U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 21-0371 BLA
and 21-0372 BLA

TAMMIE R. ADAMS (Widow of and o/b/o KENNETH D. ADAMS)	)	
Claimant-Respondent	)	
v.	)	
BISHOP COAL COMPANY	)	
	)	DATE ISSUED: 5/31/2022
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2020-BLA-05065, 2020-BLA-05345) on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on April 4, 2018,[1] and a survivor's claim filed on October 21, 2019.[2]

The ALJ determined that the miner's claim was timely filed. She accepted the parties' stipulation that the Miner had ten years of coal mine employment and was totally disabled by a respiratory or pulmonary impairment, thereby establishing a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). Because Claimant established fewer than fifteen years of coal mine employment, she was unable to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[4] However, considering entitlement under 20 C.F.R. Part 718,

[1] The Miner filed six previous claims for benefits. Miner's Claim (MC) Director's Exhibits 1-6. On April 21, 2015, the district director denied the Miner's most recent prior claim because the evidence did not establish any element of entitlement. MC Director's Exhibit 6. The Miner requested a hearing, and the case was assigned to ALJ Dana Rosen. *Id.* On March 28, 2017, after the Miner failed to respond to an Order to Show Cause, ALJ Rosen issued an Order of Remand Dismissing Claim for Abandonment. MC Director's Exhibit 71 at 13-14.

[2] Claimant is the widow of the Miner, who died on October 8, 2019. Claimant's Exhibit 4. She is pursuing the miner's claim as well as her own survivor's claim. Survivor's Claim (SC) Director's Exhibit 5.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner failed to establish any element of entitlement in his prior claim, Claimant must submit new evidence establishing at least one element to warrant a review of the Miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3; MC Director's Exhibit 6.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or

the ALJ found that Claimant established clinical and legal pneumoconiosis and that the Miner was totally disabled due to pneumoconiosis. 20 C.F.R. §§718.202, 718.204(b), (c). Accordingly, the ALJ awarded benefits. Because the Miner was entitled to benefits at the time of his death, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[5]

On appeal, Employer challenges the ALJ's determination that the miner's claim was timely filed. Employer also argues the ALJ erred in awarding survivor's benefits under Section 422(*l*).[6] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting the Miner timely filed his subsequent claim.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

The Miner's Claim - Timeliness of Claim

Section 422(f) of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to

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substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[5] Under Section 422(*l*) of the Act, a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[6] We affirm, as unchallenged on appeal, the ALJ's findings the Miner suffered from legal and clinical pneumoconiosis, that his totally disabling respiratory or pulmonary impairment was due to pneumoconiosis, and that Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §§718.202, 718.204(b), (c), 725.309(c); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7, 11-13.

[7] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 9.

pneumoconiosis . . . ." 30 U.S.C. §932(f). The medical determination must have "been communicated to the miner or a person responsible for the care of the miner." 20 C.F.R. §725.308(a). A miner's claim is presumed to be timely filed. 20 C.F.R. §725.308(b). To rebut the timeliness presumption, Employer must show the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the Miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

Employer relies on Dr. Porterfield's February 27, 2014 report for its assertion that the miner's claim was not timely filed. Employer's Brief at 5-12. Dr. Porterfield conducted the Miner's Department of Labor (DOL) examination in conjunction with his most recent prior claim, his sixth. Employer's Exhibit 5; *see* MC Director's Exhibit 6. He opined the Miner was "100% impaired, [and] could not do [his] previous job." Employer's Exhibit 5 at 5. He diagnosed coal workers' pneumoconiosis and opined the Miner's hypoxemia and moderate restriction were due to his pneumoconiosis. *Id.* at 5-6, 13.

The ALJ determined Dr. Porterfield's report was insufficient to trigger the running of the statute of limitations because the physician did not specifically state the Miner's "total disability [was] due to pneumoconiosis." Decision and Order at 5. She also found that there was no evidence establishing that Dr. Porterfield's statements or report were directly communicated to the Miner.[8] *Id.* Thus, the ALJ concluded Employer failed to rebut the presumption of timeliness because there was no evidence to establish a diagnosis of total disability due to pneumoconiosis was communicated to the Miner more than three years before he filed this subsequent claim in April 2018. *Id.*

Additionally, the ALJ concluded ALJ Dana Rosen's dismissal of the Miner's prior claim as abandoned "function[ed] as a decision and order disposing of the claim on its merits," thereby rendering Dr. Porterfield's opinion or any other diagnosis of total disability due to pneumoconiosis in the record pertaining to that prior claim a "misdiagnosis." *Id.*, *citing* 20 C.F.R. §725.466 ("[A]n order dismissing a claim shall . . . have the same effect as a decision and order disposing of the claim on its merits, except as provided in paragraph (b) of this section."); *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609 (4th Cir. 2006) (medical determination of total disability due to pneumoconiosis predating a denial of benefits is deemed a misdiagnosis and cannot trigger

[8] At the hearing, Claimant testified she was with the Miner when Dr. Porterfield told him he was "totally disabled from black lung." Hearing Transcript at 21, 25-26. The ALJ was not persuaded that Claimant's testimony showed the Miner actually understood he was totally disabled due to pneumoconiosis. Decision and Order at 5.

the statute of limitations). Consequently, the ALJ concluded Employer failed to rebut the presumption that the Miner's April 4, 2018 claim was timely filed. *Id.*

Employer asserts the ALJ erred in finding Dr. Porterfield's report did not constitute a medical determination of total disability due to pneumoconiosis and further erred in concluding Dr. Porterfield's opinion was not directly communicated to the Miner.[9] Employer's Brief at 5-9. Employer also argues the ALJ erred in treating Dr. Porterfield's opinion as a "misdiagnosis" based on ALJ Rosen's dismissal of the prior claim by reason of abandonment; it seeks to distinguish the facts of the current claim from the Fourth Circuit's decision in *Williams* by noting ALJ Rosen dismissed the Miner's most recent prior claim because he failed to comply with procedural orders, without ever addressing the medical evidence. *Id.* at 10, *citing Williams*, 453 F.3d 609.

The Director argues, however, that Employer's assertions of error and its timeliness challenge are moot. He explains that prior to ALJ Rosen's dismissal of the Miner's sixth claim for abandonment, the district director issued a Proposed Decision and Order denying benefits in that claim. Director's Brief at 3-4. The Director contends that based on the district director's denial of benefits, Dr. Porterfield's report must be considered a misdiagnosis under applicable law. *Id.* We agree with the Director's position.

The Miner filed his sixth claim on January 22, 2014, and the district director issued a Proposed Decision and Order Denial of Benefits on April 21, 2015, finding the medical evidence, including Dr. Porterfield's 2014 report, was insufficient to establish any element of entitlement.[10] MC Director's Exhibit 6. Subsequently, the Miner requested a hearing, and the case was assigned to ALJ Rosen. *Id.* On March 28, 2017, after the Miner failed to respond to an Order to Show Cause, ALJ Rosen issued an Order of Remand Dismissing Claim for Abandonment, which remanded the matter "to the District Director for appropriate action." MC Director's Exhibit 71 at 13-14. Thus, the district director's April 21, 2015 denial of benefits is the last determination on the merits in the Miner's sixth claim.

In a subsequent claim such as this, a prior denial of benefits must be accepted as both final and correct. *Williams*, 453 F.3d at 615-16; *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1360-62 (4th Cir. 1996) (en banc). The Fourth Circuit has held "a medical determination later deemed to be a misdiagnosis of pneumoconiosis by virtue of a

[9] Employer notes Claimant's hearing testimony and the fact that Dr. Porterfield's report was made part of the record and referenced by the district director in the Schedule for the Admission of Evidence. Employer's Brief at 8.

[10] The district director determined the opinions of Employer's experts, Drs. Shipley, Willis, and Zaldivar, outweighed Dr. Porterfield's opinion. MC Director's Exhibit 6.

superseding denial of benefits cannot trigger the statute of limitations for subsequent claims." *Williams*, 453 F.3d at 618; *see Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594 (6th Cir. 2013); *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483 (6th Cir. 2009). Thus, we need not address Employer's arguments regarding the effect of ALJ Rosen's abandonment order as the district director's April 21, 2015 denial rendered Dr. Porterfield's 2014 opinion on total disability a "misdiagnosis" for purposes of triggering the running of the three-year time limit for filing a claim under 20 C.F.R. §725.308(a). *Williams*, 453 F.3d at 615-16, 618; *see* MC Director's Exhibit 6; Employer's Exhibit 5. Consequently, Dr. Porterfield's report cannot trigger the running of the three-year time limit for filing a claim.[11] Additionally, Employer has not alleged there is any other medical evidence that could trigger the three-year statute of limitations.[12]

We, therefore, affirm on alternative grounds the ALJ's finding that the Employer failed to rebut the presumption of timeliness and further affirm her determination that the claim was timely filed. Consequently, we affirm the award of benefits in the miner's claim.

The Survivor's Claim

The ALJ found Claimant entitled to benefits under Section 422(*l*). Decision and Order at 2, 4, 14. Employer raises no specific challenge to the survivor's claim award, other than its assertion that the miner's claim was improperly awarded, which we have

[11] Based on this finding, we need not address Employer's assertions that the ALJ erred in finding Dr. Porterfield's opinion was insufficient to trigger the running of the statute of limitations because it did not specifically contain a diagnosis of "total disability due to pneumoconiosis" and because there was no direct, credible evidence that Dr. Porterfield conveyed such a diagnosis to the Miner. Employer's Brief at 5-9; Decision and Order at 5.

[12] In its brief under "Statement of the Case," Employer noted the Miner's testimony at his March 1, 2019 deposition that he believed the first time he was told that he was totally disabled due to pneumoconiosis was in 2006 by Dr. Patel. Employer's Brief at 2; *see* MC Director's Exhibit 69 at 26. This testimony appears to be in reference to medical treatment that occurred between the Miner's June 8, 2001 fourth claim and September 19, 2007 fifth claim. MC Director's Exhibits 4, 5. The Miner's fifth claim was denied by the district director on March 31, 2008 because the evidence did not establish that he was totally disabled by pneumoconiosis. MC Director's Exhibit 5. Employer makes no specific arguments concerning the Miner's 2019 deposition testimony, and therefore we need not address it. 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

rejected. As we have affirmed the award in the miner's claim and Claimant satisfies the prerequisites for automatic entitlement under Section 422(*l*), she is derivatively entitled to benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013). Consequently, we affirm the ALJ's award of benefits in the survivor's claim.

Accordingly, the ALJ's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge