

BRB No. 06-0344 BLA

CEDEDRICK TOWNSEND)
(Disabled Child of TOBY TOWNSEND,)
Deceased))
)
Claimant-Petitioner)
)
v.)
)
U.S. STEEL MINING COMPANY) DATE ISSUED: 12/22/2006
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Granting Summary Judgment and Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Evera Robinson, on behalf of Cededrick Townsend, Birmingham, Alabama, *pro se*.¹

James N. Nolan (Walston Wells & Birchall, LLP), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Granting Summary Judgment and Denying Benefits (03-BLA-6462) of Administrative Law Judge Jeffrey Tureck on a survivor's 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

¹ When the miner died on June 6, 1988, he was survived by his widow and claimant, his adopted child. Evera Robinson is the daughter of the miner, and she is also the natural mother of claimant. Ms. Robinson is assisting claimant in his pursuit of benefits. Directors' Exhibit 13.

et seq. (the Act). Claimant, the adopted son of the deceased miner, filed a claim for survivor's benefits on August 21, 2002. In a Proposed Decision and Order dated June 9, 2003, the district director denied benefits on the grounds that the medical evidence failed to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis. Director's Exhibit 19. At claimant's request, the case was scheduled for a formal hearing on April 20, 2005. Prior to the hearing, employer filed a motion for summary judgment, asserting that since the miner's widow had filed a claim for survivor's benefits, which had been denied by the Department of Labor on the ground that the miner's death was not due to pneumoconiosis, claimant's application for benefits likewise should be denied either because it is a duplicate survivor's claim or because the doctrine of *res judicata* applies.² At the hearing, the administrative law judge agreed to grant claimant additional time, until July 22, 2005, to obtain legal counsel, prior to ruling on employer's motion. Hearing Transcript at 8; *see also* Administrative Law Judge Order dated April 22, 2005. When claimant failed to obtain counsel in the time allotted, the administrative law judge issued his Decision and Order granting employer's motion for summary judgment. He specifically found that the elements of *res judicata* had been established to bar the claim. Accordingly, the administrative law judge denied benefits.

² The miner previously filed a claim on March 20, 1978, which was denied by Administrative Law Judge A.A. Simpson Jr., on September 1, 1983. A motion for reconsideration of this decision was also denied. Director's Exhibit 1. On November 12, 1985, the miner filed a duplicate claim. *Id.* Judge Simpson issued a Decision and Order denying benefits with respect to the duplicate claim on November 7, 1988. Director's Exhibit 1.

Following the miner's death on June 6, 1988, the miner's widow filed an application for survivor's benefits on July 11, 1988, identifying claimant as an adopted child of the deceased miner. Director's Exhibit 1. The widow's claim was denied by the district director on July 21, 1988. *Id.* On August 29, 1990, the widow filed a second claim, which was also denied by the district director. *Id.* At her request, a formal hearing was held before Administrative Law Judge A.A. Simpson Jr., on July 8, 1991. Director's Exhibit 1. Judge Simpson determined that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* Accordingly, Judge Simpson denied benefits. *Id.* His Decision and Order dated August 5, 1992 was subsequently affirmed by the Board on appeal. *See Townsend v. United States Steel Corporation*, BRB No. 92-2461 BLA (Jan. 31, 1994) (unpub.); Director's Exhibit 1. Although the widow filed an additional claim on August 8, 1997, that claim was abandoned, and the file was administratively closed by the Department of Labor. Director's Exhibit 2.

Employer responds to claimant's *pro se* appeal, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Based on our review of the administrative law judge's Decision and Order, the briefs of the parties, and the issues presented on appeal, we affirm, as supported by substantial evidence, the administrative law judge's decision to grant summary judgment and deny benefits. Under Section 725.452(c), an administrative law judge has authority to grant summary judgment "if the administrative law judge determines that there is no genuine issue as to any material fact[,] and that the moving party is entitled to the relief requested as a matter of law." 20 C.F.R. §725.452(c); *see* Decision and Order at 3.

In addressing the specifics of employer's motion for summary judgment, the administrative law judge properly rejected employer's first argument that claimant's application for survivor's benefits should be automatically denied because it constitutes a subsequent survivor's claim under 20 C.F.R. §725.309(d)(3). As noted by the administrative law judge, a subsequent claim is recognized as "'an application filed by the *same* individual after final denial of a prior claim,' Fed. Reg. 79,968 (2000) (emphasis added); *see* §725.309(d)." Decision and Order at 3. Because claimant has not filed any prior claims for benefits, the administrative law judge correctly found that claimant's current application is not a subsequent claim, and therefore, it is not subject to automatic denial under Section 725.309(d)(3).

Notwithstanding, we affirm the administrative law judge's alternative finding that employer was entitled to summary judgment because there was no genuine issue of material fact to be decided in the instant case. As noted by the administrative law judge, the prior judgment in the widow's claim, that the miner's death was not due to pneumoconiosis, is *res judicata* in the instant survivor's claim, and thus, bars the pending action, if "four factors are shown '(1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privities; and (4) both cases must involve the same causes of action[.]' *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11 Cir. 2001) (citing *Israel Discount Bank Ltd. v. Entin*, 951 F.2d 311, 314 (11th Cir. 1992);

In re Justice Oaks II, Ltd., 898 F.2d 1544, 1550 (11th Cir. 1990)).” Decision and Order at 3.

The administrative law judge correctly found that the prior survivor’s claim filed by the miner’s widow on August 29, 1990 satisfied the first requirement for application of *res judicata* since that prior survivor’s claim was denied by courts of competent jurisdiction, including the Office of Administrative Law Judges and the Board. Decision and Order at 3. The administrative law judge likewise properly found that since the widow took no further action following the denial of her claim by the Office of Administrative Law Judges and the Board, the denial became a final judgment within sixty days of the issuance of the Board’s decision, *see* 20 C.F.R. §802.406, thereby satisfying the second element of *res judicata*. *Id.* Moreover, the administrative law judge properly found that the fourth element required for application of *res judicata* has been satisfied in this case since both the prior widow’s claim and the current application for benefits concern the same cause of action, which is whether the miner’s death was due to pneumoconiosis.³ *See* 20 C.F.R §718.205(c).

Thus, the administrative law judge properly focused the remainder of his analysis on the third element of *res judicata*, a determination that the same parties or their privities were involved in the prior case. We note that whether a party is in privity with another person for purposes of collateral estoppel (issue preclusion) or *res judicata* is a question of fact. *See Mesa Petroleum Co. v. Coniglio*, 787 F.2d 1484, 1489-90 (11th Cir. 1986) (*citing Astron Indus. Assocs., Inc. v. Chrysler Motors, Corp.*, 405 F.2d 958 (5th Cir. 1968)).

In his Decision and Order, the administrative law judge explained that “[claimant] could be considered to be in privity with his mother if their interests were so similar to each other that his mother acted as his virtual representative” in the prior claim. As noted by the administrative law judge, “virtual representation” is a term of art that applies

³ To establish entitlement to survivors’ benefits, a claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner’s death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors’ claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner’s death, pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, death was caused by complications of pneumoconiosis, or the irrebutable presumption set forth at 20 C.F.R. §718.304, is applicable. *See* 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a “substantially contributing cause” of a miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5).

“when the respective interests [of the parties] are closely aligned *and* the party to the prior litigation adequately represented those interests[,]’ *Delta Airlines, Inc. v. McCoy Rests., Inc.*, 707 F.2d 582, 587 (11th Cir. 1983), citing *Southwest Airlines Co. v. Texas Int’l Airlines, Inc.*, 546 F.2d 84, 100 (5th Cir. 1977).” Decision and Order at 4.

Furthermore, this claim arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, which has identified four factors to be considered in determining whether the respective interests of the parties are closely aligned, sufficient to warrant a finding of virtual representation.⁴ The administrative law judge correctly stated that these factors include: “participation in the first litigation, apparent consent to be bound by the litigation, apparent tactical maneuvering, [and] close relationships between the parties and nonparties[,]’ *Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (quoting 18 Wright & Miller, *Federal Practice & Procedure* § 4457, at 494-99) (alteration in original).” Decision and Order at 5.

We affirm the administrative law judge’s finding that virtual representation existed in this case because claimant and his mother were “closely aligned” in the prior surviving widow’s claim. *Id.* The administrative law judge correctly found that although claimant was only fourteen years old when his mother filed her initial survivor’s claim, and was therefore too young to actively participate in the litigation, since claimant was listed as a dependent on his mother’s application for benefits, it was reasonable to conclude that “[she] clearly was acting in [claimant’s] interests” during the pursuit of her claim. Decision and Order at 5.

We also agree with the administrative law judge that insofar as the widow was legally responsible for claimant, and she listed claimant as a beneficiary on her application for survivor’s benefits, “it appears reasonable to conclude that she gave her consent to have [claimant] bound by the outcome of the claim[,]” Decision and Order at 5, and therefore, that claimant’s inability to actively participate in the prior litigation does not serve to preclude a summary judgment ruling against claimant based on the doctrine of *res judicata*. See *Yarborough v. Yarborough*, 290 U.S. 202 (1993) (the United States Supreme Court gave *res judicata* effect to a prior Georgia divorce decree, in a subsequent support proceeding brought in another state on behalf of the child, specifically rejecting

⁴ Because the miner’s coal mine employment occurred in Alabama, this claim arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. We note that On October 1, 1981, the United States Court of Appeals for the Fifth was divided to create the new Fifth and Eleventh Circuits. The Eleventh Circuit Court has since adopted as precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981 (*en banc*)).

the objection that the prior proceeding was not binding because the minor had not been represented by a guardian ad litem in the prior divorce action). The administrative law judge also properly concluded that “there was no apparent tactical maneuvering present in this case” such to preclude a finding of virtual representation. Decision and Order at 5.

Lastly, the final factor that was examined by the administrative law judge, relevant to a finding of virtual representation, was whether a close relationship existed between the parties and nonparties to the prior litigation. *See* Decision and Order at 5. In this regard, the administrative law judge correctly explained that, “a ‘close relationship’ requires a ‘legal relationship involving a significant degree of accountability or control by one party over the other.’” Decision and Order at 5, quoting *E.E.O.C. v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1288 (11th Cir. 2004). The administrative law judge specifically concluded:

A parent-dependent child relationship certainly meets this requirement; and regardless of whether any of the other factors are met [relevant to a finding of virtual representation], this relationship is sufficient by itself to establish that the interests of the parties were closely aligned. Therefore, since [the widow’s and claimant’s] interests are closely aligned, and the widow adequately represented those interests in the prior proceeding, I find that virtual representation has been established. Accordingly, I find that the claimant was in privity with his mother.

Decision and Order at 5.

We agree that the parent/dependent-child relationship, as evidenced in this case, serves to show that the parties stood in privity with one another in the prior survivor’s claim. We further agree that claimant’s mother adequately represented claimant’s interests when she litigated her survivor’s claim as she sought to obtain benefits on behalf of herself and her dependents by establishing that the miner’s death was due to pneumoconiosis. Moreover, the mere fact that the widow was unsuccessful in obtaining benefits does not justify disregarding application of *res judicata* to bar claimant’s survivor’s claim. We, therefore, affirm the administrative law judge’s determination that virtual representation has been established, and that claimant was in privity with his mother for the purposes of *res judicata*.

Because the administrative law judge properly determined, within his purview as the trier-of fact, that the four requisite elements of *res judicata* were established, we affirm his finding that there was no genuine issue of material fact to be resolved in claimant’s case, as the prior litigation of his mother’s survivor’s claim established that the miner’s death was not due to pneumoconiosis. Because the prior widow’s claim was denied based on the insufficiency of the medical evidence to establish that the miner’s

death was due to pneumoconiosis, the final judgment issued in that prior claim precludes an award of benefits in the instant matter under the doctrine of *res judicata*. Consequently, we affirm, as supported by substantial evidence, the administrative law judge's decision to grant employer's motion for summary judgment and his denial of benefits.

Accordingly, the Decision and Order Granting Summary Judgment and Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge