

BRB No. 09-0725 BLA

JUANITA SPANGLER)
(o/b/o the Estate of FRED SPANGLER))
)
 Claimant-Respondent)
)
 v.) DATE ISSUED: 07/30/2010
)
 DONNA KAY COAL COMPANY,)
 INCORPORATED, d/b/a MAYNARD)
 HOGG)
)
 and)
)
 BITUMINOUS CASUALTY)
 CORPORATION, c/o OLD REPUBLIC)
 INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order Denying Employer's Motion for Reconsideration and the Decision and Order on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Denying Employer's Motion for Reconsideration and the Decision and Order on Remand (2007-BLA-06011) awarding benefits of Administrative Law Judge Janice K. Bullard (the administrative law judge), with respect to a subsequent claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).² This case is before the Board for a second time.³ After crediting the miner with more than twenty-

¹ The miner previously filed claims on October 30, 1975, April 5, 1984, April 18, 1990, and March 15, 1999, which were all ultimately denied. Director's Exhibits 1, 2. The district director denied the miner's 1999 claim because the miner did not establish any element of entitlement. Director's Exhibit 2. The miner did not take any further action until he filed a subsequent claim on January 28, 2003. Director's Exhibit 3.

² By Order dated April 7, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Spangler v. Donna Kay Coal Co.*, BRB No. 09-0725 BLA (Apr. 7, 2010)(unpub. Order). The Director, Office of Workers' Compensation Programs (the Director), responded, arguing that Section 1556 does not apply to the instant claim as it was filed prior to January 1, 2005. Claimant also responded and asserted that, based on the miner's twenty-five years of coal mine employment, Section 1556 applied and that the case should be remanded for further administrative proceedings. We agree with the Director that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as the relevant claim was filed prior to January 1, 2005.

³ The miner's current claim was initially denied by the district director on December 10, 2003, and the miner requested a hearing before an administrative law judge. Director's Exhibits 25, 26, 33. The claim was assigned to Administrative Law Judge Thomas F. Phalen, Jr., who issued a Decision and Order on July 11, 2006, denying benefits. Director's Exhibit 36. The miner appealed to the Board, which issued a Decision and Order on March 27, 2007, remanding the case to the district director to provide the miner with a complete pulmonary evaluation and denying employer's request to be dismissed as the responsible operator. *Spangler v. Donna Kay Coal Co.*, BRB No. 06-0832 BLA (Mar. 27, 2007) (unpub.). A complete pulmonary evaluation was obtained and the matter was again referred to the Office of Administrative Law Judges, where it

five years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge concluded, based on the stipulation of the parties, that the miner established the existence of complicated pneumoconiosis arising out of coal mine employment and was entitled, therefore, to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. The administrative law judge further found that the miner established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) and awarded benefits accordingly. The administrative law judge designated April 23, 2004, as the date from which the miner was entitled to benefits, based upon the parties' stipulation.

Employer appeals, arguing that claimant has not shown that she is a proper party to the claim.⁴ In addition, employer asserts that the failure of the Department of Labor (DOL) to initially provide a complete pulmonary evaluation, and to timely raise the issue, violated employer's due process rights. Claimant responds, urging affirmance of the administrative law judge's Order substituting her as a party and the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), agrees with employer that the administrative law judge erred in substituting claimant as a party to the claim, but argues that the case should be remanded for the administrative law judge to determine if an appropriate substitute party exists. The Director also states that employer's due process argument is without merit.⁵

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in

was assigned to Administrative Law Judge Janice K. Bullard (the administrative law judge). Director's Exhibits 36, 38.

⁴ Claimant is the daughter-in-law of the miner, Fred Spangler, who died on May 17, 2008, while this claim was pending before the administrative law judge. Claimant's Exhibit 2.

⁵ We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner was entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304, and that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We also affirm, as unchallenged on appeal, the administrative law judge's determinations that there was a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d), and that the miner was entitled to benefits. *Id.*

accordance with applicable law.⁶ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Party to the Claim

A. Background

By motion dated June 17, 2008, the miner’s counsel notified the administrative law judge that the miner had died and requested an additional forty-five days to submit evidence. On July 10, 2008, the administrative law judge issued an order denying the request for an extension of time, but granted counsel thirty days to name a substitute party. By motion dated July 16, 2008, claimant’s counsel asked that the miner’s daughter-in-law “be substituted as a party of record in the instant claim,” stating that she “would like to continue to pursue this claim on behalf of the estate of [the miner].”⁷ Claimant’s Motion to Substitute Party at 1. On August 4, 2008, the administrative law judge issued an order granting the motion. Employer filed a motion for reconsideration on August 15, 2008, which the administrative law judge denied on August 22, 2008. The administrative law judge determined that she retained jurisdiction to name a substitute party and stated that, pursuant to 20 C.F.R. §§725.301 and 725.360, any individual may proceed with a miner’s claim if good cause is shown. Order Denying Employer’s Motion for Reconsideration at 1-2. Further, the administrative law judge found that the miner’s daughter-in-law could qualify as a party under 20 C.F.R. §725.545, which identifies the persons who may be entitled to receive unpaid benefits. *Id.* at 3. Because employer did not provide any evidence that claimant was not acting on behalf of the miner’s estate, the administrative law judge found good cause established and permitted claimant to proceed with the miner’s claim for benefits. *Id.*

B. Arguments on Appeal

Employer argues that the administrative law judge did not determine whether the miner’s daughter-in-law established that she is a representative of the miner’s estate. Employer also contends that the administrative law judge did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the

⁶ The record reflects that the miner’s coal mine employment was in Kentucky. Director’s Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁷ We note that claimant retained the same counsel who was representing the miner at the time of his death.

Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a) as, in her Order Denying Employer's Motion for Reconsideration, she shifted the burden to employer to prove that claimant is not a proper party. In addition, employer alleges that the administrative law judge did not explain how claimant established that she was a representative of the miner's estate or that she had authority to act on behalf of an unadministered estate pursuant to 20 C.F.R. §725.545(e). Further, employer contends that the administrative law judge erred in relying upon 20 C.F.R. §725.360(a)(2) to find that claimant is a party. Employer argues that the case should be dismissed, therefore, because there is no viable claimant.

Claimant responds and asserts that the administrative law judge properly substituted her as a party after the miner's death. The Director also responds and agrees with employer, that the administrative law judge erred in designating claimant as a party, because claimant did not prove that she met the criteria set forth in the regulations. The Director further maintains that, contrary to employer's request for dismissal, the case should be remanded to the administrative law judge for a determination of the proper substitute party.

Upon review of the parties' arguments and the facts of this case, we agree with employer and the Director that the administrative law judge erred in designating claimant as a party to this claim and that she did not comply with the APA. The identification of a valid party to a claim is governed by several regulations. In relevant part, 20 C.F.R. §725.360 confers party status upon: a claimant; a person authorized to execute a claim on behalf of a claimant who is physically or legally impaired; a widow, child, parent, brother or sister of a claimant or the representative of a claimant's estate who makes a showing that his or her rights may be prejudiced by a decision; and any other person whose rights with respect to benefits may be prejudiced by a decision. 20 C.F.R. §725.360(a)(1),(2), (b), (d). The regulation set forth at 20 C.F.R. §725.545(c) defines those persons who may be entitled to recoup an underpayment of benefits, thereby qualifying as a party whose rights may be prejudiced by a decision, in accordance with 20 C.F.R. §725.360(b).⁸ Under 20 C.F.R. §725.545(c):

If an individual to whom an underpayment was made dies before receiving payment of the deficit or negotiating the check or checks representing payment of the deficit, such payment shall be distributed to the living person (or persons) in the highest order of priority as follows:

(1) The deceased individual's surviving spouse

⁸ Pursuant to 20 C.F.R. §725.545(a), an "underpayment" includes a nonpayment of benefits.

- (2) In the case of a deceased miner or spouse his or her child entitled to benefits as the surviving child of such miner or surviving spouse for the month in which such miner or spouse died (if more than one such child, in equal shares to each such child).
- (3) In the case of a deceased miner, his parent entitled to benefits as the surviving parent of such miner for the month in which such miner died (if more than one such parent, in equal shares to each such parent).
- (4) The surviving spouse of the deceased individual who does not qualify under paragraph (c)(1) of this section.
- (5) The child or children of the deceased individual who do not qualify under paragraph (c)(2) of this section (if more than one such child, in equal shares to each such child).
- (6) The parent or parents of the deceased individual who do not qualify under paragraph (c)(3) of this section (if more than one such parent, in equal shares to each such parent).
- (7) The legal representative of the estate of the deceased individual as defined in paragraph (e) of this section.

20 C.F.R. §725.545(c). In the present case, employer and the Director argue correctly that the administrative law judge did not properly apply the pertinent regulations.

Contrary to the administrative law judge's finding in her Order Denying Employer's Motion for Reconsideration, claimant cannot qualify as a party under 20 C.F.R. §725.360(a)(2), which refers to a person who has filed a claim on behalf of a living individual, who is unable to do so because of a physical or legal impairment. 20 C.F.R. §725.360(a)(2), *citing* 20 C.F.R. §725.301. In this case, 20 C.F.R. §725.360(a)(2) and its corollary, 20 C.F.R. §725.301(c), do not apply because the claim at issue was filed by the miner during his lifetime.⁹ 20 C.F.R. §725.301(c), (d); Director's Exhibit 3. Furthermore, claimant, as the miner's daughter-in-law, does not fall within any of the categories of relatives listed in either 20 C.F.R. §725.360(b), as a person who may be a party to a claim, or 20 C.F.R. §725.545(c)(1)-(6), as a person who is entitled to recoup an underpayment of benefits.¹⁰

⁹ Claimant does not assert that she is a beneficiary of the miner's estate whose rights could be prejudiced by a decision under 20 C.F.R. §725.360(d).

¹⁰ Claimant has not alleged any relationship that would require consideration under 20 C.F.R. §725.545(c)(1)-(6).

Under the facts of this case, therefore, claimant may qualify as a party only if she is a legal representative of the miner's estate, entitled to recoup the underpayment of benefits to which the miner was entitled during his lifetime under 20 C.F.R. §725.545(c)(7). See *Youghioghney & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995). Pursuant to 20 C.F.R. §725.545(e), a "legal representative" of the miner's estate generally means the executor or administrator, but may include an individual acting on behalf of an unadministered estate or a person "who has the authority under applicable law to collect the assets" of the miner's estate. 20 C.F.R. §725.545(e). This person must also be able to give the Office of Workers' Compensation Programs (OWCP) "good acquittance." *Id.* "Good acquittance" occurs when payment to the person releases OWCP from liability for the payment of benefits. 20 C.F.R. §725.545(f).

Because the administrative law judge did not properly consider whether claimant qualified as a legal representative under 20 C.F.R. §725.545(e), we must vacate the administrative law judge's determination that claimant is a proper party to these proceedings. In addition, we agree with the Director that, under the circumstances of this case, remand to the administrative law judge for reconsideration of whether claimant is a proper party is appropriate.¹¹ Whether claimant is a proper party is a question of fact for the administrative law judge to resolve, based upon the application of the regulations. Accordingly, we remand this case to the administrative law judge to address the issue of whether claimant is a proper party of the miner's estate pursuant to 20 C.F.R. §725.545.

II. Due Process

A. Procedural History

This case was initially assigned to Administrative Law Judge Thomas F. Phalen, Jr., who issued a Decision and Order on July 11, 2006, denying benefits. Director's Exhibit 36. The miner appealed to the Board, which issued a Decision and Order on March 27, 2007, granting the Director's request to remand the case to the district director to provide the miner with a complete pulmonary evaluation and denying employer's request to be dismissed as the responsible operator. *Spangler v. Donna Kay Coal Co.*, BRB No. 06-0832 BLA (Mar. 27, 2007)(unpub.). A complete pulmonary evaluation was obtained and the matter was again referred to the Office of Administrative Law Judges, where it was assigned to the administrative law judge. Director's Exhibits 36, 38. While the claim was pending before the administrative law judge, the miner died on May 17, 2008, and the miner's counsel sought an extension of time to allow him to procure

¹¹ The administrative law judge may reopen the record for the submission of evidence relevant to this issue, or entertain motions from any other person who claims the right to proceed on behalf of the miner or his estate. 20 C.F.R. §725.456.

additional evidence. The administrative law judge initially denied this motion, but subsequently permitted the record to be reopened for the admission of the report of the miner's autopsy.

On February 25, 2009, employer, in a letter to the administrative law judge, "agree[d] that the autopsy evidence establishe[d] complicated pneumoconiosis and entitlement to the irrebuttable presumption at 20 C.F.R. §718.304," thereby withdrawing its controversion of the claim. However, employer continued to contest the date on which the miner's entitlement to benefits commenced and claimant's standing to pursue the claim.

B. Arguments on Appeal

Employer argues that the fact that the DOL did not recognize that it had failed to meet its statutory obligation to provide the miner with a complete pulmonary evaluation, until the initial appeal before the Board, deprived employer of the opportunity to mount a meaningful defense. Employer maintains that the delay in raising this issue caused it to defend the claim for several additional years, which allowed for the development of better evidence in the form of the autopsy report. Further, employer asserts that the delay compromised its ability to respond to the new evidence. The Director urges the Board to reject employer's argument, as employer failed to preserve its due process objection and did not establish that a violation of its right to due process has occurred.

We hold that there is no merit to employer's due process argument. When an employer has received notice of the claim, and has been able to respond to the evidence supportive of a finding of entitlement, allegations of a denial of due process have been rejected by the courts, even when there have been significant delays in the proceedings. *Amax Coal Co. v. Director, OWCP* [Chubb], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *C & K Coal Co. v. Taylor*, 165 F.3d 254, 21 BLR 2-523 (3d Cir. 1999). Further, employer's reliance on *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), is misplaced. In *Borda*, the court ordered transfer of liability to the Black Lung Disability Trust Fund because the DOL's delay in notifying the employer of the claim prevented the employer from mounting a meaningful defense, thereby violating the employer's due process rights. *Borda*, 171 F.3d at 182-84, 21 BLR at 2-558-62. In the present case, employer was properly notified of the miner's claim and has had the opportunity to defend its position and submit relevant evidence throughout all stages of the litigation of this case.

We further hold that there is no merit to employer's allegation that it was prejudiced by the remand to the district director for a complete pulmonary evaluation because it "provided [c]laimant the ability to submit better evidence" and "denied employer the benefits of the earlier denial." Employer's Brief at 10-11. Employer opted

not to submit any evidence to rebut the report of the miner's autopsy and, instead, sought judgment on the record following the autopsy report's submission. *See* Employer's Letter dated February 25, 2009. Subsequently, employer stipulated to its own liability by conceding that the autopsy report established complicated pneumoconiosis and entitlement to the irrebuttable presumption at 20 C.F.R. §718.304. *Id.* Thus, the DOL did not deprive employer of an opportunity to present a meaningful defense. *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). We reject, therefore, employer's assertion that it should be dismissed as the operator responsible for the payment of benefits in this case.

III. Attorney Fee Request

On June 29, 2009, claimant's counsel filed an attorney fee application for services performed before the Board from August 3, 2006 to October 17, 2008, pursuant to 20 C.F.R. §802.203, BRB Nos. 06-0832 BLA and 08-0845 BLA. Counsel requests a total fee of \$1,743.75 for 7.75 hours of legal services at an hourly rate of \$225.00. In light of our decision to remand this case to the administrative law judge for further proceedings, we decline to address the fee petition at this time.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge