

BRB No. 05-0209 BLA

STEVEN STOLITZA)	
(On behalf of JOHN STOLITZA, JR.,)	
deceased))	
)	
Claimant-Respondent)	
)	
v.)	
)	
BARNES & TUCKER COMPANY)	DATE ISSUED: 10/26/2005
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Denying Employer's Motion to Dismiss, Order Denying Employer's Motion for Reconsideration, and Decision and Order – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Denying Employer's Motion to Dismiss, Order Denying Employer's Motion for Reconsideration, and Decision and Order – Awarding Benefits (04-BLA-5326) of Administrative Law Judge Daniel L. Leland on a subsequent

claim¹ 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).² By Order dated July 1, 2004, the administrative law judge denied employer's Motion to Dismiss the instant claim based on the district director's March 10, 1992 denial of the prior claim as untimely filed under 20 C.F.R. §725.308.³ Employer had argued that that denial is final and is *res judicata*, and its effect is to bar the filing of the instant claim. See Employer's December 9, 2003 Motion to Dismiss. Citing *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134

¹Claimant filed his first claim on September 30, 1991. Director's Exhibit 1. Employer controverted liability for benefits, requesting dismissal of the claim as untimely under 20 C.F.R. §725.308 in light of Dr. Klemens' March 25, 1980 medical opinion that claimant was totally disabled due to pneumoconiosis. *Id.* On March 10, 1992, the district director denied the 1991 claim as it was untimely filed, and stated that claimant was notified of his total disability due to pneumoconiosis "by correspondence dated March 25, 1980." *Id.* Claimant took no further action on the 1991 claim. Claimant filed the instant subsequent claim on July 25, 2002. Director's Exhibits 3, 4. Employer sought denial of the instant claim based on the district director's March 10, 1992 final denial of the prior claim as untimely filed under 20 C.F.R. §725.308. Director's Exhibit 17. The district director awarded benefits. Director's Exhibits 18, 24. Employer challenged the district director's determination and requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 20, 26, 29. On October 16, 2003, the district director informed claimant that the Black Lung Disability Trust Fund would begin to make interim payments. Director's Exhibit 28. The district director thereafter referred the case to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 30-33.

²Employer did not file an appeal with the Board following the administrative law judge's Order Denying Employer's Motion to Dismiss and Order Denying Employer's Motion for Reconsideration. The filing of an interlocutory appeal was, however, unnecessary where employer timely challenged these rulings, preserving its arguments for appeal.

³The administrative law judge indicated that it was presumed that *employer* had submitted to the district director Dr. Klemens' March 25, 1980 medical opinion of total disability due to pneumoconiosis. Order Denying Employer's Motion to Dismiss at 2. He also found no evidence that Dr. Klemens' report "was explained to the district director;" that the district director held a hearing on the issue of timeliness or provided the parties with an opportunity to brief the issue; that the district director requested information from claimant regarding the timeliness issue before issuing the denial; or that claimant's counsel, Mr. Bilonick, was involved in the first claim, even though he was representing claimant at that time. *Id.*

(1999)(*en banc*), the administrative law judge found that the doctrine of collateral estoppel did not apply to preclude relitigation of the timeliness of the prior claim, since claimant did not have a full and fair opportunity to litigate the issue in the previous forum. Administrative Law Judge's July 1, 2004 Order Denying Employer's Motion to Dismiss at 2. The administrative law judge thereafter denied employer's Motion for Reconsideration by Order dated July 14, 2004, rejecting employer's argument that claimant did, in fact, have a full and fair opportunity to litigate the timeliness issue before the district director but did not take advantage of the opportunity. By letter to the administrative law judge dated September 7, 2004, employer indicated that it no longer contests several issues, including its status as the responsible operator, that claimant established 21.8 years of coal mine employment and that claimant was totally disabled due to pneumoconiosis that arose out of his coal mine employment. At the hearing held before the administrative law judge on September 28, 2004, employer confirmed this fact, and argued that the only issue in this case is whether the district director's final denial of the prior claim is *res judicata* and its effect is to bar the filing of the instant subsequent claim. Hearing Transcript at 5-6.

The administrative law judge, in his October 29, 2004 Decision and Order – Awarding Benefits, noted his rulings denying employer's Motion to Dismiss and Motion for Reconsideration. The administrative law judge stated that the only issue was the date of onset, as employer withdrew its controversion of all medical issues. The administrative law judge awarded benefits commencing in July of 1991, based on Dr. Wolfe's finding of complicated pneumoconiosis on the July 22, 1991 x-ray, *see* Director's Exhibit 1, and terminating on November 30, 2003 in light of claimant's death on December 4, 2003.

On appeal, employer contends that the district director's denial of the prior claim based on its untimeliness is final and not subject to challenge. Employer argues that the doctrine of *res judicata* applies and the effect of the district director's denial is to bar the filing of the instant claim. Employer thus contends that the administrative law judge erred in relitigating the issue of the timeliness of the prior claim and should have denied the instant subsequent claim based on the district director's denial of the prior claim. Alternatively, employer argues that, contrary to the administrative law judge's finding, claimant had a full and fair opportunity to argue the timeliness issue when the case was pending with the district director and did not avail himself of that opportunity. Claimant responds in favor of the decisions below, and urges the Board to affirm the administrative law judge's award of benefits. Employer has filed a reply to claimant's response brief. Employer argues that claimant's attempt to make legitimate the untimely filing of the prior claim is unavailing where that claim was finally denied and thus, the issue of its timeliness is not before the Board. Employer asserts that, rather, the issue is the impact of that final denial on the instant subsequent claim, which, employer argues, is to bar its

filing. The Director, Office of Workers' Compensation Programs, has not filed a substantive brief in the appeal.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Order Denying Employer's Motion to Dismiss, Order Denying Employer's Motion for Reconsideration, Decision and Order – Awarding Benefits, the arguments raised by the parties on appeal and the relevant evidence of record, we reverse the administrative law judge's Order Denying Employer's Motion to Dismiss and vacate his Order Denying Employer's Motion for Reconsideration and Decision and Order – Awarding Benefits. The administrative law judge's analysis of the case is flawed; he erroneously considered the issue to be the propriety of the district director's 1992 denial of the prior claim as untimely filed under 20 C.F.R. §725.308, where that denial is final and not subject to challenge. The pertinent issue is, rather: What effect does the district director's final denial of the prior claim have on the instant subsequent claim? We agree with employer's argument that the district director's final denial of the prior claim based on its untimeliness is *res judicata* and its effect is to bar the filing of the instant subsequent claim. *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988)(Black Lung claimant may not seek to avoid the bar of *res judicata* on the ground that the decision was wrong); *Tyus v. Schoemehl*, 93 F.3d 449, 453 (8th Cir. 1996)(once a court has decided an issue of fact or law necessary to its judgment, the determination is conclusive in a subsequent action between the parties, whether in the same or a different claim). We, therefore, hold that the administrative law judge's Order Denying Employer's Motion to Dismiss is erroneous as a matter of law and we reverse it.⁴ Consequently, we vacate the administrative law judge's Order Denying Employer's Motion for Reconsideration and Decision and Order – Awarding Benefits in the instant subsequent claim.

⁴We note that the facts in *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990) and *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990), wherein the Board held that the three-year filing limitation provided in 20 C.F.R. §725.308 applies only to the first claim filed and not to subsequent claims, differ from the facts in the instant case. In both *Andryka* and *Faulk*, unlike in the instant case, there was a prior timely filed claim.

Accordingly, the administrative law judge's Order Denying Employer's Motion to Dismiss is reversed, and his Order Denying Employer's Motion for Reconsideration and Decision and Order – Awarding Benefits are both vacated.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge