U.S. Department of Labor

Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 94-3725 BLA
OWCP No. 236-24-2807

NOT-PUBLISHED

RILEY ENGLAND, JR.

Claimant-Petitioner

v.

RANGER FUEL CORPORATION

Employer-Respondent

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

Party-in-Interest

DATE ISSUED: MAY 31 1995

DECISION and ORDER

Appeal of the Decision and Order - Granting Benefits of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Granting Benefits (93-BLA-1400) of Administrative Law Judge John C. Holmes (the administrative law judge) determining the date of onset for payment of benefits on modification of the Decision and Order - Denial of Benefits dated August 14, 1986 of Administrative Law Judge George G. Pierce (Judge Pierce), on 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). The administrative law judge initially found that Judge Pierce did not make a mistake in a determination of fact by failing to find the existence of complicated pneumoconiosis. Based on the consulting opinions of Drs. Shipley, Wiot, and Fino along with that of Dr. Wheeler, Director's Exhibit 82, the administrative law judge found that complicated pneumoconiosis was first diagnosed on January 11, 1989. He thus further determined, pursuant to *Williams* v.

Director, OWCP, 13 BLR 1-28 (1989),[1] that the proper date of onset was January 1, 1989. The administrative law judge thus ordered employer to pay benefits to claimant commencing January 1, 1989.

On appeal, claimant challenges the administrative law judge's onset determination, and argues that the proper date of onset is the date of filing. He also contends that the administrative law judge abused his discretion in refusing to admit into the record x-ray evidence proffered by claimant post-hearing, and further misinterpreted the modification process under 20 C.F.R. §725.310. Employer responds, and seeks affirmance of the decision below. The Director, Office of Workers' Compensation Programs (the Director), has not submitted a brief in the appeal.

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).

The pertinent procedural history of this case is as follows: Judge Pierce found that the evidence supported employer's concessions of twenty-five years of coal mine employment and of the existence of occupational pneumoconiosis under 20 C.F.R. §§718.202(a)(1), 718.203. He further found that claimant failed to establish total disability under 20 C.F.R. §718.204(c), and denied benefits. Director's Exhibit 53.

The district director subsequently granted claimant's request for modification and determined that the new evidence filed by claimant, namely, Dr. Cappiello's finding of complicated pneumoconiosis Category B by x-ray dated January 11, 1989 and Dr. Bassali's finding of complicated pneumoconiosis Category B on x-ray

---

[1]In *Williams v. Director, OWCP,* 13 BLR 1-28 (1989), the Board held that where claimant establishes entitlement under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), *see* 20 C.F.R. §718.304, the administrative law judge must consider whether the record evidence establishes an onset date of claimant's complicated pneumoconiosis to determine whether the evidence establishes the onset date of claimant's total disability. The Board further indicated that if the evidence does not reflect when claimant's pneumoconiosis became complicated pneumoconiosis, the onset date for payment of benefits is the month in which the claim was filed or during which claimant filed his election card, unless the evidence affirmatively establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing or date of election, in which case benefits must commence following the period of simple pneumoconiosis.

and CT scan dated January 25, 1990, Director's Exhibit 70, established a change in claimant's condition under Section 725.310. The district director thus found entitlement under 20 C.F.R. §718.304, and awarded benefits to commence September 11, 1986.[2] Director's Exhibit 77.

By Agreement to Pay Benefits dated October 2, 1992, employer accepted liability based on x-ray evidence that it developed on modification. It also asserted that the claim did not need to be referred to the Office of Administrative Law Judges (OALJ) and requested a pay order. Director's Exhibits 82, 83. The OALJ, already in possession of the case, remanded it to the district director. Director's Exhibit 84.

The district director awarded benefits, commencing September 1, 1986. Director's Exhibits 85, 86, 88. Employer requested reconsideration of the district director's onset determination, arguing that the proper date of onset was January 1989 based on the earliest proof of the existence of complicated pneumoconiosis, namely, Dr. Cappiello's findings. Director's Exhibit 89. The district director denied employer's request for reconsideration because counsel for employer, in accepting liability, indicated that the claim did not need to be forwarded to the OALJ. Director's Exhibit 90. Employer appealed the denial.

At the hearing, claimant's counsel indicated that he had learned that x-ray films existed from the mid-1980's and he proposed securing those films to have then reread for the presence or absence of complicated pneumoconiosis. Counsel stated, however,

> Regardless of the actual dates on the films, we would be willing to stipulate to an onset no earlier than September of 1986 if the films show evidence of complicated pneumoconiosis. Obviously, if the films do not show evidence of complicated pneumoconiosis, the Employer's contention would be meritorious.

Hearing Transcript at 6. The administrative law judge thus ordered that the record be kept open for the submission of any newly discovered pre-existing x-rays and for employer to have an opportunity to have any such x-rays read. *Id.* at 21, 23.

Claimant's counsel subsequently indicated that he had learned that all of the x-ray films from 1968 to 1983 had been destroyed, and, that, nevertheless, he was submitting interpretations of the films made by various physicians at the time the films were taken,

---

[2]The district director subsequently indicated that the onset date should have been September 1, 1986 - the beginning of the month following the issuance of Judge Pierce's decision. Director's Exhibit 90.

to establish the existence of complicated pneumoconiosis prior to September 1986. Counsel argued that the district director's onset determination could thus be upheld. Director's Exhibit 94. The Director also submitted Dr. Wheeler's 1981 reading of the x-ray dated August 19, 1980, which was previously admitted as Director's Exhibit 28 by Judge Pierce. Director's Exhibit 93.

Employer objected to the admission of the documents submitted by claimant and by the Director, arguing that they were outside the scope of the administrative law judge's order and noting that employer was precluded from developing any meaningful rebuttal evidence given that the x-ray films were unavailable. The administrative law judge, by telephonic conference of April 25, 1994, apparently sustained employer's objection and indicated his intent to determine onset as January 1989, the date of the earliest film available for rereading, as argued by employer. *See* Claimant's letter dated June 1, 1994, Employer's letter dated June 16, 1994.

Claimant initially contends that in determining the date of onset, the administrative law judge erred in relying on Dr. Cappiello's January 1989 x-ray finding of complicated pneumoconiosis as this evidence, claimant asserts, shows only that claimant suffered from complicated pneumoconiosis at some time prior thereto. He further argues that it cannot be ascertained from the record that claimant's complicated pneumoconiosis did not exist from at least September 1986. In this regard, claimant asserts that he may have suffered from complicated pneumoconiosis from the time of Dr. Wheeler's 1981 interpretation of the x-ray dated August 19, 1980. Claimant thus requests that the Board determine that the proper date of onset is the date of filing, or February 1981. Director's Exhibit 1. Employer contends that the administrative law judge's finding is supported by substantial evidence and is in accord with law.

Claimant's contention lacks merit. The administrative law judge properly found, pursuant to *Williams,* that the consulting opinions of Drs. Shipley, Wiot and Fino, along with that of Dr. Wheeler, established January 11, 1989 as the onset date of claimant's complicated pneumoconiosis. Director's Exhibit 82. Moreover, a review of the record reveals that Dr. Wheeler initially interpreted the August 19, 1980 x-ray as positive for large opacities category A, Director's Exhibit 28, but twelve years later, in 1992, reread the x-ray as positive for simple pneumoconiosis only. *Id.* Claimant's reliance on Dr. Wheeler's initial interpretation is thus misplaced. Inasmuch as the record evidence establishes January 11, 1989 as the onset date of claimant's total disability due to pneumoconiosis, we hold that the administrative law judge further properly ordered employer to pay benefits commencing January 1, 1989. 20 C.F.R. §725.503(b); *Williams, supra.*

Claimant further contends that the administrative law judge mistakenly believed that he was without authority to modify the decision of Judge Pierce based on a mistake in a determination of fact under Section 725.310, to provide that the proper onset date was the date of filing. Employer contends that claimant should be bound by his counsel's "stipulation" at the hearing that the date of onset could not pre-date Judge Pierce's August 1986 denial of benefits. Hearing Transcript at 5-6.

We reject claimant's arguments as they are premised on mischaracterizations of the facts of the case. Specifically, Judge Pierce did not award benefits and thus, did not reach the issue of onset. Accordingly, the administrative law judge, on modification, could not modify Judge Pierce's decision with regard to the onset issue. Rather, claimant properly sought modification of Judge Pierce's denial of benefits under Section 725.310, Director's Exhibits 68, 70; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), submitting evidence, including Dr. Cappiello's findings, that he suffered from complicated pneumoconiosis. Employer thereafter accepted liability based, primarily, on Dr. Cappiello's findings. When the administrative law judge, on modification, determined that claimant established complicated pneumoconiosis, it was this determination, and not any belief held by the administrative law judge regarding his authority to modify Judge Pierce's decision, that formed the basis for the administrative law judge's further determination regarding the date of onset for the commencement of benefits.

Moreover, contrary to employer's argument, claimant's counsel did not stipulate, but rather merely indicated that he would be willing to stipulate, to an onset date of no earlier than September of 1986. Inasmuch as there was no voluntary agreement between opposing counsel on the issue of onset, there was no stipulation to which claimant's counsel could be bound. *Black's Law Dictionary* 1269 (5th ed. 1979).

Claimant also contends that the administrative law judge's exclusion of x-ray interpretations proffered by claimant post-hearing pursuant to the administrative law judge's order at the hearing that the record remain open for the submission of additional evidence, violated the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Specifically, claimant asserts that the administrative law judge abused his discretion by excluding the proffered reports because the x-ray films upon which the reports were based had been destroyed and were thus not available for rereading. Claimant argues that the administrative law judge should have admitted the reports since they were probative of the issue of the onset of claimant's complicated pneumoconiosis and were not developed for purposes of litigation, but rather, were developed and maintained by claimant's treating physician for medical purposes. Claimant

further concedes that the fact that the underlying x-ray films were unavailable could be considered by the administrative law judge in determining the credibility of the reports. Employer responds that the administrative law judge properly sustained employer's objection to the proffered evidence because it was outside the scope of the administrative law judge's order and because employer was precluded from developing any meaningful rebuttal given the fact that the underlying x-ray films were unavailable.

Claimant's contentions lack merit. The administrative law judge has broad discretion to resolve procedural matters. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). In the instant case, the hearing transcript reveals that the administrative law judge allowed for the post-hearing submission of any newly discovered x-rays and for the parties to develop any additional readings thereof. Hearing Transcript at 5-6, 21, 23. In contrast, the reports proffered by claimant were based on x-ray films which, as conceded by claimant, are no longer available. Accordingly, the administrative law judge could properly sustain employer's objection to the proffered reports as employer was precluded from having the x-rays read by its experts. 20 C.F.R. §725.456(b)(3); *Baggett v. Island Creek Coal Co.*, 6 BLR 1-1311 (1984); *see also King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985). We thus reject claimant's assertion that the administrative law judge abused his discretion in this regard.

We, therefore, affirm the administrative law judge's onset determination as it is supported by substantial evidence and is in accord with law. We, therefore, further affirm the administrative law judge's Decision and Order - Granting Benefits.

Accordingly, the administrative law judge's Decision and Order - Granting Benefits is affirmed.

SO ORDERED.

[redacted]

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[redacted]

ROY P. SMITH
Administrative Appeals Judge

[redacted]

REGINA C. McGRANERY
Administrative Appeals Judge