

Chapter 18

Overpayment, Waiver, and Recovery

I. "Overpayment" defined

A. The regulation

The provisions at 20 C.F.R. § 725.522(c) (2000) and § 725.522(b) (2008) state that if benefit payments are commenced prior to the final adjudication of the claim and it is later determined by an administrative law judge, the Benefits Review Board ("Board"), or a court of appeals that the claimant was ineligible to receive such payments, such payments shall be considered overpayments pursuant to § 725.540 and may be recovered. Subsection 725.540(a) provides the following additional means by which an overpayment may be created:

a) General. As used in this subpart, the term "overpayment" includes:

- (1) Payment where no amount is payable under this part;
- (2) Payment in excess of the amount payable under this part;
- (3) A payment under this part which has not been reduced by the amounts required by the Act (see § 725.533);
- (4) A payment under this part made to a resident of a State whose residents are not entitled to benefits (see §§ 725.402 and 725.403);
- (5) Payment resulting from a failure to terminate benefits to an individual no longer entitled thereto;
- (6) Duplicate benefits paid to a claimant on account of concurrent eligibility under this part and Part 410 or 727 of this title or as provided in § 725.309.

20 C.F.R. § 725.540(a) (2008).

B. Oversight of recovery efforts by OWCP

The amended regulations make clear that "[n]o operator or carrier may recover, or make an adjustment of, an overpayment without prior application to, and approval by, the Office which shall exercise full supervisory authority over the recovery of or adjustment of all overpayments." 20 C.F.R. § 725.547(b) (2008). Pursuant to 20 C.F.R. § 725.101(a)(21) (2008), the word "Office" refers to the Department of Labor's Office of Workers' Compensation Programs.

II. Jurisdiction

A. Federal Claims Collection Act¹

In *Jones v. Director, OWCP*, 14 B.L.R. 1-80 (1990), the Board held that the administrative law judge and the Board had subject matter jurisdiction over the issue of waiver and recovery of overpayment. 33 U.S.C. §921(b); 20 C.F.R. §§ 725.450 and 725.481 (2000) and (2008). The Board stated that the Federal Claims Collection Act's (FCCA) \$20,000 ceiling on agency discretion with respect to the compromise and collection of claims does not affect the jurisdiction of the Office of Administrative Law Judges or Board to determine whether overpayments should be waived. The provisions of the FCCA, as amended by the Debt Collection Act of 1982, are not triggered until a collectible claim or debt to the government is found to exist. An overpayment does not become a claim or debt within the meaning of the Debt Collection Act until a determination that it will not be waived has been made. The FCCA's \$20,000 limitation² does not come into effect until the waiver process is complete; thus, it does not affect the administrative law judge's or the Board's jurisdiction in waiver determinations. *See also Potisek v. Director, OWCP*, 14 B.L.R. 1-87 (1990).

B. Six year statute of limitations inapplicable

A claim for recovery of an overpayment pursued by the Director is not time-barred by the six-year statute of limitations. In *Nelson v. Director, OWCP*, 21 B.L.R. 1-5 (1997), Claimant argued that a 1993 overpayment claim filed by the Department of Labor was untimely pursuant to the six year statute

¹ Reference to the FCCA at § 725.544(a) has been deleted under the amended regulations and replaced by citation to 31 U.S.C. § 3711. Also, the amended regulations provide that the agency's claims for the recovery of an overpayment may not exceed \$100,000, exclusive of interest.

² Reference to the FCCA at 20 C.F.R. § 725.544(a) (2008) was deleted in the amended regulations and replaced by a citation to 31 U.S.C. § 3711. Also, the amended regulations provide that the agency's claims for recovery of an overpayment may not exceed \$100,000, exclusive of interest.

of limitations contained at 28 U.S.C. § 2415(a). Claimant argued that the Department had "enough information in 1979 to seek recovery." The Board held, however, that the action to recover an overpayment "is not an action for money damages within the meaning of § 2415(a)" such that the claim was not time-barred.

III. Waiver of recovery of overpayment

Recovery of overpayments may be waived under certain circumstances.³ The regulations provide that there shall be no adjustment or recovery of an overpayment in any case where an incorrect payment has been made with respect to an individual: (a) who is without fault; *and* where (b) adjustment or recovery would either: (1) defeat the purpose of title IV of the Act, or (2) be against equity and good conscience. 20 C.F.R. § 725.542 (2008).⁴

Also, the provisions at 20 C.F.R. § 410.561h require waiver of adjustment or recovery of an overpayment under 20 C.F.R. § 410.561e(a), (b), and (c), and 410.561f. Pursuant to 20 C.F.R. § 725.543 (2000), the standards for determining the applicability of the criteria of § 725.542 (2000) shall be the same as those applied by the Social Security Administration under § 410.561-410.561h.

However, the amended version of 20 C.F.R. § 725.543 (2008) provides that the standards utilized by the Social Security Administration at 20 C.F.R. §§ 404.506 - 404.512 are to be applied instead of the standards found at §§ 410.561 - 410.561h. In its comments to the regulatory amendment, the Department noted that Part 404 better reflected the current state of the law as the Part 410 criteria had not been revised since 1972. 65 Fed. Reg. 80,016 (Dec. 20, 2000).

NOTE: At the time of printing of this edition of the *Benchbook*, there were no published Board or circuit court cases interpreting the amended overpayment regulations. The provisions at 20 C.F.R. § 404.506 provide that "there shall be no adjustment or recovery in any case where an overpayment under title II has been made to an individual who is without fault if adjustment

³ Prior to applicability of the amendments to the regulations, the waiver provisions at 20 C.F.R. §§ 725.541-725.544 (2000) were *inapplicable* where the overpayment was made by an employer or insurance carrier. 20 C.F.R. § 725.547 (2000). The amended regulations provide, however, that the foregoing waiver provisions *are applicable* to overpayments made by responsible operators. 20 C.F.R. § 725.547(a) (2008).

⁴ The Board holds that the provisions at § 725.544, addressing the claimant's ability to pay the overpayment amount, are inapplicable to the issue of waiver, which "pertains to the separate issue of collection and compromise of claims." *Ashe v. Director, OWCP*, 16 B.L.R. 1-1-109 (1992).

or recovery would either defeat the purpose of title II of the Act, or be against equity and good conscience." The standards under Parts 404 and 410 (*i.e.* determining whether the claimant is without fault and assessing whether recovery would be defeat the purpose of title IV or be against equity and good conscience) are the same. As a result, citations to Part 410, and case law interpreting those provisions, remain.

A. Entitlement to a hearing

If a claimant seeks waiver of the recovery of an overpayment that was paid by the Trust Fund, s/he is entitled to request and receive a hearing prior to the Director, OWCP being authorized to commence recoupment of the amount paid. *See Jones, supra; Potisek, supra.*⁵

In *Nelson v. Director, OWCP*, 21 B.L.R. 1-5 (1997), the Board reiterated that "prior to the recovery of an overpayment, a (claimant) has a right to an oral hearing on the issues of fault and whether recovery would defeat the purpose of the Act or be against equity and good conscience." Because no hearing had been held with regard to these issues, the claim was remanded.

B. "Without fault" defined

If the fact-finder concludes that the claimant is at fault, there is no need to consider whether recovery would be against equity and good conscience or defeat the purpose of the Act, as waiver would be prohibited. 20 C.F.R. § 725.542 (2008). The amended regulations make reference to 20 C.F.R. § 404.507 to define "fault."

1. Honest mistake

A finding of "without fault" does not necessarily involve a finding of no bad faith or misrepresentation on claimant's part, as "fault" can be the result of an honest mistake. *Barone v. Bowen*, 869 F.2d 49 (2nd Cir. 1989); *Morgan v. Finch*, 423 F.2d 551 (6th Cir. 1970). Further, the Board held that actions of the government are not relevant in determining whether claimant is "without fault" under 20 C.F.R. § 410.561(b). *Valente v. Secretary of Health & Human Services*, 733 F.2d 1037 (2nd Cir. 1984); *Morgan, supra*; *Jones v. Director, OWCP*, 14 B.L.R. 1-80 (1990). *See also Hampton v. Director, OWCP*, 11 B.L.R. 1-118 (1988) (the Board affirmed an administrative law judge's finding that

⁵ In *Justus v. Knox Creek Coal Co.*, 16 B.L.R. 1-95 (1992), the Board held that, where an overpayment is made by an employer/carrier, "the administrative law judge properly found that the hearing requested by claimant was not within his jurisdiction and could serve no purpose."

However, the waiver provisions apply to overpayments made by the responsible operator under the amended regulations such that the Board's *Justus* decision is inapplicable. 20 C.F.R. § 725.547(a) (2008).

claimant was at fault when she remarried and failed to inform the Department of Labor even though uncontradicted testimony established that employees at the Social Security Administration misinformed her and asserted that her remarriage would not affect her eligibility for black lung benefits).

2. Erroneous information

a. Prior to applicability of 20 C.F.R. Part 725 (2008)

Erroneous information supports waiver

Under § 410.561h, an adjustment or recovery of an overpayment will be waived if a claimant relies on "erroneous information" as described in § 410.561f. If the claimant relies on erroneous information, s/he will be without fault and will not have to undergo further analysis under § 410.561a.

Agency misinformation

Where a claimant is initially found entitled to benefits, receives interim benefits, and then the claim is finally denied, such initial determination of entitlement does not constitute "erroneous information." *Potisek v. Director, OWCP*, 14 B.L.R. 1-87 (1990) (the Board held that claimant did not rely on "erroneous information" under 20 C.F.R. § 410.561(f) where Department of Labor failed to advise claimant of possibility that she would have to repay interim benefits if claim was ultimately denied; § 410.561(f) contemplates situation where agency official provides misinformation, not a failure to provide information). See also *Bracher v. Director, OWCP*, 14 F.3d 1157 (7th Cir. 1994); *McConnell v. Director, OWCP*, 993 F.2d 1454, 1458 (10th Cir. 1993); *Napier v. Director, OWCP*, 999 F.2d 1032, 1035 (6th Cir. 1993).

Stipulations

The Board holds that a stipulation that the claimant is "without fault" in the creation of the overpayment under 20 C.F.R. § 410.461(b) is not a concession that the claimant is without fault by relying on "erroneous information" within the meaning of 20 C.F.R. § 410.561f. *Freedline v. Director, OWCP*, BRB No. 89-0329 BLA (Sept. 20, 1991)(unpub.).

Change in award status

In *Weiss v. Director, OWCP*, 16 B.L.R. 1-56 (1990), the Board held that an initial determination of entitlement is not the sort of "erroneous information" to which § 410.561f is referring. The Board noted that § 410.561f refers to erroneous information "with respect to the interpretation of a pertinent provision of the Act or regulations," not a factual finding regarding

claimant's entitlement to benefits under the Act. *See generally Potisek, supra; McConnell v. Director, OWCP*, 993 F.2d 1454 (10th Cir. 1993).

In *Bracher v. Director, OWCP*, 14 F.3d 1157 (7th Cir. 1994), the Seventh Circuit agreed with the Tenth Circuit's holding in *McConnell v. Director, OWCP*, 993 F.2d 1454, 1458 (10th Cir. 1993) that the district director's initial award of benefits does not constitute the type of "erroneous information" contemplated in the Act in determining whether to waive an overpayment. In this vein, the *Bracher* court held that interim black lung payments to a miner, who is ultimately found to not be entitled to benefits, are recoverable under the overpayment and recoupment provisions of the Act. *See also Benedict v. Director, OWCP*, 29 F.3d 1140 (7th Cir. 1994).

Remand overpayment claim for consideration of autopsy evidence

In *Napier v. Director, OWCP*, 999 F.2d 1032 (6th Cir. 1993), the Sixth Circuit remanded an overpayment claim to permit the widow to offer an autopsy report indicating that the miner died due to pneumoconiosis. The court determined that it would be inequitable "to require his estate to disgorge the money" if the record supports entitlement to benefits.

b. After applicability of 20 C.F.R. Part 725 (2008)

Final award later modified, recovery waived

Under certain circumstances, the amended regulations provide that an overpayment shall not be subject to collection where the claimant is without fault. The language at § 725.310(d) reads as follows:

An order issued following the conclusion of modification proceedings may terminate, continue, reinstate, increase or decrease benefit payments or award benefits. Such order shall not affect any benefits previously paid, except that an order increasing the amount of benefits payable based on a finding of a mistake in a determination of fact may be made effective on the date from which benefits were determined payable by the terms of an earlier award. In the case of an award which is decreased, no payment made in excess of the decreased rate prior to the date upon which the party requested reconsideration under paragraph (a) of this section shall be subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which is decreased following the initiation of modification by the district director, no payment made in excess of the decreased rate prior to the date upon which the district director initiated modification proceedings under paragraph

(a) shall be subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which has become final and is thereafter terminated, no payment made prior to the date upon which the party requested reconsideration under paragraph (a) shall be subject to collection or offset under subpart H of this part.

In the case of an award which has become final and is thereafter terminated following the initiation of modification by the district director, no payment made prior to the date upon which the district director initiated modification proceedings under paragraph (a) shall be subject to collection or offset under subpart H of this part.

20 C.F.R. § 725.310(d) (2008).

In its comments, the Department noted that subsection (d) was revised "with the stated purpose of prohibiting the recovery, by either the Trust Fund or a responsible operator, of benefits paid pursuant to a final award of benefits that is later modified." 65 Fed. Reg. 79,975 (Dec. 20, 2000). The Department also made it clear that the district director must initiate a modification proceeding in order to preclude collection of any payments made pursuant to the prior final award. 65 Fed. Reg. 79,975 (Dec. 20, 2000).

Waiver against responsible operator and carrier

The amended regulations provide that the waiver provisions at 20 C.F.R. §§ 725.541-725.544 are applicable to overpayments made by responsible operators as well as payments made from the Trust Fund. 20 C.F.R. § 725.547(a) (2008). In its comments, the Department stated the following:

The Department concluded that the opportunity to obtain a waiver or adjustment of a debt should be made available to all claimants regardless of their benefits' source.

. . .

The Department also rejected the position that waiver of an overpayment owed an operator amounted to the unconstitutional deprivation of property, citing caselaw upholding overpayment recoveries under the more restrictive Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 914(j), 922, as incorporated by 30 U.S.C. § 932(a).

65 Fed. Reg. 80,016 (Dec. 20, 2000).

C. "Defeat the purpose of title IV of the Act" defined

1. Generally

The provisions at § 410.561c state that the phrase "defeat the purpose of title IV" means to "deprive a person of income required for ordinary and necessary living expenses." Similarly, the provisions at 20 C.F.R. § 404.508, (which are referenced in the amended regulations) define the phrase as "to deprive a person of income required for ordinary and necessary living expenses." The regulation further provides that "[t]his depends upon whether the person 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. § 404.508(a). The regulation sets forth examples of expenses that should be considered, including fixed living expenses (such as food, clothing, rent, mortgage, health insurance), medical hospitalization, and expenses for support of others for whom the claimant is legally responsible. 20 C.F.R. § 404.508(a)(1) - (4).

2. Prospective expenses excluded

In *Keiffer v. Director, OWCP*, 18 B.L.R. 1-35 (1993), the Board held that the overpayment regulation does not "provide for consideration of prospective expenses"; rather, "the administrative law judge's decision and order must be based on the evidence of [current income and] current expenses in the record before him, 20 C.F.R. § 725.477(b), not on what could happen in the future." Thus, the fact that the miner's wife will someday need full-time nursing care cannot be considered. However, the Board noted that the claimant may seek modification at any time based upon a change in financial circumstances. See also *Rosimos v. Director, OWCP*, BRB No. 89-2527 BLA (Apr. 30, 1991)(unpub.) (claimant's age and unexpected medical costs relating to the claimant's health are not properly considered).

3. Spouse's income considered

In *McConnell v. Director, OWCP*, 993 F.2d 1454 (10th Cir. 1993), the court held that the income of a claimant's wife could be considered in determining whether recovery of overpayment would defeat the purpose of the Act, despite arguments that the income was the wife's property.

4. Installment and credit card payments considered

In *Gordon v. Director, OWCP*, 14 B.L.R. 1-60 (1990), the Board held that "installment payments" under § 410.561c(a)(1), as incorporated into the regulations at 20 C.F.R. § 725.543, include department store credit card accounts and are thus, "ordinary and necessary expenses." The Board further

held that the different subsections under § 410.561a are separate categories and must be considered independently of each other.

5. Gifts to others

The Board has held that the payments need not be for someone for whom the claimant is legally responsible. As an example, gifts to claimant's granddaughter were "ordinary and necessary expenses." *See also Smith v. Director, OWCP*, BRB No. 89-3561 BLA (Feb. 26, 1991) (unpub.) (the Board cited the Tenth Circuit's *Gordon* decision, but upheld administrative law judge's finding that annual expenses for gifts, landscaping, and restaurant meals "perhaps went beyond those costs which are considered as ordinary and necessary expenses under the Act").

6. Child support, considered only if legally required

In *McConnell v. Director, OWCP*, 993 F.2d 1454 (10th Cir. 1993), the court held that expenses paid by the claimant's wife in support of her 43 year old daughter and other children could not be considered in absence of evidence that the claimant and his wife were legally responsible for such support.

D. "Against equity and good conscience" defined

1. Generally

Section 410.561d states that it is "against equity and good conscience" when a claimant relinquishes a valuable right or changes his or her position for the worse based on notice that a payment would be made or by reason of an incorrect payment. A claimant must demonstrate that the money was spent in such a manner that would not have occurred but for receipt of the overpayment.

Similarly, the amended regulations make reference to 20 C.F.R. § 404.509, which sets forth the same standard. There are several useful examples where recovery of an overpayment would be "against equity and good conscience" listed in the regulation. 20 C.F.R. § 404.509.

2. Factors to be considered

a. Financial circumstances irrelevant

Section 410.561d specifically states that the claimant's financial circumstances are irrelevant in determining whether recovery would be against equity and good conscience. *See also* 20 C.F.R. § 404.509(b); *Hervol v. Director, OWCP*, 16 B.L.R. 1-53 (1990).

b. Extended vacation, no waiver

McConnell v. Director, OWCP, 993 F.2d 1454 (10th Cir. 1994) (money spent on extended vacation could not be recovered).

c. Resignation prior to receipt of benefits, no waiver

In *Strickland v. Director, OWCP*, BRB No. 89-2963 BLA (Sept. 24, 1991) (unpub.), the Board held that recovery of an overpayment is not against equity and good conscience where the claimant, expecting to receive benefits, resigns from employment six years prior to the award of interim benefits. The Board concluded that claimant did not relinquish a valuable right or change his position for the worse in reliance on an overpayment pursuant to § 410.561d since he resigned prior to a determination that he was entitled to benefits.

d. Purchase camper, no waiver

Smith v. Director, OWCP, BRB No. 89-3561 BLA (Feb. 26, 1991)(unpub.)(overpayment should not be waived on the basis of detrimental reliance where the claimant purchased items like a camper vehicle and the evidence failed to establish that the "claimant would not have been able to undertake those financial obligations without the income from the benefits").

e. Relinquish savings for lump sum payment, no waiver

In *Benedict v. Director, OWCP*, 29 F.3d 1140 (7th Cir. 1994), the court held that lump sum recovery of an overpayment was not against equity and good conscience as:

Benedict admits that he neither relinquished a valuable right nor changed his position for the worse because of the overpayment. Instead he argues that recovery of the overpayment would simply be unfair because it would force him and his wife to relinquish a large portion of their savings accumulated over the course of their lives. While we are not unsympathetic to Benedict's position, we also recognize that Benedict's receipt of the interim benefits enabled him, at a minimum, to maintain his high level of savings. Had Benedict not received the interim benefits, he may well have spent whatever savings he accumulated in precisely the same way that he spent the interim benefits, thus reducing his life savings by a corresponding amount.

V. Amount of the overpayment

In calculating the amount of the overpayment, 20 C.F.R. § 725.535(d) (2000) and (2008) provides an exclusion for legal, medical, or related expenses incurred in connection with a state or federal claim for black lung benefits.

A. Federal overpayment reduced due to expenses incurred for pursuit of state award

In *Pickens v. Director, OWCP*, 19 B.L.R. 1-116 (1995), the claimant was found liable for an overpayment of Black Lung benefits because he received a concurrent state award for permanent total disability, 15% of which was due to pneumoconiosis. The claimant paid \$7,600 in attorney's fees in order to obtain the state award.

The Board held that in determining the extent to which the overpayment should be reduced in light of the legal expenses incurred in connection with the state award as required by 20 C.F.R. § 725.535(d), the burden is on the claimant to establish the amount of legal expenses that are related to obtaining that portion of the state award attributable to pneumoconiosis. Mere submission of payment receipts, without any indication that the time charged was spent obtaining the pneumoconiosis portion of the state award is insufficient. The Board concluded that, in the absence of more specific evidence supplied by a claimant, the percentage of the state award due to pneumoconiosis is an acceptable form of "other evidence" under § 725.535(d) in determining the portion of attorney's fees to be excluded from the amount of the overpayment.

B. Lump sum state award, apportionment of

Depending on how fees or expenses are apportioned, the regulatory exclusion can provide a significant reduction in the amount of the overpayment for which the claimant is liable. For example, in *Cadle v. Director, OWCP*, 19 B.L.R. 1-56 (1994), the Board set forth the method for apportioning legal fees and medical expenses incurred in connection with the state claim where the attorney's fees and costs are awarded by the state in a lump sum without any mandate for their disbursement.

If the state award is in a lump sum, it is divided into monthly payments. Then, the monthly state award is credited toward the claimant's legal fees and expenses thereby delaying the reduction of claimant's federal monthly benefits on account of his concurrent state award until he has received an amount of state benefits equal to the attorney's fees and costs. *See also Director, OWCP v. Barnes and Tucker Co.*, 969 F.2d 1524 (3d Cir. 1992).

In *Cadle*, the Board overruled *Scuilli v. Bethlehem Mines Corp.*, 8 B.L.R. 1-206 (1985) to the extent it is inconsistent with *Cadle*. In *Scuilli*, the Board held that attorney's fees and expenses should be spread evenly over the life of a benefit award on a monthly basis and then subtracted on a monthly basis from the state monthly benefit; the net state benefit amount is then used to determine the offset. Since most state benefit awards are more generous than federal awards, the effect of this *pro rata* method would have eliminated any exclusion for attorney's fees and expenses from the amount of the overpayment.

VI. Recovery of the overpayment

A. Entitlement to a hearing

Citing to *Califano v. Yamasaki*, 442 U.S. 682 (1979), the Board held that, in cases where the *waiver of recovery* of overpayment is *not* an issue, the district director may begin recoupment prior to a hearing and decision concerning the amount of the overpayment. *Burnette v. Director, OWCP*, 14 B.L.R. 1-152 (1990).

B. Repayment amount and schedule

If it is determined that the overpayment cannot be waived (in the case of a responsible operator under the pre-January 2001 amendments to the regulations) or will not be waived (in the case of the Director, OWCP or responsible operator under the amended regulations), then there are two issues presented regarding the overpayment: (1) the actual overpayment amount that the claimant received, and (2) the amount that may be recovered by the Director, OWCP or employer.

In *Keiffer v. Director, OWCP*, 18 B.L.R. 1-35 (1993), the Board held that the administrative law judge must consider the "financial circumstances of the entire household, including the combined income and expenses of both claimant and spouse as well as jointly and separately owned assets in determining claimant's ability to repay and (the amount of) overpayment." The Board further held that the administrative law judge should "discuss the impact of depletion of an income-producing asset on claimant's future monthly income relative to his monthly expenses as well as how claimant's other assets would enhance is repayment ability. In the event that the claimant's financial circumstances change, the Board noted that he or she may seek modification:

[T]he purpose of the formal hearing is to establish the existence of the debt, not how it will be paid. (citations omitted). The administrative law judge's inquiry is merely whether claimant is in a financial position to assume repayment of the debt created by the overpayment. Once the debt is established as owing, and

collection efforts begin . . . claimant has the right to seek modification if his financial circumstances change, see 4 C.F.R. § 104.2(b); 20 C.F.R. § 725.310.

Id. See also *Ashe v. Director, OWCP*, 16 B.L.R. 1-109 (1992) (the Board held that it is within the administrative law judge's discretion to consider assets of the claimant's spouse in determining the repayment amount and schedule); *McConnell, supra*.

After issuance of *Keiffer*, the Board issued an unpublished decision in *Jennings v. Director, OWCP*, BRB No. 97-1537 BLA (May 27, 1998) and upheld an administrative law judge's finding that, because Claimant's monthly income exceeded his monthly expenses, "recovery of the overpayment would not deprive claimant of funds needed to meet ordinary and necessary living expenses."

The Board further affirmed the administrative law judge's conclusion that Claimant was entitled to a partial waiver of the overpayment amount upon finding that Claimant had "changed his position for the worse and relinquished a valuable right by both paying . . . toward his daughter's college tuition and by paying . . . for house repairs." However, the Board then held that an administrative law judge does not have the authority to determine a repayment schedule in a case involving a claim for repayment of overpayment.

Rather, the administrative law judge is limited to determining the amount of the overpayment and whether the overpayment should be partially or totally waived. The Board cited to its decision in *Kieffer v. Director, OWCP* 18 B.L.R. 1-35 (1993) and concluded that "[t]he purpose of the formal hearing is to establish the existence of debt, not how it will be repaid."

C. Offset of a state benefit award

Often an overpayment stems from the fact that the claimant is receiving benefits both from a state award as well as a federal award. The regulations provide that federal benefits be offset by any state benefits awarded to the claimant. 30 U.S.C. § 932(g); 20 C.F.R. § 725.535 (2008). See *O'Brockta v. Eastern Assoc. Coal Co.*, 18 B.L.R. 1-71 (1994), *aff'd.*, 54 F.3d 141 (3rd Cir. 1995). Subsection 725.535(b) provides that only concurrent state awards may offset federal awards and it precludes offset of a prior state award against subsequent federal black lung benefits as the state award covers benefits for a period ending before a claimant becomes entitled to federal benefits. 20 C.F.R. § 725.535(b) (2008). See also *Harmon Mining Co. v. Director, OWCP*, 826 F.2d 1388 (4th Cir. 1987).

One example of offset is *Lucas v. Director, OWCP*, 14 B.L.R. 1-112 (1990). Here, the Board determined that because the State of West Virginia found that 15% of the claimant's disability was due to pneumoconiosis, then only 15% of the state award was attributable to the disease for the purposes of

determining the amount of overpayment and offset. *See Burnette, supra.*

In *Director, OWCP v. Hamm*, 113 F.3d 23 (4th Cir. 1997), the court noted that offset provisions under the Act are "designed to supplement, but not duplicate, state benefits for pneumoconiosis." As a result, it concluded that the Board's determination that Claimant's "federal benefits . . . be offset by only 20 percent of his total state benefits because only 20 percent of those benefits could be attributable to pneumoconiosis," was in error. In this vein, the Fourth Circuit stated the following:

Hamm receives lifetime benefits from West Virginia for total disability. Prior to obtaining his total disability award, Hamm received a number of permanent partial disability (PPD) awards from the state. In 1974, 1977, and 1988, he obtained PPD awards of 15, 15, and 20 percent respectively for pneumoconiosis. His second and third awards were based on increases in his total impairment due to pneumoconiosis to 30 percent and finally 50 percent.

Consequently, the court determined that the aggregate prior awards resulted in a State determination "that Hamm suffers 50 percent permanent disability on account of pneumoconiosis" such that his federal benefits "should be offset by 50 percent of the amount of his second injury award."

1. The "up-front" method; attorney fees

In *Director, OWCP v. Barnes & Tucker Co.*, 969 F.2d 1524 (3rd Cir. 1992), the Third Circuit upheld the Director's interpretation of the method of offset under 20 C.F.R. § 725.535 to allow the "up-front" method of calculating offset. The Court upheld the Director's determination of the amount of offset through using the "up-front method," which assumes that the claimant will use as much of his or her initial benefit payments as is necessary to pay attorney fees; thus, federal benefits are not offset until the claimant's state attorney's fees are paid. In so holding, the Court reasoned that the Director, as the policymaker under the Black Lung Benefits Act, was entitled to deference as long as the interpretation is neither unreasonable nor inconsistent with the regulations.

2. Survivors' benefits

In *Carbon Fuel Co. v. Director, OWCP*, 20 F.3d 120 (4th Cir. 1994), the court held that Section 932(g) of the Act requires an offset of state workers' compensation benefits, which are conditioned on "death or disability due to pneumoconiosis," such that the "survivor's federal black lung benefits must be offset by a state workers' compensation award where both awards depended upon a showing that the decedent had been totally disabled due to

pneumoconiosis, although pneumoconiosis was not the cause of death."

D. The Federal Employees Compensation Act

In *Sammons v. Wolf Creek Collieries*, 19 B.L.R. 1-24 (1994), the Board held that, in the event benefits are awarded, an employer was not entitled to offset for Federal Employee Compensation Act (FECA) benefits received by a claimant-federal mine inspector, which totaled \$ 1,500.00 a month, because the miner's FECA award was for his accidental death and not for total disability due to pneumoconiosis.

In *Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999), the court held that Claimant, who worked as a federal employee, was not required to "seek recourse against the federal government under FECA before seeking recourse against a private employer under the Black Lung Benefits Act." The court reiterated that "if an individual were entitled to benefits both from his private employer under the Black Lung Benefits Act and from the federal government under FECA, the FECA benefits would offset the amount owed by the private employer." The court concluded that the miner was "free" to choose to pursue benefits under both FECA and the Black Lung Benefits Act or to "seek compensation first, or even exclusively, under the more generous (black lung) statutory scheme."

E. Collection and reimbursement, no jurisdiction to consider

In *Director, OWCP v. Peabody Coal Co.*, 330 F.3d 830 (6th Cir. 2003), the Sixth Circuit held that the administrative law judge has "decision-making authority over the determination of whether a black lung benefits claim exists," but jurisdiction for the enforcement of agency orders lies in the district courts pursuant to 30 U.S.C. § 934(B)(4)(A). Under the facts of the case, the miner was overpaid black lung benefits during his lifetime as the result of falsifying his receipt of state benefits. Upon his death, his spouse was automatically entitled to survivor's benefits. The survivor and Employer negotiated an agreement "to the effect that any future survivor's benefits owed (to the spouse) by Peabody Coal would be setoff against the amount of overpayment" The district director subsequently reinstated survivor's benefits and Employer objected to the payment of these benefits.

The claim was subsequently referred to this Office for adjudication, but the judge determined that he was without jurisdiction to decide the matter of "collection and reimbursement." The court agreed stating that Employer did not challenge the survivor's entitlement to benefits; rather, Employer sought enforcement of the negotiated agreement, which provided that survivor's benefits would be offset by the amount of overpaid benefits in the living miner's claim.