

BRB No. 98-0863 BLA

CLYDE ROBERTS	)	
	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: <u>9/1/99</u>
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED )	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Jennifer U.Toth (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-012) of Administrative Law Judge John C. Holmes (the administrative law judge) denying benefits 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). The administrative law judge treated claimant's request for a hearing as a request for modification. He noted that the merits of the case had been previously addressed, following a full hearing, and that benefits had been denied. The administrative law judge observed that claimant had withdrawn his Notice of Appeal to the Board challenging the denial of benefits. The administrative law judge stated that with his new request, claimant has submitted no new evidence, and that therefore there would be no reason to hold another hearing. He concluded that "[t]his matter has been fully litigated." He stated that his prior determination denying benefits, "is adopted herein." On appeal, claimant contends that the administrative law judge erred by allowing the Director to contest entitlement following the district director's initial determination of entitlement. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

The procedural history of this case is as follows: Claimant filed his first application for benefits in 1978. Director's Exhibit 1. On November 6, 1979, the Office of Workers' Compensation Programs found claimant entitled to benefits and designated Apollo Fuels, Inc., (Apollo) as the responsible operator liable for the payment of benefits. Director's Exhibit 18. At some point thereafter, the files in this case were lost by the deputy commissioner's office for almost ten years. Director's Exhibits 19, 20. When the case resurfaced in 1992, the district director (formerly, the deputy commissioner) issued an Order to Show Cause why the case should not be reopened and readjudicated. On May 12, 1992, Apollo responded by controverting the claim and filing a motion to be dismissed.<sup>1</sup> Director's Exhibit 21. Following *de novo* reconsideration of the case, on May 2, 1993, the district director issued a determination sustaining the initial finding of entitlement from November 6, 1979. Director's Exhibit 38. Apollo disagreed with the district director's determination and requested a hearing before an administrative law judge. On March 15, 1994, Administrative Law Judge James Guill issued an Order denying employer's motion to dismiss it as the responsible operator in this claim. Director's Exhibit at 52. Thereafter, the Director filed a Motion to Remand the case to the district director for further development of the responsible operator issue. Director's Exhibit 72. In response to the motion, Apollo joined in the request for a remand to the district director. Director's Exhibit 73. On March 16, 1995, Administrative Law Judge Ainsworth H. Brown granted the Motion to Remand for further consideration of the responsible operator issue. Director's Exhibit 74. Thereafter, on January 7, 1997, the administrative

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<sup>1</sup>Apollo Fuels, Inc., (Apollo) controverted its designation as responsible operator and argued that readjudication of the claim at this point was barred by the legal doctrine of laches. Director's Exhibit 21. Apollo argued that the unreasonable delay in the adjudication of this claim by the Department of Labor prejudiced its defense. *Id.* Apollo also argued that the claim failed to establish the medical elements of entitlement. Apollo asserted that claimant was not employed as a miner within the meaning of the Act. Director's Exhibit 22.

law judge issued a Decision and Order denying benefits<sup>2</sup>, dismissing Apollo as the responsible operator and remanding the case to the district director. Director's Exhibit 86. Claimant filed a Notice of Appeal to the Board challenging this determination on February 1, 1997. Director's Exhibit 87. On February 20, 1997, the Director filed a cross-appeal. Director's Exhibit 89. Subsequently, claimant requested dismissal of his appeal, noting that the administrative law judge's Decision and Order is not actually a denial of benefits, but is rather "a remand and not a decision and order denying benefits, as is indicated on the face of the

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<sup>2</sup> The administrative law judge found that the medical evidence of record failed to establish invocation of the interim presumption under any of the provisions of 20 C.F.R. §727.203(a). In the alternative, the administrative law judge found rebuttal established pursuant to Section 727.203(b)(3) and (b)(4).

document.”<sup>3</sup> Director’s Exhibit 91. On April 24, 1997, the Board granted claimant’s motion to dismiss his appeal and consequently dismissed the Director’s cross-appeal as well. Director’s Exhibit 94. The district director reconsidered the claim and on July 14, 1997 issued an order denying benefits. The district director noted that if no party objected to his determination within thirty days, benefits already paid would represent an overpayment.<sup>4</sup> Director’s Exhibit 95. On August 7, 1997, claimant filed an objection to the district director’s determination. Director’s Exhibit 96. The Office of Workers’ Compensation Programs accepted claimant’s objection as a

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<sup>3</sup> In his Decision and Order, after dismissing Apollo as the responsible operator, the administrative law judge remanded the case to the Office of Workers' Compensation Programs. The administrative law judge stated that he found claimant was not entitled to benefits, but added that “[T]he Director may come to a similar conclusion and change [his] position with respect to this issue, permitting Claimant to argue legal issues presented.” Director’s Exhibit 86 at 6. Thus, it appears that the administrative law judge declined to make a definitive finding of eligibility.

<sup>4</sup> The district director found that the interim presumption could not be invoked under any subsection of 20 C.F.R. §727.203(a). He held that claimant could not establish entitlement pursuant to 20 C.F.R. Part 727. The district director then reviewed the case under 20 C.F.R. Part 718. He found that claimant failed to establish the presence of pneumoconiosis or total disability due to pneumoconiosis. Thus, the district director essentially followed the administrative law judge’s discussion of the evidence.

request for a hearing. Director's Exhibit 98. On October 23, 1997, the administrative law judge issued an Order To Show Cause why further litigation of this claim should not be precluded. Claimant responded to the Order, stating that he was requesting a "hearing on the merits of the entitlement claim as well as...waiver of the overpayment issue." Unnumbered Exhibit. On February 17, 1998, the administrative law judge issued a Decision and Order in which he concluded that "[ t]his matter has been fully litigated."<sup>5</sup> He declined to relitigate the case, stating that his prior determination denying benefits, "is adopted herein." Decision and Order at 2. Claimant filed the instant appeal.

The Board's scope of review is defined by statute. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a). 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 on the Board and may not be disturbed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant's sole substantive argument on appeal is that the Decision and Order denying benefits should be vacated because the law does not permit the Director to change his position after conceding entitlement for nearly twenty years. Procedurally, claimant asserts that the administrative law judge violated the Administrative Procedure Act, (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in that he failed to consider this issue in his Decision and Order. We disagree.

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<sup>5</sup> The administrative law judge appears to have treated claimant's request for a hearing as a request for modification. The administrative law judge noted that he had previously addressed this case on the merits, following a full hearing, and denied benefits. He also noted that claimant had withdrawn his Notice of Appeal to the Board. The administrative law judge stated that with his new request, claimant has submitted no new evidence, and there was no reason to hold another hearing. Decision and Order at 1.

The administrative law judge did not ignore the district director's previous approval of claimant's application for Black Lung benefits. In the initial Decision and Order of January 7, 1997, the administrative law judge addressed the fact that the Director had altered his position on the issue of entitlement after Apollo was dismissed as the responsible operator. The administrative law judge noted that, on three occasions, the Director ignored the fact that claimant failed to establish total disability and declared him entitled to benefits. Decision and Order at 3. However, the administrative law judge did not find this a sufficient basis upon which to reject the Director's most recent challenge to claimant's pursuit of benefits. Claimant cites no authority for the proposition that the Director cannot change his position from that of the initial determination, and we know of none. In *Shortt v. Director, OWCP*, 766 F.2d 172, 8 BLR 2-9 (4th Cir. 1985), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, held that the Director is not bound by the determinations of the district director made prior to the adjudication of the claim. 766 F.2d at 173; 8 BLR at 2-13. In *Shortt*, the Fourth Circuit held that the intervening decision of the administrative law judge serves to "nullify the preliminary decision" issued by the district director. *Id.* The court noted that a claim for benefits "must survive review by the ALJ, the Board, and the courts of appeal before it becomes binding on the Director."<sup>6</sup> *Id.* at 173, 2-14.

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<sup>6</sup>We recognize that the length of time that this case has been within the adjudicatory process has far exceeded the time in which Black Lung Benefits cases are usually resolved. However, we agree with Judge Guy's concurring opinion in *Director, OWCP v. Oglebay Norton Co.*, 877 F.2d 1300, 1306, 12 BLR 2-357, 2-360 (6th Cir. 1989), wherein he observed that no due process rights were implicated, nor other injustice suffered, by exposing the claimant to the possibility of having to defend at a hearing before an administrative law judge the initial determination of entitlement which had been made approximately eight years earlier. This principle has been reiterated by the Fourth Circuit Court of Appeals, which has stated that "[i]t is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay." (Citation omitted). *Consolidation Coal Co. v. Borda*, 171 F.3d 143, 150, 21 BLR 2-545 (4th Cir. 1999). Inasmuch as claimant has not alleged any undue prejudice resulting from the Director's change in position in the instant case, we decline to disturb the

Therefore, we hold that, as a matter of law, the Director had the right, as well as the obligation, to reconsider the initial determination of entitlement in view of the administrative law judge's contrary determination.

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administrative law judge's Decision and Order.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge