

BRB No. 05-0131 BLA

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| MADGE SWIFT |) | |
| (Widow of MILES SWIFT) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | DATE ISSUED: 06/21/2005 |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order on Motion for Reconsideration and Vacating Order Awarding Benefits Upon Remand From the Benefits Review Board and Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Paul Sotak, Scranton, Pennsylvania, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Motion for Reconsideration and Vacating Order Awarding Benefits Upon Remand From the Benefits Review Board and Denying Benefits (Decision and Order on Reconsideration) (2002-BLA-05168) of Administrative Law Judge Janice K. Bullard rendered on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

¹ Claimant is the widow of the miner, Miles Swift, who died on January 28, 2001. Claimant filed a survivor's claim on February 9, 2001.

1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. In the administrative law judge's original Decision and Order, based on the claim filing date of February 9, 2001, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718. The administrative law judge found that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 and denied benefits.

Claimant appealed and in *Swift v. Director, OWCP*, BRB No. 03-0167 BLA (Apr. 26, 2004)(unpub.), the Board affirmed the administrative law judge's finding that the medical opinion evidence was insufficient to establish claimant's burden of proving, on her survivor's claim, that the miner's death was caused, contributed to, or hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Board, however, also noted that since the administrative law judge indicated that the miner was awarded benefits on a claim filed on December 31, 1979, claimant may be entitled to benefits pursuant to 20 C.F.R. §725.212. The Board thus remanded this case for the administrative law judge to determine whether claimant satisfied the criteria of 20 C.F.R. §725.212 and was therefore entitled to benefits.² *Swift*, slip op. at 3-5.

On remand, the administrative law judge, without discussing the evidence in detail, found that claimant satisfied the requirements for entitlement to benefits pursuant to Section 725.212 since at the time of the miner's death the miner was receiving benefits

² Section 725.212 provides, in relevant part, that:

- (a) An individual who is the surviving spouse or surviving divorced spouse of a miner is eligible for benefits if such individual:
 - (1) Is not married;
 - (2) Was dependent on the miner at the pertinent time; and
 - (3) The deceased miner either:
 - (i) Was receiving benefits under section 415 or part C of title IV of the Act at the time of death as a result of a claim filed prior to January 1, 1982; or
 - (ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. A surviving spouse or surviving divorced spouse of a miner whose claim is filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under §718.306 or part 718 on a claim filed prior to June 30, 1982.

on a claim filed before January 1, 1982.³ Accordingly, survivor's benefits were awarded. The Director, Office of Workers' Compensation Programs (the Director), subsequently filed a timely motion requesting reconsideration of the administrative law judge's Decision and Order on Remand, disputing the propriety of the award of survivor's benefits in light of his discovery that the miner was awarded benefits on a subsequent claim filed after January 1, 1982.

In her Decision and Order on Reconsideration, the administrative law judge reconsidered her earlier decision and, upon a review of the entire file pertaining to the miner's claim, found that she had erred in determining that the miner had been awarded benefits based upon his initial claim filed in 1979, a determination she had reached upon the mistaken belief that the miner's award had been based upon a modification of the 1979 claim. Upon further reflection, and inspection of the evidence, the administrative law judge found that the miner's 1979 claim had been denied and that the miner had been awarded benefits on a subsequent claim filed on March 2, 1984. Taking into consideration the circumstances surrounding the miner's award of benefits, the administrative law judge found that claimant failed to satisfy the requirements for entitlement to benefits pursuant to Section 725.212 since the miner was not receiving benefits at the time of his death on a claim filed before January 1, 1982. Accordingly, the administrative law judge vacated her award of benefits and denied benefits on the survivor's claim. On appeal, claimant contends that the administrative law judge erred in denying benefits. The Director responds urging affirmance of the denial of benefits.

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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant presents several arguments on appeal consisting of assertions that: the Director waived his right to dispute whether the miner's 1988 award of benefits was based upon the claim he filed in 1979 and that the Director is bound by his stipulation that the miner's 1988 award of benefits was based upon his 1979 claim. Claimant also alleges ambiguity with respect to the finality of the 1980 denial. In addition, claimant suggests that she detrimentally relied on the representations by the Director with respect to the viability of the 1979 claim. We conclude that claimant's arguments have no merit.

³ The administrative law judge issued her Decision and Order Awarding Benefits Upon Remand From the Benefits Review Board on August 30, 2004.

Upon reconsideration on remand, the administrative law judge performed a further inspection of the evidence which disclosed the following events: The miner filed his initial claim for benefits on December 31, 1979, which the district director denied on July 7, 1980. Decision and Order on Reconsideration at 2; Director's Exhibit 1 (originally marked Director's Exhibit-20). No further action was taken on this claim by the miner. On March 2, 1984, the miner filed a subsequent claim, which the district director denied. Decision and Order on Reconsideration at 2; Director's Exhibit 1 (originally marked Director's Exhibit-2). At the miner's request, the 1984 claim was referred to the Office of Administrative Law Judges for a hearing. Administrative Law Judge Lawrence E. Gray issued a Decision and Order on March 17, 1988, awarding lifetime benefits to the miner.

The administrative law judge found that the record established that an interval of more than one year had occurred between the final denial of the miner's 1979 claim and his filing of his subsequent claim, which was filed on March 2, 1984. Decision and Order on Reconsideration at 2. The administrative law judge thus found that the evidence clearly established that the miner's lifetime award of benefits was based on a subsequently filed claim, and not on the miner's initial claim which was filed in 1979. *Id.* In light of her finding, the administrative law judge concluded that the miner's 1984 claim constituted a subsequent claim pursuant to Section 725.309. *Id.* The administrative law judge therefore concluded that the record established that Judge Gray's March 8, 1988, Decision and Order awarding benefits to the miner was based upon a claim filed after January 1, 1982, and not on a claim filed before that date. *Id.* Consequently, the administrative law judge found that claimant failed to establish that she met the criteria for derivative entitlement to benefits pursuant to 20 C.F.R. §725.212. *Id.*

Claimant initially asserts that the Director waived his right to dispute that the miner's 1988 award of benefits was based on the claim he filed in 1979. Contrary to claimant's assertion, the administrative law judge did not specifically find that the miner was awarded benefits in 1988 on the claim he filed in 1979. Although she stated that the miner had filed a claim in 1979 and that he had been awarded benefits in 1988, she merely gave an abbreviated history of the miner's background since derivative entitlement to benefits was not identified as a contested issue in the survivor's claim. *See* Director's Exhibit 10. Furthermore, since the administrative law judge initially denied benefits in the survivor's claim, the Director was not dissatisfied with the decision and therefore not obligated to allege error or file a cross-appeal. *See Dalle-Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987).

We also reject claimant's contention that the Director "stipulated" that the miner was awarded benefits in 1988 on the claim filed in 1979. Claimant argues that the Director should be held to the statement he made in a 2003 letter to the administrative

law judge. In that letter, dated February 4, 2003, the Director submitted proposed findings of fact and conclusions of law. After noting that the only contested issue in the survivor's claim was whether the miner's death was due to pneumoconiosis, the Director succinctly summarized the procedural history of the miner's claim, stating that "[t]he miner's application for benefits, which was filed with the Department of Labor on December 31, 1979, was awarded on March 8, 1988." In her Decision and Order issued May 20, 2003, the administrative law judge, in her discussion of the procedural history of the claim, briefly summarized the history of the miner's claim and stated that "Miles Swift ("the miner", hereinafter) filed a claim for benefits under the Act on December 31, 1979, and was awarded benefits." 2003 Decision and Order at 1. Based on this statement, the Board, in our 2004 decision, noted that the administrative law judge found that the miner was awarded benefits on a claim filed December 31, 1979. *Swift v. Director, OWCP*, BRB No. 03-0617 (Apr. 26, 2004), slip op. at 3. In her Decision and Order on Remand, the administrative law judge reiterated her statement that the miner "filed a claim for benefits under the Act on December 31, 1979, and was awarded benefits, and he was receiving benefits at the time of his death." August 30, 2004 Decision and Order at 1. The Director timely requested reconsideration in a letter to the administrative law judge dated September 7, 2004; he stated that "[t]he record establishes that the miner was awarded benefits in 1988 *not* based upon his December 31, 1979 claim, but based upon a subsequent claim filed in 1984. The miner's 1979 claim was finally denied by letter dated July 7, 1980." Director's Motion for Reconsideration at 1. In that letter, the Director also acknowledged that in his February 4, 2003 letter he had incorrectly asserted that the 1988 award of benefits was based upon the 1979 claim rather than the 1984 claim and he apologized for this misstatement.

In her Decision and Order on Reconsideration, the administrative law judge noted that in response to the Director's motion, she had requested the entire file pertaining to the miner's lifetime claim. Upon reviewing the entire file pertaining to the claims filed during the miner's lifetime, the administrative law judge realized that she had mistakenly determined that the miner was awarded benefits on his 1979 claim. The administrative law judge rejected claimant's contention that the Director should be held to his inaccurate recitation of the facts. Decision and Order on Reconsideration at 2, n. 1. The administrative law judge also noted that the "Director originally had represented that the award was made on that claim, and Claimant made no representation with respect to when the miner had filed his claim(s) for benefits." Decision and Order on Reconsideration at 2, n. 2. On appeal herein, the Director argues that the incorrect representation in the 2003 pleading to the administrative law judge stating that the miner filed a claim in 1979 and was awarded benefits in 1988 was included only as a background and did not involve an agreement or understanding between the parties. Director's Brief at 2. We agree.

The significance to the parties regarding the relevance of whether the claim filed by the miner in 1979, resulted in the subsequent award of benefits in 1988, is not reflected in any of the proceedings before the district director or the administrative law judge. Only after the Board instructed the administrative law judge to consider the possibility of entitlement based on her statement referring to the award of benefits on a claim filed in 1979 did the sequence of events that led to the award become relevant to the resolution of the issue of whether claimant was entitled to derivative benefits. Therefore, we conclude that the administrative law judge reasonably declined to hold the Director to his “erroneously based stipulations” in this case as reflected by his incorrect statement in the February 2003 letter. Decision and Order on Reconsideration at 2, n. 1. In accordance with the Board’s remand instructions, the administrative law judge reasonably rejected claimant’s assertion that the Director waived his right to proffer proof of the actual claim upon which the miner’s award was based and permissibly considered the issue *de novo* based on the record in the miner’s lifetime claim, in spite of the misstatement reflected in the Director’s pleadings. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). As such, we affirm the administrative law judge’s determination that the Director was not bound by his misstatement of the facts surrounding the miner’s claim.

In addition, claimant has provided no basis to establish that she was prejudiced by the incorrect reference to the earlier claim. *See generally Reigh v. Director, OWCP*, 19 BLR 1-64 (1995). Consequently, we affirm the administrative law judge’s denial of survivor’s benefits. *See Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Accordingly, the administrative law judge's Decision and Order on Motion for Reconsideration and Vacating Order Awarding Benefits Upon Remand From the Benefits Review Board and Denying Benefits on this survivor's claim is affirmed.

SO ORDERED.

ROY P.SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge