BRB No. 09-0649

CHRISTY S. SPARKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 09/30/2010
	)	
and	)	
	)	
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	ORDER on MOTION for RECONSIDERATION

Employer has filed a timely motion for reconsideration, with a suggestion of reconsideration *en banc*, of the Board's decision in this case, *Sparks v. Service Employees Int'l, Inc.*, 44 BRBS 11 (2010). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. For the reasons set forth below, we deny employer's motion, and we affirm the Board's decision.

To briefly reiterate, claimant filed a claim for benefits under the Defense Base Act (DBA), 42 U.S.C. §1651, for an injury allegedly sustained while she was working in Iraq. Employer paid medical benefits but challenged its liability for compensation, as well as whether claimant's injury occurred within the DBA's coverage. Thereafter, claimant and her husband filed for bankruptcy but did not disclose the existence of the DBA claim to the bankruptcy trustee until after they received a discharge in bankruptcy. The administrative law judge applied the equitable doctrine of judicial estoppel to the claim under the DBA, and he granted employer's motion for summary decision and denied the claim for benefits.[1] Claimant appealed.

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[1]The administrative law judge found that claimant did not disclose the pending DBA claim at any time during the pendency of bankruptcy proceedings and her belated notice of the DBA claim to the bankruptcy trustee did not remedy her omission. He also found that the bankruptcy court relied on claimant's omission in granting her discharge

On appeal, the Board reversed the administrative law judge's determination that judicial estoppel applies, holding that Section 16, 33 U.S.C. §916, prevents claimant's creditors from attaching the DBA benefits and, thus, claimant did not have a motive for concealing her DBA claim.[2] As any DBA benefits are not assets to which the bankruptcy creditors would be entitled, the Board held that claimant gained no advantage over them by withholding information about her DBA claim from the bankruptcy court.[3] Because there was no "unfair advantage" over the creditors, the Board concluded there was no attempt by claimant to make a "mockery of the judicial process," and it held that one element for applying judicial estoppel is absent.[4] Accordingly, the Board held that the

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and that claimant's positions in the bankruptcy court and before him were inconsistent. Finally, the administrative law judge found that claimant's omission was not inadvertent, as she knew of her DBA claim at the time she filed for bankruptcy, and she had motive to conceal it, thereby keeping any recovery for herself instead of potentially exposing it to her creditors. Decision and Order at 5-6.

[2]Section 16 states: "No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived." 33 U.S.C. §916; *In re Sloma*, 43 F.3d 637 (11th Cir. 1995); *Thibodeaux v. Thibodeaux*, 454 So.2d 813, 16 BRBS 142(CRT) (La. 1984), *cert. denied*, 469 U.S. 1114 (1985).

[3]The record contains a letter dated April 10, 2009, from claimant's counsel to the bankruptcy trustee memorializing a conversation they had on April 8, 2009. By signing the letter, the trustee confirmed his agreement with the statements that claimant's DBA claim is a "workers' compensation-type" claim and the proceeds therefrom would either be exempt from her creditors or would be the type of proceeds he would not pursue on behalf of the creditors based on his experience and interpretation of the bankruptcy laws. Cl. Resp. to Emp. M/SD at exh. 1.

[4]Judicial estoppel is a common-law, equitable, doctrine invoked at a court's discretion and designed to protect the integrity of the judicial process by preventing a party from asserting one position in a legal proceeding and then asserting an inconsistent position in a second proceeding. *New Hampshire v. Maine*, 532 U.S. 742 (2001); *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, considers two factors: 1) "it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding" and 2)

administrative law judge erred in applying the doctrine to bar claimant's claim. *Sparks v. Service Employees Int'l, Inc.*, 44 BRBS 11 (2010); *see New Hampshire v. Maine*, 532 U.S. 742 (2001); *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1275 (11th Cir. 2010); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002). The Board reversed the grant of summary decision for employer and remanded the case to the administrative law judge for consideration of the issues on the merits. *Sparks*, 44 BRBS at 15.

In its motion for reconsideration, employer argues that the Board erred in reversing the administrative law judge's decision as substantial evidence supports the factual finding that claimant had motive to conceal, and benefited by withholding, information about her DBA claim. Employer thus asserts that the administrative law judge's application of judicial estoppel was within his discretion. Employer also asserts that, even though DBA compensation is protected from attachment by Section 16 of the Act, claimant's deliberate withholding of information was improper and prevented the bankruptcy court from scrutinizing whether granting her a discharge would be an abuse of the system. Employer contends that if the court had knowledge of the DBA claim, claimant arguably would not have been entitled to a discharge in bankruptcy; thus, employer contends claimant gained an advantage over her creditors. Claimant responds, urging the Board to reject employer's arguments.[5]

"such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." *Burnes*, 291 F.3d at 1285 (quoting *Salomon Smith Barney, Inc. v. Harvey, M.D.*, 260 F.3d 1302, 1308 (11th Cir. 2001)). In ascertaining whether the inconsistencies "make a mockery of the judicial system[,]" the Eleventh Circuit considers the debtor's intent and whether the omission or error was inadvertent. "Inadvertence" is when the debtor "lacks knowledge of the undisclosed claims or has no motive for their concealment." *Burnes*, 291 F.3d at 1287; *In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999). Motive encompasses whether the debtor would gain an advantage by concealing the claims from the bankruptcy court. *Burnes*, 291 F.3d at 1288; *see also Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1275 (11th Cir. 2010).

[5]Employer filed a motion to strike claimant's responses, a brief in support of that motion, a proposed order on the motion to strike, and a reply to claimant's responses. Employer moved to strike claimant's response and supplemental response as being untimely filed, as claimant did not ask for or receive an enlargement of time in which to file those documents. Pursuant to 20 C.F.R. §802.219, claimant's responses should have been filed by May 24, 2010, but they were not filed until June 9 and June 15, 2010, respectively. Despite the untimeliness of these documents, we deny employer's motion to strike, and we accept claimant's response briefs and employer's reply brief into the record.

Employer asserts there is substantial evidence to support the administrative law judge's findings that the elements of judicial estoppel are present and that there was no abuse in discretion in applying this doctrine to bar claimant's DBA claim. As the Board stated in its initial decision, despite claimant's awareness of her pending DBA claim, Section 16 precludes her creditors from attaching any proceeds of that claim. Thus, the Board held that claimant gained no advantage over her creditors, and a factor necessary for judicial estoppel is absent. 33 U.S.C. §916; *Robinson*, 595 F.3d 1269; *Burnes*, 291 F.3d 1282. Contrary to employer's argument in its motion for reconsideration, *Robinson*, 595 F.3d 1269, is distinguishable and does not affect the Board's conclusion. The debtor in that case withheld knowledge from the bankruptcy court of an employment discrimination claim as well as information regarding a ten-year-old pending workers' compensation claim against her deceased husband's employer. Although the debtor fully repaid her creditors pursuant to her Chapter 13 repayment plan, the Eleventh Circuit affirmed the district court's decision granting the debtor's employer summary decision in the employment discrimination claim because of the nondisclosure in bankruptcy court. The court relied on the nondisclosure of the workers' compensation claim as additional evidence of the debtor's motive, but it did not address the resulting status of the workers' compensation claim. Therefore, while elements of the two cases are similar, *Robinson* did not specifically bar the workers' compensation claim and did not address the effect a statutory provision, such as Section 16, would have on the status of the workers' compensation claim. *Robinson*, 595 F.3d at 1274-1277.[6] As Section 16 precludes creditors from attaching any compensation claimant may obtain in her DBA case, claimant has no motive to conceal the claim, and judicial estoppel cannot apply. It was an abuse of discretion to apply a doctrine absent the necessary factors.

Employer also contends the bankruptcy court may have denied claimant a discharge, if it had known of the DBA claim, on the ground that claimant abused the bankruptcy process. This argument is speculative at best. In addressing the preliminary question regarding abuse of the bankruptcy process, a presumption of abuse exists if the debtor's current monthly income less allowable expenses is greater than a certain amount.

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[6]At the time of the nondisclosure, the debtor in *Robinson* was having problems complying with her repayment plan and she had an expectation that she would recover compensatory, punative, and liquidated damages from the discrimination suit. As these proceeds would be attachable by her creditors, the court concluded that Robinson had a motive to conceal the claim from the creditors she was having trouble repaying. *Robinson*, 595 F.3d at 1274-1277; *see also Burnes*, 291 F.3d 1282.

11 U.S.C. §707(b)(1), (2)(A)(i).[7] "Current monthly income" is defined in the Bankruptcy Code as "the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income." 11 U.S.C. §101(10)(A-B); *In re Waters*, 384 B.R. 432 (N.D.W.V. 2008). Claimant has not received, and is not receiving, any "income" from the DBA claim, as employer has not paid disability benefits voluntarily and the claim has not been adjudicated and is in dispute. Thus, from this source, she has no "income" which is "known or virtually certain at the time of confirmation" and which would affect any bankruptcy abuse analysis. 11 U.S.C. §707(b)(2)(A)(i); *see Hamilton v. Lanning*, 130 S.Ct. 2464 (2010); *In re Koch*, 109 F.3d 1285 (8th Cir. 1997); *Waters*, 384 B.R. 432. As neither the bankruptcy trustee nor the bankruptcy court was compelled to re-open claimant's case after learning of the DBA claim, there appears to be no evidence of abuse by claimant. Indeed, the trustee agreed that the claim either would be exempt or would be one that he would not pursue. *See* n.3, *supra*. Therefore, we reject employer's contention that claimant abused the bankruptcy process, and we decline to reverse the Board's determination that judicial estoppel does not apply in this case.

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[7]A Chapter 13 bankruptcy is entirely voluntary, so the court cannot convert a Chapter 7 bankruptcy, such as claimant's, to a Chapter 13 bankruptcy without the consent of the debtor. *See* 11 U.S.C. §707(b)(1); *In re Koch*, 109 F.3d 1285, 1290 (8th Cir. 1997). Thus, contrary to employer's argument, the bankruptcy court in this case was not deprived of that option by claimant's failure to notify it of the DBA claim.

Accordingly, the motion for reconsideration is denied, and the Board's decision in this case is affirmed.[8] 20 C.F.R. §802.409.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[8]As a majority of the permanent members have agreed to deny employer's motion for reconsideration, reconsideration *en banc* is unnecessary. 20 C.F.R. §§801.301(b), 802.407(d).