PART III

PROCEDURAL ISSUES

F. VIABILITY OF CLAIMS

3. MERGER OF CLAIMS/SUBSEQUENT CLAIMS

DIGESTS

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.309(d), regarding subsequent claims, is not "impermissibly retroactive," and, therefore, may be applied to all claims pending on January 19, 2001. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 863-864, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit rejected the argument that 20 C.F.R. §725.309(d) is impermissibly retroactive in combination with the revised regulation at 20 C.F.R. §718.201(c), which recognizes that pneumoconiosis can be latent and progressive. The court held that the revised regulation at Section 725.309(d), does not create an irrebuttable presumption that a claimant's pneumoconiosis is progressive, but rather places the burden of proof squarely on the claimant to prove a change in an applicable condition of entitlement such as whether he developed pneumoconiosis since the denial of the prior claim. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 863-864, 869-870, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.309(d), requiring a claimant to demonstrate that one of the applicable conditions of entitlement has changed since the denial of the prior claim, is valid, not arbitrary or capricious, and does not "waive [as NMA asserted] *res judicata* or traditional notions of finality." ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 869-870, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

A subsequent claim filed by a surviving divorced spouse, where the initial claim was denied solely because claimant failed to establish her dependency on the miner, must be denied because claimant cannot establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d). The issue of the dependency of a surviving divorced spouse is not capable of change after the miner's death. 20 C.F.R. §725.217. ***See Tucker v. Director, OWCP***, 23 BLR 1-42 (2004).

The Board held that the administrative law judge erroneously considered the propriety of the district director's 1992 denial of the prior claim as untimely filed under 20 C.F.R. §725.308, where that denial is final and not subject to challenge. The Board determined that the pertinent issue is, rather: What effect does the district director's final denial of the prior claim have on the instant subsequent claim filed in 2002? The Board agreed with employer's argument that the district director's final denial of the prior claim based on its untimeliness is *res judicata* and its effect is to bar the filing of the instant subsequent claim. The Board thus held that the administrative law judge's Order Denying Employer's Motion to Dismiss is erroneous as a matter of law and reversed it. Consequently, the Board vacated the administrative law judge's Order Denying Employer's Motion for Reconsideration and Decision and Order – Awarding Benefits in the instant subsequent claim. ***Stolitza v. Barnes & Tucker Co.***, 23 BLR 1-93 (2005).

The Fourth Circuit, citing its unpublished decision in ***Westmoreland Coal v. Amick***, No. 04-1147, 2004 WL 2791653 (4th Cir. Dec. 6, 2004), held that the statute of limitations provided by Section 422(f) of the Act, 30 U.S.C. §932(f), and implemented by 20 C.F.R. §725.308, applies to both initial and subsequent claims. The Court held that because neither the statute nor the Section 725.308 regulation makes any distinction between initial or subsequent claims, simply referring to "any" or "a" claim for benefits, an interpretation of the statute or regulation that makes a distinction between initial and subsequent claims is precluded. ***Sewell Coal Co. v. Director, OWCP* [*Dempsey*]**, 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008), *vac'g and remanding* ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

In a case involving a subsequent claim filed under the revised regulations, the United States Court of Appeals for the Fourth Circuit rejected employer's assertion that the administrative law judge did not properly consider evidence from the prior claim. The court explained that because 20 C.F.R. §725.309 states that any evidence from the prior claim is part of the record, and "because the administrative law judge must review the entire record before making a determination, . . . it follows that she must also take into account the existence of any pre-denial evidence." The court determined that the administrative law judge had fulfilled her obligation under Section 725.309, as she specifically referred to evidence from the prior claim and found that it was consistent with her finding, based on the newly submitted evidence, that claimant "had since established statutory complicated pneumoconiosis." ***Westmoreland Coal Co. v. Cox***, 602 F.3d 276, BLR (4th Cir. 2010).

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