BRB No. 10-0420 BLA

ALBERT D. HARRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CANNELTON INDUSTRIES, INCORPORATED	)	DATE ISSUED: 04/29/2011
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

William S. Mattingly and William P. Margelis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2009-BLA-5368) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim, filed on April 1, 2008, 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). Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge credited claimant with at least thirty-five

years of coal mine employment, as supported by the Social Security Administration earnings records, and found that employer was the properly designated responsible operator. Noting that employer stipulated to the existence of pneumoconiosis in claimant's prior claim,[1] the administrative law judge found that employer was bound by its stipulation in the present claim. Therefore, the administrative law judge found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a), and that the evidence did not rebut the presumption that the pneumoconiosis arose out of claimant's coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the newly submitted medical evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that the weight of the evidence of record was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis, based on the stipulation from claimant's 1982 claim, arguing that the administrative law judge impermissibly applied 20 C.F.R. §725.309(d)(4)(2010) retroactively. Employer further contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.204(c). Additionally, while agreeing that this claim falls within the category of claims potentially affected by the 2010 amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] employer asserts that the claim must be remanded for the administrative law judge to determine the applicability of Section 411(c)(4).[3]

[1] Claimant filed his first claim for benefits on August 12, 1982. Director's Exhibit 1. In a Decision and Order issued on May 14, 1986, Administrative Law Judge John C. Holmes accepted employer's stipulation to the existence of pneumoconiosis, finding it supported by the positive x-ray evidence of record. Judge Holmes, however, found that the evidence failed to establish the presence of a totally disabling respiratory impairment. Accordingly, he denied benefits. *Id*. Claimant took no further action until filing the present claim on April 1, 2008. Director's Exhibit 3.

[2] Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and were pending on or after March 23, 2010, the effective date of the amendments.

[3] Relevant to this claim, Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption

The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with employer that the administrative law judge erred in finding that employer's stipulation in the 1982 claim is binding in this claim pursuant to Section 725.309(d)(4)(2010). The Director argues that the language regarding stipulations contained in Section 725.309(d)(4)(2010),[4] which was first revised in 2001, may be applied only prospectively. Director's Brief at 3, *citing* 20 C.F.R. §725.2 (2010). Therefore, the Director contends that the administrative law judge erred in applying the provision retroactively to find that employer's 1986 stipulation is binding, and so, the administrative law judge must reconsider the issue of the existence of pneumoconiosis. Additionally, the Director contends that the administrative law judge should consider claimant's entitlement under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), arguing that claimant's 2008 claim falls within the category of cases affected by the amendments to Section 411(c)(4).[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

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of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

[4] Section 725.309(d)(4) provides:

> If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see §725.463) shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

20 C.F.R. §725.309(d)(4)(2010).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that the new evidence of total respiratory disability demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and her finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) on the merits. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

and in 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).

To establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, we consider employer's contention that the administrative law judge erred in finding that the stipulation to the existence of pneumoconiosis from claimant's 1982 claim is binding in this case. The administrative law judge, by Order dated January 27, 2010, provided employer with additional time to submit medical evidence, based on employer's apparent lack of awareness that it had previously stipulated to the existence of pneumoconiosis in claimant's 1982 claim. Employer responded to the administrative law judge's Order, stating that Section 725.309(d)(4)(2010), which became effective on January 19, 2001, does not apply in this claim because it was not in effect at the time employer made its stipulation in the 1982 claim. Employer, therefore, argued that the stipulation to the existence of pneumoconiosis in the 1982 claim is not binding in this case. Noting employer's contentions, the administrative law judge, nonetheless, found that Section 725.309(d)(4)(2010)[7] applied to bind employer to its stipulation. Specifically, the administrative law judge found that, because claimant filed his subsequent claim on April 1, 2008, well after the revisions to Section 725.309 were enacted, application of the provisions of Section 725.309(d)(4)(2010) was not retroactive. Decision and Order at 10. Moreover, the administrative law judge found, citing *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996), and *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), that revised Section 725.309(d)(4)(2010) was merely a codification of previously existing law with respect to the binding nature of stipulations. *Id*. Consequently, the administrative law judge found that, "regardless of when [revised Section 725.309] took effect, the employer is bound by

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

[7] We note that the administrative law judge mistakenly referred to "[20 C.F.R. §]718.309" in her Decision and Order. *See* Decision and Order at 10-11. However, it is clear from her discussion of the subsequent claims provision contained at 20 C.F.R. §725.309, that these references to Section 718.309 are typographical errors.

its stipulation before Judge Holmes that [claimant] had pneumoconiosis." Decision and Order at 11.

Employer and the Director contend that the administrative law judge erred in applying Section 725.309(d)(4)(2010) retroactively to find that employer's stipulation, from the 1986 hearing, is binding in this claim. Specifically, employer and the Director assert that, because Section 725.309(d)(4)(2010) was not in effect at the time of the 1986 stipulation, employer had no notice that its stipulation could be binding in future litigation. Moreover, employer and the Director argue that the provisions of Section 725.309(d)(4)(2010) do not represent a codification of existing law with regard to the binding nature of stipulations in subsequent claims. Rather, the case law cited by the administrative law judge was relevant to the binding effect of stipulations in the continuation of litigation in the same claim. Therefore, employer and the Director contend that the administrative law judge impermissibly applied Section 725.309(d)(4)(2010) retroactively to the present claim.

As employer and the Director correctly contend, when employer stipulated to the existence of pneumoconiosis, at the 1986 hearing before Judge Holmes, the applicable regulations did not provide for such stipulations to be binding in future litigation. Rather, the language regarding the binding nature of stipulations was added to Section 725.309 in the revisions to the regulations, which became effective on January 19, 2001. *See* 65 Fed. Reg. 80054 (Dec. 20, 2000). Specifically, as the Director states:

> Section 725.309, as revised in 2001, added the provision concerning stipulations; however, that provision may only be applied prospectively. 20 C.F.R. §725.2 (2010). While the [administrative law judge] correctly noted the revised [S]ection 725.309(d) applies to [claimant's] pending 2008 claim, and thus to any stipulations that may be made in conjunction with this claim, she erred in applying it retroactively to a stipulation made fifteen years before the regulatory provision was promulgated. At the time [employer] stipulated to the presence of clinical pneumoconiosis, it had no notice that its stipulation would be binding in the adjudication of a subsequent claim. Therefore, the [administrative law judge's] application of [S]ection 725.309(d) is impermissibly retroactive.

Director's Letter Brief at 3.

We agree. The provision of Section 725.309(d)(4)(2010), making a party's stipulations in a prior claim binding in a subsequent claim, in concert with 20 C.F.R. §725.2, is not to be applied retroactively to stipulations made in claims filed on or before January 19, 2001. 20 C.F.R. §§725.2, 725.309(d)(4)(2010).

Consequently, we vacate the administrative law judge's finding that the existence of pneumoconiosis was established based on employer's stipulation in claimant's 1982 claim, and remand the case for the administrative law judge to consider all of the relevant evidence in determining whether the existence of pneumoconiosis is established pursuant to 20 C.F.R. §718.202(a). Moreover, because the administrative law judge's finding that the existence of pneumoconiosis was established affected her weighing of the medical opinion evidence on the issue of disability causation, we also vacate the administrative law judge's findings at 20 C.F.R. §718.204(c), and her award of benefits.

In light of our decision to vacate the administrative law judge's award of benefits, we agree with the Director that the administrative law judge must first consider whether claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Therefore, on remand, because the administrative law judge found that claimant had at least thirty-five years of coal mine employment and a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), the administrative law judge must initially determine whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). In determining whether claimant is entitled to the presumption at Section 411(c)(4), the administrative law judge must determine whether claimant worked at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988). If the administrative law judge determines that the presumption is invoked, she should then consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge must allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 11047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, any additional evidence submitted must be consistent with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge