

Civil Action No. 1:02 CV 51

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
CLARKSBURG DIVISION**

**GLORIA L. NOWLIN,
Plaintiff**

v.

**EASTERN ASSOCIATED COAL CORPORATION,
Defendant**

**BRIEF OF AMICUS CURIAE
DIRECTOR, OFFICE OF WORKERS' COMEPNSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR**

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GLORIA L. NOWLIN,)	
)	
Plaintiff)	
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v.)	Civil Action No. 1:02 CV 51
)	(Keeley)
EASTERN ASSOCIATED COAL)	
CORPORATION,)	
)	
Defendant)	
)	

**BRIEF OF AMICUS CURIAE,
DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR**

INTRODUCTION

Gloria Nowlin, a coal miner's widow, filed this action against Eastern Associated Coal Corporation ("EACC") seeking to enforce a final award under the Black Lung Benefits Act ("BLBA"). 30 U.S.C. §§901-944. The award became final in 2000, approximately fourteen years after a Department of Labor ("DOL") administrative law judge ("ALJ") first awarded benefits, and after EACC pursued five appeals to DOL's Benefits Review Board. During litigation of the claim, EACC largely failed to pay benefits when it was obligated to do so. The parties have stipulated that EACC did not pay \$127,332.40 in benefits due Mrs. Nowlin during the merits litigation. Instead, she received those benefits from the Black Lung Disability Trust Fund.

Mrs. Nowlin now seeks to recover the twenty-percent additional compensation to which a claimant is entitled "[i]f any compensation, payable under the terms of an award, is not paid within ten days after it becomes due." 33 U.S.C. §914(f) (incorporated by 30 U.S.C. §932(a)).

DOL's applicable black lung program regulation expressly provides that the claimant is entitled to twenty-percent additional compensation even if the Trust Fund pays benefits on behalf of a defaulting operator. 20 C.F.R. §725.607(b).¹

EACC has filed a motion for summary judgment challenging the applicability and validity of 20 C.F.R. §725.607, and asking the court to find that Mrs. Nowlin is not entitled to any additional compensation. Mrs. Nowlin has responded that the regulation applies and is valid, and has moved for summary judgment awarding her twenty-percent additional compensation on all the benefits the Trust Fund paid her during the merits litigation, *i.e.*, \$25,464.48.² The Director, OWCP, agrees with Mrs. Nowlin that the regulation applies and is valid. The Director disagrees, however, that she is entitled to twenty-percent additional compensation on all the benefits the Trust Fund paid.

Under section 725.607, the claimant is entitled to additional compensation only if there is an effective benefit award, and the operator fails to timely pay the claimant benefits in accordance with it. As explained more fully at pp. 10-12, *infra*, an effective award is a decision by a district director, administrative law judge, the Benefits Review Board, or a United States court of appeals, which triggers the payment obligation of a party liable for benefits. In the case of an effective decision issued by an administrative law judge, the Benefits Review Board, or a court, a party may request further proceedings but the obligation to pay benefits remains. If no

¹ Although revisions to the black lung program regulations took effect on January 19, 2001, and the revised regulations generally apply to claims pending on that date (*see* 20 C.F.R. §725.2(c) (2003)), the decision awarding benefits in this case became final before January 19, 2001 – the Board's last decision is dated June 22, 2000. Thus, contrary to the parties' assumption that the revised regulations apply, the pre-January 19, 2001 program regulations govern this case. Throughout this brief, citations to the black lung regulations refer to the pre-January 19, 2001 regulations, unless otherwise indicated. (20 C.F.R. Part 725 (2000).)

² Twenty percent of \$127,332.40 is actually \$25,466.48.

party initiates further proceedings, such an effective award becomes final. The claimant is entitled to additional compensation on benefits paid by the Trust Fund only if the Fund made the payments on account of the operator's failure to comply with an effective award.

Applying this test to the facts of this case would entitle Mrs. Nowlin to \$10,921.56, not to \$25,464.68, as she claims in her motion for summary judgment. Of the \$127,332.40 that the Trust Fund paid Mrs. Nowlin during the merits litigation, only \$54,607.80 was paid pursuant to an effective award and on account of EACC's failure to comply with such an award. Mrs. Nowlin is therefore entitled to twenty percent of \$54,607.80, or \$10,921.56.

We detail the basis for our position in the argument section below.

INTEREST OF AMICUS

The Secretary of Labor has designated the Director of the Office of Workers' Compensation Programs ("OWCP") the administrator of both the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§901-950, and the Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§901-944. 20 C.F.R. §701.202(a), (f). The Director is the policymaker under the BLBA. *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 244 (4th Cir. 1994). He therefore has an interest in the applicability and validity of the black lung regulation challenged here: 20 C.F.R. §725.607. Moreover, the Director is a party to all BLBA claims proceedings. 30 U.S.C. §932(k); 20 C.F.R. §725.360(a)(5). In this capacity, he explains the BLBA and its implementing regulations in the course of claims litigation, and defends the validity of black lung program regulations when challenged. *See, e.g., Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 498 (4th Cir. 1999).

Because he is the policymaker, the Director's reasonable interpretation of the BLBA and its implementing regulations is entitled to deference. *Betty B Coal Co.*, 194 F.3d at 498 (citing

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)); *Sigma-Tau Pharmaceuticals, Inc. v. Schwetz*, 288 F.3d 141, 146 (4th Cir. 2002) (quoting *Pauley*). Accordingly, this Court has deferred to the Director's interpretation of a BLBA provision. *Nowlin v. EACC*, 266 F.Supp.2d 502, 507 (N.D. W.Va. 2003) (addressing the proper construction of LHWCA section 21(d) (33 U.S.C. §921(d), incorporated into the BLBA by 30 U.S.C. §932(a))).

The Director also protects the assets of the Black Lung Disability Trust Fund. *See, e.g., Director, OWCP v. Hileman*, 897 F.2d 1277, 1281 n. 2 (4th Cir. 1990) (Director "charged with a fiduciary duty to protect the Black Lung Disability Trust Fund from unjustified claims"). The Trust Fund is the statutory payor of last resort. It is statutorily required to pay benefits where there is no coal mine operator that may be held liable, the liable coal mine operator defaults, or the liable operator has not timely commenced payment after a district director's initial determination of entitlement. 26 U.S.C. §9501(d)(1)(A), (B). The Fund receives monies primarily from an excise tax on coal production. 26 U.S.C. §9501(b)(1). It was in debt to the U.S. Treasury in the amount of \$7,253,557,000 by the end of fiscal year 2001.³ In this case, the Trust Fund had to pay Mrs. Nowlin benefits during the entitlement litigation because EACC defaulted on its obligation to do so. The Director is therefore interested in seeing that proper financial consequences flow from EACC's conduct.

³ OWCP Annual Report to Congress for Fiscal Year 2001 at 61. The Fund currently must borrow from the general treasury to pay most of the interest on this debt, although the Fund's tax receipts suffice to pay benefits and the administrative costs of the program. *Id.* at 26.

RELEVANT PROCEDURAL HISTORY

Mrs. Nowlin's husband, Malcolm, filed a claim under the BLBA on January 6, 1976. EACC controverted the claim and began developing medical evidence. While the claim was pending before OWCP's district director, Mr. Nowlin died, and Mrs. Nowlin filed a claim for survivor's benefits.⁴ On May 4, 1981, the district director determined that Mr. Nowlin had been totally disabled due to pneumoconiosis (*i.e.*, black lung disease) at the time of his death in March 1981, and that Mrs. Nowlin was entitled to survivor's benefits. The district director's award directed the payment of benefits commencing January 1976. EACC timely requested a hearing, and declined to begin the payment of monthly benefits. Thus, the Trust Fund paid Mrs. Nowlin both monthly benefits and the retroactive benefits due from January 1976 forward. 26 U.S.C. §9501(d)(1)(A)(i).⁵

EACC continued to litigate the claim for approximately nineteen years. EACC appealed five successive ALJ awards to the Benefits Review Board before accepting the Board's affirmation of the fifth.⁶ EACC did not request a stay of payment during any of its Board

⁴ Where, as here, the miner filed his claim before January 1, 1982, his widow is entitled to survivor's benefits based on the miner's claim if the miner is determined either to have been totally disabled due to pneumoconiosis at the time of his death or to have died due to pneumoconiosis. The widow must prove only her relationship to the miner and her dependency on him. 30 U.S.C. §932(1); 20 C.F.R. §725.212(a)(3)(ii); *see, e.g., Keener v. EACC*, 954 F.2d 209, 211 n. 1 (4th Cir. 1992). In addition, Mrs. Nowlin is entitled to receive any benefits awarded on her husband's claim that were not paid before he died. 20 C.F.R. §725.545(c)(1); *see, e.g., Charles v. Director, OWCP*, 1 F.3d 251, 253 (4th Cir. 1993).

⁵ For claims like Mr. Nowlin's, filed before January 1, 1982, the Trust Fund is required by statute to pay retroactive benefits, *i.e.*, benefits that accrue before the date of the district director's initial determination, notwithstanding an employer's contest of the claimant's entitlement. 26 U.S.C. §9501(d)(1)(A).

⁶ Under the BLBA, once an OWCP district director (formerly known as a "deputy commissioner," *see* 20 C.F.R. §725.101(a)(11)) renders an initial determination, any party may request a *de novo* hearing before an ALJ. 33 U.S.C. §921(c) (incorporated into the BLBA by 30

appeals.⁷ EACC also failed to pay Mrs. Nowlin benefits during four of its five appeals of ALJ awards.⁸ When EACC failed to pay Mrs. Nowlin the benefits due pursuant to the ALJs' awards, the Trust Fund did so as required by statute. 26 U.S.C. §9501(d)(1)(A)(ii). The chart below summarizes the case's procedural history:

May 4, 1981:	District director awards benefits commencing January 1, 1976.
February 14, 1986:	ALJ awards benefits commencing October 1, 1975.
June 26, 1990:	BRB vacates and remands
August 28, 1991:	ALJ reinstates award of benefits
August 17, 1993:	BRB vacates and remands
June 14, 1994:	ALJ reinstates award of benefits
August 31, 1995:	BRB vacates and remands
June 10, 1996:	ALJ reinstates award of benefits
August 14, 1997:	BRB vacates and remands
January 16, 1998:	BRB denies Director's motion for reconsideration and clarification
May 14, 1999:	ALJ reinstates award of benefits, commencing May 1, 1976.
June 22, 2000:	BRB affirms award and modifies commencement date to January 1, 1976.

EACC did not petition for review of the Board's June 22, 2000 decision. The award therefore became final on August 21, 2000, upon the expiration of the sixty-day period for filing a petition for review. *See* 33 U.S.C. §921(c) (incorporated by 30 U.S.C. §932(a)). In December 2000, EACC assumed its obligation of paying monthly benefits to Mrs. Nowlin, and reimbursed

U.S.C. §932(a)); 20 C.F.R. §§725.419(a), 725.450. A party aggrieved by an ALJ's decision may appeal to the Benefits Review Board, whose members are appointed by the Secretary of Labor. 33 U.S.C. §921(b) (incorporated by 30 U.S.C. §932(a)); 20 C.F.R. §725.481. Any party aggrieved by the Board's decision may file a petition for review with the United States Court of Appeals for the circuit in which the injury occurred. 33 U.S.C. §921(c) (incorporated by 30 U.S.C. §932(a)).

⁷ An employer may seek a "stay of payments" from the Board or a Court pending appeal. 33 U.S.C. §921(b)(3), (c) (incorporated by 30 U.S.C. §932(a)). The Board or Court may grant a stay if the employer demonstrates that "irreparable injury would otherwise ensue." *Id.* The granting of a "stay of payments" excuses an employer from liability for twenty-percent additional compensation. 33 U.S.C. §914(f) (incorporated by 30 U.S.C. §932(a)); 20 C.F.R. §725.607(a).

⁸ EACC did pay Mrs. Nowlin benefits during its appeal of the second ALJ award, from October 1991 through August 1993. The parties agree that Mrs. Nowlin is not entitled to twenty-percent additional compensation for the benefits paid during this period.

the Trust Fund (with interest) for the benefits the Trust Fund had paid on its behalf. *See* 30 U.S.C. §934(b)(1) (upon final determination of its liability for benefits, operator must reimburse Trust Fund for benefits paid).

On April 1, 2002, Mrs. Nowlin filed this suit under section 21(d) of the LHWCA. 33 U.S.C. §921(d) (incorporated by 30 U.S.C. §932(a); 20 C.F.R. §725.604) (permitting the beneficiary of a final compensation order, or the district director, to file an action in district court for enforcement of the order). EACC filed a motion to dismiss on various procedural grounds, which this Court denied. *Nowlin*, 266 F.Supp.2d at 508. Following a scheduling conference, the Court issued an order establishing a timetable for the filing of dispositive motions and accompanying briefs, and inviting the Director to participate as an *amicus* "[i]n light of the novel question presented." Order dated July 28, 2003. The Director now files this *amicus* brief.

STATEMENT OF THE ISSUES

1) Whether the Secretary's regulation at 20 C.F.R. §725.607 limits the claimant's entitlement to twenty-percent additional compensation to instances in which the employer defaulted on benefits payable under the terms of an effective award.

2) Whether the claimant is eligible for twenty-percent additional compensation notwithstanding payment of benefits by the Black Lung Disability Trust Fund on behalf of an employer that has defaulted on an effective award.

3) Whether section 725.607 is valid because it is "reasonably related" to the Black Lung Benefits Act's purpose of imposing primary liability for black lung benefits on coal mine operators.

ARGUMENT

A. Applicable Law

Section 14(f) of the Longshore and Harbor Workers' Compensation Act ("LHWCA") provides:

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

33 U.S.C. §914(f). Section 14(f) is one of many LHWCA procedural provisions incorporated into the BLBA. 30 U.S.C. §932(a); *see generally Donovan v. McKee*, 669 F. Supp. 138, 140 (S.D. W.Va. 1987) (awarding BLBA claimant twenty-percent additional compensation), *aff'd*, 845 F.2d 70 (4th Cir. 1988). The BLBA, however, specifically authorizes the Secretary to vary the incorporated LHWCA provisions before applying them under the BLBA. 30 U.S.C. §932(a) (LHWCA provisions are incorporated "except as otherwise provided . . . by regulations of the Secretary"); *Director, OWCP v. Nat'l Mines Corp.*, 554 F.2d 1267, 1274 (4th Cir. 1977) (the BLBA "empower[s] the Secretary to depart from specific requirements of the Longshoremen's Act in order to administer the black lung compensation program").⁹ Pursuant to this authority, the Secretary promulgated section 725.607 to implement the incorporated section 14(f):

(a) If any benefits payable under the terms of (1) an award by a deputy commissioner (§725.419(d)), (2) a decision and order filed and served by an administrative law judge (§725.478), or (3) a decision filed by the Board or a U.S. court of appeals, 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,

⁹ The BLBA also generally authorizes the Secretary to promulgate regulations "appropriate to carry out the provisions of" the Act. 30 U.S.C. §936.

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.

(b) If, on account of an operator's or other employer's failure to pay benefits as provided in paragraph (a) of this section, *benefit payments are made by the fund*, the eligible claimant shall *nevertheless* be entitled to receive such additional compensation to which he or she may be eligible under paragraph (a) of this section, with respect to all amounts paid by the fund on behalf of such operator or other employer.

(c) The *fund shall not be liable for payments* in addition to compensation under any circumstances.

20 C.F.R. §725.607 (emphasis added).

In promulgating this regulation to fit the BLBA, the Secretary altered the language and operation of section 14(f) in three ways that are relevant to the instant case. First, the Secretary changed section 14(f)'s phrase "not paid" to "not paid by an operator or other employer" 20 C.F.R. §725.607(a). Second, the regulation provides that a claimant is entitled to additional compensation even if the Trust Fund pays benefits on behalf of a defaulting operator. 20 C.F.R. §725.607(b). Third, the regulation provides that the Trust Fund may never be held liable for twenty-percent additional compensation. 20 C.F.R. §725.607(c). The Secretary explained in the regulation's preamble that it "is intended to encourage the prompt payment of benefits by operators whether or not additional proceedings are pursued." 43 Fed. Reg. 36815 (Aug. 18, 1978).

B. Section 725.607 entitles a claimant to twenty-percent additional compensation on benefits the operator fails to pay pursuant to an effective award, notwithstanding the Trust Fund's payment of those benefits. It does not entitle a claimant to twenty-percent additional compensation on those benefits the Trust Fund paid in the absence of an effective award.

Mrs. Nowlin contends that section 725.607 entitles her to twenty-percent additional compensation on all the benefits that EACC failed to pay her during the merits litigation. EACC

contends that section 725.607 entitles Mrs. Nowlin to nothing because the Trust Fund paid her all the benefits that EACC failed to pay during the merits litigation. Neither party is correct.

i) Section 725.607 limits a claimant's entitlement to twenty-percent additional compensation to instances in which the employer defaulted on benefits payable under the terms of an effective award.

In order for a claimant to be entitled to additional compensation, section 725.607 requires that there be benefits "payable under the terms of (1) an award by a [district director] (§725.419(d)), (2) a decision and order filed and served by an administrative law judge (§725.478), or (3) a decision filed by the [Benefits Review] Board or a U.S. court of appeals" 20 C.F.R. §725.607(a). The three types of awards listed in the regulation have one thing in common: they are all "effective" awards. See 33 U.S.C. §921(a) (discussed *infra* at pp. 10-12, 16-17). Although district director and ALJ awards become effective under different circumstances, once there is an effective award the operator must commence the payment of benefits to the claimant. 20 C.F.R. §725.530(a).¹⁰

A district director's award – issued before an operator has had an opportunity for a hearing – becomes effective only if uncontested. Section 725.419(d) specifies that a district director's award becomes effective only if the operator fails to request a hearing or revision of

¹⁰ 20 C.F.R. §725.530(a), titled "Operator payments; generally," provides that:

An operator . . . which has been determined liable for the payment of benefits to a claimant by the [district director], or ordered to pay such benefits by an administrative law judge, the Board, or a court . . . shall commence the payment of benefits . . . within 30 days of such determination [or] order

Thus, section 725.607(a) requires the payment of additional compensation if an operator fails to commence the payment of benefits within forty days of an effective award (*i.e.*, section 725.607(a)'s ten days, plus section 725.530(a)'s thirty days).

the award within thirty days. 20 C.F.R. §725.419(d).¹¹ If the operator timely contests the district director's award, it is not effective, and the operator is not obligated to pay benefits. Thus, section 725.419(d) ensures that an operator will not be required to pay benefits before it has had an opportunity to defend itself. Similarly, section 725.607(a)'s reference to section 725.419(d) makes clear that additional compensation is "payable under the terms of a district director's award" only if that award becomes effective and the operator fails to pay benefits.¹²

An ALJ's award, by contrast, is issued after an operator has had the opportunity for a hearing and becomes effective upon filing regardless of whether it is contested. LHWCA Section 21(a) states that "[a] compensation order shall become effective when filed in the office of the [district director]." 33 U.S.C. §921(a) (incorporated by 30 U.S.C. §932(a)). The black lung program regulations applicable to ALJ decisions similarly provide that an ALJ's decision becomes effective when it is filed in the district director's office. 20 C.F.R. §725.478 (ALJ

¹¹ 20 C.F.R. §725.419(d) provides that:

If no response to a proposed decision and order is sent to the [district director] within [30 days] . . . , the proposed decision and order shall become a final decision and order, which is effective upon the expiration of the applicable 30-day period.

¹² If an operator does request further proceedings, the Trust Fund is nevertheless required to pay benefits pursuant to 20 C.F.R. §725.420(c). This regulation implements 26 U.S.C. §9501(d)(1)(A)(i), which requires the Trust Fund to pay benefits where the operator fails to commence payment within thirty days of an initial determination of entitlement. 20 C.F.R. §725.420(c) provides:

If a notified operator refuses to commence payment of a claim within 30 days from the date on which an initial determination is made under this section, benefits shall be paid by the fund to the claimant

decision must be filed in district director's office upon issuance); 20 C.F.R. §725.479(a) (ALJ's "decision and order shall become effective when filed in the office of the [district director].").¹³

Applying these principles to the facts here, there were five distinct periods during which no benefits were payable pursuant to an effective award. EACC, therefore, bears no liability for additional compensation on the benefits the Trust Fund paid during those periods. First, there were no benefits payable pursuant to an effective award before the first ALJ decision in February 1986. The Trust Fund, however, paid a total of \$47,866.20 in benefits before February 1986 pursuant to the district director's May 4, 1981 award. Because EACC had timely contested that award, it did not become effective, and did not obligate EACC to pay benefits. 20 C.F.R. §725.419(d); *Reich v. Youghiogheny & Ohio Coal Co.*, 858 F. Supp. 1381, 1390 (S.D. Ohio 1994), *aff'd*, 66 F.3d 111 (6th Cir. 1995). And, because EACC was not obligated to pay benefits pursuant to an effective award, it has no liability for additional compensation on the benefits paid from May 1981 through February 1986 – the date of the first ALJ decision.

The four additional periods during which there were no benefits payable under the terms of an effective award were the periods between each of the Board's four decisions vacating the preceding award and each of the succeeding ALJ awards on remand. *See supra*, p. 6. Following each Board vacatur, there was no effective award until the filing of the succeeding ALJ award on remand. During these four periods, the Trust Fund once again paid benefits – a total of \$24,858.40 – pursuant to the district director's May 4, 1981 award. Added to the \$47,866.20 the Trust Fund paid Mrs. Nowlin before the first ALJ award, the total amount the

¹³ Case law under the BLBA and LHWCA applying these provisions includes: *Amax Coal Co. v. Director, OWCP*, 892 F.2d 578, 582 (7th Cir. 1989); *Nowlin*, 266 F.Supp.2d at 504; *Mecca v. Kemmerer Coal Co.*, 14 Black Lung Reporter 1-101, 1-104 (Benefits Review Board 1990); *see also Lazarus v. Chevron USA*, 958 F.2d 1297, 1299 (5th Cir. 1992) (LHWCA compensation is due and payable when compensation order is filed in district director's office); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 127 n. 1 (5th Cir. 1983) (same).

Trust Fund paid Mrs. Nowlin pursuant to the district director's May 4, 1981 award was \$72,724.60 (\$47,866.20 plus \$24,858.40). Because this amount was not paid pursuant to an effective award, no twenty-percent additional compensation attaches to it. It must therefore be deducted from the total of \$127,332.40 that the parties have stipulated the Trust Fund paid Mrs. Nowlin before calculating the twenty-percent additional compensation due. This subtraction leaves \$54,607.80. This is the amount that EACC failed to pay pursuant to an effective award within the meaning of section 725.607. Mrs. Nowlin is entitled to twenty percent of that amount, *i.e.*, \$10,921.56.¹⁴

Mrs. Nowlin's only argument to the contrary lacks merit. She starts from the correct premise that an ALJ award obligates the operator to reimburse the Trust Fund for any benefits the Fund has previously paid the claimant. Mrs. Nowlin argues that an operator's failure to timely reimburse the Trust Fund entitles the claimant to twenty-percent additional compensation on the amount the operator owes the Fund. Mrs. Nowlin's Brief at 8. As we explain below, however, the regulation Mrs. Nowlin cites in support does not address operator reimbursement of the Trust Fund and makes no mention of operator liability for twenty-percent additional compensation. Moreover, the statutory and regulatory provisions that do address an operator's obligation to reimburse the Fund specify other consequences for an operator's failure to make timely reimbursement and also fail to mention operator liability for twenty-percent additional compensation.

Mrs. Nowlin cites 20 C.F.R. §725.502(b)(2) (2003) in support of her argument. Mrs. Nowlin's Brief at 8. Although this regulation does not apply, *supra*, footnote 1, the applicable

¹⁴ The parties have not stipulated to the amount of benefits the Trust Fund paid the claimant pursuant to an effective award. They have stipulated only that the Trust Fund paid the claimant a total of \$127,332.40.

regulation, 20 C.F.R. §725.502(c), embodies an identical principle: an ALJ award requires payment not only of monthly benefits to the claimant, but also of any "past due benefits."¹⁵ Mrs. Nowlin incorrectly assumes that the obligation to pay "past due benefits" refers to the operator's obligation to reimburse the Trust Fund. The phrase "past due benefits," however, refers to benefits that were due but not paid to the claimant. 20 C.F.R. §725.502(c). In this case, no past benefits were due Mrs. Nowlin at the time of the first ALJ award in 1986, or at the time of any of the subsequent ALJ awards on remand, because the Trust Fund had timely paid her all the benefits that were due. Thus, section 725.502(c) is simply not relevant here. It addresses a situation in which there are "past due benefits" owed the claimant. It does not address an operator's obligation to repay the Trust Fund pursuant to an ALJ award, as Mrs. Nowlin contends. Finally, although section 725.502 addresses how benefit payments should be made, e.g., benefits shall be paid periodically, promptly and directly to the individual entitled, it makes no mention of operator liability for twenty-percent additional compensation.

The sections of the BLBA and its implementing regulations that do address operator reimbursement of the Trust Fund further undermine Mrs. Nowlin's argument. 30 U.S.C. §934; 20 C.F.R. §§725.602, 725.603.¹⁶ Under these provisions, an operator that fails to timely

¹⁵ 20 C.F.R. §725.502(c) provides that ". . . all past due benefits shall be paid during the month in which the first benefit payment is made." The revised section 725.502(b)(2) changes the phrase "past due benefits" to "the amount of benefits payable for periods prior to the effective date of the order." 20 C.F.R. §725.502(b)(2) (2003). It also specifies that the district director must calculate the amount of such benefits and notify the parties of the amount. Such benefits must be paid within thirty days of the district director's notice. *Id.*

¹⁶ Mrs. Nowlin is correct that an ALJ award obligates an operator to reimburse the Trust Fund for any benefits it has paid. 20 C.F.R. §725.602(a) provides that:

In any case in which the fund has paid benefits . . . on behalf of an operator . . . which is determined liable therefore . . . such operator . . . shall simultaneously with the first payment of benefits made to the beneficiary, reimburse the fund

reimburse the Trust Fund is subject to a lien on its property in the amount of the debt, and a lawsuit by the Secretary to enforce the lien and/or collect the debt. 30 U.S.C. §934(b)(2), (b)(4); 20 C.F.R. §725.603(b), (c). These provisions apply only after the award has become final, *i.e.*, the time for requesting further proceedings has expired. *Id.* Significantly, none of them mentions operator liability for twenty-percent additional compensation. Thus, EACC is not liable for twenty-percent additional compensation based on its failure to reimburse the Trust Fund after issuance of the ALJ awards in this case. The Court should therefore reject Mrs. Nowlin's argument that she is entitled to twenty-percent additional compensation on all the benefits the Trust Fund paid her.¹⁷

ii) The Trust Fund's payment of benefits on behalf of EACC while an effective award was in place does not render Mrs. Nowlin ineligible for twenty-percent additional compensation on those benefits.

EACC contends that section 725.607 does not apply where, as here, the Trust Fund paid the claimant the benefits owed her after the employer's default. EACC's Brief at 5-12. EACC seeks support for this proposition not only in the language of section 725.607, but also in the Secretary's regulations at sections 725.502 and 725.522. All three regulations, however, support the opposite conclusion: notwithstanding Trust Fund payment, a claimant is entitled to twenty-

(with interest) for the full amount of all benefit payments made by the fund with respect to the claim.

¹⁷ Nor does the fact that section 725.607(b) entitles a claimant to twenty-percent additional compensation on "all amounts paid by the fund on behalf of such operator . . ." support Mrs. Nowlin's position. This language must be read in light of subsection (b)'s introductory language. A claimant is entitled to twenty-percent additional compensation only if the Trust Fund has made payments on account of an operator's failure to timely comply with an effective award. 20 C.F.R. §725.607(b) ("[i]f, on account of an operator's . . . failure to pay benefits *as provided in paragraph (a) of this section*, . . .") (emphasis added). Thus, Mrs. Nowlin is not entitled to twenty-percent additional compensation on those benefits the Trust Fund paid when no effective award was in place. *See also* argument ii, *infra*.

percent additional compensation after an employer's default, provided an effective award was in place at the time of the Fund payment.

First, EACC argues that there are no "unpaid benefits" pursuant to section 725.607 because the Black Lung Disability Trust Fund paid all the benefits due Mrs. Nowlin during litigation of the claim. EACC's Brief at 5-12. The language of section 725.607(a) clearly refutes this argument. It provides that the claimant is entitled to twenty-percent additional compensation "[i]f any benefits . . . are not paid *by an operator or other employer* . . . within 10 days" 20 C.F.R. §725.607(a) (emphasis added). The benefits paid by the Trust Fund pursuant to the ALJ awards were "not paid *by an operator or other employer*," thus rendering the benefits "not paid" within the meaning of the regulation. Moreover, section 725.607(b) expressly provides that "[i]f, on account of an operator's . . . failure to pay benefits [pursuant to an effective award] . . . benefit payments are made by the fund, the eligible claimant shall nevertheless be entitled to receive" twenty-percent additional compensation. 20 C.F.R. §725.607(b).¹⁸ And, EACC argues that an operator has no obligation to pay benefits unless and until an award becomes final. EACC cites revised section 725.502 of the Secretary's regulations in support of its argument that the regulations fail to define when an award becomes "effective," and that absent such a definition, only a final award requires operator payment. EACC's Brief at 11.¹⁸ The statute and applicable regulations clearly state, however, that an ALJ's award is effective – and therefore requires payment of benefits – when filed in the district director's office.

¹⁸ EACC incorrectly assumes that 20 C.F.R. §725.502 (2003) applies to this case. See footnote 1, *supra*. Even if the regulation did apply, however, it would not support EACC's argument. The regulation, titled "When benefit payments are due," states that benefits are due after issuance of an effective order requiring the payment of benefits by an ALJ, notwithstanding an appeal to the Board, and that an ALJ's award becomes effective when filed in the district director's office. 20 C.F.R. §725.502(a)(1), (a)(2) (2003). Accordingly, this regulation would also impose on EACC the obligation to pay Mrs. Nowlin's benefits after the issuance and filing of each ALJ award.

33 U.S.C. §921(a) (incorporated by 30 U.S.C. §932(a)) (award "effective" when filed in district director's office); 20 C.F.R. §725.479(a) (same); 20 C.F.R. §725.530(a) (requiring payment of benefits within thirty days of ALJ award).¹⁹ Thus, the filing of each successive ALJ award, coupled with EACC's failure to pay Mrs. Nowlin benefits, imposes on EACC liability for additional compensation.

Finally, EACC argues that the Trust Fund, not the operator, must pay any benefits due pursuant to an ALJ award while the award is on appeal. EACC relies on section 725.522 for this proposition. EACC's Brief at 9-10.²⁰ Section 725.522, titled "Payments prior to final adjudication," does not relieve an employer of the obligation to pay benefits pending appeal. Rather, section 725.530(a) requires "[a]n operator . . . ordered to pay . . . benefits by an administrative law judge . . . [to] commence the payment of benefits . . . within 30 days of such . . . order" Section 725.522 merely echoes the Trust Fund's statutory obligation to pay benefits after an operator defaults. The Trust Fund must pay benefits when the "operator . . . fails or refuses to commence the payment of benefits" 20 C.F.R. §725.522(b). Similarly, the applicable statutory provision mandates that the Trust Fund pay benefits (subject to reimbursement by the operator) when the liable operator "(i) has not commenced payment of

¹⁹ EACC advances another argument based on the revised section 725.502. It argues that it cannot be held liable for twenty-percent additional compensation because it timely reimbursed the Trust Fund for the benefits the Fund paid Mrs. Nowlin. EACC's Brief at 8-11. Like Mrs. Nowlin, EACC relies on section 725.502(b)(2), arguing that the obligation to pay past due benefits refers to the operator's obligation to reimburse the Trust Fund. EACC argues that it met this obligation. This argument fails for the same reasons that Mrs. Nowlin's argument based on the revised section 725.502(b)(2) failed. There were no past due benefits in this case, and the regulation does not address an operator's obligation to reimburse the Trust Fund. See discussion at 13-15, *supra*.

²⁰ EACC incorrectly assumes that the revised section 725.522 applies to this case. See footnote 1, *supra*; 20 C.F.R. §725.522 (2003). Revised section 725.522, however, does not differ from the earlier version of section 725.522 in any way material to this case.

such benefits within 30 days after the date of an initial determination of eligibility by the Secretary of Labor, or (ii) has not made a payment within 30 days after that payment is due." 26 U.S.C. §9501(d)(1)(A). Importantly, section 725.522 explicitly states that section 725.607's twenty-percent additional compensation provision applies to cases in which the Trust Fund pays benefits on behalf of an operator. 20 C.F.R. §725.522(b) ("[i]n the event that the fund undertakes the payment of benefits on behalf of an operator or carrier, the provisions of §§725.601-725.608 shall be applicable to such operator or carrier.").

Accordingly, none of the three regulations EACC cites supports its position. Rather, all three clarify that section 725.607 renders the operator liable for twenty-percent additional compensation for the benefits the Trust Fund pays pursuant to an effective award because the liable operator has defaulted.

C. Section 725.607 is valid because it is "reasonably related" to the BLBA's purpose of imposing primary liability for black lung benefits on coal mine operators.

EACC last argues that section 725.607 is invalid if it entitles a claimant to twenty-percent additional compensation notwithstanding the Trust Fund's payment of benefits on behalf of a defaulting employer. EACC's Brief at 12-18. EACC claims that providing additional compensation "to claimants that already have use of the money as paid by the Trust Fund would constitute pure windfall and be inconsistent with the purpose of the §914(f) penalty which was to insure [that] injured workers timely received their benefits." EACC's Brief at 17.

The validity of a regulation promulgated under the BLBA will be sustained if it is "reasonably related to the purposes of the enabling legislation." *Harman Mining Co. v. Director, OWCP*, 826 F.2d 1388, 1390 (4th Cir. 1987), quoting *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Nat'l Mines Corp.*, 554 F.2d at 1275. BLBA regulations

"are presumptively valid," and the party seeking to demonstrate their invalidity bears a "heavy burden." *Harman Mining*, 826 F.2d at 1390. EACC has not met that burden here.

Section 725.607 is reasonably related to the purposes of the BLBA. The Act imposes on coal mine operators primary liability for benefits due their former employees who are totally disabled due to pneumoconiosis. 30 U.S.C. §932(a), (h). Congress intended to impose liability for black lung benefits on individual coal mine operators – rather than the Trust Fund – to the "maximum extent feasible." *Old Ben Coal Co. v. Luker*, 826 F.2d 688, 693 (7th Cir. 1987), citing S. Rep. 95-209, 95th Cong., 1st Sess. 9 (1977), reprinted in *Committee on Education and Labor, House of Representatives, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* at 612 (Comm. Print) (1979).

The Trust Fund, therefore, is a payor of last resort. It is available to make payments when no liable coal mine operator may be identified or the liable coal mine operator defaults. 26 U.S.C. §9501(d)(1)(A), (B); see generally *Director, OWCP v. Trace Fork Coal Co.*, 67 F.3d 503, 506 n. 6 (4th Cir. 1995) (Trust Fund must pay benefits when a coal mine operator cannot be held liable); *Nat'l Mines Corp.*, 554 F.2d at 1275 (Trust Fund must pay benefits when liable operator defaults).

Section 725.607 seeks to encourage operators to comply with effective awards pending appeal, thereby protecting the Trust Fund from being used as an operator-surrogate while an award is contested. Operator non-compliance with effective awards has been a pervasive problem under the BLBA and has contributed significantly to the Trust Fund's multi-billion dollar debt. 65 Fed. Reg. 80009-11 (Dec. 20, 2000); 64 Fed. Reg. 54999-55000 (Oct. 8, 1999). DOL explained section 725.607's purpose in detail in the preamble to the revised black lung program regulations. 65 Fed. Reg. at 80009-11; see also 64 Fed. Reg. at 54999-55001; 62 Fed.

Reg. 3365-66 (Jan. 22, 1997).²¹ Just as EACC argues here, operators had commented that the Trust Fund's statutory obligation to pay interim benefits after an operator declined to do so eliminated the need for the twenty-percent provision because Trust Fund payment put compensation in the claimant's hands during an employer's appeal. In response, DOL explained that the congressional objective of ensuring timely receipt of benefits by claimants "does not extend to insulating the responsible operator from the economic risks of paying benefits on an award which might ultimately be reversed." 64 Fed. Reg. at 55000.

Clearly there is a risk that claimants whose awards are reversed will be unable to repay the resulting overpayment.²² "[R]ecovering overpayments from a largely elderly and unemployed population [is] problematic at best." 65 Fed. Reg. at 80011. An operator's failure to comply with an ALJ award pending appeal shifts to the Trust Fund the risk of non-recovery of overpayments. That risk, however, properly rests with the liable operator. 65 Fed. Reg. at 80009-11; 64 Fed. Reg. at 54999-55001.²³

To discourage operators from using the Trust Fund in this manner, DOL promulgated section 725.607 and made explicit an operator's liability for twenty-percent additional

²¹ DOL made only technical revisions to section 725.607 in 2000. See 65 Fed. Reg. 79925 (Dec. 20, 2000) (list of regulations which underwent technical revisions). Nevertheless, the preamble discussed section 725.607's role in the regulatory scheme in the context of the substantive revisions to section 725.502.

²² An overpayment occurs when more than the correct amount is paid to a claimant. 42 U.S.C. §404 (incorporated by 30 U.S.C. §§923(b), 940); 20 C.F.R. §725.540.

²³ If an award is reversed, the amount the Trust Fund paid the claimant becomes an overpayment that the Department may seek to recover. 42 U.S.C. §404 (incorporated by 30 U.S.C. §§923, 940); 20 C.F.R. §725.522(c). A claimant is entitled to waiver of recovery of an overpayment, however, if recovery will either defeat the purposes of the BLBA (*i.e.*, deprive the claimant of income or assets needed to meet ordinary and necessary living expenses) or be against equity and good conscience. 20 C.F.R. §§725.542, 725.543.

compensation when the Trust Fund pays benefits on account of an operator's default. 65 Fed. Reg. at 80009. The regulation imposes on EACC the cost of additional compensation because of its failure to timely pay the claimant the benefits owed pursuant to effective ALJ awards, a failure that necessitated Trust Fund payment and the associated risk of non-recovery of any overpayment. In this manner, the regulation serves Congress' purpose of imposing liability on responsible operators to the "maximum extent feasible." 65 Fed. Reg. at 80010.²⁴

Finally, EACC argues that receipt of twenty-percent additional compensation would be a "windfall" to the claimant where, as here, the Trust Fund paid her benefits throughout the entitlement litigation. EACC's Brief at 17. Imposition of liability for twenty-percent additional compensation, however, seeks to deter coal mine operators from failing to comply with effective awards in future cases. It attempts to protect the Trust Fund from operator default such as happened here. This public purpose overrides the fact that a claimant may receive additional compensation.

In sum, section 725.607 serves the BLBA's purpose of imposing on coal mine operators primary liability for benefits due their former employees who are totally disabled due to pneumoconiosis. The operator held liable for benefits pursuant to an effective award must pay the claimant in a timely manner or pay twenty-percent additional compensation. The regulation is reasonably related to the statute's purpose and is therefore valid.

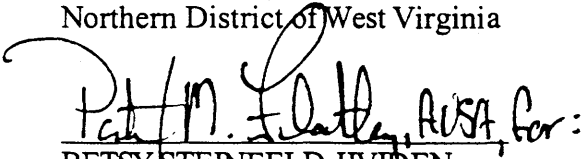
²⁴ The preamble explained that the only concern Congress expressed with regard to the application of section 14(f) in black lung cases was that an operator be afforded the right to contest the claim before application of the provision. 65 Fed. Reg. at 80011 (quoting 127 Cong. Rec. 19,645 (1981)). EACC has not claimed that it was subjected to section 14(f) liability without a hearing, although that would be the effect of accepting Mrs. Nowlin's argument that EACC is liable for additional compensation on benefits paid pursuant to the district director's May 4, 1981 award.

CONCLUSION

For all of the foregoing reasons, the Director, OWCP, respectfully urges the Court to deny EACC's motion for summary judgment, and to grant Mrs. Nowlin's motion for summary judgment to the extent it seeks twenty-percent additional compensation on those benefits the Trust Fund paid pursuant to an effective award.

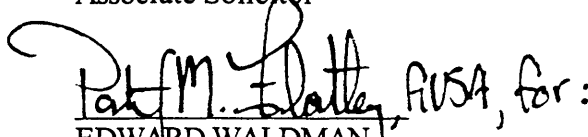
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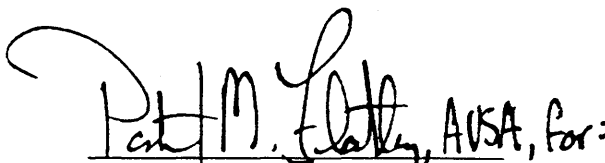
CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2003, a copy of the foregoing Brief of *Amicus*

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