BRB No. 01-0931 BLA

MILLARD BOWEN, JR.	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
NORFOLK & WESTERN RAILWAY COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Summary Judgment of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Millard Bowen, Jr., Williamson, West Virginia, for claimant, *pro se*.

Ashley M. Harman (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Granting Summary Judgment (2001-BLA-0377) of Administrative Law Judge Michael P. Lesniak denying benefits on a duplicate 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).[1] This case has a lengthy procedural history. Claimant initially filed an application for

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

benefits on June 21, 1978. Director's Exhibit 15-1. In a Decision and Order issued on February 26, 1988, Administrative Law Judge Robert S. Amery denied benefits, finding that claimant did not meet the definition of a "miner" under the Act because the function of claimant's work for employer from 1942 to 1973 was not integral to the extraction or preparation of coal, but was related to the transportation of the coal after it entered the stream of commerce. Judge Amery further found that the evidence of record was insufficient to establish entitlement pursuant to 20 C.F.R. Part 727 (2000). Director's Exhibit 15-30. Judge Amery's finding that claimant was not a "miner" within the meaning of the Act and regulations was affirmed on appeal to the Board. *Bowen v. Norfolk & Western Railway Company,* BRB No. 88-0978 BLA (Nov. 26, 1991)(unpub.); Director's Exhibit 15-34. The Board subsequently denied claimant's motion for reconsideration by Order issued on April 9, 1992. Director's Exhibit 15-36.

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effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Claimant filed a petition for modification in April 1992, Director's Exhibit 15-39, which was denied by the district director on July 22, 1992. Director's Exhibit 15-41. On July 15, 1993, after an evidentiary hearing, Administrative Law Judge Glenn Robert Lawrence issued a Decision and Order denying modification pursuant to 20 C.F.R. §725.310 (2000), based on his finding that the evidence failed to establish that claimant was employed as a "miner." Director's Exhibit 15-55. Claimant filed a second petition for modification on November 15, 1993, which was denied by the district director on January 6, 1994. Director's Exhibit 15-59. Claimant filed a third request for modification on March 7, 1994, which was again denied by the district director. Director's Exhibits 15-62, 15-64, 15-65. After requesting a formal hearing, claimant moved to withdraw his modification request, which was granted by Administrative Law Judge Robert G. Mahoney on October 31, 1994.[2] Director's Exhibits 15-66, 15-74, 15-75.

Claimant filed the present duplicate claim for benefits on August 24, 2000, and requested a formal hearing after the district director denied the claim on September 20, 2000. Director's Exhibits 1, 8, 11. The case was assigned to Judge Lesniak (the administrative law judge) and scheduled for hearing on August 14, 2001. Employer then filed a Motion for Summary Judgment on July 24, 2001, which was opposed by claimant.

The administrative law judge found that claimant did not meet the definition of a "miner" at 20 C.F.R. §725.202(a), *see Collins v. Director, OWCP,* 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); *Eplion v. Director, OWCP,* 794 F.2d 935 9 BLR 2-52 (4th Cir. 1986); and that since the issue of whether claimant was a miner within the meaning of the Act had been fully litigated in claimant's original claim, the legal doctrines of *res judicata* and collateral estoppel precluded claimant from relitigating the issue. Accordingly, the administrative law judge granted employer's motion for summary judgment, dismissed employer as the responsible operator herein, cancelled the hearing, and denied benefits.

[2]Although Judge Mahony's Order indicated that he was granting claimant's motion to withdraw his claim, Judge Mahony did not cite to 20 C.F.R. §725.306, and the regulatory conditions for withdrawal were not met. *See* Director's Exhibits 15-74, 15-75. Further, the withdrawal provisions at Section 725.306 were not available to claimant after Judge Lawrence's decision on the merits became effective. *See Clevenger v. Mary Helen Coal Co.*, BRB No. 01-0884 BLA, 22 BLR 1- (Aug. 30, 2002)(*en banc*); *Lester v. Peabody Coal Co.*, BRB No. 02-0193 BLA, 22 BLR 1- (Sep. 9, 2002)(*en banc*). In any event, claimant's letter merely advised that his case was to be heard on December 8, 1994, and that claimant wished to withdraw "from any further proceeding at this time." Director's Exhibit 15-74. Claimant subsequently took no further action on his original claim.

In the present appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).[3]

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and contains no reversible error therein. In granting employer's motion for summary judgment, the administrative law judge determined that the final judgments rendered in claimant's original claim established that claimant was not employed as a "miner" within the meaning of the Act from 1942 to 1973, Decision and Order at 2-5, and we must accept the correctness of the legal conclusions contained in those final judgments. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996). Since the present claim is a duplicate claim subject to the provisions at 20 C.F.R. §725.309 (2000), the sole means by which claimant can now establish that he is a miner as defined at Section 725.202(a) is with proof that he subsequently worked as a miner. *See generally Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). As the record is devoid of such evidence, claimant is precluded from entitlement to benefits under the Act.

Accordingly, the administrative law judge's Decision and Order Granting Employer's Motion for Summary Judgment is affirmed.

SO ORDERED.

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[3]Since the miner's employment took place in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Director's Exhibit 2.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge