BRB No. 02-0330 BLA

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| PEARLEY H. RASNAKE<br>(Widow of FRANKLIN D. RASNAKE)<br><br>Claimant-Petitioner<br><br>v.<br><br>BARRENSHE COAL, INCORPORATED<br><br>and<br><br>WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND<br><br>Employer/Carrier-Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED:<br><br>DECISION and ORDER |

Appeal of the Decision and Order Allowing Recovery of Overpayment of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

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Jennifer U. Toth (Eugene Scalia, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] the miner's widow, appeals the Decision and Order Allowing Recovery of Overpayment (2000-BLA-0578) of Administrative Law Judge Pamela Lakes Wood directing claimant to reimburse employer for overpayments made 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).[2] The administrative law judge noted that the parties waived a hearing in this case and requested a decision on the record. Decision and Order at 5. The administrative law judge stated that at issue was the Director's "up-front" method of calculating the amount of offset that claimant's federal benefits should be reduced due to claimant's receiving concurrent state benefits. Decision and Order at 5. Applying the regulations at 20 C.F.R. Part 725, the administrative law judge found the amount of the overpayment to be $12,670.40. Decision and Order at 4; Director's Exhibit 20. The administrative law judge rejected claimant's contention that the district director's accounting method, known as the "up-front" method, was invalid and that claimant's legal fees and medical expenses incurred in obtaining an award from the state of West Virginia,[3] should have been deducted from the overpayment which resulted from her award of benefits under the Act.[4] Specifically, the administrative law judge determined that the legal and medical

[1]Claimant is Pearley H. Rasnake, the miner's widow. The miner, Franklin D. Rasnake, died on October 31, 1994 and claimant was subsequently awarded benefits on her survivor's claim by the Department of Labor on August 7, 1996. Director's Exhibits 13, 14.

[2]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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4]Claimant asserted that a deduction of attorney fees and expenses in the total amount of $18,762.08 should be made from the federal benefits payable of $26,697.44, which would

expenses incurred by claimant in obtaining the award from the State of West Virginia did not offset the overpayment because, pursuant to the "up-front" accounting method employed by the district director, these expenses were considered deducted to claimant from the initial payments of state benefits.[5] The 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*,

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result in an overpayment of $7,935.36. Decision and Order at 4; Director's Exhibit 22.

[5]Utilizing the "up-front" method, the district director did not offset or reduce 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 20 C.F.R.§725.535(d). Director's Exhibit 22. 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 was $18,762.08. Thus, the district director did not consider claimant as having received any state benefits, which effectively began in October, 1994, for purposes of determining the amount of overpayment until they exceeded $18,762.08, which did not occur when calculated on a monthly basis until after October, 1995.

*OWCP*, 18 BLR 1-57 (1994) and thus held that the "up-front" approach is not unreasonable or inconsistent with the statutory or regulatory scheme and ordered claimant to pay $12,670.40. Decision and Order at 7-8. The administrative law judge concluded that the West Virginia Coal Workers' Pneumoconiosis Fund was, therefore, entitled to recover the overpayment as calculated by the district director. Decision and Order at 8.

On appeal, claimant contends that there is no statutory or regulatory basis for the Director's "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. Employer, and the Director, Office of Workers' Compensation Programs (the Director), respond asserting that the administrative law judge's decision is supported by substantial evidence.

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).

After consideration of the administrative law judge's Decision and Order Allowing Recovery of Overpayment, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Under the Act, benefits payable by a liable party may be offset or reduced by the amount of 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), 923(g); 20 C.F.R. §§725.533(a)(1),[6] 725.535. The regulations further provide that amounts for medical, legal or related expenses incurred by a claimant in connection with his state claim are excluded in computing this reduction. 20

[6]The regulation at 20 C.F.R. §725.533 has been substantially revised. The Department of Labor deleted from the regulation provisions concerning Section 415 "transition claims." *See* 30 U.S.C. §925. The Department of Labor explained:

> Although the Department does not intend to alter the rules applicable to any section 415 claim that may remain in litigation, parties have adequate access to these rules in earlier editions of the Code of Federal Regulations.

65 Fed. Reg. 80015. This revision does not impact the instant claim.

C.F.R. §725.535(d). Neither the Act nor the regulations provides guidance as to how such expenses are to be excluded from the offset calculation.[7]

Claimant contends that the administrative law judge erred in adopting the Director's "up-front" method for calculating the amount of 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). Claimant also 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,* a case arising, as does the instant case, within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the Board deferred 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. The Board noted the Fourth Circuit's statement in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), citing *BethEnergy Mines, Inc. v. Pauley*, 501 U.S. 680, 15 BLR 2-155 (l991), *aff'g* 890 F.2d l295, 13 BLR 2-162 (3d Cir. l989) and *Adkins v. Director, OWCP*, 878 F.2d 151, 12 BLR 2-313 (4th Cir. 1989), that "the Director's interpretation of the regulations is entitled to substantial deference from this court." *Cadle*, 18 BLR at 1-62.

[7]The Director developed a method of offset calculation known as the "up-front" method. This method provides that absent evidence that a state award or state law requires a particular method for paying attorney fees or medical expenses, or that the parties have in fact agreed to a different method of paying, the Director will presume that a claimant will use as much of his initial benefit payments as is necessary to pay his fees and expenses. *See generally Cadle v. Director, OWCP*, 18 BLR 1-57 (1994).

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, 16 BLR 2-99 (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 benefit 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.[8] 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 penalize claimant, but is beneficial to claimants and consistent with the remedial purpose of the Act. *Cradle, supra*; *Molnar, supra*. Consequently, we affirm the administrative law judge's use of the "up-front" method in this case, and, since claimant does not assert any additional challenges to the administrative law judge's overpayment calculation, further affirm the administrative law judge's finding that an overpayment of $ 12,670.40 exists in this case. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH

[8]In *Director, OWCP v. Barnes and Tucker Co.* [*Molnar*], 969 F.2d 1524, 16 BLR 2-99 (3d Cir. 1992), *rev'g Molnar v. Barnes and Tucker Co.*, 15 BLR 1-93 (1991), the 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." *Id*. at 969 F.2d at 1527, 16 BLR at 2-104.

Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge