U.S. Department of Labor

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

BRB Nos. 16-0395 BLA and
16-0612 BLA

SYLVIA SADLER (Widow, of and on behalf of, EDGAR ROSS SADLER)	)	
Claimant-Respondent	)	
v.	)	
BIG HORN COAL COMPANY	)	DATE ISSUED: 10/25/2017
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Employer's Motions for Reconsideration, to Disqualify, and to Vacate, and Order Awarding Benefits and Order Awarding Survivor's Benefits of William S. Colwell, Administrative Law Judge United States Department of Labor.

Evan B. Smith (Appalachian Citizen's Law Center), Whitesburg, Kentucky, for claimant.

John S. Lopatto, Washington, D.C., for employer.

Ann Marie Scarpino (Nicholas C. Geale, Acting Solicitor of Labor; Maia 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 appeals the Order Denying Employer's Motions for Reconsideration, to Disqualify, and to Vacate and Order Awarding Benefits, and the Order Awarding Survivor's Benefits (2011-BLA-05460, 2015-BLA-05366) of Administrative Law Judge William S. Colwell (the administrative law judge), rendered on a miner's subsequent claim and a survivor's claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1]

At a hearing on the miner's prior claim, the administrative law judge erroneously informed the miner that if he withdrew his request for modification in that claim, he would be able to file a subsequent claim. Employer argues that notwithstanding the miner's reliance on the administrative law judge's statements, the miner's current subsequent claim is time-barred because he received a diagnosis of total disability due to pneumoconiosis more than three years prior to filing the claim. Employer therefore argues that claimant is not entitled to derivative benefits in the survivor's claim. In support of its argument, employer asserts, *inter alia*, that extraordinary circumstances do not exist for waiving the statute of limitations. Finding that the administrative law judge acted permissibly and that extraordinary circumstances exist to waive the statute of limitations, we affirm the administrative law judge's orders in all respects.

I. Procedural History

On July 18, 2001, the miner filed a timely request for modification of the denial of a claim he filed on February 23, 1990. Director's Exhibit 1. The district director denied

[1] Claimant is the surviving spouse of the deceased miner. She is pursuing the miner's claim on behalf of his estate and filed a claim for survivor's benefits on October 22, 2014. Director's Exhibit 23. The Board granted employer's motion to consolidate the miner's and survivor's claims. *Sadler v. Big Horn Coal Co.*, BRB Nos. 16-0395 BLA and 16-0612 BLA (Nov. 10, 2016) (unpub. Order).

the miner's request by order dated October 2, 2001.[2] *Id*. The claim then was forwarded to the Office of Administrative Law Judges (OALJ) for a hearing. *Id*.

A number of delays followed, the most notable occurring at claimant's request. In an August 24, 2005 letter, claimant explained that the miner recently had undergone "extensive testing" at National Jewish Medical Center, but that it was "too soon" for the results to be submitted. Claimant's Brief at 4-5, *quoting* August 24, 2005 Letter. Claimant also indicated that the miner was looking for an attorney to represent him. *Id*. at 5. The administrative law judge cancelled the hearing scheduled for September 2005 in response to claimant's letter. Dr. Rose performed the testing described in claimant's letter and issued a report on September 16, 2005, diagnosing the miner as being totally disabled due to pneumoconiosis.[3] Employer's Exhibit 2.

After two additional hearings were cancelled, the miner retained an attorney who filed a motion on June 6, 2008 to "dismiss" the miner's claim "without prejudice," so that the miner could further develop evidence. Director's Exhibit 1. On June 12, 2008, the administrative law judge held a hearing at which the parties discussed the miner's motion

[2] The miner's initial claim was denied by the district director on June 5, 1990. Director's Exhibit 1. The miner requested a hearing but the claim was never forwarded to the Office of Administrative Law Judges (OALJ). *Id*. After the miner filed a second claim for benefits on February 7, 1994, it was discovered that the miner's initial claim was still pending. *Id*. The miner requested a hearing, and the claim was referred to the OALJ. *Id*. Administrative Law Judge Donald W. Mosser denied benefits on October 13, 1998, and the Board affirmed the denial. *Id*.; *Sadler v. Big Horn Coal Co.*, BRB No. 99-0236 BLA (July 28, 2000) (unpub.).

[3] It is undisputed that, absent waiver, Dr. Rose's report commenced the running of the three-year statute of limitations because it constitutes a medical determination of total disability due to pneumoconiosis that was communicated to the miner. 30 U.S.C. §932(f); *see Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 1506-07, 20 BLR 2-302, 2-310-11 (10th Cir. 1996); *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95, 25 BLR 2-273, 2-282 (6th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP* [*Williams*], 453 F.3d 609, 617-618, 23 BLR 2-345, 2-364-65 (4th Cir. 2006). It is also undisputed that if the miner's claim is not time-barred, the miner's estate is entitled to benefits and claimant is entitled to survivor's benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

as being a request to withdraw his 2001 petition for modification.[4] *Id.* Interpreting the relevant regulation to require him to determine whether withdrawal of the modification request was in the miner's best interest, the administrative law judge stated:

> What happens, though, I need to make sure that – that's why it's so important to have you here, Mr. Sadler, is to make sure that I can talk about this with you on the record – is if – it's my understanding that if you pull back on that modification request based on the prior claims, then that case will be ended and that will [] serve as a denial and that case will be over.
>
> You then would have an opportunity to file a subsequent claim or another claim, but that claim then now would be under the new regulations that were established in 2001.
>
> . . .
>
> The benefit of that – and, again, it's totally your decision and your counsel's decision . . . is the new case – if you go forward with the new case, since black lung is a progressive disease, then there's an opportunity, then, to use the more current evidence.
>
> . . .
>
> [I]f you decide to do this, you and your counsel, to withdraw the most recent modification request and let this case, then, be sent back to the [d]istrict [d]irector, with the understanding that you could then, at some other, later date, then file another claim.[5]

Claimant's Exhibit 6 (Transcript of June 12, 2008 Hearing) at 9-11. At no point during the hearing did the administrative law judge or counsel for either party discuss the statute of limitations. The administrative law judge granted the miner's request in an Order dated October 29, 2008, more than three years after Dr. Rose's report, concluding that

[4] The implementing regulations provide that a claimant may withdraw a claim when the "appropriate adjudication officer" approves the request "on the grounds that it is in the best interests of the claimant[.]" 20 C.F.R. § 725.306(a)(2).

[5] Later in the hearing, the administrative law judge further indicated that the miner could file a new claim later in "2008 or 2009." Claimant's Exhibit 6 (Transcript of June 12, 2008 Hearing) at 14.

withdrawal "was reasonable" and in the miner's "best interest" so that the miner could further develop his case and file a subsequent claim.[6] Order Granting Withdrawal at 4.

The miner filed the current subsequent claim on June 1, 2010. Director's Exhibit 2. The district director awarded benefits on January 3, 2011, and employer requested a hearing before the OALJ. Director's Exhibits 15, 16. The miner died on February 26, 2014, while his claim was pending.

On June 5, 2014, employer filed a Motion to Dismiss, asserting that the miner's claim was not timely filed. The administrative law judge initially determined that the claim was time-barred based on Dr. Rose's report. Order Denying Motion to Dismiss at 4. The administrative law judge acknowledged, however, that at the hearing he misrepresented the miner's ability to file a new claim because he did not address the statute of limitations and instead specifically informed the miner that he would be able to file a subsequent claim without restriction. *Id.* at 6-7. Given the inequity that would otherwise result, the administrative law judge concluded that the miner's reasonable reliance on his representations constituted "extraordinary circumstances" that waived the statute of limitations.[7] *Id.* at 8-9. He therefore denied employer's motion. *Id.* at 9.

Employer filed a Motion for Reconsideration on August 25, 2015, which claimant opposed. Employer's reply contained two additional motions: a Motion to Disqualify the administrative law judge and a corresponding Motion to Vacate the July 21, 2015 Order. Employer argued that the administrative law judge inappropriately provided legal advice to claimant at the hearing and that he therefore should be disqualified and his

[6] Notably, given that pneumoconiosis can be a latent and progressive disease, claimants are normally not limited in the number of claims they may file. *See, e.g.*, *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1221, 24 BLR 2-155, 2-171 (10th Cir. 2009) ("Because black lung is a progressive disease, miners are permitted to file successive claims."); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996) ("[N]othing bars or should bar claimants from filing claims *seriatim*, and the regulations recognize that many will."). An exception, however, applies to claims previously found to be time-barred because the limitation applies to both the initial and any subsequent claims. *Oliver*, 555 F.3d at 1221, 24 BLR at 2-171; *Sewell Coal Co. v. Director, OWCP* [*Dempsey*], 523 F.3d 257, 259, 24 BLR 2-128, 2-133 (4th Cir. 2008).

[7] The implementing regulations state that the three-year statute of limitations in miners' claims "may not be waived or tolled except upon a showing of extraordinary circumstances." 20 C.F.R. §725.308(c).

decision vacated. On April 25, 2016, the administrative law judge issued an order denying employer's motions and awarding benefits in the miner's claim. Based on the award in the miner's claim, the administrative law judge issued an order awarding survivor's benefits on July 21, 2016, finding that claimant is automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[8]

On appeal, employer argues that the Secretary of Labor (Secretary) lacked authority to promulgate 20 C.F.R. §§725.306 and 725.308(c), which allow for withdrawal of a claim only when it is in the claimant's best interests, and waiver or tolling of the statute of limitations based on a showing of extraordinary circumstances, respectively. Employer further asserts that, even assuming the regulations are valid, the administrative law judge inappropriately provided legal advice at the hearing and thus erred in finding that extraordinary circumstances existed to waive the statute of limitations. Claimant responds, urging affirmance of the administrative law judge's awards of benefits in the miner's claim and the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited brief, urging the Board to reject employer's challenges to the regulations.

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.[9] 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).

II. The Miner's Claim

Section 422 of the Act provides that "any claim for benefits by a miner" shall be "filed within three years after a medical determination of total disability due to pneumoconiosis[.]" 30 U.S.C. §932(f). The implementing regulation provides that the three-year time limit may be waived "upon a showing of extraordinary circumstances."

[8] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-200 (2010).

[9] Because the record reflects that the miner's last coal mine employment was in Wyoming, the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

20 C.F.R. §725.308(a), (c). The Act further incorporates a provision of the Longshore and Harbor Workers' Compensation Act that prohibits agreements by employees to waive their rights to compensation. 33 U.S.C. §915(b), incorporated by reference at 30 U.S.C. §932(a). The regulation implementing this provision provides, in relevant part, that a claimant may only withdraw a claim when the "appropriate adjudication officer approves" the withdrawal on "the grounds that it is in the best interests of the claimant[.]" 20 C.F.R. §725.306(a)(2).

Employer's argument that the Secretary did not possess rulemaking authority to enact these regulations is without merit. The Secretary has statutory authority to promulgate regulations to carry out the Act, 30 U.S.C. §936, and the United States Supreme Court has held that statute of limitations provisions are subject to equitable tolling unless they are inconsistent with the text of the relevant statute. *Young v. U.S.*, 535 U.S. 43, 49-50 (2002). Employer has not identified any language in 30 U.S.C. §932(f) or elsewhere in the Act that bars equitable tolling. Employer thus has failed to demonstrate how the Secretary exceeded his authority in promulgating 20 C.F.R. §725.308(c), a regulation that this Board has long enforced. *See, e.g., Cabral v. Eastern Assoc. Coal. Co.*, 18 BLR 1-25, 1-32-33 (1993); *Jones v. Bethlehem Mines Corp.*, 4 BRBS 373 (1976); *Sester v. Director, OWCP*, 4 BRBS 47 (1967).

Similarly, the regulation at 20 C.F.R. §725.306(a) is a reasonable gap-filling measure interpreting the Act's prohibition on the waiver of compensation. The Act does not specifically state the standard for the withdrawal of modification claims. *See* 20 C.F.R. §725.310. The regulation therefore recognizes the Act's remedial nature by limiting the circumstances under which a claimant may withdraw a claim for the purpose of protecting claimants from ill-advised or coerced decisions to abandon litigation. *See Morton v. Ruiz,* 415 U. S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 742, 21 BLR 2-204, 2-208 (The regulation at 20 C.F.R. §725.306(a)(2) "protects claimants from ill-advised or coerced decisions to abandon litigation"). The regulations at issue in this case are valid.[10] 30 U.S.C. §936.

[10] Employer's argument that the Secretary of Labor lacked the authority to promulgate 20 C.F.R. §725.306(a)(2) to "defeat an employer's statute of limitations defense" at 20 C.F.R. §725.308 is specious. Employer's Brief at 18. The two regulations do not conflict. The administrative law judge's attempt to determine whether withdrawal was in the miner's best interests did not constitute extraordinary circumstances to waive the statute of limitations. Instead, the basis of the extraordinary circumstances finding was the miner's reasonable reliance on the administrative law judge's misrepresentation that he would be able to file a subsequent claim after his prior claim was withdrawn.

Employer's further contention that the administrative law judge acted beyond the scope of his authority by giving "legal advice" at the 2008 hearing is without merit. Employer's Brief at 15. The Board has explicitly held that "the regulations allow for the withdrawal of a modification request, in the same manner that a claimant is allowed to withdraw a claim under 20 C.F.R. §725.306." *W.C.* [*Cornett*] *v. Whitaker Coal Corp.*, 24 BLR 1-20, 1-27 (2008) (adopting the Director's view of the regulation). Therefore, pursuant to 20 C.F.R. §725.306(a)(2), the administrative law judge was required to evaluate whether the proposed withdrawal was "in the best interests of the claimant[.]" 20 C.F.R. §725.306(a)(2); *see Hunt*, 124 F.3d at 742, 21 BLR at 2-208. The administrative law judge was engaged in the inquiry required by the plain language of 20 C.F.R. §725.306(a)(2) when discussing with the parties the effect of a withdrawal of the miner's modification request on his ability to file a new claim. Thus, the administrative law judge did not exceed the scope of his authority or abdicate neutrality as employer contends. *Cornett*, 24 BLR at 1-27.

We similarly find no merit to employer's contention that the administrative law judge should have recused himself. Recusal is appropriate whenever a judge exhibits bias or partiality. *Liteky v. United States*, 510 U.S. 540, 555 (1994). Opinions formed by a judge "on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings," however, "do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* Beyond mischaracterizing the administrative law judge's statements as "legal advice," employer has not identified any conduct that displayed favoritism or antagonism -- nor do we see any such conduct on the record before us. We therefore affirm the administrative law judge's denial of employer's motion to disqualify, and we deny employer's request that this case be remanded to another administrative law judge on the same basis. *Id*. at 555.

Finally, we reject employer's argument that the administrative law judge erred in determining that extraordinary circumstances existed to waive the statute of limitations. The Board reviews an administrative law judge's procedural rulings for abuse of discretion. *See Dempsey v. Sewell Coal Co*., 23 BLR 1-47, 1-55 (2004) (en banc). The language permitting waiver was added to the regulations to prevent inequitable results from the strict application of the statute of limitations. *Cabral*, 18 BLR at 1-31-32, *citing* 43 Fed. Reg. 36,772, 36,785 (Aug. 18, 1978) ("The revised regulatory provisions

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Order Denying Motion to Dismiss at 7-8. The extraordinary circumstances that gave rise to waiver, in other words, was not 20 C.F.R. §725.306(a)(2) itself, but rather the administrative law judge's misapplication of it.

codified in Section 725.308 reflect the remedial nature of the Act" in that they "provide claimants with relief from the statutory bar in extraordinary circumstances, in order to eliminate the 'inequitable denial' of claims."). A party's reasonable reliance on an adjudicator's good faith misrepresentation of the timeliness of a claim has long been held to justify the equitable waiving of statutes of limitations. *See*, *e.g.*, *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (equitable waiver of statute of limitations is appropriate "where the court has led the plaintiff to believe that she had done everything required of her"); *Carlile v. S. Routt Sch. Dist. RE 3-J*, 652 F.2d 981, 986 (10th Cir. 1981) (a party's detrimental reliance on a district court order incorrectly stating that an action had commenced warranted equitable waiver). Such waiver prevents an unjust result when a party has been "lulled into inaction" by a governing tribunal. *Carlile*, 652 F.2d at 986.

So too here. When deciding to withdraw his modification request in the prior claim, the miner reasonably relied on the administrative law judge's statements that he would have an unrestricted ability file a subsequent claim. Transcript of June 12, 2008 Hearing at 10-11. All parties at the hearing understood, without objection, that withdrawal was for the specific purpose of allowing the miner to file a subsequent claim at a later date. *Id.* The administrative law judge's order, submitted approximately four months after the hearing, stated that withdrawal was "reasonable" and in the miner's "best interest" so that he could develop further evidence. Order Granting Withdrawal at 4.

Yet, the administrative law judge's finding was erroneous. The actual effect of withdrawal was that the miner's prior claim became finally denied, and any subsequent claim was time-barred because the administrative law judge's order postdated Dr. Rose's report by more than three years. 30 U.S.C. §932(f). In other words, absent waiver of the statute of limitations, the miner's right to benefits under the Act would be permanently extinguished because of his reliance on the administrative law judge's statements. This is precisely the type of inequitable result waiver provisions are designed to prevent. *Cabral*, 18 BLR at 1-128. We therefore hold that the administrative law judge acted within his discretion in finding that the miner's reliance on his misstatements constituted extraordinary circumstances justifying waiver of the statute of limitations.[11] 20 C.F.R.

[11] Employer contends that the failure of the miner's former attorney to recognize at the 2008 hearing the statute of limitations issue posed by Dr. Rose's 2005 medical report cannot provide the basis for a finding of extraordinary circumstances at 20 C.F.R. §725.308(c). We decline to address this argument, as the administrative law judge ultimately found, and we have affirmed, that his own erroneous representations, rather than the conduct of the miner's former attorney, created the extraordinary circumstances justifying waiver of the statute of limitations under 20 C.F.R. §725.308(c). Orders

§725.308(c); s*ee Brown*, 466 U.S. at 151; *Carlile*, 652 F.2d at 982; *Dempsey*, 23 BLR at 1-55.

We therefore affirm the administrative law judge's determination that the miner's June 1, 2010 claim was timely. Because we have rejected employer's allegations of error, we affirm the administrative law judge's Order Denying Employer's Motions for Reconsideration, to Disqualify, and to Vacate, and Order Awarding Benefits in the miner's claim.

III. The Survivor's Claim

Relying on the award of benefits in the miner's claim, the administrative law judge subsequently issued a separate order finding that claimant satisfied the prerequisites for automatic entitlement under Section 422(*l*) of the Act.[12] 30 U.S.C. §932(*l*); Order Awarding Survivor's Benefits at 2. Employer has not separately challenged the award of benefits in the survivor's claim. Therefore, in light of our affirmance of the award of benefits in the miner's claim, we also affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Denying Motions and Awarding Benefits at 10-11; Order Denying Motion to Dismiss at 7-8.

[12] To establish entitlement under Section 422(*l*), claimant must prove that: she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*).

Accordingly, the administrative law judge's Order Denying Employer's Motions for Reconsideration, to Disqualify and to Vacate, in addition to his Order Awarding Benefits and Order Awarding Survivor's Benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge