

ARNOLD CLEVINGER) BRB No. 88-2575 BLA

)
Claimant-Respondent)

v.)

HARMAN MINING CORPORATION)

DATE ISSUED:

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Employer-Respondent)

)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Petitioner)

ARNOLD CLEVINGER)

) BRB No. 88-3335 BLA

) Claimant-Petitioner)

v.)

HARMAN MINING CORPORATION)

)
Employer-Respondent)

)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Respondent)

DECISION and ORDER

Appeals of the Decision and Order, the Order Denying Director's Motion for Reconsideration, the Decision and Order Awarding Medical Benefits, and the Order Denying Claimant's Motion for Reconsideration of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe & Farmer), Norton, Virginia, for claimant.

Laura Montgomery (Arter & Hadden), Washington, D.C., for employer.

Edward O. Falkowski (Marshall J. Breger, 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, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and LIPSON, Administrative Law Judge.*

PER CURIAM:

In this consolidated appeal, the Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order and the Order Denying Director's Motion for Modification (85-BLA-0735) of Administrative Law Judge Clement J. Kichuk awarding medical benefits on a Medical Benefits Only 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). Based on testimony elicited at the hearing, the administrative law judge found that claimant's coal mine employment did not include at least one working day as a miner after December 31, 1969. Consequently, the administrative law judge dismissed employer as the responsible operator herein pursuant to 20 C.F.R. §725.492(a)(3), and transferred liability for payment of medical benefits to the Black Lung Disability Trust Fund (Trust Fund) pursuant to 20 C.F.R. §725.490(a). The administrative law judge did not reach the merits of the claim inasmuch as the Director had not contested

entitlement. On appeal, the Director challenges the administrative law judge's dismissal of employer as responsible operator herein, because post-1969 employment was not a contested issue. On appeal, claimant's counsel also challenges the

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

administrative law judge's findings concerning claimant's post-1969 coal mine employment, and further contests the administrative law

judge's Decision and Order Awarding Attorney Fees, which disallowed 33.75 hours for services performed on claimant's behalf. Employer responds, urging affirmance.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

On appeal, the Director contends that since the issue of whether claimant was engaged in post-1969 coal mine employment as a miner was uncontroverted by the parties, the administrative law judge erred in finding that claimant was not a "miner" within the meaning of the Act after 1963, and dismissing employer as the

responsible operator herein pursuant to Section 725.492(a)(3).¹ We agree. The regulations provide that the hearing shall be confined to those contested issues which have been identified by the deputy commissioner pursuant to 20 C.F.R. §725.421, or any other issue raised in writing before the deputy commissioner, and that an administrative law judge may consider a new issue only if it was not reasonably ascertainable by the parties at the time the claim was before the deputy commissioner. 20 C.F.R. §725.463; see Callor v. American Coal Co., 4 BLR 1-687 (1982), aff'd sub nom. American Coal Co. v. Benefits Review Board, 738 F.2d 387 (10th Cir. 1984). The Director notes that although employer contested the issue of whether it was the responsible operator, the reasons submitted to the deputy commissioner for controverting the issue were unrelated to the nature of claimant's post-1969 employment with employer. See Director's Exhibits 10, 22. Additionally, Department of Labor Form CM-1025 lists post-1969 employment as a separate issue which may be contested by employer or the Director by checkmark, and the form expressly provides that "[t]he absence of a checkmark indicates that the fact asserted is not contested." Director's Exhibit 22. The Director correctly notes that

¹ At the hearing, claimant testified that after he was injured in a mine fire in 1963, he ceased working as an underground miner. When claimant returned to work for employer between 1966 and 1973, he was a general outside laborer, performing such tasks as sowing grass on the strip roads, mowing grass, running errands, cleaning the office, taking out the trash and looking after the mail. Decision and Order at 2; Hearing Transcript at 36, 37, 53. The administrative law judge relied on claimant's testimony, corroborated by the testimony of claimant's son, in finding that claimant performed no post-1969 coal mine employment as a miner. Order Denying Director's Motion for Reconsideration at 1, 2.

employer did not check the issue of post-1969 employment. Further, a letter of June 8, 1970, signed by employer's cashier, reflected that claimant was employed as a Track Man and Cutting Machine Operator from November 3, 1966 to the present date; employer's answers to interrogatories listed claimant's cumulative periods of coal mine employment with employer and included the period from October 3, 1966 to March 3, 1973; and claimant's Employment History Form CM-911a solely lists his occupation as a Track Man with employer from October 1936 to March 1973. See Director's Exhibits 2, 5, 12; Claimant's Exhibit 4. The Board has held that intent and notice are important criteria when applying Section 725.463(a) to permit or prevent consideration of substantive issues, see Chaffins v. Director, OWCP, 7 BLR 1-431 (1984), Derry v. Director, OWCP, 6 BLR 1-553 (1983), Perry v. Director, OWCP, 5 BLR 1-527 (1982), Simpson v. Director, OWCP, 6 BLR 1-49 (1983), since the purposes of the regulation are to expedite cases by ensuring that the parties are not surprised by new issues at the hearing, and to force the parties to develop evidence prior to the hearing. Carpenter v. Eastern Associated Coal Corp., 6 BLR 1-784 (1984). The Director asserts that he did not attend the hearing in reliance on the deputy commissioner's identification of contested issues, and because the record reflected that none of the parties intended to litigate the issue of post-1969 coal mine employment as a miner. Fundamental fairness requires that the parties be advised of the issues which will be decided at the hearing, so that they have the opportunity

to prepare the necessary arguments and provide appropriate documentation.²

Derry, supra.

Moreover, Section 725.463(b) prohibits an administrative law judge from considering any new issue which was reasonably ascertainable by the parties at the time the claim was before the deputy commissioner. See Thornton v. Director, OWCP, 8 BLR 1-277 (1985). The Director maintains that while the claim was at the deputy commissioner level, both claimant and employer were in a position to know the nature of claimant's post-1969 employment with employer. In fact, the administrative law judge disallowed counsel's fee request for 33.75 hours of services performed on behalf of claimant, precisely because he found that before the claim was forwarded to the Office of Administrative Law Judges, counsel had ample opportunity to easily and quickly ascertain that claimant was not a coal miner after 1963. Decision and Order Awarding Attorney Fees at 2. As employer failed to

² Both the Director and claimant's counsel assert that claimant's testimony concerning the nature of his post-1969 coal mine employment duties did not provide a complete description of all the tasks claimant performed for employer between December 31, 1969, and March 3, 1973. If claimant performed any task during that period which constituted covered coal mine employment pursuant to Collins v. Director, OWCP, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986), employer would be the proper responsible operator herein pursuant to 20 C.F.R. §725.492(a)(3).

controvert the issue, and as the nature of claimant's post-1969 employment was easily ascertainable by the parties prior to the hearing, the administrative law judge was precluded from adjudicating the issue pursuant to Section 725.463. Consequently, we must reverse the administrative law judge's finding that claimant was not engaged in coal mine employment as a miner after 1963, vacate the administrative law judge's dismissal of employer as the responsible operator herein pursuant to Section 725.492(a)(3) and his transfer of liability to the Trust Fund pursuant to Section 725.490(a), and remand this case for the administrative law judge to adjudicate the merits of this claim. We further vacate the administrative law judge's Decision and Order Awarding Attorney Fees. If, on remand, the administrative law judge awards medical benefits to claimant, the administrative law judge must redetermine a proper attorney fee in light of employer's controversion of the claim; however, if the administrative law judge determines that claimant is not entitled to medical benefits, no attorney fees may be awarded.

Accordingly, the administrative law judge's Decision and Order Awarding Medical Benefits, the Order Denying Director's Motion for Reconsideration, the Decision and Order Awarding Attorney Fees, and the Order Denying Claimant's Motion for Reconsideration are vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge