

BRB No. 89-3633 BLA

LONNIE STUM)
)
 Claimant)
)
 v.)
)
 SOUTH HOPKINS COAL COMPANY) DATE ISSUED:
)
 and)
)
 OLD REPUBLIC INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Revised Decision and Order of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

Robert P. Moore (Calvert & Moore), Madisonville, Kentucky, for claimant

Mark J. Botti (Arter & Hadden), Washington, D.C., for employer.

Barry H. Joyner (Thomas S. Williamson, 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Revised Decision and Order (85-BLA-532) of Administrative Law Judge Charles W. Campbell awarding 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). This case is on appeal before the Board for the second time. In his initial Decision and Order, the administrative law judge credited claimant with at least thirty-six years of qualifying coal mine employment, and found that since claimant had abandoned his original Part B claim,¹ transfer of liability for payment of benefits to the Black Lung Disability Trust Fund (Trust Fund) was not appropriate. Consequently, the administrative law judge reviewed the instant Part C claim, filed on February 10, 1984, pursuant to the provisions at 20 C.F.R. Part 718, and found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded.

On appeal, the Board agreed with employer's contention that, prior to adjudication on the merits, a determination should have been made as to whether a material change in conditions had been established pursuant to 20 C.F.R. §725.309, but deemed the error harmless inasmuch as there was substantial evidence of record to support a finding of material change thereunder. *Stum v. South Hopkins Coal Co.*, BRB No. 87-1658 BLA (Apr. 19, 1989)(unpublished). The Board vacated the administrative law judge's findings pursuant to Section 718.204, however, and remanded this case for the administrative law judge to weigh all of the relevant evidence together, like and unlike, pursuant to Section 718.204(c), and to determine whether claimant's pneumoconiosis was, in and of itself, totally disabling pursuant to

¹ Claimant's original Part B claim for benefits, filed on March 2, 1973, was denied by the Social Security Administration on June 27, 1973. Director's Exhibit 38. After claimant elected review by the Department of Labor, the claim was again denied on August 30, 1979. Director's Exhibit 38. Claimant filed the instant Part C claim for benefits on February 10, 1984. Director's Exhibit 1.

Section 718.204(b). *Id.*

On remand, the administrative law judge found that new evidence submitted subsequent to the denial of claimant's original claim was sufficient to establish a material change in conditions pursuant to Section 725.309, and again found total disability due to pneumoconiosis established at Section 718.204 pursuant to the appropriate standard articulated by the United States Court of Appeals for the Sixth Circuit, wherein appellate jurisdiction of this claim lies. Consequently, the administrative law judge awarded benefits.

In the instant appeal, employer asserts that claimant did not abandon his Part B claim, and thus the original claim is still viable and transfer of liability to the Trust Fund is appropriate. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject employer's arguments. Claimant has not participated in this appeal.²

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

Employer challenges the administrative law judge's finding that claimant's Part B claim was finally denied by reason of abandonment. A review of the record, however, reveals that employer conceded at the hearing that it did not contest the issue of whether claimant's Part B claim was still viable, and the parties declined the opportunity to submit post-hearing briefs on the issue. See Hearing Transcript at 6, 49, 51, 52; Director's Exhibit 40. Moreover, employer failed to raise the issue on its first appeal to the Board; rather, employer argued that the duplicate claim provisions at Section 725.309 were applicable. We therefore decline to address employer's arguments regarding the issue of abandonment, raised for the first time on this second appeal before the Board, as untimely raised. See *generally Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991)(Stage, J., dissenting); *Bernardo v. Director, OWCP*, 9 BLR 1-97 (1986).

² The administrative law judge's finding that claimant established entitlement to benefits pursuant to 20 C.F.R. Part 718 is affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge