BRB No. 08-0752 BLA

F.D.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 07/21/2009
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts and James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (06-BLA-5875) of Chief Administrative Law Judge John M. Vittone 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).[1] Claimant filed a claim for benefits on October 21, 1998. Director's Exhibit 1-740. In a Decision and Order dated August 25, 2000, Administrative Law Judge Robert L. Hillyard found that the evidence did not establish the existence of pneumoconiosis or the existence of a totally disabling respiratory impairment. Accordingly, Judge Hillyard denied benefits. Director's Exhibit 1-307.

Although claimant filed an appeal with the Board, he subsequently moved to withdraw his claim. Employer responded, objecting to claimant's withdrawal of his claim. The Board, noting that only adjudication officers may allow the withdrawal of a claim, dismissed claimant's appeal, and remanded the case to the district director "for further appropriate action." [*F.D.*] *v. Bledsoe Coal Corp.*, BRB No. 00-1179 BLA (Mar. 27, 2001)(Order)(unpub.).

In a Proposed Decision and Order dated June 12, 2001, the district director allowed claimant to withdraw his claim. Director's Exhibit 1-255. On June 22, 2001, employer requested reconsideration of the Proposed Decision and Order, arguing that claimant should not be allowed to withdraw his 1998 claim. Director's Exhibit 1-254. The district director denied reconsideration on June 27, 2001. Director's Exhibit 1-253.

Claimant filed a new claim for benefits on July 16, 2001. Director's Exhibit 1-247. In a Proposed Decision and Order dated October 28, 2002, the district director denied benefits. Director's Exhibit 1-89. At claimant's request, the case was forwarded to the Office of Administrative Law Judges (OALJ) for a formal hearing. Director's Exhibit 1-74. While claimant's appeal was pending before the OALJ, employer moved for summary judgment. Citing *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002)(*en banc*), employer argued that the district director erred in allowing claimant to withdraw his 1998 claim after an administrative law judge's decision denying that claim had become effective. Employer contended that claimant's 2001 claim should have been considered a request for modification of the denial of his 1998 claim. Director's Exhibit 1-17.

In an Order of Remand dated June 4, 2003, Administrative Law Judge Jeffrey Tureck found that claimant's 1998 claim was still pending:

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2009). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

> A District Director's decision is considered final and effective if no request for revision or a request for a hearing is filed within 30 days after it is issued. *See* 20 C.F.R. §725.419(a), (d). Accordingly, the District Director's approval of the request for withdrawal would have become effective on July 27, 2001 had no action been taken by the parties. But claimant filed his subsequent claim on July 16, 2001, while the earlier claim was still pending. Since the earlier claim was still pending, §725.309(b) requires the July 16, 2001 claim to be merged with it. Therefore, the July 16, 2001 submission should not have been treated as a new claim. Rather, the evidence submitted at that time should have been added to the existing claim file. Further, the District Director's decision withdrawing the 1998 claim never became final since the filing of new evidence on July 16, 2001 became, in effect and perhaps inadvertently, a request for revision of the District Director's decision to withdraw the claim. Since that claim never became final, then *Clevenger* must be applied to it, and it cannot be withdrawn since there was a decision by the administrative law judge holding that the claimant was not entitled to benefits.
>
> Under these conditions, this case must be remanded to the District Director to get the case sorted out and give the parties the opportunity to file additional evidence not subject to the limitations set out in the 2001 amended regulations. Moreover, the record in 2003-BLA-05409 must be incorporated into the October 28, 1998 file.

Director's Exhibit 1-11.

On remand, the district director issued an Order, wherein she vacated the June 12, 2001 Order allowing the withdrawal of claimant's 1998 claim. Director's Exhibit 1-7. The district director also found that claimant's 2001 claim must be considered a request for modification of claimant's 1998 claim pursuant to 20 C.F.R. §725.310 (2000). *Id.* The district director, however, added an alternative, advising claimant that:

> Another option available is your right NOT to have the July 16, 2001, application treated as an appeal. Should you elect this option, you may exercise your right to file a new claim under the 2001 Amendments to the Act one year after the most recent decision was issued in your prior claim, or anytime after June 27, 2002.
>
> Should you desire NOT to have the application submitted July 16, 2001, treated as an appeal, you must submit a written statement advising as to your intent to this office within thirty (30) days from the date of the

> correspondence. If such an election is not received by our office within the noted time limitations, we will issue a modification decision on your claim.

Director's Exhibit 1-8.

On July 3, 2003, claimant requested that his 2001 application for benefits "not be treated as an appeal." Director's Exhibit 1-6. By letter dated July 9, 2003, the district director acknowledged receipt of claimant's correspondence and stated:

> [N]o further action will be taken in the claim filed October 21, 1998. The July 16, 2001, application which was filed prematurely will not be treated as a modification request.
>
> The date of the last decision issued in the claim filed October 21, 1998 was the withdrawal order issued June 12, 2001. Our previous correspondence provided an incorrect date. Therefore, the claimant may file a new claim anytime subsequent to June 12, 2002.
>
> Accordingly, the claim filed October 21, 1998, has been administratively closed and is deemed abandoned.

Director's Exhibit 1-2.

On the same day, July 9, 2003, claimant filed a new application for benefits. Director's Exhibit 2. The district director processed claimant's 2003 claim as a subsequent claim pursuant to 20 C.F.R. §725.309, subject to the evidentiary limitations set forth at 20 C.F.R. §725.414. *See* Director's Exhibits 41, 51. In a Proposed Decision and Order dated June 30, 2004, the district director awarded benefits. Director's Exhibit 41. At employer's request, the case was forwarded to the OALJ for a hearing. Director's Exhibit 52. At the January 23, 2007 hearing, Chief Administrative Law Judge John M. Vittone (the administrative law judge) noted that claimant's 2003 claim was subject to the new regulations. Hearing Transcript at 12.

In a Decision and Order dated June 27, 2008, the decision currently before the Board, the administrative law judge noted that "until now" the claim before him had been treated as a subsequent claim filed in 2003. Decision and Order at 2. However, the administrative law judge found that claimant's 1998 claim, which had never been withdrawn, had been most recently denied as of July 9, 2003, when the district director informed the parties that claimant's 1998 claim had been administratively closed, and deemed abandoned. *Id.* at 3. The administrative law judge, therefore, found that claimant's July 9, 2003 benefits application, and the subsequently submitted evidence, constituted "a motion to reopen the 1998 claim," *i.e.*, a request for modification pursuant to 20 C.F.R. §725.310 (2000).

In his adjudication of claimant's 1998 claim, the administrative law judge credited claimant with thirty years of coal mine employment,[2] and found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). After finding that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b), the administrative law judge further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), and that claimant's total disability is due to pneumoconiosis 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's 1998 claim is still pending. Employer, therefore, contends that the administrative law judge should have adjudicated claimant's 2003 claim as a subsequent claim, and addressed whether there was a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Alternatively, employer contends that, because the administrative law judge did not determine that claimant's 1998 claim was pending until he issued his decision, employer was unable to submit all of the evidence to which it was entitled, free of the evidentiary limitations of 20 C.F.R. §725.414. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (4), and 718.204(b), (c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a motion to remand so that claimant's 2003 claim may be properly processed as a request for modification of claimant's pending 1998 claim, "to afford both employer and claimant the opportunity to submit additional evidence if they so choose." Director's Motion at 5. In a reply brief, employer reiterates its previous contentions of error.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Employer generally contends that the administrative law judge erred in finding that claimant's 1998 claim is pending. Employer's Brief at 16. However, employer

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 1. 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*).

alleges no specific error in regard to the administrative law judge's findings on this issue. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. Consequently, we affirm the administrative law judge's finding that claimant's 1998 claim is still pending.

In this case, the administrative law judge found that claimant's 2003 claim, filed within a year of the July 9, 2003 denial of claimant's 1998 claim, was a request to reopen the 1998 claim, *i.e.*, a request for modification pursuant to 20 C.F.R. §725.310 (2000). However, in making this determination, the administrative law judge did not consider the implication of his finding on the development of the evidence in this case. The Director addresses this issue as follows:

> Given [the administrative law judge's] finding that the 1998 claim remains viable, the limitations in Section 725.414 are not applicable to this case. They apply only to claims filed on or after January 19, 2001. *See* 20 C.F.R. §725.2(c). As employer suggests, however, [the administrative law judge] did not consider that this finding would have implications regarding the parties' evidentiary development and thus took no action to determine if the parties desired to submit additional evidence in light of this ruling . . . [I]n our view, the most reasonable course at this time, given the unusual nature of the proceedings, is to remand the case to afford both employer and claimant the opportunity to submit additional evidence, if they so choose.

Director's Motion at 5 (footnote omitted). Employer agrees that the case should be remanded, arguing that, because the parties developed their evidence based on the district director's mistaken belief that the claim being adjudicated was a 2003 subsequent claim, the parties were improperly constrained by the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer's Reply Brief at 3.

Claimant's pending 1998 claim is not subject to the evidentiary limitations applicable to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2(c). We, therefore, grant the Director's motion to remand this case so that the parties may be provided with an opportunity to submit evidence, unrestrained by the evidentiary limitations at 20 C.F.R. §725.414.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded to the district director for further proceedings 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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BETTY JEAN HALL
Administrative Appeals Judge