BRB No. 95-0833 BLA

ROBERT F. HUNT)
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Claimant-Respondent)
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v.)
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)
JONIDA TRUCKING, INCORPORATED)
) DATE ISSUED:
Employer-Petitioner)
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

John G. Paleudis (Hanlon, Duff & Paleudis Co., L.P.A.), St. Clairsville, Ohio, for employer.

Kathleen M. Bole (J. Davitt McAteer, 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 McGRANERY, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand and the Decision on Reconsideration (89-BLA-0228) of Administrative Law Judge Gerald M. Tierney awarding benefits 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).

This claim is before the Board for the fifth time.[1] Initially, the administrative law judge credited claimant[2] with seventeen years of qualifying coal mine employment and found that employer is the proper responsible operator, that the Director stipulated to the existence of pneumoconiosis, and that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded. Employer did not enter an appearance at the hearing. Hearing Transcript at 2.

On reconsideration, the administrative law judge rejected employer's arguments that it relied on claimant's advice in failing to contest liability as the responsible operator and that claimant wanted to withdraw his claim. The administrative law judge also rejected employer's arguments regarding the weighing of the medical evidence. Decision and Order on Reconsideration dated August 28, 1991. On second reconsideration, the administrative law judge denied employer's argument that claimant wants to accept benefits only from the Black Lung Disability Trust Fund and not from employer. Decision and Order on Reconsideration dated October 8, 1991.

On appeal, the Board denied employer's request to dismiss the claim and remanded the case to the administrative law judge for consideration of claimant's request for withdrawal of the claim pursuant to 20 C.F.R. §725.306. *Hunt v. Jonida Trucking, Inc.*, BRB Nos. 92-0524 BLA and 92-0124 BLA (Sep. 24, 1992)(unpub.). On remand, the administrative law judge held that withdrawal of the claim is not in claimant's best interest pursuant to Section 725.306. Accordingly, claimant's request

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[1]Employer filed five notices of appeal with the Board. Three appeals were dismissed as premature. *See* 20 C.F.R. §802.206; *Whitfield v. Peabody Coal Co.*, 7 BLR 1-626 (1984); *see also Harmar Coal Co. v. Director, OWCP* [Rostis], 926 F.2d 302, 14 BLR 2-182 (3d Cir. 1991).

[2]Claimant is Robert F. Hunt, the miner, who filed an application for benefits on June 1, 1987. Director's Exhibit 1.

to withdraw was denied and employer was ordered to continue monthly benefit payments. [1993] Decision and Order on Remand. On reconsideration, the administrative law judge considered the Director's request that employer be required to post a bond pursuant to 20 C.F.R. §§725.606 and 725.494 and ordered employer to secure the payment of $150,000 as authorized by Section 725.606. Decision on Reconsideration dated November 10, 1994.

On appeal, employer contends that the administrative law judge erred in denying claimant's request to withdraw his claim, that employer is entitled to a hearing on the merits, that the claim should have been adjudicated as a request for modification, that the record does not support an award of benefits, that employer is not the proper responsible operator, and that employer should not be required to post a bond. Employer also moved to stay the administrative law judge's Order requiring a bond. The Director, Office of Workers' Compensation Programs (the Director) responds, arguing that employer lacks standing to contest the administrative law judge's decision not to allow the withdrawal, that employer waived its right to contest its designation as the responsible operator, and that the administrative law judge properly ordered employer to post bond.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Employer contends that the administrative law judge erred in designating it as the responsible operator. Employer's Brief at 40. We reject this contention. The record reveals that employer failed to respond in any way to this claim, although it was served with a Notice of Claim, Director's Exhibit 23, and hearing notices dated October 16, 1989 and March 28, 1990. Further, employer did not contest the responsible operator issue, Director's Exhibit 30, when the case was referred to the Office of Administrative Law Judges for a formal hearing. Thus, employer is precluded from contesting its designation as responsible operator on appeal. *See* 20 C.F.R. §§725.413(b)(3), 725.421, 725.463; *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *see generally Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989); *Krizner v. U.S. Steel Mining Co., Inc.*, 17 BLR 1-31 (1992)(*en banc*)(Brown, J., concurring; Smith, J., dissenting). Therefore, we affirm the administrative law judge's finding that employer is the properly designated responsible operator pursuant to 20 C.F.R. Part 725, Subpart F.

Employer next contends that it is now entitled to a hearing on the merits because it relied on statements from claimant that it would not be liable for benefits, if awarded, and thus failed to defend the claim. Employer's Brief at 22. A formal hearing was held on the merits of this claim on June 4, 1990, and employer does not argue that it was not notified. Hearing Notices of October 16, 1989 and March 28, 1990. The administrative law judge found that employer has the burden of securing its own legal representation and that claimant has no duty to render legal advice to the responsible operator. [August 28, 1991] Decision and Order on Reconsideration at 1.

Inasmuch as the unexcused failure of any party to attend a hearing shall constitute a waiver of that party's right to present evidence at the hearing, 20 C.F.R. §725.461(b); *see Prater v. Clinchfield Coal Co.*, 12 BLR 1-121 (1989), we hold that the administrative law judge acted within his discretion in rejecting employer's argument and concluding that employer had waived its right to a hearing, *see Wagner v. Beltrani Enters.*, 16 BLR 1-65 (1990).

Employer next contends that the administrative law judge erred in failing to adjudicate the claim pursuant to Section 725.310. Employer's Brief at 23-27. The claim was initially denied on September 17, 1987. Director's Exhibit 21. Claimant requested a hearing on November 13, 1987. Director's Exhibit 22. On November 27, 1987, the district director informed claimant that the claim file was being forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 24.

Instead, an informal conference was held and, on January 6, 1988, the district director recommended that the prior denial be affirmed. By letter dated January 6, 1988, claimant was given thirty days to respond to this recommendation. Director's Exhibit 25. Claimant failed to respond until July 26, 1988 when an attorney, who stated he was not representing claimant, told the district director he had obtained additional medical evidence on behalf of claimant. The district director treated this contact as a request for modification, denied modification, and forwarded the claim for a hearing. Director's Exhibit 28.

At the hearing on June 4, 1990, the administrative law judge acknowledged that there was a question regarding modification. [1990] Hearing Transcript at 11-12. The administrative law judge found that because of the confusion in the relationship between claimant and the attorney who acted on his behalf but was not "representing" him, and because claimant's request for a hearing on November 13, 1987 indicated an intent to pursue the claim, claimant preserved his right to a hearing on his original claim. [1990] Decision and Order at 3.

Inasmuch as the administrative law judge is afforded broad discretion in dealing with procedural matters, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), and is not bound by the findings of the district director, *see Kott*, *supra*, and employer has demonstrated no abuse of discretion, *cf. Morgan v. Director, OWCP*, 8 BLR 1-491 (1986), we affirm the administrative law judge's finding regarding modification. *See Plesh v. Director, OWCP*, 71 F.3d 103, BLA (3d Cir. 1995)(premature request for hearing can be perfected by subsequent entry of final order).

Employer next contends that the administrative law judge erred in weighing the evidence of record and asserts that the evidence is not sufficient to support an award of benefits. Employer's Brief at 27-40. Inasmuch as employer did not contest any of the issues before the administrative law judge, Director's Exhibit 30, employer is now precluded from contesting the administrative law judge's findings on those issues on appeal. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); *Kott*, *supra*; *Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14 (1992).

Employer next contends that the administrative law judge erred in refusing to allow claimant to withdraw his claim pursuant to Section 725.306. Employer's Brief at 11. The Director, in her response brief, argues that employer lacks standing on appeal because it is not adversely affected by the denial of the withdrawal of the claim. Director's Brief at 2. Specifically, the Director argues that employer was not injured in fact by the administrative law judge's decision on withdrawal and that its interests are not within the zone of interests protected by the withdrawal provision. Director's Brief at 3-5.

Contrary to the Director's argument, employer is liable for the payment of benefits whereas he would not be liable if claimant's request for withdrawal of his claim were granted. Thus, employer is adversely affected by the administrative law judge's decision not to allow the withdrawal and may challenge the administrative law judge's findings on this issue on appeal. 20 C.F.R. §802.201; *see Angelo v. Bethlehem Mines Corp.*, 6 BLR 1-593 (1983).

Employer contends that the administrative law judge's denial of claimant's request to withdraw his claim is contrary to claimant's wishes and that substantial evidence does not support the administrative law judge's finding that withdrawal is not in claimant's best interests. Employer's Brief at 11-22. In finding that withdrawal of the claim would not be in claimant's best interests, the administrative law judge considered claimant's testimony that he would accept benefits if they came from the

Trust Fund and letters written by claimant's wife indicating that the couple is experiencing financial difficulties and needs the benefits. Decision and Order on Remand at 2-3; [1992] Hearing Transcript at 7-9; Employer's Exhibits 4, 5, 8.

The administrative law judge also noted claimant's "concern for the financial well-being" of employer and claimant's refusal to accept any of the benefit payments that had been made to him. Employer's Exhibit 1. The administrative law judge stated that claimant is not contributing to employer's financial hardship and that if employer did become bankrupt, as a result of an unrelated pending personal injury lawsuit, then claimant's benefits would be paid by the Trust Fund. Decision and Order at 3. Finally, the administrative law judge found that withdrawal would be against claimant's best interests because it would leave him with no recourse should his financial or medical situation deteriorate and because a new claim would most likely be vigorously contested by employer's insurer. Decision and Order at 3-4.

Inasmuch as the administrative law judge must approve the withdrawal of a claim as being in claimant's best interests, 20 C.F.R. §725.306; *see Rodman v. Bethlehem Steel Corp.*, 16 BRBS 123, 127 n.5 (1984); *Mathews v. Mid-States Stevedoring Corp.*, 11 BRBS 139 (1979); *Graham v. Ingalls Shipbuilding/Litton Systems, Inc.*, 9 BRBS 155 (1978), and is afforded broad discretion in dealing with procedural matters, *see Clark*, *supra*, we affirm the administrative law judge's finding that withdrawal would not be in claimant's best interests pursuant to Section 725.306(a) as supported by substantial evidence.[3]

Employer next contends that the administrative law judge erred in requiring it to secure the payment of $150,000 as authorized by 20 C.F.R. §725.606. Employer's Brief at 41. Employer contends that no bond is necessary to secure payment of future benefits. Employer's Brief at 41-42. Section 725.606 states that, whenever an adjudication officer deems it advisable, he or she may require any operator or other employer to make a deposit to secure the prompt and convenient payment of benefits to eligible claimants.

In this case, the administrative law judge determined that employer is in a precarious financial position and should be required to take action to guarantee the discharge of its liability. Decision on Reconsideration at 1-2. Inasmuch as

[3]Employer states that Section 725.306 is invalid and violated the U.S. Constitution. Employer's Brief at 11-12. Because employer fails to articulate its argument, we decline to address this issue. *See Cox v. Director, OWCP*, 7 BLR 1-610 (1984), *aff'd* 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

substantial evidence supports the administrative law judge's finding that employer is in a precarious financial position which could affect the prompt and convenient payment of future benefits, and employer admits its financial difficulties, Employer's Brief at 41; Employer's Exhibits 4, 5, 8, we affirm the administrative law judge's finding that employer must secure the payment of benefits pursuant to Section 725.606.

Finally, employer filed a motion requesting the Board to issue a Stay Order pursuant to 20 C.F.R. §802.105 regarding the posting of a bond. The Director argues that the Board lacks jurisdiction to issue such an order. The Act, 33 U.S.C. §921(b)(3), implemented by Section 802.105, authorizes the Board to stay the payment of the amounts required by an award of compensation or benefits. 20 C.F.R. §802.105(a). The money required of employer in this instance is not the actual payment to claimant but instead a bond needed to assure that employer will be able to make future payments to claimant. Thus, the Board's authority to stay payments does not apply in this instance. Therefore, we deny employer's request for a Stay Order.

Accordingly, the administrative law judge's Decision and Order on Remand disallowing the withdrawal of the claim, and the Decision on Reconsideration ordering employer to secure the payment of $150,000 are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

SMITH, Administrative Appeals Judge: I concur.

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge: I concur in the result only.

REGINA C. McGRANERY
Administrative Appeals Judge