

BRB Nos. 02-0126 BLA
and 02-0126 BLA-A

FREEMAN LAMBERT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NO COAL, INCORPORATED)	
)	DATE ISSUED:
and)	
)	
WEST VIRGINIA COAL WORKERS')	
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-Respondents)	
Cross-Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

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

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund, Employment Programs Litigation Unit), Charleston, West Virginia, for employer and carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (2000-BLA-0234) of Administrative Law Judge Jeffrey Tureck 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).¹ The administrative law judge determined that claimant was awarded benefits under the Act commencing on April 1, 1991, and that on October 4, 1996, the State of West Virginia granted claimant an award for a 25% permanent partial disability due to occupational pneumoconiosis. Decision and Order at 3. Subsequently, on June 8, 1998, the State of West Virginia found that claimant was entitled to a Second Injury Life Award (SILA) for permanent total disability, payable from May 8, 1991. *Id.* Based on the parties' agreement that 25% of claimant's SILA award was attributable to pneumoconiosis, and that claimant incurred attorney's fees of \$22,481.50 in pursuit of the pneumoconiosis portion of his state award, the administrative law judge concluded that claimant's federal benefits must be offset by 25% of his concurrent state benefits, *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); *Burnette v. Director, OWCP*, 14 BLR 1-151 (1990); and that claimant's \$22,481.50 in legal expenses for the pneumoconiosis portion of his state award was properly excluded under 20 C.F.R. §725.535(d) in computing the reduction in benefit payments. Decision and Order at 3-6. Applying the "up-front" method, *see Cadle v. Director, OWCP*, 18 BLR 1-56 (1994), the administrative law judge deducted claimant's legal expenses from claimant's state award for the period from May 8, 1991 through June 11, 1992, and calculated an overpayment of \$36,146.10 for the period between June 12, 1992 and December 31, 1998, after which employer ceased payment of federal benefits. Decision and Order at 6. The administrative law judge thus ordered claimant to repay the sum of \$36,146.10 to employer in reimbursement for the overpayment in federal benefits. The administrative law judge further ordered that claimant receive credit for all federal payments withheld by employer since January 1999. Decision and Order at 7.

On appeal, claimant contends that the administrative law judge erred in failing to

¹The 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.

determine the exact amount of the credit claimant was entitled to receive for federal benefit payments withheld by employer since January 1999, and in failing to subtract that amount from the overpayment of \$36,146.10 as calculated by the administrative law judge. Employer responds, urging affirmance of the administrative law judge's method of computing the overpayment, and cross-appeals, contending that the administrative law judge erred in excluding 100% of the legal expenses incurred in obtaining the pneumoconiosis portion of claimant's state award from the federal overpayment calculation herein. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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).

Turning first to employer's arguments on cross-appeal, employer maintains that, pursuant to the Board's decision in *Pickens v. Director, OWCP*, 19 BLR 1-116 (1995), since 25% of claimant's state SILA award was attributable to pneumoconiosis, only 25% of the attorney fees incurred by claimant in pursuit of his state award may properly be excluded under 20 C.F.R. §725.535(d) in computing the reduction or offset of federal benefits. We disagree. Section 725.535(d), on its face, places on claimant the burden of establishing the amount of legal expenses related to obtaining a state award for pneumoconiosis, and specifically provides that such expenses shall not be excluded unless established by evidence as required by the Office of Workers' Compensation Programs, which may consist of, *inter alia*, a detailed statement by the claimant's attorney; bills, receipts, or canceled checks; or other evidence indicating the amount of such expenses. 20 C.F.R. §725.535(d)(1)-(4). In *Pickens*, wherein the claimant had submitted documents evidencing payments to his attorney, but where the payment receipts did not indicate whether the time charged was spent obtaining the pneumoconiosis portion of the claimant's state award, the Board held that, in the absence of more specific evidence supplied by claimant, the Director's designation of the percentage of the state award due to pneumoconiosis as an acceptable form of "other evidence" pursuant to Section 725.535(d) was reasonable. *Pickens*, 19 BLR at 1-121. In the present case, however, the administrative law judge found that evidence in the record supported the parties' agreement that claimant expended a total of \$24,942.56 in attorney's fees to obtain his state SILA award, of which \$2,454.56 was spent in pursuit of the hearing loss portion of his award and \$22,481.50 was spent in pursuit of the pneumoconiosis portion of his award. Decision and Order at 3, 5. Consequently, under the facts of this case, we affirm the administrative law judge's exclusion of the full \$22,481.50 in legal expenses attributable to the pneumoconiosis portion of claimant's state SILA award, as the administrative law judge's findings pursuant to Section 725.535(d) are supported by

substantial evidence and consistent with applicable law. *See Pickens, supra.*

Turning to claimant's arguments on appeal, claimant does not dispute the administrative law judge's calculation of an overpayment of federal benefits in the amount of \$36,146.10 as of December 31, 1998, but argues that the administrative law judge should also have determined the dollar amount of credit claimant was entitled to receive for all federal benefit payments, after offset, which were withheld by employer since January 1999, thereby providing claimant with the net amount due and owing to employer. Inasmuch as employer's withholding of federal benefits was ongoing, however, we affirm the administrative law judge's finding that claimant must reimburse employer the sum of \$36,146.10 for its overpayment of federal benefits through December 31, 1998, and we remand this case to the district director for a computation of the credit owed to claimant by reason of employer's withholding of benefits since January 1999, and collection of the overpayment.²

Accordingly, the administrative law judge's Decision and Order calculating the amount of overpayment of federal benefits is affirmed, and this case is remanded to the district director for collection and computation of claimant's credit.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

²Claimant also seeks imposition of a 20% penalty pursuant to 20 C.F.R. §725.607 for all federal benefit payments withheld by employer since January 1999 in the absence of an order staying the payment of those benefits. This issue is beyond the Board's scope of review, however, as it was not raised by claimant below.

REGINA C. McGRANERY
Administrative Appeals Judge