BRB No. 09-0767 BLA

DARRELL MAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	DATE ISSUED: 08/25/2010
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	DECISION and ORDER
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	

Appeal of the Decision and Order – Awarding Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Timothy J. Walker (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2007-BLA-05602) of Administrative Law Judge Donald W. Mosser (the administrative law judge), rendered on a subsequent claim filed on June 6, 2006, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). In a Decision and Order dated July 14, 2009, the administrative law judge accepted the parties' stipulation that claimant worked at least twenty-one years in coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was sufficient to establish that claimant's disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis at 20 C.F.R. §725.309, because he did not undertake a comparison of the old and new evidence to determine whether there has been a "change in condition." Employer's Petition for Review and Brief (not paginated). Employer also contends that the administrative law judge failed to properly consider evidence from the prior claim, in deciding the merits of claimant's entitlement. In addition, employer argues that the administrative law judge erred in weighing the medical opinions and improperly shifted the burden to prove that claimant is not totally disabled to employer. Claimant responds, urging affirmance of the award of benefits. Employer also filed a reply brief, reiterating its arguments.

The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, arguing that there was an unadjudicated modification request on a duplicate claim, filed on August 11,1995, which was still pending when claimant filed his 2006 application for benefits. The Director contends that the 2006 application was erroneously adjudicated under the revised regulations at 20 C.F.R. Part 718 as a subsequent claim, when in fact it constitutes a second modification request of the previously denied duplicate claim, filed on August 11, 1995, under the prior regulations. The Director maintains that this error may not be deemed harmless by the Board because the law governing duplicate claims under the prior regulations,[1] as set forth in *Grundy*

[1] The Department of Labor revised the regulations implementing the Black Lung Benefits Act (the Act), 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148,

Mining Co. v. Flynn, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003), governs the adjudication of the 1995 duplicate claim and the pending modification request.[2] *See* Director's Motion to Remand at 3. The Director further notes that the modification request is not subject to the evidentiary limitations set forth at 20 C.F.R. §725.414, as they are applicable only to claims filed after January 19, 2001, and the operative claim in this case was a duplicate claim filed on August 11, 1995. Claimant responds, asserting that, because "the Director did not list modification as a [contested] issue on the CM-1025" and he "did not raise this issue at the hearing or by post-hearing brief," the Director has waived his right to challenge the administrative law judge's award of benefits. Claimant's Objection to the Director's Motion to Remand at 1. Claimant argues that due to the Director's error, claimant and employer have been prejudiced and liability should rest with the Black Lung Disability Trust Fund (Trust Fund). Employer also responded to the Director's Motion to Remand, noting only that it was in agreement with claimant that liability for payment of benefits should rest with the Trust Fund if the case is remanded. Employer's Response to Director's Motion to Remand.

By Order dated May 10, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims and became effective on March 23, 2010. *May v. Leeco, Inc.*, BRB No. 09-0767 BLA (May 10, 2010) (unpub. Order). All three parties responded to this Order. Both employer and the Director agree that if the Board grants the Director's Motion to Remand, then the

---

§1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). The substantive revisions made to 20 C.F.R. §§725.309, 725.310 apply only to claims filed after January 19, 2001. Where a former version of the regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

[2] The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that, pursuant to 20 C.F.R. §725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 BLR 2-10, 2-18 (6th Cir. 1994). Claimant "must also demonstrate that this change rests upon a qualitatively different evidentiary record" than was considered in the previous claim. *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 479, 23 BLR 2-44, 2-63 (6th Cir. 2003) (Moore, J., concurring in the result). If claimant is successful, he has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence supports a finding of entitlement. *Flynn*, 353 F.3d at 480, 23 BLR at 2-66.

filing date for the operative claim will be August 11, 1995, and therefore the amendments would not apply.[3] Claimant argues that the amendments are applicable as he filed his most recent claim on June 2, 2006.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address the Director's Motion to Remand.[4] The relevant procedural history of this case is as follows. Claimant first filed a claim on March 5, 1990. Director's Exhibit 1 at 122. In a Decision and Order issued on February 25, 1993, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish that he was totally disabled. Director's Exhibit 1 at 8. Claimant filed a duplicate claim on August 11, 1995. Director's Exhibit 1 at 237. In a Decision and Order issued on April 28, 1998, Administrative Law Judge Robert L. Hillyard determined that while claimant established total disability, the evidence was insufficient to establish the requisite element of disability causation. Director's Exhibit 2 at 595. The Board affirmed this denial of benefits on May 10, 1999. *See May v. Leeco, Inc.*, BRB No. 98-1109 BLA (May 10, 1999) (unpub). Claimant first filed a request for modification on July 30, 1999, which was denied by Administrative Law Judge Daniel L. Roketenetz on July 11, 2001. Director's Exhibit 2. Claimant filed another claim (second modification request) for benefits on September 7, 2001, but there is no indication in the record that the district director took action with regard to claimant's application. *Id.* Claimant then filed a

[3] Employer specifically stated, "the present claim should be treated as a request for modification of the decision upon a [duplicate] claim filed on August 11, 1995." Employer's Supplemental Brief (in response to Order) at 2.

[4] Claimant asserts that because the Director, Office of Workers' Compensation Programs (the Director) did not raise the issue of a procedural error in the processing of his application below, and specifically before the administrative law judge, the Director has waived the right to raise this issue before the Board on appeal. The Board, however has recognized that whether the Director participates at the hearing or not, the Director remains a party-in-interest at all stages of the adjudication in a claim for benefits under the Act. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). Furthermore, because the Board has authority to consider any issue that pertains to the proper administration of the Act, we reject claimant's argument. *See Mansfield v. Director, OWCP*, 8 BLR 1-445 (1986).

claim on June 2, 2006, which was processed by the district director as a subsequent claim, awarded by the administrative law judge, and is the subject of this appeal. Director's Exhibit 4.

After consideration of the administrative law judge's Decision and Order, the procedural history of the case, and the briefs of the parties, we are compelled to vacate the award of benefits. We agree with the Director that because claimant filed his September 7, 2001 application for benefits within one year of Judge Roketenetz's July 11, 2001 Decision and Order, that application constitutes a second request for modification of the denial of the August 11, 1995 duplicate claim. *See* 20 C.F.R. §§725.309(d), 725.310 (2000). For reasons unknown, there was no action taken by the district director with regard to claimant's modification request. Claimant subsequently filed another claim on June 2, 2006. We conclude that the district director erred in treating the June 2, 2006 application as a subsequent claim, as the prior modification request filed by claimant on September 7, 2001 was still viable, along with the underlying duplicate claim filed on August 11, 1995.

The regulation at 20 C.F.R. §725.309(b) (2000) states, in pertinent part, that "[i]f a claimant files a claim under this part while another claim filed by the claimant under this part is still pending, the later claim shall be merged with the earlier claim for all purposes." 20 C.F.R. §725.309(b) (2000). Based on the facts of this case, we agree with the Director that because claimant's September 7, 2001 modification request was still pending when claimant filed his June 2, 2006 application for benefits, the merger provisions of 20 C.F.R. §725.309 (2000) are applicable. Insofar as the district director took no action on the September 7, 2001 application/modification request, and there is no evidence that claimant ever withdrew his request, the September 7, 2001 modification request is still pending, with the August 11, 1995 duplicate claim being the operative claim. *See Tackett v. Howell and Bailey Coal Co.*, 9 BLR 1-181 (1986). Thus, we conclude that the district director and the administrative law judge erroneously adjudicated the June 2, 2006 application as a subsequent claim.[5] We, therefore, vacate the administrative law judge's award of benefits and remand this case for consideration of claimant's September 7, 2001 request for modification, on the August 11, 1995 duplicate claim, filed pursuant to 20 C.F.R. §725.310 (2000). On remand, the administrative law judge should give the parties the opportunity to develop and submit evidence without regard to the evidentiary limitations at 20 C.F.R. §725.414.

[5] Based upon the parties' responses to the May 10, 2010 Order, our review of the record, and in light of our decision to grant the Director's Motion to Remand, we conclude that the amendments are not applicable to the governing claim filed August 11, 1995, based on its filing date.

As an additional matter, claimant and employer jointly assert that due to the district director's error, they have been unduly prejudiced and liability for benefits should transfer to the Trust Fund.[6] The administrative law judge on remand is instructed to address the issue of whether it is appropriate to transfer liability to the Trust Fund under the facts of this case.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is vacated, and this case is remanded for consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6] Because we vacate the administrative law judge's award of benefits, based on the June 2, 2006 claim, it is not necessary that we address the arguments raised by employer in its Brief in Support of Petition for Review. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).