U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 21-0410 BLA
and 21-0411 BLA

SHIRLEY L. MOORE (o/b/o and Widow of VERNOY W. MOORE) Claimant-Respondent v. BULLION HOLLOW ENTERPRISES, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/04/2022 DECISION and ORDER

Appeal of the Decision and Order on Remand of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Dana Rosen's Decision and Order on Remand (2013-BLA-06042 and 2015-BLA-05121) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on November 30, 2012,[1] and a survivor's claim filed on January 12, 2016. This case is before the Benefits Review Board for the second time.

In her initial decision, the ALJ credited the Miner with at least forty-four years of qualifying coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant[2] invoked the Section 411(c)(4) presumption that the Miner was totally disabled due to pneumoconiosis and thereby established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits. Based on the award in the miner's claim, she found Claimant entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[3] 30 U.S.C. §932(*l*) (2018).

[1] The Miner filed three prior claims in 1979, 1995, and 2010. Miner's Claim (MC) Director's Exhibits 1-2. The district director denied the Miner's most recent prior claim on June 8, 2011, because the evidence did not establish pneumoconiosis. MC Director's Exhibit 2.

[2] Claimant is the widow of the Miner, who died on July 18, 2014. Survivor's Claim (SC) Director's Exhibit 4.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

Pursuant to Employer's appeal, the Board rejected Employer's challenges to the constitutionality of the ALJ's appointment and merits of entitlement, and therefore affirmed the award in both the miner's and survivor's claims.[4] *Moore v. Bullion Hollow Enters.*, BRB Nos. 19-0331 BLA, 19-0332 BLA, slip op. at 4-14 (July 31, 2020) (unpub.). The Board further held, however, that the ALJ erred in finding Employer collaterally estopped from challenging the designation of Old Republic Insurance Company (Old Republic) as the responsible carrier.[5] *Id.* at 14-15. It therefore vacated the ALJ's responsible carrier determination and remanded the case for her to address Employer's arguments and determine whether Old Republic is the properly designated responsible carrier.[6] *Id.* at 15-16.

In addressing Employer's responsible carrier arguments on remand, the ALJ found Travelers' stipulation to responsible carrier liability in the Miner's 1995 claim was not binding in this subsequent claim and, therefore, does not preclude the Director from designating a different responsible carrier in this claim. Further finding the Miner last worked for Bullion Hollow in June 1992 when Old Republic insured it, the ALJ concluded Old Republic is the properly named responsible carrier.

On appeal, Employer again asserts constitutional challenges to the ALJ's appointment and removal protections under the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2. Employer also challenges Old Republic's designation as the responsible carrier.[7] Claimant responds, urging the Board to reject Employer's Appointments Clause challenges. The Director, Office of Workers' Compensation

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[4] The Board declined to address Employer's argument concerning the removal protections afforded ALJs as the issue was inadequately briefed. *Moore,* BRB Nos. 19-0331 BLA, 19-0332 BLA, slip op. at 6-7.

[5] Although Employer challenged Old Republic's designation as the responsible carrier, it did not challenge the designation of Bullion Hollow Enterprises (Bullion Hollow) as the responsible operator. *Moore,* BRB Nos. 19-0331 BLA, 19-0332 BLA, slip op. at 3.

[6] Employer argued Travelers Insurance Company (Travelers), who was not named as a party to this claim, insured Bullion Hollow on the Miner's last day of employment and not Old Republic. Employer also argued that because Travelers stipulated it was the responsible carrier in the Miner's 1995 claim, that stipulation is binding in naming the responsible carrier for the Miner's current claim. *Moore,* BRB Nos. 19-0331 BLA, 19-0332 BLA, slip op. at 14.

[7] Employer continues to preserve its arguments with respect to total disability, though the Board affirmed the ALJ's findings on this issue. Employer's Brief at 12 n.3.

Programs (the Director), responds, urging the Board to reject Employer's constitutional arguments and to affirm the ALJ's finding that Old Republic is the responsible carrier. Employer replied, in separate briefs, to Claimant and the Director.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[8] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause and Removal Provisions

Employer initially contends the ALJ lacked the constitutional authority to adjudicate this case because she was not properly appointed under the Appointments Clause and because the removal protections afforded ALJs are unconstitutional. Employer's Brief at 16-26. The Board previously addressed Employer's challenges to the ALJ's appointment and removal protections. The Board held the ALJ's appointment complied with the Appointments Clause and that Employer forfeited its arguments regarding the removal protections because they were inadequately briefed.[9] *Moore*, BRB Nos. 19-0331 BLA, 19-0332 BLA, slip op. at 4-7. These dispositions are now law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990). Because Employer has neither shown the Board's decision was clearly erroneous nor set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Sammons v. Wolf Creek Collieries*, 19 BLR 1-24, 1-28 n.3 (1994); *Brinkley*, 14 BLR at 1-150-51; *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).[10]

[8] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 1.

[9] The Board noted although Employer cited to *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) as supporting its assertion that the ALJ's Civil Service removal protections undermine the validity of the ALJ's appointment, Employer failed to explain its assertion given that the Supreme Court expressly stated in *Free Enterprise* that its holding therein does not address ALJs. *Moore*, BRB Nos. 19-0331 BLA, 19-0332 BLA, slip op. at 6-7.

[10] To the extent Employer raises new arguments concerning the validity of the ALJ's appointment or removal protections, Employer has forfeited those arguments by failing to raise them in its previous appeal to the Board. *See Edd Potter Coal Co., v. Director, OWCP* [*Salmons*], 39 F.4th 202, 210 (4th Cir. 2022) ("On remand, parties may not raise whatever

Responsible Carrier

Employer contends the ALJ erred in designating Old Republic as the responsible carrier. Employer asserts Travelers' stipulation that it was the responsible carrier in the Miner's 1995 claim remains binding under 20 C.F.R. §725.309(c)(5) and thus precludes Old Republic from being designated the responsible carrier in this claim. Employer's Brief at 27-31; *see* 20 C.F.R. §725.309(c)(5). We disagree.

The regulation at 20 C.F.R. §725.309(c)(5) states:

> If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), will be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim will be binding on that party in the adjudication of the subsequent claim.

20 C.F.R. §725.309(c)(5). Because the language regarding stipulations contained in 20 C.F.R. §725.309(c)(5) was first introduced as part of the 2001 regulatory revisions, *see* 20 C.F.R. §725.309 (1999); 20 C.F.R. §725.309 (2000), this provision may be applied only to stipulations made in claims filed after January 19, 2001. 20 C.F.R. §725.2; 65 Fed. Reg. 79,920, 80,054 (Dec. 20, 2000). Therefore, as Travelers made its stipulation in connection with the Miner's 1995 claim, Employer's reliance on 20 C.F.R. §725.309(c)(5) is misplaced.

Further, assuming *arguendo* that 20 C.F.R. §725.309(c)(5) is applicable, we agree with the Director's argument that it does not support Employer's position. The unambiguous language of 20 C.F.R. §725.309(c)(5) provides that a stipulation made "by any party" in a prior claim remains binding on "*that party*" in a subsequent claim." 20 C.F.R. §725.309(c)(5) (emphasis added). As Travelers is not a party to this claim, any stipulation it made in the Miner's 1995 claim is not effective in this subsequent claim. *See Mullins v. J&W Coal Co.*, BRB No. 16-0506 BLA, slip op. at 5 n.5 (Aug. 31, 2017) (unpub.); Director's Brief at 4-7. Likewise, as the Director did not enter into or make the stipulation that Travelers was the responsible carrier, the stipulation does not bind the Director in these claims. *See Mullins v. Mack Coal Co.*, BRB No. 15-0205 BLA, slip op. at 7 (Apr. 19, 2016) (unpub.) ("[E]ven if [an employer's] concession [in a prior claim], that it was no longer contesting the issue of responsible operator, could be construed as a

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new issues they would like if they have previously failed to bring those issues to the attention of the ALJ and the Board. The mere fact of remand does not wipe the whole slate clean.").

stipulation pursuant to 20 C.F.R. §725.309(c)(5), the Director was not a party to the stipulation and would not be bound by it."); Director's Brief at 5-6; MC Director's Exhibit 1 (March 24, 1998 Hearing Transcript). The ALJ thus permissibly found Travelers' stipulation with regard to the Miner's 1995 claim is not binding.[11]

Employer also argues ALJ Daniel F. Sutton erred in remanding Claimant's 1995 claim to the district director to consider renaming Old Republic as the responsible carrier after the district director transferred the case to the Office of Administrative Law Judges. Employer's Brief at 8, 27, 31. Employer contends "[t]here is no vehicle that allowed [Judge Sutton] to return the case to the district director for consideration [of the responsible carrier issue], *id.* at 27, and argues the ALJ committed reversible error in failing to address ALJ Sutton's error, *id.* at 31. However, Employer fails to cite any authority by which the ALJ or Board can reverse findings of a prior ALJ in a claim that is not currently pending before us.

Further, as the Director correctly states, the Miner's 1995 claim was ultimately denied and the Department's ability to identify another responsible operator or carrier is limited only by the principles of issue preclusion.[12] Director's Brief at 7-8 ; MC Director's Exhibit 1; *see* 65 Fed. Reg. at 79,990-91 (in a subsequent claim, "the Department's ability to identify another operator would be limited only by the principles of issue preclusion" and "where the claimant will have to relitigate his entitlement anyway, the district director

[11] The ALJ rejected Employer's assertion that the law of the case doctrine precluded holding Old Republic liable because she found that a factual exception occurred that undermined the prior stipulation. Because the stipulation was based on inaccurate information, she concluded that holding Travelers to its prior stipulation "would result in manifest injustice." Decision and Order on Remand at 8. We do not affirm her finding based on this rationale. Instead, as discussed *supra*, we affirm her findings based on the prospective nature of the 2000 amendments to 20 C.F.R. §725.309 and the plain text interpretation of the revised regulation. 20 C.F.R. §§725.2, 725.309 (2000); 65 Fed. Reg. at 80,054.

[12] A party seeking to rely on the doctrine of collateral estoppel is obliged to establish five elements: (1) that the issue sought to be precluded is identical to one previously litigated; (2) that the issue was actually determined in the prior proceeding; (3) that the issue's determination was a critical and necessary part of the decision in the prior proceeding; (4) that the prior judgment is final and valid; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 (4th Cir. 2006) (citing *Sedlack v. Braswell Servs. Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998)).

should be permitted to reconsider his designation of the responsible operator). As the determination of the responsible carrier was not necessary to support the denial of benefits in the Miner's 1995 claim, the doctrine of collateral estoppel is inapplicable and the district director was free to designate a different responsible carrier for these claims. Director's Brief at 7-8; MC Director's Exhibit 1; *see* 65 Fed. Reg. at 79,990-91; *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (en banc). Therefore, any error in the Miner's 1995 claim responsible carrier determination has no bearing on these claims and is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Old Republic has failed explain how the error to which it points could have made any difference. *See Shinseki v. Sanders*, 556 U.S. 396, 414 (2009).

Additionally, we reject Employer's assertion that the ALJ erred in finding the Miner last worked as a coal miner for Bullion Hollow in June 1992 when Old Republic insured its black lung liabilities.[13] Employer's Brief at 31. Although Employer cites portions of the Miner's testimony as establishing that he worked for Bullion Hollow in 1993 or 1995 subsequent to Old Republic's insurance coverage, the ALJ permissibly found the Miner's testimony inconsistent as to the date of his last coal mine employment and not reliable.[14] *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); Decision and Order on Remand at 7; Employer's Brief at 31-32.

Similarly, we disagree the ALJ failed to explain in accordance with the Administrative Procedure Act[15] why a letter from the Miner's sons did not definitively

[13] We affirm, as unchallenged, the ALJ's finding that Old Republic insured Bullion Hollow's black lung liabilities until October 1, 1992. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 4 n.2. The record reflects Travelers provided coverage from January 5, 1993, until sometime in 1995. MC Director's Exhibit 1.

[14] The ALJ accurately observed the Miner testified at the April 29, 2003 hearing that he ceased coal mine employment in the first half of 1992 but also testified he last worked as a miner in June of 1993. Decision and Order on Remand at 7 (citing MC Director's Exhibit 1 at 1699, Apr. 29, 2003 Hearing Transcript).

[15] The Administrative Procedure Act requires every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

prove the Miner continued to work after 1992.[16] Employer's Brief at 31-32. The ALJ specifically explained she found the letter supported the opposite conclusion – she found the letter, in conjunction with the bookkeeper's accounting that Bullion Hollow last paid the Miner in April 1992, establishes the Miner did not work in coal mine employment after his heart surgery in June 1992. Decision and Order on Remand at 7. Because Employer identifies no specific error in the ALJ's characterization of the letter and what it proves, we affirm it. 20 C.F.R. §802.211(b) (requirements for an issue to be adequately briefed); *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Because it is supported by substantial evidence, we affirm the ALJ's findings that the Miner was last employed in coal mine work for Employer in June 1992 and that Old Republic is the responsible carrier. 20 C.F.R. §725.495.

Accordingly, the ALJ's Decision and Order on Remand is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[16] The ALJ accurately observed the Miner's sons indicated in a June 21, 2000 letter that they ran the everyday operations of Bullion Hollow after June 1992. Decision and Order on Remand at 6 (citing Randy and Steve Moore June 21, 2000 letter). The letter further indicated, although the Miner's sons continued to meet with the Miner through 1994 to discuss Bullion Hollow's financial position and bankruptcy proceedings, the Miner was no longer physically able to work as a miner following his June 1992 heart surgery and ceased entering the mines at that time. *Id.*