrier shall be treated as provided in [20 C.F.R. §725.601 *et seq.*].

⁵ In *Califano v. Yamasaki*, 442 U.S. 682 (1979), the Supreme Court held that collection of an overpayment of Social Security benefits by withholding future benefits without first affording the overpaid individual the opportunity to request an informal conference or hearing violated the individual’s right to due process of law.

(c) Unless suspension, reduction, or termination of benefits payments is required by an administrative law judge, the Benefits Review Board or a court, the district director, after receiving notification of the occurrence of an event that would require the suspension, reduction, or termination of benefits, shall follow the procedures for the determination of claims set forth in [20 C.F.R. §§725.401-423 and 725.450-483].

20 C.F.R. §725.532(a)-(c). Therefore, an official order must be issued before a responsible operator can recover an overpayment by withholding monthly benefits.

The regulations further set forth explicit procedures that must be followed when a responsible operator seeks recovery of an overpayment. Specifically, upon notification of an overpayment of benefits provided by a responsible operator, the district director is required to determine and verify the extent of the overpayment. The interested parties must be afforded the opportunity to participate fully in the determination process, receiving copies of all notices and orders. The interested parties must also be given a reasonable time period within which to respond to the findings of the district director and to develop supporting evidence. The district director's findings may be contested by any interested person and such disputes are to be resolved under the procedures for determination of claims. *See generally* 20 C.F.R. §§725.541, 725.547, 725.548, 725.601.

In considering the district director's award of a twenty percent penalty for the non-payment of benefits by employer beginning in January 1999, the administrative law judge found:

[E]mployer unilaterally stopped *all* payments to claimant. At no time did [e]mployer seek an order staying payments until the issue of the overpayment could be resolved. Therefore, based on the clear language of §725.607(a), [e]mployer violated the regulations and is liable for payment of the additional [twenty percent].

Decision and Order at 4 (emphasis added). We agree with the Director that the administrative law judge's findings are supported by the facts in this case and are in accordance with applicable law.

It is uncontested that employer stopped making benefits payments beginning in January 1999.⁶ Employer continued to withhold payments after receiving the March 29,

⁶The administrative law judge's statement that employer terminated payments subsequent to the March 1999 Order is incorrect. The record indicates that employer terminated payments in January 1999. Director's Exhibit 31. In addition, in its Supplemental Brief to Administrative Law Judge Jeffrey Tureck dated June 1, 2001,

1999 Order, in which the district director specifically directed employer to pay a reduced amount of compensation, “beginning April 1999 and continuing,” in light of the overpayment of benefits to claimant. Director’s Exhibit 14. On October 12, 1999, the district director issued his decision calculating the amount of claimant’s overpayment, directing claimant to reimburse employer and stating that no monthly benefits are payable to an overpaid beneficiary. *Id.* The record thus belies employer’s assertion that it “only suspended payments when the [district director] calculated the overpayment and stated no benefits are to be paid to an overpaid beneficiary.” Carrier’s Brief at 7-8.

With respect to the applicable law, pursuant to 20 C.F.R. §725.547(b) (1999): “[n]o operator or carrier may make an adjustment of an overpayment without prior application to, and approval by, the Office which shall exercise full supervisory approval over the adjustment of all overpayments.”⁷ 20 C.F.R. §725.547(b) (1999). Moreover, 20 C.F.R. §725.530(a) provides, in pertinent part: “An operator that fails to pay any benefits that are due, with interest, shall be considered in default with respect to those benefits ... In addition, a claimant who does not receive any benefits within 10 days of the date they become due is entitled to additional compensation equal to twenty percent of those benefits (see §725.607).” 20 C.F.R. §725.530(a).

The administrative law judge properly found that employer’s actions in this case constituted a violation of Section 725.547(b). Because employer admits that it ceased payments nine months before the October 1999 Order was issued, carrier has implicitly conceded that employer acted without authority at that time. Furthermore, carrier’s reliance upon language in the October 1999 Order to excuse employer’s refusal to pay even the reduced benefits set in the March 1999 Order is unavailing, as the March 1999 Order contained an explicit instruction requiring employer to continue benefits payments, albeit in a lower amount. Carrier’s contention that the October 1999 Order justified employer’s withholding of compensation benefits is, therefore, unsupported by the record and contrary to the existing regulations. Accordingly, we reject carrier’s arguments as without merit, and affirm the administrative law judge’s imposition of the twenty percent penalty pursuant to Section 725.607(a).⁸

carrier stated that from January 1, 1999 through April 1, 2001, employer made no benefits payments to claimant. Director’s Exhibit 32.

⁷ It is noteworthy that carrier does not argue that employer’s withholding of benefits payments beginning in January 1999 should be excused because employer did not know that the law requires an official order to authorize that conduct.

⁸ Carrier’s assertion that the administrative law judge erred in distinguishing *Burnette v. Director, OWCP*, 14 BLR 1-151 (1990), from the present case is without

Carrier further contends that the administrative law judge erred in failing to determine whether the district director's statement in his October 1999 Order, that no monthly benefits are payable to an overpaid beneficiary, gave employer the authority to suspend benefits payments. Carrier's allegation of error is without merit. Although the administrative law judge did not specifically discuss the October 1999 Order, he generally referenced the documents admitted into evidence before Judge Tureck, which included the Order, and acknowledged that claimant had been notified of the overpayment in 1999.⁹ Decision and Order at 1-2; *see* Director's Exhibits 14, 21 at 12-13. The administrative law judge also indicated that claimant requested a hearing – an option that became available only after the issuance of the October 1999 Order – making it apparent that the administrative law judge was aware of its existence and significance. In any event, an ambiguous statement in an order that was not addressed to employer does not constitute authority to supersede the regulations, which require an official order to withhold payment of black lung benefits. *See* 20 C.F.R. §§725.532, 725.537, 725.607.

merit. Carrier's Brief at 8-9. In contrast to the facts of this case, in *Burnette*, the district director considered the claimant's written arguments on the overpayment issue before beginning recoupment of the overpayment by issuing an order terminating benefits payments.

⁹ While carrier contends on appeal that the administrative law judge did not specifically identify and discuss the October 1999 Order, we note that in carrier's closing argument dated March 9, 2007, which was submitted for the administrative law judge's consideration prior to the issuance of his Decision and Order, carrier did not reference the October 1999 Order, or argue that employer's suspension of payments was authorized thereby.

Once it was determined that employer withheld payment without a court order, imposition of the penalty was automatic under Section 725.607.

Based on the foregoing, we affirm the administrative law judge's determination that claimant is entitled to receive an additional twenty percent of the benefits payments, which totals \$7,287.08, based upon the terms of Section 725.607(a), as it is rational and supported by substantial evidence. Because carrier raises no further issues on appeal, the administrative law judge's Order directing employer to pay claimant the sum of \$7,287.08 in settlement of the overpayment issue is affirmed.

Accordingly, the Decision and Order – Calculation of Claimant’s Credit Regarding Overpayment of Benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

I concur in the result only:

NANCY S. DOLDER, Chief
Administrative Appeals Judge