BRB No. 07-0300 BLA-A

[W.M.]	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	DATE ISSUED: 12/31/2007
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 Awarding Living Miner's Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell Boyd & Lloyd LLP), Washington, D.C., for employer.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 Living Miner's Benefits (04-BLA-6327) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on 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).[1] Claimant originally filed a claim for benefits on March 22, 1996, which was denied by Administrative Law Judge Alfred Lindeman on September 2, 1997, on the ground that the evidence was insufficient to establish total disability. Director's Exhibit 1. Pursuant to claimant's appeal, the Board initially affirmed Judge Lindeman's finding that clamant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as that finding was unchallenged by the parties on appeal. [*W.M.*] *v. Whitaker Coal Corp.*, BRB No. 97-1759 BLA (Sept. 7, 1998) (unpub.). The Board, however, vacated Lindeman's finding that clamant was not totally disabled, granting a motion filed by the Director, Office of Workers' Compensation Programs (the Director), to remand the case in order for claimant to receive a complete pulmonary evaluation addressing the issue of total disability. *Id*. Thus, the Board vacated the denial of benefits and remanded the case to the district director for further medical development. *Id*. Employer subsequently filed a motion for reconsideration, and the Board agreed to modify its decision to reflect that the administrative law judge's findings as to existence of pneumoconiosis at 20 C.F.R. §718.202(a) were vacated in order to allow employer the opportunity to contest all issues of entitlement on remand. [*W.M.*], BRB No. 97-1759 BLA (unpub. Order on Reconsideration *en banc*) (Apr. 7, 1999); Director's Exhibit 459.

On remand, claimant was examined by Dr. Wicker at the request of the Department of Labor and by Dr. Dahhan at the request of employer, both of whom opined that claimant did not have a totally disabling respiratory or pulmonary impairment.. Director's Exhibits 407, 477. On May 2, 2001, Administrative Law Judge Rudolf L. Jansen issued a Decision and Order on Remand – Denying Benefits. Judge Jansen determined that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), but that it failed to show that claimant was totally disabled pursuant to Section 718.204(b)(2). Director's Exhibit 1-283. Accordingly, benefits were denied. Claimant filed an appeal with the Board. While the case was pending with the Board, claimant filed a motion asking the Board to remand the claim to the district director in order to allow him to withdraw his claim. On January 11, 2002, the Board granted claimant's motion to dismiss his appeal with prejudice, and remanded the case to the district director for further consideration of claimant's withdrawal request, noting that only "adjudication officers," and not the Board, had the authority to grant a withdrawal of a claim. [*W.M.*], BRB No. 01-0704 BLA (unpub. Order) (Jan. 11, 2002).

[1] Claimant filed an appeal, BRB No. 07-0300 BLA, but also filed a Motion to Withdraw Appeal dated May 17, 2007. By Order dated July 3, 1997, the Board granted claimant's motion and dismissed BRB No. 07-0300 BLA . [*W.M.*] *v. Whitaker Coal Corp.*, BRB Nos. 07-0300 BLA and 07-300 BLA-A (unpub. Order) (July 3, 2007). Employer's appeal, BRB No. 07-0300 BLA-A is currently before us.

On March 4, 2002, the district director issued an order granting withdrawal of the 1996 claim. Director's Exhibit 1-202. By letter dated March 12, 2002, employer filed an objection, asserting that the district director lacked authority to grant withdrawal of claimant's 1996 claim as it had already been denied by Judge Jansen. Director's Exhibit 1-201. On March 8, 2002, the district director advised employer that its objection to the motion was noted for the record, and that the objection would be listed as a contested issue if claimant subsequently filed a claim for benefits.

Claimant next filed an application for benefits on April 9, 2002. Director's Exhibit 1-193 That filing was treated as an initial claim by the district director and the development of medical evidence ensued. However, while the case was pending, the district director issued a letter dated March 24, 2003, advising claimant that the his prior order vacating his 1996 claim had been issued in error, and thus, that the prior order was vacated. Director's Exhibit 1-11. Citing *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002) (*en banc*),[2] the district director explained that it had no authority to grant withdrawal of the 1996 claim because claimant had not filed a motion to withdraw until after a decision on the merits of the claim had become final. *Id*. Thus, claimant was advised that the district director rescinded its prior Order of Withdrawal. *Id*. Claimant was also informed that the district director would treat his April 2002 application as a request for modification of the 1996 claim, unless claimant notified the Office in writing that he did not want to seek modification. *Id*. Claimant was further advised of his right to file a subsequent claim pursuant to 20 C.F.R. §725.309. *Id*. On April 14, 2003, claimant, by counsel, wrote that his April 9, 2002 application should not be treated as an

[2] In *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002) (*en banc*), the Board held that the provisions of 20 C.F.R. §725.306 are applicable only up until such time as a decision on the merits issued by an adjudication officer (*e.g.*, district directors, administrative law judges) becomes effective, *see* 20 C.F.R. §§725.419, 725.479, 725.502, at which time, there no longer exists an appropriate adjudication officer authorized to approve a withdrawal request under 20 C.F.R. §725.306. *Clevenger*, 22 BLR at 1-199-200; *accord Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-190-191 (2002) (*en banc*). The Board agreed with the Director's argument that "the date a decision on the merits becomes effective is a practical point for terminating authority to allow withdrawal because it is readily identifiable and marks the point beyond which allowing withdrawal would be unfair to opposing parties," and consequently, "there is no compelling reason to allow [claimant] to avoid the consequences of that defeat; claimant may instead appeal the denial, seek modification within a year pursuant to Section 725.310, or thereafter file a subsequent claim under Section 725.309." *Clevenger*, 22 BLR at 1-200; *Lester*, 22 BLR 1-191.

appeal or modification request. Director's Exhibit 1-4. By Order dated April 25, 2003, the district director advised claimant that adjudication of his 2002 application was terminated. Director's Exhibit 1-3.

Claimant subsequently filed a new claim on April 14, 2003, which was processed as a subsequent claim. Director's Exhibit 2. On February 25, 2004, the district director issued a Proposed Decision and Order denying benefits. Director's Exhibit 24. Claimant requested a hearing, which was held on February 7, 2006. In his Decision and Order Awarding Living Miner's Benefits (Decision and Order) issued on December 4, 2006, the administrative law judge determined that the district director, in his Order dated March 24, 2003, should have reinstated Judge Jansen's denial of benefits, and that he was without authority to offer claimant the option of withdrawing his April 9, 2002 application (the modification request). The administrative law judge specifically stated:

> Under the regulations, because the District Director's actions on the request for withdrawal were improper, the March 22, 1996 claim is still pending (i.e., there is no valid action by the District Director handling the remand directive of the Board – had the District Director denied the motion to withdraw and reinstated the denial of benefits at the time, and then no action was taken, I would be left with a different scenario). Under the circumstances of this case, the April 9, 2002 "application" for benefits merges with the original March 22, 1996 claim. 20 C.F.R. Section 725.309(b). Still, there is no valid District Director action resolving the Board's remand directives dated January 11, 2002 for the original March 22, 1996 claim by the time the April 17, 2003 "application" for benefits was filed. Thus, it too, merges with the original 1996 claim.

Decision and Order at 5. The administrative law judge incorporated the findings of Judge Jansen and proceeded to review all of the record evidence as to claimant's entitlement under the prior regulations. Because he determined that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, and total disability due to pneumoconiosis, he awarded benefits beginning March 1, 1996, the month in which claimant filed his original claim.

Employer appeals, asserting that the administrative law judge erred in merging claimant's 2002 application, and his 2006 claim, with his original March 1996 claim. Employer contends that the administrative law judge erred by not adjudicating claimant's 2006 application as a subsequent claim, and by not also considering whether that subsequent claim was timely filed. In the alternative, employer asserts that, if the Board holds that claimant's original claim is still viable, the administrative law judge erred by allowing the Department of Labor to provide claimant with multiple examinations, and by refusing to remand the case to the district director to allow employer to develop the

claim without regard to the evidentiary limitations. Employer maintains that the administrative law judge's award of benefits, under the facts of this case, has resulted in substantial prejudice to employer, as it has been denied its due process right to develop a proper defense against claimant's entitlement. Thus, employer contends that liability for benefits should transfer to the Black Lung Disability Trust Fund.[3] Employer further challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.204(b) and (c).

Claimant has not filed a brief. The Director, responds, agreeing with employer that the administrative law judge erred in his merger determination. The Director maintains that, contrary to the administrative law judge's suggestion, the district director acted properly in allowing claimant to withdrawal his April 9, 2002 application (modification request), and that the administrative law judge erred by failing to treat the April 17, 2003 application as a subsequent claim subject to the evidentiary limitations at Section 725.414. The Director, however, urges the Board to reject employer's argument that claimant's subsequent claim was not timely filed, and that liability for benefits should transfer to the Trust Fund if the claims were properly merged. Employer has also filed a reply brief.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 employer and the Director that the administrative law judge erred in merging claimant's 2002 and 2006 filings with claimant's initial claim, thereby considering claimant's entitlement based on the initial claim. The administrative law judge's rationale for merger appears to be based on his belief that the district director

[3] Employer further contends that "the only alternative to Trust Fund liability would be to vacate the award in this case and to remand the matter back to the district director to assemble a record treating this as a request for modification of Judge Jansen's decision." Employer's Brief in Support of Petition for Review at 17. Employer maintains that the reports of Drs. Simpao and Rasmussen were improperly developed by the Department of Labor and must be stricken. *Id.* Employer further contends that it "must be given the opportunity to fully develop its claim without the restrictions of Section 725.414." *Id.*

erred by allowing claimant to withdraw his modification request. However, as noted by the Director:

> The regulations do not specifically address the effect of withdrawing a modification request. Given the regulatory void, the district director here reasonably treated the situation as analogous to the withdrawal of a claim. A claim may be withdrawn at any time before a denial becomes effective. *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002). In this case, no decision had been issued addressing the modification request and thus there was no reason not to allow withdrawal of that request.
>
> The district director also reasonably concluded that the consequences of modification withdrawal were the same as those of claim withdrawal. When a claim is withdrawn, it is treated as if it was never filed. 20 C.F.R. §725.306(b). Consistent with that provision, the district director here logically concluded that the claimant's request to withdraw his modification attempt vitiated any action after the Board's order dismissing his appeal – the period during which modification proceedings were ongoing. Absent a timely modification request, claimant's [initial] 1996 claim therefore was finally denied as of January 11, 2002, when the Board dismissed claimant's appeal of the [administrative law judge's] denial of benefits.

Director's Letter Brief at 5.

Since the Director is charged with the administration of the Act, special deference is generally given to the Director's reasonable interpretation of a regulation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Freeman United Coal Mining Co. v. Director, OWCP [Taskey]*, 94 F.3d 384, 387, 20 BLR 2-348, 2-355 (7th Cir. 1996); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). We defer to the Director's reasonable interpretation of the regulations to allow for withdrawal of a modification request, in the same manner that a claimant is allowed to withdraw a claim under 20 C.F.R. §725.306. Contrary to the administrative law judge's determination in this case, the district director acted appropriately in allowing claimant to withdraw his modification request. Therefore, claimant's April 17, 2003 application for benefits, which was filed more than one year after the Board dismissed claimant's appeal on January 11, 2002, must be treated as a subsequent claim pursuant to 20 C.F.R. §725.309. Based on the April 17, 2003 filing date, the subsequent claim is governed by the revised regulations and the evidentiary limitations pursuant to 20 C.F.R. §725.414. Because the administrative law judge erred by not treating the April 17, 2003 application

as a subsequent claim, and by not applying the evidentiary limitations, we vacate his award of benefits and remand this case for further consideration.[4]

We next address employer's assertion that claimant did not timely file his subsequent claim. Employer argues that, because the administrative law judge failed to treat claimant's April 17, 2003 application as a subsequent claim, he failed to consider evidence in the prior claim record relevant to the issue of timeliness. We agree. The regulation at Section 725.308(a) governs the time limits for filing claims and provides that "[a] claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which *has been communicated to the miner*...(emphasis added)." 20 C.F.R. §725.308(a). This regulation further provides that there is a rebuttable presumption that every claim for benefits is timely filed." 20 C.F.R. §725.308(c). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction these claims arise,[5] held in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 291 (6th Cir. 2001)[6] that "it is employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition [of total disability due to pneumoconiosis] was communicated" to the miner more than three years prior to the filing of his claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296. In light of our decision to remand this case, we direct the administrative law judge on remand to specifically address employer's assertion that claimant's subsequent claim was not timely filed pursuant to Section 725.308 and *Kirk*.

[4] Because we hold that this case is subject to adjudication under the 2007 revised regulations as argued by employer, employer's assertion that liability for benefits should transfer the Black Lung Disability Trust Fund is rendered moot.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[6] In *Kirk*, the Sixth Circuit held that the three-year statute of limitations "clock" imposed by Section 725.308 on the filing of a claim, "begins to tick the first time that a miner is told by a physician that he is totally disabled due to pneumoconiosis[,]" and that "[t]his clock is not stopped by the resolution of the miner's claim or claims…the clock may only be turned back if the miner returns to the mines after a denial of benefits." *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608, 22 BLR 291, 298 (6th Cir. 2001).

Furthermore, the administrative law judge is required to address whether evidence developed in conjunction with claimant's dismissed modification request is admissible into the record. The Director notes that evidence from a previously denied miner's claim is automatically admitted into the record pursuant to 20 C.F.R. §725.309(d) but that "there is no exception for other evidence developed in litigation." Director's Letter Brief at 6. The Director maintains that "evidence from a withdrawn claim or modification request is not automatically admissible in a subsequent miner's claim. Rather such evidence is admissible only if it complies with the evidence-limiting rules of Section 725.414, or if a party establishes good cause for its admission under Section 725.456(b)(1)." *Id*.

Employer contends that the administrative law judge erred in considering Dr. Simpao's evaluation as it was developed in conjunction with claimant's withdrawn modification request. On remand, the administrative law judge must address whether Dr. Simpao's evaluation is admissible in light of the evidentiary limitations pursuant to Section 725.414. The remainder of employer's arguments on appeal concern the administrative law judge's findings on the merits of entitlement, which we decline to address, as the evidentiary record before us may not reflect admissible evidence pursuant to Section 725.414.

Accordingly, the Decision and Order Awarding Living Miner's Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge