U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0625 BLA

MARLIN D. RICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KARST ROBBINS COAL COMPANY	)	
	)	
and	)	
	)	
BITUMINOUS CASUALTY CORPORATION	)	DATE ISSUED: 01/23/2019
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Black Lung Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

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

Michelle S. Gerdano (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Carrier[1] appeals the Decision and Order Awarding Benefits (2014-BLA-05509) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of the previous denial of a subsequent claim, and is before the Board for the second time.[2]

In its previous decision, the Board addressed claimant's appeal, filed without the assistance of counsel, and carrier's cross-appeal, of the Decision and Order Denying Benefits of Administrative Law Judge Paul C. Johnson, Jr. Judge Johnson initially denied carrier's motion to rescind its insurance policy with Karst Robbins Coal Company and be dismissed as the responsible carrier. Reviewing the claim for benefits, he noted that

[1] Although petitioner indicates that the appeal is a joint appeal from Karst Robbins Coal Company (employer) and carrier, petitioner further states that employer "filed for bankruptcy years ago" and the "company's estate was dissolved and the bankruptcy case closed on August 23, 2007." Carrier's Brief at n. 7; *see also* Director's Exhibit 106. Therefore, we consider carrier to be the party filing the appeal in this case. In the Decision and Order that is the subject of this appeal, the administrative law judge identified the carrier as Old Republic Insurance Company. However, on appeal the parties have identified the carrier as Bituminous Casualty Corporation, or BITCO, throughout their briefs. The district director and prior administrative law judges have consistently referred to the carrier as Bituminous Casualty Corporation. Director's Exhibits 34, 58, 108; *see M.R.* [*Rice*] *v. Karst Robbins Coal Co.,* BRB Nos. 09-0119 BLA/A (Oct. 21, 2009) (unpub.). Therefore, consistent with the record, we list Bituminous Casualty Corporation as the carrier in the caption of this case.

[2] With the exception of a procedural fact that was not made part of the record until after the Board remanded this case, and which we will discuss later in this decision, the Board previously set forth the full procedural history of this case, including claimant's multiple claims and modification requests. *Rice*, BRB Nos. 09-0119 BLA/A, slip op. at 3-5.

claimant submitted his current application on May 22, 2006 and determined that it was claimant's third claim, following the final denial of two earlier claims.

Judge Johnson noted that claimant's first claim, filed on October 6, 1983, was denied on July 30, 1991, when the Board affirmed Administrative Law Judge E. Earl Thomas's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[3] Director's Exhibit 1. He further found that the district director denied claimant's second claim, filed on September 23, 2002, on February 19, 2004 because, although claimant established the existence of complicated pneumoconiosis, he failed to establish that his complicated pneumoconiosis arose out of coal mine employment. Director's Exhibit 2. Judge Johnson also noted that claimant filed a request for modification on November 18, 2004, which the district director denied on April 5, 2005.

Treating the May 22, 2006 claim as a subsequent claim in which claimant must demonstrate a change in the condition of entitlement decided against him in his 2002 claim, Judge Johnson found that whether claimant's complicated pneumoconiosis was caused by his coal mine employment is not a condition that can change over time, in the absence of additional coal dust exposure. Because claimant did not return to coal mine employment after the denial of his 2002 claim, Judge Johnson found that he could not establish that the condition of entitlement previously adjudicated against him had changed, as required by 20 C.F.R. §725.309. Accordingly, Judge Johnson denied benefits.

Upon review of claimant's appeal, the Board held that Judge Johnson erred in adjudicating claimant's 2006 claim as a subsequent claim. [*Rice*] *v. Karst Robbins Coal Co.*, BRB Nos. 09-0119 BLA/A, slip op. at 3 (Oct. 21, 2009) (unpub.). The Board was persuaded by the position of the Director, Office of Workers' Compensation Programs (the Director), that claimant's 2002 subsequent claim was still pending because claimant filed a second request for modification of the denial of that claim by letter dated July 5, 2005, which was not acted upon by the district director.[4] *Rice*, BRB Nos. 09-0119 BLA/A, slip

[3] In its previous decision, the Board summarized additional procedural facts regarding the 1983 claim that Judge Johnson did not discuss. Specifically, the Board noted that it had subsequently denied claimant's motion for reconsideration on October 9, 1991. *Rice*, BRB Nos. 09-0119 BLA/A, slip op. at 3 n.2. Claimant then appealed to the United States Court of Appeals for the Sixth Circuit, which dismissed the appeal for want of prosecution on December 12, 1991. *Id*.

[4] The Board noted that claimant's July 5, 2005 letter to the district director, which was accompanied by a black lung benefits application form, was identical to claimant's November 18, 2004 letter that the district director treated as a modification request and denied on April 5, 2005. *Rice*, BRB Nos. 09-0119 BLA/A, slip op. at 3-6. As relevant here, both letters included the statement that "if there is a present case pending on this

op. at 5-6. The Board further held that, because claimant's 2002 claim was still pending, his 2006 claim merged with it. *Id*. at 6. Therefore, the Board vacated Judge Johnson's finding that claimant's May 22, 2006 claim constituted an independent subsequent claim, vacated the denial of benefits, and remanded the case to the district director for the initiation of modification proceedings on claimant's 2002 subsequent claim. *Id*. The Board noted that because claimant's first claim filed in 1983 was denied on the grounds that claimant did not establish the existence of pneumoconiosis, the pneumoconiosis element was the applicable condition of entitlement that claimant needed to establish, with new evidence, in order to obtain review of the merits of his 2002 subsequent claim. *Id*. at 6-7. The threshold inquiry was not, as Judge Johnson found, whether claimant's pneumoconiosis arose out of coal mine employment. *Id*. at 7.

Upon review of carrier's cross-appeal, the Board rejected carrier's argument that collateral estoppel precluded relitigation of the responsible operator issue, affirming Judge Johnson's finding that employer is the responsible operator. *Rice*, BRB Nos. 09-0119 BLA/A, slip op. at 7-9. However, the Board held that Judge Johnson erred in finding that he lacked jurisdiction to address the issue of whether carrier could rescind its insurance contract with employer, instructing him to address that issue on remand. *Id*. at 10.

On remand, the district director issued an Order directing the parties to show cause why the claim should not be returned to the Office of Administrative Law Judges for adjudication as a subsequent claim filed in 2006. Director's Exhibit 94. According to the district director, the Director's argument to the Board that the district director had no basis for failing to adjudicate claimant's July 5, 2005 modification request was "factually incorrect" because the district director had, in fact, "acted at the express direction of [c]laimant's then-counsel in not adjudicating the modification request." *Id*. at 1 (unpaginated exhibit).

The district director explained that after claimant's then-counsel, Joseph E. Wolfe, submitted the first modification request on November 18, 2004, a claims examiner contacted Mr. Wolfe by telephone "to clarify his intent." *Id*. at 3. During that call, Mr. Wolfe indicated that claimant intended to pursue modification and would be submitting additional evidence. *Id*. As no additional evidence was submitted, however, the district director denied that request for modification on April 5, 2005. *Id*. The district further

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claim, please do not file a modification; simply return the application." *Id.* at 4, *quoting* Director's Exhibit 2. Instead of treating claimant's July 5, 2005 letter as a request for modification, as it had with the prior request, the district director returned claimant's application for benefits, stating, "as indicated in your letter . . . you do not want to file a modification request. Therefore, the application . . . along with the other documents, are being returned to you." *Id*. at 5.

explained that, after Mr. Wolfe submitted the second modification request on July 5, 2005, the claims examiner again called Mr. Wolfe, who indicated that claimant did not wish to pursue modification, and requested that the benefits application be returned. *Id*. The claims examiner therefore concluded that the July 2005 modification request "was a nullity and did not adjudicate it." *Id*. The district director noted that the claims examiner memorialized the telephone calls with Mr. Wolfe in separate "note[s] to file," but, because they were misfiled, neither note was included in the record that was before Judge Johnson and the Board.[5] *Id*.

In light of the new information, the district director stated that when claimant filed another claim on May 22, 2006, more than one year after the district director's April 5, 2005 denial of modification of the 2002 claim, the district director correctly treated the 2006 claim as a subsequent claim. He therefore instructed the parties to show cause within thirty days why the claim should not be processed as a subsequent claim filed in 2006. *Id*. As no party objected, the district director returned the case to the Office of Administrative Law Judges with the additional documentation clarifying the procedural history of claimant's 2002 claim. The case was ultimately returned to Judge Johnson.[6]

In a Decision and Order on remand issued on May 6, 2013, Judge Johnson indicated that, in light of claimant's withdrawal of the July 2005 modification request, he would again treat the claim as a new subsequent claim filed in 2006. Director's Exhibit 115. He reiterated his finding that claimant failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and denied benefits. *Id*. Additionally, Judge Johnson rejected carrier's argument that its insurance contract with employer should be rescinded, and thus again found that carrier is the responsible carrier. *Id*. He also rejected carrier's

[5] The notes documenting these telephone calls were entered into the record on remand as attachments to the district director's Order to Show Cause. Director's Exhibit 94 at 7, 9, 32 (unpaginated exhibit). The district director noted that "[t]he Office of the Solicitor has been informed of the existence of the omitted information, and agrees that, if known, it would have precluded the argument made to the Board, and that it should be brought to the attention of the parties." *Id*. at 2 n.1.

[6] The case was initially assigned to Administrative Law Judge Daniel F. Solomon, who canceled a scheduled hearing and directed that the case file be transmitted to the Board. Director's Exhibit 105. By letter dated November 26, 2012, the Clerk of the Appellate Boards informed Judge Solomon that, because no party in interest filed an appeal from a decision or order, the Board lacked jurisdiction and was transmitting the case back to the Office of Administrative Law Judges. Director's Exhibit 107.

argument that it be dismissed because of mishandling of the case by the district director. *Id.*

Claimant requested modification of that denial on October 23, 2013. Director's Exhibit 119. In a Decision and Order issued on August 1, 2017, which is the subject of this appeal, Judge Solomon (the administrative law judge) credited claimant with at least ten years of coal mine employment. Decision and Order at 8-9. He disagreed with Judge Johnson and the district director that the May 2006 application for benefits was a subsequent claim, citing the Board's prior holding that the July 5, 2005 letter from claimant's counsel constituted a request for modification.[7] *Id*. at 5-7. Therefore, he treated this case as a request for modification of the 2002 subsequent claim. *Id*. He agreed with Judge Johnson that employer is the responsible operator, carrier is the responsible carrier, and carrier should not be dismissed because of the district director's processing of the claim. *Id*. at 10-11.

In addition, the administrative law judge found that the evidence establishes that claimant has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, entitling him to the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); Decision and Order at 27-31. Because claimant established at least ten years of coal mine employment, the administrative law judge found that he is entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *Id*. The administrative law judge further found that carrier failed to rebut the presumption. *Id*. Alternatively, the administrative law judge found that claimant has clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and that he is totally disabled by a respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). *Id*. at 31-35. Based on these findings, the administrative law judge found that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and awarded benefits.

On appeal, carrier again contends that collateral estoppel precludes the designation of employer as the responsible operator. Carrier further asserts that both Judge Johnson and the current administrative law judge erred in failing to dismiss it as the responsible carrier. Carrier also argues that collateral estoppel precluded the administrative law judge from reconsidering the length of coal mine employment issue. Alternatively, carrier argues

[7] The administrative law judge recounted the district director's determination that the July 2005 modification request was withdrawn, but he did not mention it when making his finding and appeared to rely solely on the Board's 2009 holding, made before the purported modification withdrawal was documented in the record. Decision and Order at 6.

that the administrative law judge erred in crediting claimant with at least ten years of coal mine employment and, therefore, erred in finding that claimant is entitled to the rebuttable presumption that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).

Carrier further contends that the administrative law judge erred in weighing the medical evidence, both in finding that claimant's complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203, and in finding that claimant is totally disabled due to clinical pneumoconiosis at 20 C.F.R. §§718.202(a), 718.203, 718.204(b)(2), (c). Carrier asserts that, even if claimant's pneumoconiosis arose out of coal mine employment, the administrative law judge erred in finding that he established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Finally, carrier asserts that the administrative delay caused by the district director's error in processing this claim constitutes a due process violation requiring the transfer of liability for the payment of benefits to the Black Lung Disability Trust Fund (the Trust Fund).[8]

Claimant responds, urging affirmance of the award of benefits. The Director filed a limited response, noting that the Board has already rejected carrier's contention that collateral estoppel precludes relitigation of the responsible operator issue. The Director urges the Board to reject carrier's contentions that its insurance policy with employer should have been rescinded, and that it was denied due process.

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.[9] 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).

A. Procedural Posture

The parties dispute this case's procedural posture. Claimant argues that this case is the subsequent claim he filed on September 23, 2002, now being considered pursuant to his third request for modification. Claimant's Response Brief at 10-15. Carrier argues that

[8] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[9] Claimant's coal mine employment was in Kentucky. Hearing Transcript at 20; Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

this case is a subsequent claim filed by claimant on May 22, 2006, now being considered pursuant to claimant's request for modification of Judge Johnson's June 14, 2013 decision denying benefits.[10] Carrier's Brief at 13-15. The parties disagree as to whether claimant intended to withdraw his July 5, 2005 letter requesting modification. We need not resolve this issue, however, because it would not affect the outcome of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

As noted above, Judge Thomas denied claimant's October 1983 claim because he failed to establish pneumoconiosis. Director's Exhibit 1. Subsequently, in the 2002 and 2006 claim filings, both the district director and Judge Johnson denied benefits because, although claimant established complicated pneumoconiosis, he failed to establish that his complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. Director's Exhibits 2, 58, 115. In finding that claimant established a mistake in a determination of fact under the modification requirements at 20 C.F.R. §725.310, the current administrative law judge found that claimant established complicated pneumoconiosis, and invoked the rebuttable presumption at 20 C.F.R. §718.203(b) that his complicated pneumoconiosis arose out of coal mine employment, and carrier failed to rebut the presumption. These findings would result in claimant also establishing a change in an applicable condition of entitlement under the subsequent claim requirements at 20 C.F.R. §725.309, regardless of whether the 2002 or 2006 claim is considered the prior claim that is the subject of claimant's modification request.[11]

In some cases, a more precise clarification of the procedural posture would be necessary, as that determination could affect the evidence that the administrative law judge may consider, along with the commencement date for benefits. Specifically, 20 C.F.R. §725.309(c)(4) provides that "[i]f the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence

[10] The Director, Office of Workers' Compensation Programs (the Director), does not argue on appeal that the administrative law judge erred in treating this case as a request for modification of the subsequent claim filed by claimant on September 23, 2002. However, the Director apologized for characterizing the claim in such a manner in the prior appeal, and states that this position "advanced to the Board in 2009 was made in good faith, was ultimately corrected, and . . . resulted in no undue prejudice to the parties." Director's Brief at 3 n. 3.

[11] As noted above, Judge Thomas denied benefits in the October 6, 1983 claim because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1 (unpaginated). The district director denied benefits in the September 23, 2002 claim because claimant failed to establish that his complicated pneumoconiosis arose out of coal mine employment. Director's Exhibit 2 (unpaginated).

submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement." Moreover, "[i]n any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d)(6).

In this case, however, the administrative law judge considered the current filing a request for modification of the September 23, 2002 subsequent claim, but nevertheless awarded benefits based on evidence developed only after the district director's February 19, 2004 denial of benefits became final. Thus, even if employer is correct that this case involves a modification of the 2006 claim, the administrative law judge's decision is based on newly-submitted evidence as required by 20 C.F.R. §725.309(c)(4). Moreover, he awarded benefits commencing as of August 2006, which is after the date upon which the district director's February 19, 2004 denial of the 2002 claim became final, meaning that claimant has not been awarded additional benefits because of the administrative law judge's treatment of this case as a modification of the 2002 claim rather than the 2006 claim.[12] Claimant has not challenged either of those determinations on appeal. Claimant's Brief at 16-25. Thus, because the administrative law judge's characterization of the procedural posture in this case does not affect its outcome, we decline to consider this issue.[13] *See Larioni*, 6 BLR at 1-1278.

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[12] Based on his finding that claimant was credibly diagnosed with complicated pneumoconiosis arising out of coal mine employment on August 7, 2006, the administrative law judge's determination of August 2006 as the date for the commencement of benefits is consistent with 20 C.F.R. §725.503(d)(2), which states that in modification proceedings, when benefits are payable based on a change in conditions, such benefits "are payable . . . beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment . . . ." This finding is also unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[13] Carrier argues that claimant cannot satisfy the requirements of 20 C.F.R. §725.309 because he failed to establish that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c) in the prior claims, and because there can be no change in his physical condition thereafter. Carrier's Brief at 16-18. Thus, carrier argues that this subsequent claim is barred by res judicata and finality. Employer's argument has no merit. In *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-60 (6th Cir. 2013) and *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 483-86 (6th Cir. 2012), the Sixth Circuit explained that the proper analysis at 20 C.F.R. §725.309 is not whether claimant can establish a change in his physical condition or a material change, but whether claimant has established at least one of the elements of entitlement previously adjudicated against him, based on the new evidence. *Id.*; *see* 20 C.F.R. §725.309(c). In the current claim, the administrative law judge found that claimant submitted new evidence

B. Responsible Operator and Carrier

We also decline to consider carrier's argument that collateral estoppel precludes relitigation of the responsible operator issue. Carrier's Brief at 13. As noted above, carrier raised this argument in its prior cross-appeal, and the Board properly rejected it. *Rice*, BRB Nos. 09-0119 BLA/A, slip op. at 7-9; *see also Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 320-21 (6th Cir. 2014). Because carrier has not shown that the Board's decision was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

We also reject carrier's argument that the administrative law judge erred in failing to dismiss it as the responsible carrier. Before Judge Johnson, carrier maintained that employer procured its federal black lung insurance policy with carrier through misrepresentations that it employed only ten miners when the evidence establishes that it employed 160 miners. Director's Exhibit 108 at 8-9. Thus, carrier asserted that employer paid a substantially lower premium for its policy and carrier assumed a greater risk of loss than warranted. *Id*. Carrier moved for Judge Johnson to rescind the insurance policy and dismiss carrier as the responsible carrier. *Id*.

Judge Johnson rejected carrier's argument, finding that the alleged misrepresentation, even if true, did not relieve carrier of its obligation to pay benefits under the Act. *Id*. He explained that "[n]either the Act, nor its implementing regulations carve out the basis for any exclusion to coverage between an employer and carrier for the payment of federal black lung benefits, including coverage obtained based on an employer's misrepresentations." *Id*. at 7. Judge Johnson also found the evidence submitted by carrier to establish a fraudulent misrepresentation "not credible" and entitled to little weight. Director's Exhibits 108 at 8-9; 115 at 3-4. Thus, Judge Johnson found that carrier failed to establish any fraudulent act and is the responsible carrier in this claim. *Id*. In considering this issue, the current administrative law judge agreed with Judge Johnson's conclusion that the Act and the regulations do not warrant rescission, and thus denied carrier's request to be dismissed as the responsible carrier. Decision and Order at 10-11.

Carrier argues that the administrative law judge erred by not rescinding the insurance policy because of employer's alleged misrepresentations regarding its number of employees. Carrier's Brief at 20-23. Carrier's argument lacks merit. As Judge Johnson

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establishing that he had more than ten years of coal mine employment, thereby invoking the rebuttable presumption that his complicated pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b). The administrative law judge further found that carrier did not rebut this presumption.

found, and the Director notes, the United States Court of Appeals for the Seventh Circuit rejected this argument in *Lovilia Coal Co. v. Williams*, 143 F.3d 317 (7th Cir. 1998), *aff'g*, 20 BLR 1-58 (1996). For the reasons set forth in *Williams*, we reject employer's arguments.[14] *See also Tazco, Inc. v. Director, OWCP* [*Osbourne*], 895 F.2d 949, 951 (4th Cir. 1990) (holding that "the carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes"); *Bates v. Creek Coal Co.*, 18 BLR 1-1, 1-4 (1993), *rev'd on other grounds*, 134 F.3d 734 (6th Cir. 1997) (holding that if an operator underpaid premiums to carrier "or provided false information regarding the amount of employees to be covered by the policy," the carrier "may have a cause of action in civil court" against the operator, but the operator's actions "do not shield" the carrier from liability); 64 Fed. Reg. 54,966, 55,005 (Oct. 8, 1999) ("Because an insurance carrier assumes the responsibility for benefits ascribed to its insured operator, that responsibility must encompass every employee of the operator who qualifies as an eligible miner under the Act.").[15]

C. Due Process

We also reject carrier's argument that the district director's mishandling of notes relating to the July 5, 2005 letter from claimant's counsel constituted a due process violation, and thus deny its request to be dismissed and to transfer liability for benefits to the Trust Fund. Carrier's Brief at 13-15. Due process "is concerned with procedural outrages, not procedural glitches." *Energy W. Mining v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009). Carrier must demonstrate that it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d

[14] The United States Court of Appeals for the Seventh Circuit explained that such an outcome "would in essence be freeing insurers of liability in any circumstance where an insurer contends that the premium charged did not 'accurately reflect the coverage' of the policy sold." *Lovilia Coal Co. v. Williams*, 143 F.3d 317, 324 (7th Cir. 1998), *aff'g*, 20 BLR 1-58 (1996). The court recognized that the Act "effectively requires that an insurance carrier provide benefits for all of a coal mine operator's black lung liability, and that the insurance carrier bears the burden of collecting proper premiums for all covered miners." *Id*. at 323.

[15] Further, carrier generally argues that the evidence it submitted in this case establishes that employer made a material misrepresentation to carrier. Carrier's Brief at 21-23. However, carrier does not raise any specific challenge to Judge Johnson's finding that this evidence is not credible and is entitled to little weight. Therefore, we affirm his finding that carrier failed to establish the alleged misrepresentation that underlies its argument for rescission. *See Cox v. Benefits Review Board*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); Director's Exhibits 108 at 8-9;115 at 3-4.

873, 883-84 (6th Cir. 2000); *see also Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999). Carrier has not shown that it was deprived of that opportunity.

Carrier makes three arguments. First, it argues that the district director's error "misled the Board into believing that a remand rather than [affirmance] of [Judge Johnson's] decision was in order." Carrier's Brief at 14-15. Had the Board affirmed Judge Johnson's September 26, 2008 denial of benefits, carrier theorizes that the denial would have become final shortly thereafter. *Id*. Carrier contends that claimant's only recourse then would have been to file another subsequent claim, thereby resulting in a later date for the commencement of benefits.[16] This argument lacks merit, as it is based on carrier's mere speculation that the Board would have held that Judge Johnson's denial of benefits was supported by substantial evidence and in accordance with applicable law; the Board did not address Judge Johnson's analysis of the medical evidence. In addition, there is no basis for carrier's argument that claimant's only recourse would have been to file a new subsequent claim had the Board affirmed the September 26, 2008 denial of benefits, as evidenced by the fact that claimant subsequently requested modification of Judge's Johnson's denial of benefits when it became final. Director's Exhibit 119.

Second, carrier argues that while this claim was pending, both employer and Karst Robbins Machine Shop "were dissolved" in 2007, thereby "eliminating any right that [carrier] may have had to recover premiums that would have been due but for their fraudulent representations." Carrier's Brief at 14. As the Director notes, carrier first became aware of the alleged misrepresentations of employer through a telephone conversation in 1986 between its adjuster and employer's representative -- sixteen years before claimant filed his subsequent claim in 2002 and nineteen years before claimant's counsel submitted the July 5, 2005 letter. Director's Brief at 8-9; Director's Exhibit 21 at 606; Director's Exhibit 2. Carrier has not explained why it failed to recover premiums from employer during this time. Nor has carrier explained how the procedural development of this case precluded it from filing a civil action against employer before employer was dissolved in 2007. *See Cox v. Benefits Review Board*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *see also Bates*, 18 BLR at 1-4.

Third, carrier asserts that the purported delay from the district director's mishandling of notes relating to the July 5, 2005 letter allowed claimant to benefit from a change in law due to reinstatement of the Section 411(c)(4) presumption in 2010 by the Patient Protection and Affordable Care Act, Public Law No. 111-148, resulting in the administrative law judge's revisiting the length of coal mine employment issue. Carrier's

[16] Carrier relies on 20 C.F.R. §725.309(c)(6), which sets forth that in a subsequent claim, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

Brief at 14-15. Contrary to carrier's contention, the administrative law judge did not recalculate claimant's coal mine employment because of the intervening change in law.[17] Decision and Order at 8-9. Therefore, we reject carrier's due process argument, and affirm the administrative law judge's finding that carrier is liable for the payment of benefits in this claim. *See Holdman*, 202 F.3d at 883-84; *Borda*, 171 F.3d at 184.

D. Length of Coal Mine Employment

Carrier argues that the administrative law judge erred in revisiting the length of coal mine employment findings by Judge Thomas in the 1983 claim and the district director in the 2002 claim. Carrier's Brief at 7-11. Both Judge Thomas and the district director found that claimant worked for less than ten years in coal mine employment. Director's Exhibits 1, 2 (unpaginated). Carrier contends that collateral estoppel precludes relitigation of this issue. *Id*.

Initially, we hold that carrier waived this affirmative defense by not raising it before the administrative law judge. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); *Prater v. Director, OWCP*, 8 BLR 1-461 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984). During the February 10, 2016 hearing, the administrative law judge asked the parties their position on the length of coal mine employment issue. Hearing Transcript at 13-14. Claimant's representative stated that claimant had at least eight years and ten months of coal mine employment. *Id*. Carrier stated that the finding of eight years and ten months "has already been made in the prior claim" and that it is "not subject to challenge." *Id*. After this colloquy, claimant testified that the finding of less than ten years of coal mine employment was not accurate, because he worked for at least three or four years in which he was paid in cash and did not submit income taxes on those earnings. Hearing Transcript at 21-22; Decision and Order at 8-9. Notwithstanding claimant's testimony, carrier did not further pursue this issue or expressly plead the elements of collateral estoppel in its post-hearing brief. *See* Carrier's Post-Hearing Brief. As carrier did not adequately plead the collateral estoppel defense, it may not rely on this defense for the first time before the Board. *See Gilbert v. Ferry*, 413 F.3d 578, 579 (6th Cir. 2005).

[17] The question the administrative law judge decided – whether claimant had ten years of coal mine employment and invoked the presumption at 20 C.F.R. §718.203(b) that his pneumoconiosis arose out of coal mine employment – was not subject to a change in law while this claim was pending. That presumption is separate from Section 411(c)(4) inquiry of whether claimant can invoke the presumption that his total disability is due to pneumoconiosis based on fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in underground mines.

Moreover, even assuming arguendo that carrier did not waive the collateral estoppel defense, we hold that collateral estoppel does not preclude relitigation of the issue of the length of claimant's coal mine employment. A party seeking to rely on the doctrine of collateral estoppel must establish four elements: (1) the precise issue was raised and actually litigated in the prior proceeding; (2) the determination of the issue was necessary to the outcome of the prior proceeding; (3) the prior proceedings resulted in a final judgment on the merits; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Lawson*, 739 F.3d at 313; *see also Sedlack v. Braswell Servs. Grp., Inc.*, 134 F.3d 219, 224 (4th Cir. 1998). Here, the issue of the length of claimant's coal mine employment was not necessary to the outcome of the prior proceeding with respect to Judge Thomas's denial of benefits in the 1983 claim, as that denial was based on claimant's failure to establish the existence of pneumoconiosis. Director's Exhibit 1 (unpaginated).

Although the district director found that claimant established less than ten years of coal mine employment in the 2002 claim, that finding was not necessary to the outcome of that decision. The district director found that claimant failed to establish that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203 because the district director chose to credit Dr. Hippensteel's opinion, submitted by employer, that a large lesion seen on claimant's chest x-ray was due to histoplasmosis, and not claimant's coal mine employment. Director's Exhibit 2 (unpaginated). Therefore, regardless of the length of claimant's coal mine employment, the district director denied benefits in that claim based on crediting the medical opinion evidence that was submitted by employer. Because the length of coal mine employment finding was not necessary to the prior denial, we reject carrier's contention that the administrative law judge was precluded from addressing the length of claimant's coal mine employment. *See Lawson*, 739 F.3d at 313; *Sedlack*, 134 F.3d at 224.

Carrier also argues that the administrative law judge erred in finding that claimant established at least ten years of coal mine employment. We disagree. Claimant bears the burden of proof to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge recognized that Judge Thomas found eight years and four months of coal mine employment, based on claimant's Social Security Administration (SSA) earnings records. Decision and Order at 8. Moreover, claimant testified at the hearing that he was paid in cash by various coal mine operators. Hearing Transcript at 21-

22. He stated that he was paid "off the books" for three or four years and that he worked full-time. *Id*. He did not pay income tax on these earnings. *Id*. The administrative law judge found that claimant's testimony was credible. Decision and Order at 6, 8-9, 22. Crediting claimant with an additional "three years he worked 'off the books,'" the administrative law judge found that claimant established more than ten years of coal mine employment. *Id*. at 22.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). As a miner's credible, uncontradicted testimony may be used to establish the nature and length of his employment, we affirm the administrative law judge's decision to credit claimant with an additional three years of coal mine employment not reflected in the SSA earnings records. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65 (6th Cir. 2015); *Wensel v. Director, OWCP*, 888 F.2d 14, 17 (3d Cir. 1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984); *Hutnick v. Director, OWCP*, 7 BLR 1-326, 1-329 (1984). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant has at least ten years of coal mine employment, and thus invoked the rebuttable presumption that his complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Decision and Order at 6, 8-9, 22.

E. Relationship of Pneumoconiosis to Coal Mine Employment

Carrier contends that the administrative law judge erred in finding that it failed to rebut the presumption that claimant's complicated pneumoconiosis arose out of coal mine employment. Carrier's Brief at 18-20. We disagree.

The administrative law judge weighed Dr. Rosenberg's opinion on this issue. In his report, dated January 11, 2016, Dr. Rosenberg opined that claimant's x-rays are consistent with coal workers' pneumoconiosis, but that "such changes can also be seen with histoplasmosis." Carrier's Exhibit 1 at 3. He also opined that the x-rays revealed a "large mass formation with distortion." *Id*. He noted that before 1987, claimant's x-rays were negative, but that these marked changes developed after 2002. *Id*. He further noted that claimant is totally disabled by a respiratory impairment. *Id*. Dr. Rosenberg concluded that the "essence of the situation with respect to [claimant] is whether or not the observed mass formation relates to past coal mine dust exposure or infection related to histoplasma." *Id*. Although Dr. Rosenberg indicated that the "extensive hepatic and splenic calcifications" seen on x-ray "support an infection related to histoplasmosis," he nonetheless determined that "[m]edical records from the [years 1987 to 2002] need to be reviewed to see if [claimant] developed acute histoplasmosis, which is also responsible for his respiratory

related findings." *Id*. Thus, Dr. Rosenberg declined to address whether claimant has "pulmonary massive fibrosis or pulmonary complications of histoplasmosis." *Id*.

Contrary to carrier's argument, the administrative law judge permissibly found that Dr. Rosenberg's opinion is "uncertain," and therefore insufficient to rebut the presumption at 20 C.F.R. §718.203(b).[18] Decision and Order at 22, 38; *see Griffith v. Director, OWCP*, 49 F.3d 184, 186-87 (6th Cir. 1995); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. Thus, we affirm the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) and that claimant established a mistake in a determination of fact at 20 C.F.R. §725.310.

[18] Because the administrative law judge provided a valid basis for discrediting Dr. Rosenberg's opinion, we need not address employer's other arguments regarding the weight accorded the opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983); Employer's Brief at 19. Additionally, we need not address employer's argument that the administrative law judge erred in crediting Dr. Prince's opinion that claimant has complicated pneumoconiosis arising out of coal mine employment, as this opinion does not support employer's burden to rebut the 20 C.F.R. §718.203(b) presumption. Further, because we affirm the administrative law judge's determination that claimant has complicated pneumoconiosis that arose out of coal mine employment, we need not address employer's challenges to the administrative law judge's alternative findings that claimant is totally disabled due to simple pneumoconiosis. Employer's Brief at 19-20.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge