

BRB No. 99-0647 BLA

LEWIS F. HURST)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

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

S. F. Raymond Smith (Rundle & Rundle), Pineville, West Virginia, for claimant.

Helen H. Cox (Henry L. Solano, 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 and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLO-0025) of Administrative Law Judge Stuart A. Levin denying claimant 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 is before the Board for the second time.¹ Originally, in a Decision and Order issued on

¹ Claimant was awarded benefits by the Department of Labor on September 28, 1983, Director's Exhibit 9. Subsequently, on March 24, 1991, claimant was granted a permanent total disability Second Injury Life Award by the West Virginia

Workers' Compensation Fund, effective from April 9, 1987, Director's Exhibit 54. Sixty percent of claimant's state award was determined to be attributable to pneumoconiosis, see Director's Exhibit 55, and claimant received a lump sum payment of \$75,000.35, from which claimant's attorney deducted \$14,809.60 for attorney fees plus \$111.25 in medical expenses, Director's Exhibit 58.

Concurrent state and federal benefits for pneumoconiosis are duplicative and federal benefits must be reduced, or offset, by the amount of the state benefits, 30 U.S.C. §§922(b), 932(g); 20 C.F.R. §§725.533(a)(1), 725.535(b). Thus, in light of the fact that claimant had received a state award, in part, for pneumoconiosis for the same period of time that claimant was awarded federal benefits, the district director informed claimant on May 24, 1991, of an overpayment of his federal benefits totaling \$23,073.80 and found claimant at fault in the creation of the overpayment, in light of his failing to timely report the state award, Director's Exhibit 68. The district director determined that waiver of the overpayment was not proper, Director's Exhibit 76.

However, when a state award is premised upon a finding that a percentage of a claimant's total disability is due to pneumoconiosis, that percentage determines the amount of the offset necessitated by Section 725.535(b), see 20 C.F.R. §725.535(b); *Lucas v. Director, OWCP*, 14 BLR 1-112 (1990)(*en banc*, with McGranery, J., dissenting), but the amount of legal and medical expenses incurred in connection with the state award are excluded from the amount of the state benefits that claimant's federal benefits must be reduced or offset by, see 20 C.F.R. §725.535(d). Thus, in calculating the amount of offset by which claimant's federal benefits should be reduced due to claimant's state award, the district director included sixty percent of claimant's state award, but excluded from that amount sixty percent of the amount of claimant's attorney fees and medical expenses incurred in connection with the state award pursuant to 20 C.F.R. §725.535(b), (d). Although claimant's attorney had deducted \$14,809.60 from claimant's state award for attorney fees, the district director reduced this amount to \$14,725.43, the maximum amount to which claimant's attorney was entitled under West Virginia law, when calculating sixty percent of the amount of claimant's attorney fees and medical expenses incurred in connection with the state award. Thus, the district director found claimant entitled to a total credit of \$8,902.01 against the amount of the offset by which claimant's federal benefits should be reduced due to claimant's state award, which represented sixty percent of the total of \$14,725.43 in attorney fees plus \$111.25 in medical expenses. The \$8,902.01 was credited against a like amount of federal benefits that claimant had received from April 8, 1987, the effective date of claimant's state award, through January 31, 1988, and the district director ultimately found a total

February 24, 1994, Administrative Law Judge Edith Barnett stated that the sole issue in this case was whether in calculating the amount of offset by which claimant's federal benefits should be reduced, due to claimant's concurrent state award, see 30 U.S.C. §§922(b), 932(g); 20 C.F.R. §§725.533(a)(1), 725.535(b), claimant was entitled to have excluded from that amount either one-hundred percent or sixty percent of the amount of claimant's attorney fees and medical expenses incurred in connection with his state award pursuant to 20 C.F.R. §725.535(d), inasmuch as sixty percent of claimant's state award was determined to be attributable to pneumoconiosis, see Director's Exhibits 55, 80. Judge Barnett found that there was no explanation provided in the record for the district director's determination that claimant was entitled to have excluded from the amount of offset only sixty percent of the amount of claimant's attorney fees and medical expenses or for the district director's determination that claimant's attorney was only entitled to \$14,725.43 in attorney fees in connection with claimant's state award. Thus, Judge Barnett vacated the district director's determination and remanded the case for the district director to recalculate the amount of offset to reflect that claimant was entitled to have of one-hundred percent of the amount of claimant's attorney fees and medical expenses, incurred in connection with his state award, excluded from the amount of offset and for the district director to provide a specific rationale for the recalculation.

The Director, Office of Workers' Compensation Programs (the Director), appealed and the Board noted that in *Pickens v. Director, OWCP*, 19 BLR 1-116 (1995), issued subsequent to Judge Barnett's Decision and Order, the Board had adopted the Director's method of computing the amount of legal and medical expenses that could be excluded from the amount of offset that federal benefits were subject to due to a concurrent state award pursuant to Section 725.535(d). See Director's Exhibit 88; *Hurst v. Director, OWCP*, BRB No. 94-2243 BLA (Jan. 26, 1996)(unpub.). The same method was utilized by the district director in this case, *i.e.*, the same percentage of legal and medical expenses that claimant incurred in his state award could be excluded from the amount of offset as the percentage of the state award that was attributable to pneumoconiosis. Thus, the Board vacated Judge Barnett's rejection of the Director's calculation in this case and remanded the

overpayment of claimant's federal benefits received from February 1, 1988, through March, 1991, totaling \$23,073.80, representing sixty percent of the amount of claimant's concurrent state award which was not properly offset from claimant's federal benefits.

case for reconsideration. The Board also vacated Judge Barnett's rejection of the district director's determination that claimant's attorney was only entitled to \$14,725.43 in attorney fees in connection with claimant's state award, as that was the maximum amount of attorney fees to which claimant's attorney was entitled under West Virginia law, *i.e.*, twenty percent of 208 weeks of state benefits, see W.V. Code §23-5-6 (Michie 1995) [formerly W.V. Code §23-5-5]; see *Committee on Legal Ethics of the West Virginia State Bar v. Coleman*, 377 S.E.2d 485 (W.Va., 1988). Thus, the Board held that claimant's attorney was only entitled to \$14,725.43 in attorney fees in connection with claimant's state award.

On remand, Judge Barnett remanded the case to the district director for recalculation of the amounts of the offset and overpayment in this case in accordance with the Board's holding in *Pickens, supra*. Director's Exhibit 91. The district director credited \$8,902.01, which represented sixty percent of the total of \$14,725.43 in attorney fees plus \$111.25 in medical expenses claimant incurred in connection with his state award, against a like amount of federal benefits that claimant had received from April 8, 1987, the effective date of claimant's state award, through January, 1988, Director's Exhibit 92. The district director ultimately found a total overpayment of claimant's federal benefits received from February 1, 1988, through March, 1991, totaling \$23,046.80, representing sixty percent of the amount of claimant's concurrent state award which had not been offset from claimant's federal benefits. After claimant submitted an Overpayment Recovery Questionnaire, Director's Exhibit 95, the district director found claimant at fault in causing the overpayment because he accepted benefits which he knew or reasonably could have known to represent duplicate benefits and denied claimant waiver of recovery of the overpayment as the record failed to establish claimant's inability to make repayment, Director's Exhibit 96. In response, claimant contended that he was not at fault in the creation of the overpayment, Director's Exhibit 97, and the case was ultimately referred to the Office of Administrative Law Judges, Director's Exhibit 99.

Thus, the record reflects an overpayment in the amount of \$23,046.80, Decision and Order at 1; Director's Exhibit 92. In his Decision and Order at issue herein, the administrative law judge noted that the parties mutually waived a hearing in this case and requested a decision on the record regarding claimant's petition for a waiver of recovery of an overpayment or an adjustment of the amount of overpayment. The administrative law judge stated that at issue was the Director's "up front" method for calculating the amount of offset that claimant's federal benefits should be reduced due to claimant's receiving concurrent state benefits.² The

² Utilizing the "up front" method, the district director did not offset or reduce

administrative law judge found that the Board had upheld the Director's "up front" method for calculating the amount of offset in *Cadle v. Director, OWCP*, 18 BLR 1-57 (1994). Accordingly, the administrative law judge denied claimant's petition for waiver of recovery of the overpayment or an adjustment. On appeal, claimant contends that the administrative law judge erred in adopting the Director's "up front" method for calculating the amount of the overpayment and contends that the Department of Labor erroneously determined that claimant was at fault in the creation of the overpayment in this case. The Director responds, urging that the

claimant's monthly federal benefits until an amount of state benefits calculated on a monthly basis had been paid to claimant that was equal to the amount of the attorney fees and medical expenses incurred in connection with the state award. Thus, the amount of attorney fees and medical expenses incurred in connection with the state award were excluded in determining the amount of the overpayment pursuant to Section 725.535(d), see 20 C.F.R. §725.535(b)-(d), Director's Exhibit 92. In other words, the district director did not recognize claimant as having received any concurrent state benefits calculated on a monthly basis until they exceeded the amount of attorney fees and medical expenses claimant incurred in connection with his state award. In this case, the relevant amount of attorney fees and medical expenses that claimant incurred in connection with his state award pursuant to Section 725.535(b), (d), was \$8,902.01. Thus, the district director did not consider claimant as having received any state benefits, which effectively began in April, 1987, for purposes of determining the amount of overpayment until they exceeded \$8,902.01, which did not occur when calculated on a monthly basis until after February, 1988.

administrative law judge's Decision and Order be affirmed.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, and the Board have held that 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); *Ball v. Jewell Coal & Coke Co.*, 6 BLR 1-693 (1983); see also *Bennett v. Director, OWCP*, 18 BLR 1-48 (1994)(McGranery, J., concurring and dissenting); *Lucas, supra*. In addition, when a state award is premised upon a finding that a specific percentage of claimant's total disability is due to pneumoconiosis, the award is subject to offset and the percentage determines the amount of offset necessitated pursuant to Section 725.533(a). 30 U.S.C. §922(b); 20 C.F.R. §725.535; see *Bennett, supra*; *Burnette v. Director, OWCP*, 14 BLR 1-151 (1990); *Lucas, supra*.

Initially, claimant contends that the administrative law judge erred in adopting the Director's "up front" method for calculating the amount of the overpayment. Claimant contends that there is no regulatory basis for the Director's "up front" method, which claimant contends does not credit claimant for attorney fees and medical expenses, incurred in connection with a state award, when calculating the amount of the overpayment as required by Section 725.535(d) and, therefore, penalizes claimant for obtaining additional, state benefits. Claimant also contends that the Director's "up front" method, in effect, adjusts the date of onset of disability in this case from April, 1987, when claimant's state benefits became effective, to February, 1988, the date from which the Director found the overpayment began, thereby increasing the amount of the overpayment. Finally, claimant contends that no deference is due to the Director's "up front" interpretation of Section 725.535(d), inasmuch as the Director has an interest in this case.

We reject claimant's contentions. As the administrative law judge properly noted, the Director's "up front" method for calculating the amount of the overpayment was upheld by the Board in *Cadle, supra*. In *Cadle*, the Board deferred to the Director's interpretation of Section 725.535(d) and applied the up-front method to

calculate the offset claimant should receive for attorney fees and medical expenses paid in connection with claimant's state award. Moreover, as the Board noted in *Cadle*, the United States Court of Appeals for the Third Circuit held, in relevant part, in *Director, OWCP v. Barnes and Tucker Co. [Molnar]*, 969 F.2d 1524, 1528-1529, 16 BLR 2-99, 2-106-107 (3d Cir. 1992), *rev'g Molnar v. Barnes and Tucker Co.*, 15 BLR 1-93 (1991), that the up-front method effectuates the remedial purpose of the Act by ensuring a level of benefits payments to claimants, from state and/or federal benefits, and that it is beneficial to claimants inasmuch as federal benefits are not offset until an amount of monthly state benefits equal to the amount of a claimant's state attorney fees and medical expenses has been paid on claimant's state claim, thereby ensuring that a claimant's benefits are not diminished for reasons other than the duplication of state and federal benefits. Thus, contrary to claimant's contentions, the Director's up-front method does credit claimant for attorney fees and medical expenses that claimant incurred in connection with his state award, when calculating the amount of the overpayment as required by Section 725.535(d), and does not artificially shift or adjust the date of onset of disability or penalize claimant, but is beneficial to claimants and consistent with the remedial purpose of the Act, *see Cadle, supra; see also Molnar, supra.*

However, claimant also contends that the Department of Labor erroneously determined that claimant was at fault in the creation of the overpayment in this case. Claimant contends that pursuant to 20 C.F.R. §725.543, a claimant is not at fault in the creation of an overpayment when the overpayment is created by the retroactive award of benefits from another agency.

The administrative law judge made no specific finding as to whether claimant was at fault in the creation of the overpayment in denying claimant's petition for waiver of recovery of the overpayment. The Director contends that the issue of whether claimant was not at fault in the creation of the overpayment was waived before the administrative law judge, as claimant agreed to limit the issue for review to what was the proper amount of the overpayment. In this regard, the administrative law judge only stated that the Director's "up front" method for calculating the amount of the overpayment was at issue. However, although the Director cites to letters, apparently from claimant, in this regard, these letters are not contained in the record. A review of the record reveals only a list of contested issues before the administrative law judge, which indicates that whether claimant is without fault in the occurrence of the overpayment was contested by the Director and was at issue before the administrative law judge, as well as whether waiver of recovery of the overpayment amount was appropriate pursuant to 20 C.F.R. §725.542, *see Director's Exhibit 99.*

Thus, the administrative law judge did not determine whether recovery of the overpayment should be waived because claimant established that he was without fault in the creation of the overpayment pursuant to 20 C.F.R. §725.542 or because recovery of the overpayment would defeat the purpose of Title IV of the Act or be against equity and good conscience. See 20 C.F.R. §§725.542, 725.543, 410.461a, 410.561b, 410.561c, 410.561d.³ Consequently, we vacate the administrative law judge's denial of claimant's petition for waiver of recovery of the overpayment and remand the case for consideration pursuant to Sections 725.542, 725.543, 410.461a, 410.561b, 410.561c and 410.561d. The administrative law judge may wish to reopen the record if he finds that the record is incomplete and that further development of the relevant evidence is warranted, see *Lynn v. Island Creek Coal Co.*, 11 BLR 1-146 (1989); see also *Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986).

Accordingly, the Decision and Order of the administrative law judge's denying claimant waiver of recovery of overpayment is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief

³ The regulations provide that the "standards for determining the applicability of the criteria listed in [20 C.F.R.] §725.542 shall be the same as those applied by the Social Security Administration under [20 C.F.R.] §§410.561-410.561h...." 20 C.F.R. §725.543.

Section 410.561c provides: "Defeat the purpose of Title IV" means to deprive a person of income required for current ordinary and necessary living expenses, and in making a such a finding, the administrative law judge must determine whether claimant has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. 20 C.F.R. §410.561c.

Section 410.561d provides: "Against equity and good conscience" means that adjustment or recovery of an incorrect overpayment will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right or changed his position for the worse. 20 C.F.R. §410.561d.

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge