BRB No. 95-1279 BLA

FRED HATFIELD Claimant-Petitioner v. ARCH OF KENTUCKY, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Substitute Final Order of Dismissal of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

Edward Waldman (Thomas S. Williamson, Jr., 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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Substitute Final Order of Dismissal (94-BLA-1364) of Administrative Law Judge Charles P. Rippey dismissing 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). Claimant's first claim for benefits filed on January 5, 1988 was denied in a Decision and Order issued by Administrative Law Judge Clement J. Kichuk on October 12, 1990. Director's Exhibit 26 at 1-7. Judge Kichuk found the existence of pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment established, but found the evidence insufficient to establish causation pursuant to 20 C.F.R. §718.204(b) and, accordingly, denied benefits.

Claimant filed a second claim on June 17, 1993, more than one year after the denial of benefits. Director's Exhibit 1. In support of his duplicate claim, claimant submitted a physical examination report by Dr. Glen Baker, objective study results, and several readings of an x-ray dated August 16, 1993. Director's Exhibit 7. Dr. Baker diagnosed pneumoconiosis, opining that it caused a severe obstructive defect that rendered claimant totally disabled. *Id*.

On December 1, 1993 the district director issued a notice of initial finding stating that the evidence indicated that claimant may be entitled to benefits, and informing employer pursuant to Section 725.413[1] that it had thirty days in which to respond. Director's Exhibit 13. Employer filed its controversion on February 23, 1994, unaccompanied by any statement of good cause for accepting the late filing. Director's Exhibit 15.

On March 8, 1994 the district director issued a proposed Decision and Order awarding benefits[2], which also contained a finding that employer had not responded timely to the notice of initial finding. Director's Exhibit 14 at 2-4. An attached letter

[1] Section 725.413 provides in part that a notified operator must indicate its intent to accept or contest liability within 30 days of receipt of notification, unless the district director extends the response period for good cause or in the interest of justice. 20 C.F.R. §725.413(a). Failure to respond timely is considered both an acceptance by the operator of the initial finding and a waiver of its right to contest the claim, unless good cause is shown. 20 C.F.R. §725.413(b)(3).

[2] The Decision and Order specified that benefits were awarded effective June 1993, but that payment of federal benefits was completely offset until July 1, 1995 because of claimant's receipt of Kentucky State Workers' Compensation benefits. Director's Exhibits 14, 23.

advised employer that because it had failed to respond to the notice of initial finding, it had waived its right to contest the claim. Director's Exhibit 14 at 1.

On March 18, 1994 employer replied by letter that its controversion was untimely because of a clerical error in its office and, thus, good cause existed to accept the late filing. Director's Exhibit 20 at 1. Employer also contended that the district director had failed to make a threshold determination of a material change in conditions. *Id*.

On March 23, 1994 the district director found employer's explanation insufficient to establish good cause and advised employer that it could request a hearing on the good cause issue only. Director's Exhibit 21. The district director added that the material change in conditions finding was incorporated into the finding that claimant met the regulatory criteria for entitlement. *Id*.

Employer requested and was granted a hearing on the sole issue of whether good cause existed for the late filing of employer's controversion. Director's Exhibits 25, 27 at 2. Judge Rippey, to whom the case was assigned, did not hold a hearing or decide the good cause issue.

Instead, on January 25, 1995 the administrative law judge issued an order to show cause why claimant's duplicate claim should not be dismissed on the grounds that claimant was unable to establish a material change in conditions. Order to Show Cause at 1. Specifically, the administrative law judge asserted that, since claimant's prior claim was denied because causation was not proven pursuant to Section 718.204(b), and since causation "had nothing to do with the Claimant's condition," then "no material change in the Claimant's condition [could] form the basis for an award of benefits." *Id*. The administrative law judge concluded that "it appears that under the Act a claim may not be refiled under these circumstances." *Id*. The order gave claimant until the close of business on February 21, 1995 to respond. *Id*.

On February 27, 1995 the administrative law judge dismissed the duplicate claim, stating he had received no response from claimant. Final Order of Dismissal. On the same day, claimant faxed a response and a motion to accept the late filing, asserting that Dr. Baker's report established a material change in conditions. Claimant's Response to Order to Show Cause. However, in an order issued on February 28, 1995 the administrative law judge indicated that he had received claimant's response only after the issuance and mailing of the dismissal order, and thus had lost jurisdiction of the claim. Procedural Order. Subsequently, on March 7, 1995, the administrative law judge issued a Substitute Final Order of Dismissal

stating that no response had been received to his order to show cause. Substitute Final Order of Dismissal.

On appeal, claimant contends that the administrative law judge erred by dismissing the claim when new evidence had been submitted regarding a material change in conditions. Claimant's Brief at 3. Claimant further asserts that Section 725.465(d) barred dismissal of the claim without the Director's written consent because the Black Lung Disability Trust Fund had made interim benefit payments to claimant.[3] Claimant's Brief at 4. Finally, claimant argues that the administrative law judge's dismissal of the claim was unreasonable because claimant's response, although late, arrived in the administrative law judge's office on the same day that he issued the dismissal order. Claimant's Brief at 5.

The Director responds to one point only, urging that the Board reject claimant's argument based on Section 725.465(d) because the Trust Fund made no interim benefit payments to claimant pursuant to Section 725.522 as the federal benefits were completely offset by claimant's state workers' compensation award. Director's Brief at 2. Employer has not responded.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

Section 725.465(a) provides three grounds for dismissal of a claim for cause:

(1) failure of claimant or his or her representative to attend a hearing without good cause;

(2) failure of claimant to comply with a lawful order of the administrative law judge; or

(3) there has been a prior final adjudication of the claim and no new evidence is submitted.

20 C.F.R. §725.465(a). Subsections (a)(1) and (3) are inapplicable because a

[3] Section 725.465(d) provides that no claim shall be dismissed where payments prior to final adjudication have been made to the claimant pursuant to Section 725.522, except upon the motion or written agreement of the Director. 20 C.F.R. §725.465(d).

hearing was never held and, as claimant states, new evidence was submitted in support of the duplicate claim. Director's Exhibit 7; Claimant's Brief at 3. Further, we hold that the administrative law judge's order requiring claimant to show cause why his duplicate claim should not be dismissed was not a "lawful order" under subsection (a)(2) because the administrative law judge purported to decide an uncontested issue.[4]

Pursuant to Section 725.463(a), the issues to be resolved by the administrative law judge are confined to those identified as contested by or raised in writing before the district director. 20 C.F.R. §725.463(a); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Simpson v. Director, OWCP*, 6 BLR 1-49 (1983). In this case, employer waived its right to raise issues or present evidence regarding the merits of entitlement because its controversion was untimely filed. *See* 20 C.F.R. §725.413(b)(3). Thus, whether good cause existed for the district director to accept the untimely controversion was the only issue indicated for decision on Form CM-1025. Director's Exhibit 27. Because the administrative law judge decided an uncontested issue and ignored the good cause issue, we reverse his dismissal order.

Further, contrary to the administrative law judge's finding that the duplicate claim process is unavailable to claimant, nothing about the prior denial precludes claimant from now establishing a material change in conditions. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that in determining whether a material change in conditions is established, "the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him." *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994). If the miner establishes the existence of that element, he has demonstrated a material change in conditions and the administrative law judge must then consider whether all of the record

[4] While claimant did not raise the issue, the administrative law judge's order to show cause on an uncontested issue constitutes plain error. *See North American Coal Corp. v. Campbell*, 748 F.2d 1124, 9 BLR 2-221 (6th Cir. 1984); *Kubachka v. Windsor Power House Coal Co*., 11 BLR 1-171 (1988); *Etzweiler v. Cleveland Brothers Equipment Co*., 8 BLR 1-172 (1985).

evidence, including that submitted with previous claims, supports a finding of entitlement to benefits. *Ross*, 42 F.3d at 997-98, 19 BLR at 2-18-19.

The element of entitlement previously adjudicated against claimant was causation at Section 718.204(b). Director's Exhibit 26 at 6. Claimant has submitted new evidence which the district director has found establishes the existence of that element, and the district director has made a finding of entitlement. Director's Exhibits 13, 4; *see Ross*, *supra*. Contrary to the administrative law judge's finding, the prior conclusion that claimant failed to establish causation does not forever preclude him from adducing sufficient evidence to establish that his totally disabling impairment is due to pneumoconiosis. The administrative law judge's contrary belief would create a class of claimants for whom relief from *res judicata* is unavailable, contravening the purpose of Section 725.309(d). *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-79 (1993)(purpose of Section 725.309(d) is to provide relief from *res judicata* for miner whose physical condition worsens over time).[5]

Therefore, we remand this case to the administrative law judge for a decision on the good cause issue only. If the administrative law judge finds that good cause is not established, then claimant is entitled to benefits, employer having waived its right to contest any other issue. *See* 20 C.F.R. §725.413(b)(3). If the administrative law judge finds good cause established for the district director to accept employer's untimely controversion, he may, within his discretion, either re-open the record or remand the claim to the district director for further evidentiary development. 20 C.F.R. §725.456(e). Should the case later reach the administrative law judge for a decision on the merits, he must apply *Ross* to determine whether a material change in conditions and entitlement are established.

[5] While the *Ross* court noted that "entitlement is not without limits," in that no miner is entitled to benefits simply because his first claim should have been granted, the court also accepted the Director's interpretation of Section 725.309(d) as "premised on the notion that miners disabled by pneumoconiosis arising out of coal mine employment are entitled to benefits under the Act." *Ross*, 42 F.3d at 998, 19 BLR at 2-20.

Lastly, we reject claimant's contention regarding the Section 725.465(d) bar to dismissal because, as the Director correctly asserts, no benefits were paid to claimant from the Trust Fund prior to the issuance of the administrative law judge's dismissal order.[6] Director's Exhibits 14, 23; *see* 20 C.F.R. §725.465(d).

[6] In view of our disposition of this case, we decline to address claimant's argument regarding the reasonableness of the administrative law judge's dismissal in light of the timing of receipt of claimant's faxed response. Further, because the good cause issue, if decided in favor of claimant, is dispositive on the merits of his claim, we deny claimant's motion to remand this case to the district director for modification proceedings. *See Mansfield v. Director, OWCP*, 8 BLR 1-445 (1986).

Accordingly, the administrative law judge's Substitute Final Order of Dismissal is reversed, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge