BRB No. 08-0311 BLA

C.E.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LITTLE ROCK COAL COMPANY	)	DATE ISSUED: 01/29/2009
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Motion to Dismiss of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Motion to Dismiss (2007-BLA-5765) of Administrative Law Judge Thomas F. Phalen, Jr. rendered on a subsequent 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). Claimant filed a claim for benefits on April 18, 1989. Director's Exhibit 1-475. At a hearing held on June 26, 1991, before Administrative Law Judge Daniel L. Stewart, claimant testified that he ceased his coal mine employment in 1981. He also testified that in 1981 he had been told

by Dr. Sutherland that he was totally disabled by coal workers' pneumoconiosis.[1] Director's Exhibit 1-78. In light of claimant's testimony, employer requested that the claim be dismissed as untimely filed pursuant to 20 C.F.R. §725.308. Director's Exhibit 1-72. On September 27, 1991, Judge Stewart issued an Order of Dismissal. Judge Stewart found that claimant's application for benefits was time barred pursuant to Section 725.308 because: 1) claimant did not file his claim within three years after a medical determination of total disability due to pneumoconiosis had been communicated to him by Dr. Sutherland in 1981; and 2) claimant did not file his claim within three years of March 1, 1978, the date of the enactment of the Black Lung Reform Act of 1977. 1991 Order of Dismissal at 2. Claimant took no action with regard to the dismissal of his claim.

Claimant next filed a subsequent claim on July 17, 2006. Director's Exhibit 3. Because claimant's 1989 claim was dismissed as untimely pursuant to Section 725.308, employer requested that claimant's subsequent claim also be dismissed as untimely filed. Director's Exhibit 48. The district director, however, rejected employer's request for dismissal and awarded benefits. Director's Exhibit 57. At employer's request, the case was forwarded to the Office of Administrative Law Judges and a hearing was scheduled for March 25, 2008. Director's Exhibit 58. On November 2, 2007, employer filed a motion to dismiss, alleging that the doctrine of *res judicata* barred this subsequent claim pursuant to Section 725.308. On November 7, 2007, the administrative law judge ordered claimant's counsel to show cause why the subsequent claim should not be dismissed. No response was received and the administrative law judge issued his Decision and Order Granting Motion to Dismiss on November 30, 2007. The administrative law judge specifically found that because Judge Stewart had previously found that claimant had not timely filed his April 18, 1989 claim within three years of a medical determination of total disability due to pneumoconiosis, which was communicated to claimant by Dr. Sutherland in 1981, and since claimant had not challenged that finding, Judge Stewart's finding that the prior claim was time barred could not be revisited under the doctrine of *res judicata.* Thus, the administrative law judge found that claimant's subsequent claim must be dismissed.

On appeal, claimant argues that the administrative law judge erred in dismissing this claim on the grounds of *res judicata.* Claimant asserts that the standard relevant to the 1989 claim was not satisfied with a physician's oral communication to claimant of a diagnosis of total disability due to pneumoconiosis. Citing *Tennessee Consol. Coal Co.*

[1] Claimant completed interrogatories in which he answered "yes" to the question of whether he ever received a medical report from Dr. J.P. Sutherland in 1981, diagnosing that he was totally disabled as a result of coal workers' pneumoconiosis. Director's Exhibit 1-43.

v. Kirk, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), claimant argues that the standard for triggering the statute of limitations for filing a federal black lung claim changed in 2001 and now requires a reasoned and written communication from a medical professional. Claimant's Brief at 4. Claimant argues that Judge Stewart's 1991 Order of Dismissal was erroneous in light of recent law because the communication was oral and since Judge Stewart did not determine whether Dr. Sutherland's diagnosis constituted a reasoned medical opinion. Employer responds, urging affirmance of the denial of benefits. Citing *Stolitza v. Barnes & Tucker Co.*, 23 BLR 1-94 (2005), employer argues that a final denial of a prior claim based on its untimeliness is *res judicata* and bars the filing of any further claims. The Director, Office of Workers' Compensation Programs, has indicated that he will not submit a response brief unless requested to do so by the Board.

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.[2] 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 Granting Employer's Motion to Dismiss, the relevant evidence of record, and the arguments of the parties on appeal, we conclude that substantial evidence supports the administrative law judge's ruling that claimant's subsequent claim must be dismissed as untimely filed by application of the doctrine of *res judicata*.

In this case, the administrative law judge correctly found that because claimant did not challenge Judge Stewart's September 17, 1991 Order of Dismissal, that Order became final at the end of the thirty-day appeal period provided by 20 C.F.R. §725.479(a). Decision and Order at 3. Thus, contrary to claimant's assertions on appeal, the relevant issue is not the propriety of Judge Stewart's determination to dismiss his prior claim pursuant to Section 725.308 but, rather, whether the doctrine of *res judicata* is applicable to bar the instant claim.[3] *Pittston Coal Group v. Sebben*, 448 U.S. 105 (1988) (Black

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Decision and Order at 2; Director's Exhibit 5.

[3] The doctrines of res judicata and collateral estoppel foreclose "the relitigation of issues of fact or law that are identical to issues which have actually been determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *Hughes v. Clinchfield Coal Co.*, 21

Lung claimant may not seek to avoid the bar of *res judicata* on the ground that the decision was wrong); *Stolitza*, 23 BLR at 1-97.

The administrative law judge correctly found that claimant and employer were both parties in the previous claim, that they were given the opportunity to litigate the issue of timeliness pursuant to Section 725.308, and that a final determination was specifically made before a court of competent jurisdiction, resolving that the prior claim was time barred. Decision and Order at 3-4. Because the requirements for application of *res judicata* have been satisfied in this case, we affirm the administrative law judge's finding that the final denial of the prior claim based on its untimeliness pursuant to Section 725.308 is *res judicata* and its effect is to bar the filing of the instant subsequent claim. *Stolitza*, 23 BLR at 1-97.

BLR 1-134, 1-137 (1999) (*en banc*), *citing Ramsey v. INS*, 14 F.3d 206 (4th Cir. 1994). The party asserting *res judicata* must establish the following criteria: (1) the issue sought to be precluded is identical to the one previously litigated; (2) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (3) determination of the issue must have been necessary to the outcome of the prior determination; (4) the prior proceeding must have resulted in a final judgment on the merits; and (5) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Sedlack v. Braswell Services Group, Inc*., 134 F.3d 219 (4th Cir. 1998).

Accordingly, we affirm the administrative law judge's Decision and Order Granting Motion to Dismiss.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge