BRB No. 01-0332 BLA

ALEXANDER NARTIC	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Debra L. Henry (United Mine Workers of America), Belle Vernon, Pennsylvania, for claimant.

George Stipanovich (Gutnick & Potter), Pittsburgh, Pennsylvania, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (1998-BLA-0790) of Administrative Law Judge Robert J. Lesnick with respect to a claim 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). The relevant procedural history of this case is as follows: Claimant, a living miner, filed an application for benefits on January 9, 1984. Director's Exhibit 28. This claim was denied by the district director in a letter issued on July 6, 1984. *Id*. Claimant took no further action until filing a second claim on February 2, 1989, which was denied by the district director on July 31, 1989. *Id*. Claimant subsequently filed a third claim for benefits on September 7, 1993. *Id*. After the district director denied benefits, claimant requested and received a hearing before Administrative Law Judge Daniel L. Leland. In a Decision and Order issued on October 31, 1995, Judge Leland determined that the evidence of record was insufficient to establish either the existence of pneumoconiosis or that claimant was totally disabled by pneumoconiosis. Accordingly, benefits were denied.

Claimant then filed a fourth application for benefits on August 27, 1997. Director's Exhibit 1. Employer conceded that claimant had complicated pneumoconiosis and, therefore, was entitled to benefits pursuant to 20 C.F.R. Part 718.[1] The case was transferred to the Office of Administrative Law Judges for a hearing before Administrative Law Judge Robert J. Lesnick (the administrative law judge) at which the sole issue was the identification of the date of onset of total disability due to pneumoconiosis. In the Decision and Order that is the subject of this appeal, the administrative law judge determined, based upon Dr. Perper's opinion, that inasmuch as

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725, 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001).

claimant was suffering from complicated pneumoconiosis as of May 1995, he was entitled to benefits from the first day of that month. Employer argues on appeal that the administrative law judge erred in finding that claimant's entitlement to benefits commenced prior to Judge Leland's Decision and Order denying benefits dated October 31, 1995. The Director, Office of Workers' Compensation Programs (the Director), has responded and concurs with employer.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In weighing the evidence relevant to the date of onset of claimant's total disability due to pneumoconiosis, the administrative law judge indicated that claimant is entitled to benefits beginning with the first month in which complicated pneumoconiosis is found to have existed, regardless of when the miner discovers the disease. Decision and Order at 3, *citing Truitt v. North American Coal Corp.*, 2 BLR 1-199, 1-204 (1979). The administrative law judge considered the evidence regarding the existence of complicated pneumoconiosis and accorded greatest weight to the newly submitted opinion of Dr. Perper. Decision and Order at 4; Director's Exhibit 23. Dr. Perper reviewed the medical evidence of record and examined a set of slides containing material from a May 10, 1995 lung biopsy. In a report dated March 3, 1998, Dr. Perper determined, contrary to the previously submitted opinions of Drs. Kleinerman and Mendelow, that the results of the lung biopsy established that claimant had complicated pneumoconiosis. The administrative law judge relied upon Dr. Perper's opinion to find that the date of onset of claimant's total disability due to pneumoconiosis was May 1, 1995, based upon the date of discovery of claimant's complicated pneumoconiosis. *Id*.

Employer and the Director assert that the administrative law judge's finding is in error, as Judge Leland's Decision and Order denying benefits, issued on October 31, 1995, precluded a determination that claimant was totally disabled due to pneumoconiosis or suffering from complicated pneumoconiosis as of May 1995. We agree. The terms of the Act and the implementing regulations provide for the finality of administrative decisions in order to promote due process and administrative efficiency. Pursuant to 20 C.F.R. §§725.310, 725.479, and 725.480, once a Decision and Order is issued, an administrative law judge's findings can be altered only by a party's request for reconsideration by the administrative law judge, an appeal to the Board, or a petition for modification.[2] Inasmuch as claimant did not take any of these actions within the

[2]A claimant can also seek to alter a denial by filing a duplicate claim pursuant to

prescribed time periods, Judge Leland's Decision and Order, and his determination that the May 1995 biopsy evidence did not establish the presence of complicated pneumoconiosis, became final on November 1, 1996. *See* 1995 Decision and Order at 7-8; *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).[3]

The more general principle of collateral estoppel, or issue preclusion, also bars relitigation of the issue of whether claimant had complicated pneumoconiosis or was totally disabled due to pneumoconiosis as of May 1995. Collateral estoppel applies when five prerequisites are met:

(1) The issue sought to be precluded is identical to one previously litigated;
(2) the issue was actually determined in the prior proceeding;
(3) the issue was a critical and necessary part of the judgment in the prior proceeding;

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20 C.F.R. §725.309 (2001). Unlike a request for reconsideration or a petition for modification, however, the successful prosecution of a duplicate claim cannot be premised upon a mistake in a determination of fact or law in the prior denial. The duplicate claim must be denied on the grounds of the prior denial unless the claimant can demonstrate that a material change in conditions has occurred since that time. 20 C.F.R. §725.309 (2001). In the duplicate claim proceeding, therefore, the previous denial of benefits is considered to be correct and is not subject to alteration. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's last year of coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibits 2, 3, 28; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

(4) the prior judgment is final and valid; and
(5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in a previous forum.

See Jones v. United Parcel Service, 214 F.3d 402 (3d Cir. 2000); *Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 126 F.3d 461 (3d Cir. 1999); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999). These elements are satisfied in the present case, as the existence of complicated pneumoconiosis was at issue and was determined in the proceeding before Judge Leland. The issue was also a critical and necessary part of the judgment denying benefits to claimant since without access to the irrebuttable presumption of total disability due to pneumoconiosis, which is invoked by a finding of complicated pneumoconiosis, claimant could not establish entitlement to benefits. *See* 20 C.F.R. §718.304 (2000). In addition, there is no assertion that Judge Leland's Decision and Order did not properly become effective and final on December 1, 1996, nor is there any evidence to suggest that claimant did not have a full and fair opportunity to litigate the issue of the existence of complicated pneumoconiosis in the proceedings before Judge Leland.

Thus, based upon the Act, the implementing regulations, and the principle of collateral estoppel, Judge Leland's determination that the May 1995 biopsy evidence was insufficient to prove that claimant had complicated pneumoconiosis was a final adjudication of that issue at the time of Judge Leland's Decision and Order. It could not, therefore, be relitigated in a subsequent proceeding by the submission of a new medical opinion in which the physician relied upon evidence addressed in the prior claim. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995)(affirming finding of complicated pneumoconiosis in duplicate claim and Board's decision vacating the administrative law judge's finding which set the onset date prior to the filing of the current claim based on evidence from the first claim).

Consequently, we must vacate the administrative law judge's identification of May 1, 1995, as the date of onset of total disability due to pneumoconiosis. Remand is not required, however, as the administrative law judge rationally determined that the remaining newly submitted medical opinions of record were insufficient to establish the date on which claimant developed complicated pneumoconiosis.[4] Decision and Order at 4-5. Under these

[4]The administrative law judge acted within his discretion in according little weight to the opinion of Dr. Wodzinski, that claimant had complicated pneumoconiosis as of September 1998, as Dr. Wodzinski did not explain his determination that claimant's impairment was attributable to cardiomyopathy, rather than complicated pneumoconiosis. Decision and Order at 4; Director's Exhibit 11; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge also rationally determined that the opinion in which Dr. Fino stated that claimant did not suffer from complicated pneumoconiosis before 1998, was not entitled to great weight on the ground that the doctor did not set forth the rationale underlying his determination. *Id.*; Director's Exhibit

circumstances, claimant is entitled to benefits from the first day of the month in which he filed his claim. 20 C.F.R. §§725.503(b), 727.302; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the Decision and Order of the administrative law judge is vacated and the administrative law judge's determination regarding the date of onset is modified such that claimant's entitlement to benefits is held to have commenced on August 1, 1997.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

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31. With respect to the opinion of Dr. McNamara, the administrative law judge acted within his discretion in finding that the doctor's diagnosis of probable coal workers' pneumoconiosis was not supported by the objective evidence of record. *Id*.