

BRB No. 13-0422 BLA

WILLIAM TOMASEK, SR. )  
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 Claimant )  
 )  
 v. )  
 )  
 CONSOLIDATION COAL COMPANY )  
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 and ) DATE ISSUED: 06/04/2014  
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 CONSOL ENERGY, INCORPORATED )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Petitioner ) DECISION and ORDER

Appeal of the Order Denying Motion for Partial Summary Decision and Order Denying Reconsideration of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Margaret M. Scully (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer/carrier.

Ann Marie Scarpino (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Order Denying Motion for Partial Summary Decision and Order Denying Reconsideration (2012-BLA-5667) of Administrative Law Judge Drew A. Swank with respect to a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on January 12, 2011.

Claimant initially filed a claim for benefits on May 27, 1999. In a Decision and Order dated March 31, 2001, Administrative Law Judge Richard A. Morgan found that United States Steel Mining Company (United States Steel) was the properly designated responsible operator. Judge Morgan, however, further found that claimant failed to establish any element of entitlement, and denied benefits. Claimant did not appeal Judge Morgan's denial of benefits.

Claimant filed this subsequent claim on January 12, 2011. In a Proposed Decision and Order dated March 14, 2012, the district director found that Consolidation Coal Company (Consolidation) was the responsible operator, but determined that claimant was not entitled to benefits. Pursuant to claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. The case was assigned to Administrative Law Judge Drew A. Swank (the administrative law judge), and a hearing was scheduled for April 10, 2013. On March 18, 2013, the Director moved for partial summary judgment, requesting that the administrative law judge find that Consolidation is the "responsible operator" that would be liable for the payment of any benefits awarded to claimant. *See* 20 C.F.R. §§725.494, 725.495. Consolidation responded to the Director's motion, arguing that collateral estoppel barred the Director from designating Consolidation as the responsible operator. Consolidation, therefore, requested that it be dismissed as the responsible operator.

After reviewing the Director's motion, and employer's response, the administrative law judge issued an Order on March 27, 2013, canceling the hearing and ordering the parties to show cause why Consolidation should not be dismissed from the case. Consolidation again argued that collateral estoppel barred the Director from naming Consolidation the responsible operator. The Director responded, arguing that the doctrine of collateral estoppel was not applicable.

By Order dated May 3, 2013, the administrative law judge noted that, in the adjudication of claimant's prior claim, Judge Morgan found that United States Steel was the responsible operator, and further noted that Judge Morgan's decision became final. As a result, the administrative law judge found that the doctrine of collateral estoppel precluded the Director from designating Consolidation as the responsible operator in the current claim. The administrative law judge, therefore, dismissed Consolidation "as the putative responsible operator," and ruled that Consolidation would "not be required to

participate in any future litigation of [the] claim.” Order Denying Motion for Partial Summary Decision at 4. By Order dated May 21, 2013, the administrative law judge denied the Director’s motion for reconsideration.

On appeal, the Director argues that the administrative law judge erred in finding that the doctrine of collateral estoppel precludes the Director from designating Consolidation as the responsible operator in this case. The Director also contends that the administrative law judge erred in dismissing Consolidation without his written approval. Consolidation responds in support of its dismissal by the administrative law judge. In reply briefs, the Director and employer reiterate their previous contentions.

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, and in accordance with applicable law.<sup>1</sup> 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).

As an initial matter, we note that the Director appeals from a non-final, or interlocutory, order of the administrative law judge. The Board ordinarily does not undertake review of non-final orders. *See, e.g., Arjona v. Interport Maint.*, 24 BRBS 222 (1991); *see also Crabtree v. Bethlehem Mines Corp.*, 7 BLR 1-354 (1984). The United States Supreme Court has articulated a three-pronged test to determine whether an order that does not finally resolve a claim is, nonetheless, appealable. First, the order must conclusively determine the disputed question. Second, the order must resolve an important issue that is completely separate from the merits of the action. Third, the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988). Because we conclude that the administrative law judge’s order in this case satisfies the three-pronged test of *Gulfstream*,<sup>2</sup> we accept this interlocutory appeal.

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<sup>1</sup> Because there is no record, we are unable to determine where claimant’s coal mine employment took place. However, because the Director, Office of Workers’ Compensation Programs (the Director), states that claimant’s last coal mine employment occurred in Pennsylvania, Director’s Brief at 4 n.3, we will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>2</sup> The administrative law judge has conclusively determined that Consolidation Coal Company (Consolidation) is not a potentially responsible operator in this case. Moreover, the dismissal of Consolidation as a potentially responsible operator resolves an important issue completely separate from the merits of the claim. Finally, the dismissal of Consolidation will be effectively unreviewable on appeal from a final

The Director argues that the administrative law judge erred in finding the doctrine of collateral estoppel precluded him from designating Consolidation as the responsible operator. Under the doctrine of collateral estoppel, “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Montana v. United States*, 440 U.S. 147, 153 (1979). The United States Court of Appeals for the Third Circuit has held that the following four elements are required for the doctrine to apply: “(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action.” *Howard Hess Dental Lab, Inc. v. Dentsply Int’l Inc.*, 602 F.3d 237, 247-48 (3d Cir. 2010).

The Director argues that the third element, that the previous determination was necessary to the decision, was not established. Specifically, the Director contends that, because black lung benefits were not awarded in the initial claim, the determination of the responsible operator was not necessary to that decision denying benefits. We agree. Because benefits were denied in claimant’s original claim, the doctrine of collateral estoppel was not applicable, as the determination of the responsible operator issue was not necessary to support the judgment. *See Howard Hess Dental Lab*, 602 F.3d at 247-48; *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (en banc). The United States Court of Appeals for the Sixth Circuit recently addressed the same issue, and held that collateral estoppel does not apply under such circumstances:

“To say that X is ‘necessary’ to Y is the same thing as saying that it is impossible for Y to exist unless X also exists.” *Bies v. Bagley*, 535 F.3d 520, 525 (6th Cir. 2008). The [administrative law judge] could have denied the first claim without having addressed the issue of the responsible operator. One can easily imagine a case where multiple parties are involved, there is a debate over the issue of the responsible operator, and the [administrative law judge] bypasses the questions entirely by dismissing the claim on other grounds. The fact that the [administrative law judge] in this case *did* address the issue of the responsible operator does not make its determination necessary.

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decision on the merits of this claim. Should benefits be awarded, and no operator is found liable for the payment of such benefits, the Black Lung Disability Trust Fund would have to assume liability. *See* 26 U.S.C. §9501(d)(1)(B).

It is logical that where benefits are awarded, a responsible operator must be decided to determine who pays. As benefits were not awarded in the present case, and as no case authority has been presented suggesting a contrary interpretation, the responsible operator determination was not necessary to the original ruling and collateral estoppel does not apply.

*Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 321 (6th Cir. 2014).

Because Judge Morgan did not award benefits in the prior claim, his determination that United States Steel was the responsible operator was not “necessary to the decision.” We, therefore, hold that the administrative law judge erred in finding that collateral estoppel barred the Director from designating Consolidation as the responsible operator in this claim.<sup>3</sup> See *Howard Hess Dental Lab*, 602 F.3d at 247-48.

Further, the administrative law judge erred in dismissing Consolidation as a party to this claim. An administrative law judge may not dismiss the operator designated as the responsible operator by the district director, except upon the motion or written agreement of the Director. 20 C.F.R. §725.465(b). The Director has not made a motion, or submitted any written agreement, requesting the dismissal of Consolidation as the responsible operator. Consequently, we vacate the administrative law judge’s Order Denying Motion for Partial Summary Decision and his Order Denying Reconsideration, and reinstate Consolidation as a party.

This case is remanded for the administrative law judge to hold the requested hearing, and to adjudicate claimant’s 2011 subsequent claim.

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<sup>3</sup> In light of our holding that the third element for the application of collateral estoppel was not established, we need not address the Director’s contention that other requirements for the application of collateral estoppel were not satisfied.

Accordingly, the administrative law judge's Order Denying Motion for Partial Summary Decision and Order Denying Reconsideration are vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge