U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0680 BLA

MICHAEL A. SLONE Claimant-Respondent v. CANADA COAL COMPANY, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 10/30/2017 DECISION and ORDER

Appeal of the Decision and Order of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Rita A. Roppolo (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, 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:

Employer/carrier (employer) appeals the Decision and Order (2013-BLA-05025) of Administrative Law Judge Dana Rosen, 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 a subsequent claim filed on September 10, 2010.[1] The administrative law judge held a telephonic hearing on February 24, 2016. Based on the parties' request at the hearing, the administrative law judge bifurcated the case, initially addressing only the issue of whether employer is the responsible operator.[2] Hearing Transcript (Tr.) at 10-13, 15.

[1] Claimant filed three previous claims for benefits, all of which were finally denied. Director's Exhibits 1-3. Claimant's most recent prior claim, filed on July 18, 2008, was denied by the district director on January 28, 2009, because the evidence did not establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 3.

[2] As the administrative law judge has not yet issued a Decision and Order on the merits of entitlement, employer's appeal is interlocutory in nature. An order that leaves the question of entitlement on the merits unresolved does not constitute a final appealable order. *Cochran v. Westmoreland Coal Co*., 21 BLR 1-89 1-91 (1998). A non-final order may be appealable if it meets the criteria of the collateral order doctrine. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988). Here, however, no party has identified a reason that the Board should accept this interlocutory appeal. Nor is it obvious to the Board that the appeal should be accepted, since the responsible operator issue would be reviewable on appeal of a final decision on the merits of the case. The Board views with extreme disfavor the bifurcation of this case and the resultant interlocutory appeal. That said, however, due to an apparent administrative oversight, this case was not identified as an interlocutory appeal at the early stage of the Board's processing in which that issue would typically be resolved. As a result, this case has now been pending at the Board for several months, and it is fully briefed. Therefore, to prevent further delay—and for that reason alone—the Board will address this appeal. *See Morgan v. Director, OWCP*, 8 BLR 1-491, 1-493 (1983). The parties, however, should not expect that such appeals will be accepted by the Board in the future, absent a compelling argument as to why the case merits interlocutory review.

In her August 19, 2016 Decision and Order, the administrative law judge found that the employer is the responsible operator, based on its concession on the issue at the 2003 hearing in claimant's initial claim for benefits. Finding that the administrative law judge correctly applied 20 C.F.R. §725.309(c)(5)[3], which states that stipulations made in prior claims are binding in subsequent claims, we affirm.

Procedural Background

Claimant filed an initial claim for benefits on January 29, 2001. Director's Exhibit 1 (internal exhibit 2).[4] In a Proposed Decision and Order issued on June 24, 2002, the district director designated employer as the responsible operator, based on the conclusion that employer was the potentially liable operator that most recently employed claimant for a cumulative period of one year. Director's Exhibit 1 (internal exhibit 24). The district director denied benefits, however, because claimant failed to establish any element of entitlement. *Id*.

Claimant requested a hearing, which was held before Administrative Law Judge Joseph E. Kane on February 12, 2003. Director's Exhibit 1 (Hearing Transcript (Tr.)). Based on claimant's testimony regarding his employment history, employer stipulated that it was the responsible operator.[5] Director's Exhibit 1 (Tr. at 18-22, 25). In an

[3] Section 725.309(c)(5) provides that, in a subsequent claim:

> If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see §725.463), will be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim will be binding on that party in the adjudication of the subsequent claim.

20 C.F.R. §725.309(c)(5).

[4] The record of claimant's first claim at Director's Exhibit 1 is 403 pages long and includes no page numbers. Because most of the documents it contains have exhibit numbers, we have included a citation to those internal exhibit numbers when referring to specific documents in Director's Exhibit 1. The records of claimant's second and third claims, however, at Director's Exhibits 2 and 3, have neither page numbers nor internal exhibit numbers. We have referred to specific documents contained in those exhibits by date and description.

[5] Employer's counsel at the hearing stated, "Your Honor[,] [i]f I could remind you to go back to the responsible operator issue that can be withdrawn. Canada Coal Company could stipulate that it's been properly named as the responsible operator."

August 27, 2003 Decision and Order, Judge Kane denied benefits because claimant failed to establish any element of entitlement. Director's Exhibit 1 (Decision and Order Denying Benefits).

Claimant filed his second claim on October 17, 2004. Director's Exhibit 2 (unpaginated, no internal exhibit numbers). On November 8, 2004, the district director issued a Notice of Claim to both employer and Kiah Creek Mining Company (Kiah Creek), which employed claimant after employer. *Id*.

The district director noted employer's previous stipulation that it was the responsible operator, but preliminarily identified Kiah Creek as the potentially liable operator that most recently employed claimant for a cumulative period of at least one year. *Id*. The district director explained that employment records indicated that claimant was employed with Kiah Creek from May 2, 1993 to November 2, 1993, but that he also "was paid temporary total disability [TTD] payments" for a state workers' compensation claim "from November 10, 1993 until November 7, 1994." *Id*. The district director concluded that claimant's employment with Kiah Creek "was considered to have been extended" to November 1994 "due to the TTD payments, and claimant was employed by the company for a full year."[6] *Id*. The district director named employer as the secondary potentially liable operator. *Id*. Both parties responded that they should not be designated as the responsible operator in the claim.[7] *Id*.

Director's Exhibit 1 (Tr. at 25). In confirming employer's stipulation, Judge Kane asked, "Okay, which would remove 18(a), that issue, the miner's most recent period of employment?" *Id*. Employer's counsel responded, "Yes, Your Honor." *Id.* The record reflects that issue 18(a) on the hearing issues form was "The miner's most recent period of cumulative employment of not less than one year was with the named Responsible Operator." Director's Exhibit 1 (internal exhibit 27).

[6] In determining whether a coal mine operator employed a miner for a cumulative period of at least one year, "any day for which the miner received pay while on an approved absence, such as vacation or sick leave may be counted as part of the calendar year or as partial periods totaling one year." 20 C.F.R. §725.101(a)(32). An unpaid leave of absence may be counted where there is no evidence that the employment was terminated and the record indicates that claimant retained the right to employment. *See Boyd v. Island Creek Coal Co*., 8 BLR 1-458, 1-460 (1986); *Elswick v. New River Co*., 2 BLR 1-1109, 1-1113-14 (1980).

[7] Employer argued to the district director that, in addition to the temporary total disability (TTD) payments that employer contended served to extend claimant's

On April 20, 2005, the district director issued a Schedule for the Submission of Additional Evidence and designated employer as the responsible operator. Director's Exhibit 2 (unpaginated). The district director concluded that the evidence did not establish that claimant was employed by Kiah Creek for at least one year. *Id*. The district director explained that claimant's period of TTD benefits from November 10, 1993 until November 7, 1994, did not extend his employment with Kiah Creek because claimant testified that he did not intend to return to work for Kiah Creek after his TTD benefits ended.[8] *Id*. The district director also reiterated that, in the prior claim, employer stipulated that it was the responsible operator. *Id*. In response, employer disputed that it was the responsible operator, and submitted additional evidence regarding claimant's employment with Kiah Creek and his receipt of TTD benefits. *Id*.

On August 19, 2005, the district director issued a Proposed Decision and Order, designating employer as the responsible operator. Director's Exhibit 2 (unpaginated). The district director denied benefits, however, because claimant again failed to establish any element of entitlement. *Id*.

Claimant filed a third claim for benefits on July 18, 2008, which was denied by the district director in a Proposed Decision and Order issued on January 28, 2009, because claimant failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 3 (unpaginated, no internal exhibit numbers). In processing the claim, the district director again designated employer as the responsible operator, based on its prior stipulation. *Id*. Employer contested its designation as the responsible operator. Claimant took no further action on his 2008 claim.

Claimant filed the current claim on September 10, 2010. Director's Exhibit 4. In a Proposed Decision and Order issued on July 9, 2012, the district director designated employer as the responsible operator and awarded benefits. Director's Exhibit 23. Employer disputed that it was the responsible operator and that claimant was entitled to benefits. Employer requested a hearing, which was held before the administrative law judge on February 24, 2016. Director's Exhibits 26, 28.

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employment with Kiah Creek Mining (Kiah Creek), claimant was employed by KTK Mining & Construction Company, Inc. (KTK). Director's Exhibit 2. Employer asserted that Kiah Creek and KTK were the same company, and that claimant's employment with them should therefore be combined. *Id*.

[8] The district director also found no evidence that Kiah Creek and KTK were the same company.

In her August 19, 2016 Decision and Order, the administrative law judge found that employer is the responsible operator based on employer's stipulation at the hearing in claimant's initial claim. She found that employer fairly entered into the stipulation, and was therefore bound by 20 C.F.R. §725.309(c)(5). The administrative law judge further found that, were it not for employer's stipulation, she would have dismissed employer from the claim because Kiah Creek more recently employed claimant for at least one year.[9] The administrative law judge ultimately concluded that employer remained bound by its stipulation, however, because it was aware of claimant's relationship with Kiah Creek when it stipulated that it was the responsible operator.

On appeal, employer challenges its designation as the responsible operator. It argues that the administrative law judge erred in applying 20 C.F.R. §725.309(c)(5), and erred in finding that it fairly entered into the stipulation before Judge Kane. Claimant responds in support of the administrative law judge's finding that employer is the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), also responds, arguing that the administrative law judge correctly applied 20 C.F.R. §725.309(c)(5) to find that employer is bound by its prior stipulation. In the alternative, the Director asserts that the administrative law judge erred in finding an employment relationship between claimant and Kiah Creek of at least one year, and urges the Board to reverse that finding.

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.[10] 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).

[9] The administrative law judge determined that although claimant left work with Kiah Creek after six months due to a work-related injury, he thereafter received TTD benefits for a period of time. She further found that he intended to return to work for Kiah Creek, and retained the right to do so, and therefore claimant's employment relationship with Kiah Creek extended to at least one year in duration. Decision and Order at 14-15.

[10] Claimant's coal mine employment was in Kentucky. 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, 1-202 (1989) (en banc).

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner" for at least one year. 20 C.F.R. §§725.494(c), 725.495(a)(1).[11] For claims filed after January 19, 2001, 20 C.F.R. §725.309(c)(5) provides that "any stipulation made by any party in connection with the prior claim will be binding on that party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(c)(5); *see* 20 C.F.R. §725.2(c).

Employer argues that the administrative law judge misapplied Section 725.309(c)(5). Emphasizing that stipulations made in "the prior claim" are binding in "the subsequent claim," employer argues that a stipulation is binding only in the immediate subsequent claim, not in any additional subsequent claims. Employer's Brief at 17. Employer asserts that, because it contested the responsible operator issue in claimant's second claim, and that claim was "[t]he claim prior to this [one],"[12] it is not bound by its February 12, 2003 stipulation. *Id*. We disagree.

The purpose of 20 C.F.R. §725.309(c)(5) is to prevent unnecessary litigation over uncontested issues. When the Department of Labor proposed the regulation,[13] it explained:

> Although the Department believes that parties must be allowed to relitigate issues decided against them in a prior claim as a matter of fairness, no such concerns underlie the treatment of uncontested issues (see §725.463) and other stipulations into which the parties entered during the adjudication of the prior claim. Where a party's waiver of its right to litigate a particular

[11] In addition, the evidence must establish that the miner's disability or death arose out of employment with that operator; the entity was an operator after June 30, 1973; the miner's employment included at least one working day after December 31, 1969; and the operator is financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[12] The record reflects that the claim prior to this one was claimant's third claim, filed on July 18, 2008, in which employer also contested the responsible operator issue. Director's Exhibit 3.

[13] The version of the regulation that the Department of Labor proposed, and eventually issued on January 19, 2001, was 20 C.F.R. §725.309(d)(4). The regulation has since been renumbered as 20 C.F.R. §725.309(c)(5), and the word "shall" was changed to "will," but the regulation's language otherwise remains the same. 78 Fed. Reg. 59,102, 59,108 (Sept. 25, 2013).

> issue represents a knowing relinquishment of that right, such waiver should be given the same force and effect in subsequent litigation of the same issue.

62 Fed. Reg. 3337, 3353 (Jan. 22, 1997). Thus, where a party knowingly relinquishes its right to litigate an issue in a prior claim, the party's waiver is given "the same force and effect in subsequent litigation of the same issue." *Id.*

Given this rationale, employer has not identified any reason, nor can we discern any, to distinguish an immediate subsequent claim from successive subsequent claims. The same interest in preventing the relitigation of issues previously conceded by the parties applies in each. The regulation's purpose thus would be undermined by employer's proposed interpretation of its language. We therefore reject employer's argument that an otherwise valid stipulation is binding only in an immediately subsequent claim.[14] 20 C.F.R. §725.309(c)(5); 62 Fed. Reg. 3337, 3353 (Jan. 22, 1997).[15]

Employer further asserts that the administrative law judge erred in finding that it fairly entered into the February 12, 2003 stipulation. We disagree. In order for a stipulation to be binding, it must be fairly entered into by the parties. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730, 25 BLR 2-405, 2-418 (7th Cir. 2013); *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996).

Employer argued to the administrative law judge that it did not fairly enter into the stipulation because it did not have knowledge of claimant's relationship with Kiah Creek. Brief of the Contested Employer at 2, 11-12. According to employer, because claimant did not testify as to his receipt of the TTD benefits at the February 12, 2003 hearing before Judge Kane, employer did not, and could not, have realized that the relationship between claimant and Kiah Creek lasted longer than a year. Decision and Order at 15-16. The administrative law judge acknowledged that claimant testified that his last day of work with Kiah Creek was November 2, 1993, when he suffered an injury. *Id*. She also

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[14] Furthermore, as the Director notes, the Department of Labor has held employer's stipulation in the January 29, 2001 claim against employer in each subsequent claim. Director's Brief at 2-3; Director's Exhibits 1-3.

[15] Employer argues further that 20 C.F.R. §725.309(c)(5) does not apply because, in claimant's second claim, the district director considered whether Kiah Creek more recently employed claimant for one year. This argument lacks merit. The Director was not a party to employer's stipulation and, thus, remained free to investigate whether there was a different responsible operator. The district director, however, ultimately concluded that employer was the responsible operator, based upon both the investigation and employer's prior stipulation. Director's Exhibit 2.

noted that claimant did not testify at the hearing that he was paid TTD workers' compensation benefits until November 7, 1994, as a result of that injury. *Id*.

Although claimant did not testify about his receipt of TTD benefits following his injury at Kiah Creek, the administrative law judge identified a permissible basis to attribute knowledge of that fact to employer. Claimant's first claim included the transcript of his April 27, 1995 testimony in his Kentucky black lung claim against Kiah Creek, in which he detailed his receipt of TTD benefits from the time of his injury until November of 1994. Decision and Order at 16. The administrative law judge found this evidence to be particularly notable because *employer* submitted the transcript to the district director during the processing of claimant's first claim.[16] The administrative law judge found, based on employer's possession and submission of the transcript, that it was "reasonable to impute knowledge" of claimant's "receipt of the [TTD] benefits to [employer]."[17] Decision and Order at 16. The administrative law judge therefore concluded that employer "had every opportunity to question [claimant] at the first hearing before [Judge Kane] about his [TTD] payments, and whether he intended to return to work for [Kiah Creek] after his injury resolved, before it stipulated to its status as the responsible operator." *Id*.

This was reasonable. We see no error in the administrative law judge's finding that employer "is bound by its previous stipulation of fact, made when it was in possession of the same facts that are the basis of its current argument, and when it had the opportunity to develop the same testimony from [claimant] that it relies on here." Decision and Order at 16. Contrary to employer's arguments, the administrative law

[16] The administrative law judge found that employer submitted the evidence of claimant's receipt of TTD benefits because Director's Exhibit 22 in the January 29, 2001 claim was labeled by the district director as "RO [Responsible Operator] Atty's Submission of Evidence." Decision and Order at 16 n.9; Director's Exhibit 1 (List of Director's Exhibits). The exhibit consisted of documents from claimant's Kentucky workers' compensation claim against Kiah Creek for occupational disease, and included the deposition transcript. Director's Exhibit 1 (internal exhibit 22). Employer does not challenge the administrative law judge's finding that it submitted the evidence related to claimant's state claim against Kiah Creek in claimant's 2001 claim for black lung benefits. That finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[17] The administrative law judge noted that employer's counsel at the February 12, 2003 hearing had even "referred to [c]laimant's testimony in the previous [s]tate claim hearing" when he asked claimant about a different matter that was addressed in that testimony. Decision and Order at 16 n.10.

judge rationally found that employer "fairly entered into the stipulation" that it is the responsible operator. Decision and Order at 16 (internal quotations omitted); *see Burris*, 732 F.3d at 730, 25 BLR at 2-418; *Richardson*, 94 F.3d at 164, 21 BLR at 2-373; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). We therefore affirm the administrative law judge's determination that employer is bound by its prior stipulation, pursuant to 20 C.F.R. §725.309(c)(5). Thus, we affirm the administrative law judge's determination that employer is the responsible operator.[18]

Accordingly, the administrative law judge's Decision and Order is affirmed, and the case is remanded to the administrative law judge for adjudication of the merits of entitlement.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[18] Because we affirm the administrative law judge's finding that employer is the responsible operator, based on its previous stipulation before Judge Kane, we need not address the Director's argument that the administrative law judge erred in finding that the evidence established a one-year employment relationship between claimant and Kiah Creek. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).