PART V

BENEFITS REVIEW BOARD POLICIES AND PROCEDURES

A. SCOPE OF REVIEW

4. STANDING

Section 802.201 of the regulations provides, in relevant part, that any party adversely affected by a decision and order issued pursuant to one of the Acts may appeal that Decision and Order to the Board. 20 C.F.R. §802.201(a). The concept of standing also applies to individual issues that might be raised. Parties only have standing, therefore, to appeal matters that are properly at issue.

CASE LISTINGS

[Third Circuit held that Director was agency respondent pursuant to Rule 15(a) of Federal Rules of Appellate Procedure] ***Krolick Contracting Corp. v. Benefits Review Board***, 558 F.2d 685, 6 BRBS 256 (3d Cir. 1977).

[Fifth Circuit held that Director must establish some pecuniary or administrative interest to petition Court of Appeals for review under 33 U.S.C. §921(c)] ***Director, OWCP v. Bethlehem Steel Corp.***, 620 F.2d 60, 63 (5th Cir. 1980).

[Fifth Circuit held that Director was the agency respondent pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure] ***Ingalls Shipbuilding Div. v. White***, 681 F.2d 275, 284, 14 BRBS 988 (5th Cir. 1982).

[employer lacks standing to challenge a regulation not relied on by trier-of-fact] ***McKinney v. Benjamin Coal Co.***, 6 BLR 1-529 (1983); *see* ***Tucker v. Eastern Coal Corp.***, 6 BLR 1-743 (1983); ***Coleman v. Harman Mining Corp.***, 6 BLR 1-601 (1983); ***Sherry v. Tesone Coal Co.***, 4 BLR 1-377 (1982)[standing to challenge constitutionality].

[where fact-finder had dismissed employer as responsible operator, Board dismissed employer's appeal on merits since employer not aggrieved by decision below] ***Angelo v. Bethlehem Mines Corp.***, 6 BLR 1-593 (1983).

[employer had no standing to argue that section 727.203 threshold requirement of ten

years of coal mine employment should be fifteen years since it was undisputed that miner had established thirty years] ***Inman v. Peabody Coal Co.***, 6 BLR 1-1249 (1984).

DIGESTS

The Board summarily denied Director's motion for reconsideration where Director did not participate on appeal to the Board or offer any explanation for its failure to participate. ***McCullar v. Director, OWCP***, 8 BLR 1-467 (1986).

The Board held that claimant was not entitled to contest, in a separate proceeding, employer's status as the designated responsible operator before being required to establish his claim. It was therefore within the administrative law judge's discretion to dispose of the case by denying the claim on the merits without addressing the question of whether employer qualified as a responsible operator. ***Seewald v. Imperial Coal Co.***, 8 BLR 1-469 (1986).

Whenever an administrative law judge is thought to have made an error in a legal determination under the Act, the Director has standing pursuant to Section 802.201(a). ***Slone v. Wolf Creek Collieries, Inc.***, 10 BLR 1-66 (1987); ***Capers v. The Youghiogheny and Ohio Coal Co.***, 6 BLR 1-1234, 1-1237 n.4 (1984).

Because the Director opposed entitlement before the administrative law judge and the administrative law judge denied benefits, the Director was not adversely affected by the administrative law judge's decision and order and, therefore, did not have standing to appeal the finding regarding years of coal mine employment. Therefore, the administrative law judge's application of the doctrine of *res judicata* to preclude the Director from raising the issue of years of coal mine employment in this duplicate claim was in error. ***Sellard v. Director, OWCP***, 17 BLR 1-77 (1993).

The Board rejected employer's argument that the Director, as a party-in-interest, does not have standing to contest the issue of whether claimant has been provided with a complete pulmonary evaluation in a case involving a properly designated responsible operator. ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994).

The regulations implementing Section 413(b) of the Act do not make a distinction between cases where the Director is a respondent and where Director is a party-in-interest. *See* 20 C.F.R. §§718.101, 718.401, 725.405, 725.406; *cf*. 20 C.F.R. §725.701(A)(b)(2). ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994).

The Director has standing to ensure the proper enforcement and lawful administration of the Black Lung program, *see* 20 C.F.R. §725.456(d); ***Pendley v. Director, OWCP***, 13 BLR 1-23 (1989)(en banc order); ***Capers v. The Youghiogheny and Ohio Coal Co.***, 6

BLR 1-1234, 1-1237 (1984), especially in *pro se* cases. ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994).

The Director occupies a unique position in proceedings under the Act, such that application of the general prohibition against the raising of another party's rights, *see* ***Warth v. Seldin***, 422 U.S. 490, 499-500, 95 S.Ct. 2197, 2205 (1975), is negated. ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994).

The Sixth Circuit held that the Director, as a respondent, has authority to file a pro-petitioner brief, and thus denied employer's motion to strike the Director's brief. ***Cornett v. Benham Coal, Inc.***, 227 F.3d 569, No. 99-3469, 2000 WL 1262464 (6th Cir., Sept. 7, 2000).

While employer lacks standing to challenge the administrative law judge's finding that withdrawal of a claim was in claimant's best interests, employer has standing to challenge the applicability of Section 725.306 where the claim has already been adjudicated and withdrawal would result in the immediate loss of employer's vested rights and interests. ***Clevenger v. Mary Helen Coal Co.***, 22 BLR 1-193 (2002)(*en banc*); ***Lester v. Peabody Coal Co.***, 22 BLR 1-183 (2002)(*en banc*).

The Sixth Circuit upheld the Board's rejection of employer's argument that claimant waived the issue of DOL's failure to provide claimant with a complete pulmonary evaluation by failing to raise it before the district director or the administrative law judge. The Board took the position that the Director had standing as a party-in-interest to raise the issue, and that the Director's failure to raise it earlier did not bar consideration of the issue for the first time on appeal. To the extent that it was claimant's responsibility to preserve the argument, the court held that the Board did not abuse its discretion to excuse his failure. ***Greene v. King James Coal Mining, Inc.***, 575 F.3d 628, BLR (6th Cir. 2009).

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