U.S. Department of Labor

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

BRB No. 15-0411 BLA

EUGENE PAULUKONIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BEAR RIDGE SHOPS, INCORPORATED	)	DATE ISSUED: 07/26/2016
	)	
and	)	
	)	
LACKWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Modification and Decision and Order on Reconsideration of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman and Goggin), Allentown, Pennsylvania, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits on Modification, and Decision and Order on Reconsideration (2012-BLA-05866) of Administrative Law Judge Lystra A. Harris, rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act) (2012). The administrative law judge accepted the parties' stipulation to over thirty-four years of coal mine employment and considered claimant's third request for modification of his denied 2003 subsequent claim.[2] Pursuant to 20 C.F.R. §725.310, the administrative law judge found that claimant did not establish a mistake in a determination of fact in the prior decision denying benefits. The administrative law judge further determined that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis, which was the element of entitlement previously adjudicated against claimant. Accordingly, the administrative law judge denied claimant's third request for

[1] Claimant's counsel advises that claimant died on April 15, 2013, and that his surviving widow is pursuing the miner's claim on his behalf. Brief in Support of Petition for Review at 1-2.

[2] Claimant's first claim was denied on May 11, 1979, because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant filed his subsequent claim on February 3, 2003, which was denied on November 29, 2004, by Administrative Law Judge Robert D. Kaplan because claimant failed to establish a change in the applicable condition of entitlement at 20 C.F.R. §725.309. Director's Exhibit 42. On appeal, the Board vacated Judge Kaplan's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4), and remanded the case. Director's Exhibit 58. On June 30, 2006, Judge Kaplan again denied benefits because claimant did not establish a change in the applicable condition of entitlement. Director's Exhibit 69. The Board dismissed claimant's subsequent appeal, at his request, and remanded the claim to the district director for consideration of claimant's petition for modification. Director's Exhibit 2. The district director denied claimant's request. Director's Exhibit 81. After transfer to the Office of Administrative Law Judges (OALJ), Administrative Law Judge Robert D. Kaplan rejected claimant's request for modification on April 14, 2008. Director's Exhibit 89. Claimant appealed, but again asked the Board to dismiss the appeal so that he could pursue modification. The Board granted claimant's request and remanded the case to the district director. Director's Exhibits 90, 93. The district director denied the petition for modification. Director's Exhibit 97. After transfer to the OALJ, Administrative Law Judge Theresa C. Timlin denied claimant's second request for modification on June 28, 2010. Director's Exhibit 130. Claimant appealed, but the Board dismissed the appeal as untimely on May 10, 2011. Director's Exhibit 134. On December 6, 2011, claimant filed his third request for modification. Director's Exhibit 135.

modification, and denied benefits. Subsequently, the administrative law judge granted claimant's request for reconsideration of her finding that the newly submitted evidence did not satisfy claimant's burden to establish the existence of pneumoconiosis, but declined to alter the denial of benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he did not establish a basis for modification pursuant to 20 C.F.R. §725.310. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response, unless specifically requested to do so by the Board. Claimant filed a reply brief, reiterating his contentions on appeal.

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.[3] 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 Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge 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). The miner's prior claim was denied because he failed to establish the existence of pneumoconiosis. Consequently, new evidence had to be submitted by claimant establishing the existence of pneumoconiosis in order to obtain review on the merits of the claim. *See* 20 C.F.R. §725.309(c). Additionally, because this case involves a request for modification of the denial of a subsequent claim, the administrative law judge was required to consider whether the evidence developed in the subsequent claim, in conjunction with the evidence submitted with the request for modification, establishes a change in conditions or a mistake in a determination of fact with regard to the prior denial of claimant's subsequent claim. *See* 20 C.F.R. §725.310; *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62-3 (3d Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-5, 18 BLR 2-26, 2-28 (4th Cir. 1993).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

I. Mistake in a Determination of Fact

At the hearing before Administrative Law Judge Teresa C. Timlin, who considered and denied claimant's second request for modification, claimant's counsel stated that claimant did not allege that the 2008 denial of his first request for modification contained a mistake in a determination of fact. Transcript of August 13, 2009 Hearing at 6. Rather, claimant contended that his condition had changed since that denial. *Id.* The newly submitted evidence before Judge Timlin consisted of Dr. Smith's positive interpretation of an x-ray dated October 30, 2008, and the medical opinions of Drs. Kraynak and Levinson. Director's Exhibits 103, 110. Judge Timlin determined that Dr. Smith's x-ray reading "tend[ed] to support a finding of the presence of pneumoconiosis," but noted "Dr. Smith described the quality of the x-ray as being only '2' due to artifacts and improper position." 2010 Decision and Order Denying Benefits at 7; Director's Exhibit 130 at 7. Judge Timlin found that Dr. Kraynak's opinion, that claimant had pneumoconiosis, was outweighed by Dr. Levinson's contrary opinion, because Dr. Levinson reviewed more objective data and, as a Board-certified internist and pulmonologist, he had qualifications superior to those of Dr. Kraynak, who holds no Board certifications. 2010 Decision and Order Denying Benefits at 10-11. Upon weighing the newly submitted evidence together, Judge Timlin determined, "[g]iven the issues with film quality, I find that [Dr. Smith's] single chest x-ray interpretation, when considered with the well-reasoned medical opinion of Dr. Levinson and the remainder of the record, does not establish that claimant has coal workers' pneumoconiosis." *Id.* at 11. Judge Timlin concluded, therefore, that claimant failed to establish the existence of pneumoconiosis and failed to establish "a change in the conditions of entitlement based on which the claim was previously denied." *Id.* Accordingly, she denied claimant's second request for modification. *Id.*

In reviewing Judge Timlin's finding, that claimant did not establish the existence of pneumoconiosis, for a mistake in a determination of fact, the administrative law judge summarized the evidence addressed by Judge Timlin and set forth her factual findings. Decision and Order Denying Benefits on Modification at 6. She then stated, "[u]pon review, I find that [Judge] Timlin did not make a mistake in a determination of fact." *Id.*

Claimant argues that the administrative law judge's determination must be vacated, maintaining:

> [T]he administrative law judge solely reiterated the prior Administrative Law Judge's findings and, then, summarily concluded that no mistake of fact had occurred. She failed to perform her fact-finding functions under

> the Administrative Procedure Act[4] [(APA)] and her obligation to provide adequate explanation and rationale for her findings.

Claimant's Brief at 4. We disagree. Based on the administrative law judge's thorough review of Judge Timlin's findings, and the manner in which the administrative law judge expressed her conclusion that these findings did not contain any error, we discern that she concurred with the rationales that Judge Timlin provided for her weighing of the newly submitted evidence. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316, 25 BLR 2-115, 2-133 (4th Cir. 2012) (explaining that if a reviewing court can discern what the administrative law judge did and why he did it, the duty of explanation under the APA is satisfied); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n. 10, 21 BLR 2-587, 2-604 n.10 (4th Cir.1999) ("If a reviewing court can discern what the administrative law judge did and why he did it, the duty of explanation is satisfied."). Moreover, claimant does not identify any specific error in the administrative law judge's conclusion that Judge Timlin's denial of claimant's second request for modification did not contain a mistake in a determination of fact.[5] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. Consequently, we affirm the administrative law judge's finding that Judge Timlin's denial of claimant's second request for modification did not contain a mistake in a determination of fact.

II. Change in Conditions

With respect to the administrative law judge's determination that claimant did not establish a change in the condition that defeated entitlement in his subsequent claim, the newly submitted evidence before the administrative law judge consisted of two readings

[4] The Administrative Procedure Act, 5 U.S.C. §500, *et seq*., as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).

[5] In claimant's Motion for Reconsideration, there was no argument presented that the administrative law judge that she should reconsider her finding that there was no mistake in a determination of fact.

of an x-ray dated December 24, 2012, and the medical opinion and treatment notes of Dr. Kraynak.[6] Claimant's Exhibits 3, 4, 5; Employer's Exhibit 2. The administrative law judge found that the x-ray evidence was in equipoise because Dr. Smith, dually qualified as a Board-certified radiologist and B reader, read the film as positive for pneumoconiosis, while Dr. Wheeler, also dually qualified, read the film as negative. Decision and Order Denying Benefits on Modification at 8; Claimant's Exhibit 4; Employer's Exhibit 2. Regarding Dr. Kraynak's opinion, the administrative law judge determined that a "treatment relationship exists" between claimant and Dr. Kraynak, but she found his diagnosis of pneumoconiosis was not well-reasoned, as he did not explain his conclusions, and did not "adequately address" why claimant's other medical conditions, particularly his heart disease, were not the cause of his respiratory problems. Decision and Order Denying Modification at 11-12; Decision and Order on Reconsideration at 5-6. In addition, the administrative law judge found that Dr. Kraynak's opinion is not well-documented because he did not review "the most recent October 2010 chest x-ray evidence, which is at issue in the current request for modification." Decision and Order Denying Modification at 11. Lastly, the administrative law judge "deduct[ed] weight" from Dr. Kraynak's opinion because he is not Board-certified "in any discipline." *Id*.; *see* Decision and Order on Reconsideration at 6. Weighing the evidence together, the administrative law judge found, "the evidence presented does not meet [c]laimant's burden to preponderantly establish the existence of pneumoconiosis." Decision and Order Denying Modification at 12. The administrative law judge concluded, therefore, that claimant failed to establish a change in conditions. *Id*.

Claimant initially argues that the administrative law judge failed to comply with the APA by engaging in a "mechanical nose count of record evidence" to find the two conflicting readings of the December 24, 2014 x-ray in equipoise. Brief in Support of Petition for Review at 5. In support of this allegation, claimant maintains that the administrative law judge erred in finding the credentials of Dr. Smith and Dr. Wheeler "equally impressive," while refusing to consider, or take judicial notice of, Black Lung Benefits Act (BLBA) Bulletin No. 14-09, the investigations by the Center for Public Integrity (CPI) and ABC News, and the decision by Johns Hopkins University to suspend its B reader program, all of which call into question the credibility of Dr. Wheeler's x-ray

[6] Claimant submitted a pulmonary function study performed at Shamokin Hospital on October 26, 2011, and a letter report of May 3, 2012, by Dr. Kraynak, indicating that the study was valid, along with Dr. Kraynak's curriculum vitae. Director's Exhibit 135; Claimant's Exhibits 1, 6. Employer submitted a letter report and validation form, both dated March 27, 2012, from Dr. Levinson, finding that study invalid. Employer's Exhibit 1. Employer also submitted a copy of Dr. Levinson's curriculum vitae. *Id*.

readings.[7] *Id.* at 7. Claimant further contends that the Director has consistently requested that administrative law judges take judicial notice of these items in appropriate cases and contends that fairness requires nothing less in this case. Claimant's allegations are without merit.

The administrative law judge observed correctly that decisions to reopen the record and/or take judicial notice of a matter are procedural issues within her sound discretion. *See Troup v. Reading Anthracite Coal Co*., 22 BLR 1-14, 1-21 (1999) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc); Decision and Order on Reconsideration at 4. The administrative law judge also accurately found, "the CPI and ABC News reports, as well as the Johns Hopkins statement, do not indicate that Dr. Wheeler has been charged with, or convicted of, any criminal activity, nor do they indicate that his medical license has been suspended or revoked." Decision and Order on Reconsideration at 4. We conclude that the administrative law judge acted within her discretion in determining that the CPI and ABC News reports "are not appropriate for the official notice claimant seeks because, as news reports, they may be subject to reasonable dispute." *Id.* at 4 n.2.; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990). In addition, the administrative law judge rationally found that, although an administrative law judge could find the BLBA Bulletin 14-09 persuasive, "administrative law judges are not beholden to such direction as it is well-settled that determinations of credibility lie within the discretion of the presiding administrative law judge." Decision and Order on Reconsideration at 5; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002). We therefore affirm the administrative law judge's denial of claimant's request that she take judicial notice of the reports regarding the credibility of Dr. Wheeler's x-ray interpretations, as she acted within her discretion in resolving these procedural issues. *See Troup*, 22 BLR at 1-21.

Turning to the administrative law judge's actual weighing of the newly submitted x-ray evidence, she permissibly found that the conflicting readings, rendered by two equally qualified physicians, are in equipoise and, therefore, insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Accordingly, we affirm the administrative law judge's determination.

[7] Claimant noted that these documents can be found on various websites and claimant listed their internet addresses in his brief. Brief in Support for Petition for Review at 7-8.

Claimant next contends that the administrative law judge erred in finding Dr. Kraynak's medical opinion insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant specifically argues that the administrative law judge mischaracterized Dr. Kraynak's opinion, held his opinion to an "unrealistic, overly burdensome standard of review," and failed to accord his opinion appropriate weight in light of his status as claimant's treating physician. Brief in Support of Petition for Review at 3-4. Claimant maintains that Dr. Kraynak provided unrebutted, unequivocal deposition testimony diagnosing clinical and legal pneumoconiosis,[8] based on claimant's coal mine employment and smoking histories, reported symptoms, results of physical examinations, and numerous clinical tests, including conflicting x-ray evidence. Claimant also argues that, contrary to the administrative law judge's finding, Dr. Kraynak discussed claimant's other conditions, including his high blood pressure and cardiac status, noting that claimant's blood pressure was under control and that he did not have any complaints of chest pain or peripheral edema. Claimant's contentions have some merit.

As claimant asserts, in finding Dr. Kraynak provided minimal explanation of why claimant's heart condition was not responsible for claimant's pulmonary impairment, the administrative law judge failed to address Dr. Kraynak's testimony regarding why he reached this conclusion:

> On [claimant's] history and physical examination, he has no complaints of chest pain, either at rest or with minimal exertion. His blood pressure is under good control. He has no signs of cardiac decompensation, meaning he has no rales on auscultation of the lungs, and he has no peripheral edema. He has good peripheral pulses.

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[8] Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Claimant's Exhibit 3 at 12. Regarding claimant's cigarette smoking, the administrative law judge did not provide a rationale for her determination that Dr. Kraynak's statement, that claimant's smoking had no effect on his pulmonary condition, as he quit smoking in the 1970s, was unreasoned. Decision and Order Denying Modification at 11; *see* Claimant's Exhibit 3 at 9. In addition, the administrative law judge indicated that Dr. Kraynak's opinion on the existence of clinical pneumoconiosis was not well-documented because he did not review "the most recent October 2010 chest [x]-ray evidence." Decision and Order Denying Modification at 11, 12. However, the newly submitted evidence before the administrative law judge does not contain an October 2010 x-ray, and the most recent x-ray of record was taken on December 24, 2012. Claimant's Exhibit 4; Employer's Exhibit 2. Further, although in his January 4, 2013 deposition, Dr. Kraynak testified that he had not reviewed any recent x-rays, he also testified that he reviewed x-rays over the course of his treatment of claimant, and in providing testimony on claimant's behalf. Claimant's Exhibit 3 at 7-8, 12

Because the administrative law judge failed to consider Dr. Kraynak's complete deposition testimony, and did not fully set forth her rationale for discrediting Dr. Kraynak's statement about claimant's smoking, we vacate her finding that Dr. Kraynak's opinion diagnosing pneumoconiosis is not well-reasoned or documented and remand this case to the administrative law judge for reconsideration. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tucker v. Director, OWCP* , 10 BLR 1-35, 1-42 (1987). On remand, the administrative law judge must reevaluate Dr. Kraynak's opinion, based on the entirety of his deposition testimony, and render her credibility findings in detail, including the underlying rationales, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. In so doing, the administrative law judge must reexamine the validity of the reasoning of Dr. Kraynak's medical opinion in light of the supporting documentation. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984).

On remand, the administrative law judge must conduct a de novo review of all evidence of record – the newly submitted evidence in conjunction with the evidence previously of record – and determine whether claimant has established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, thereby establishing a basis for modification pursuant to 20 C.F.R. §725.310. *See* 20 C.F.R. §725.310; *Keating*, 71 F.3d at 1123, 20 BLR at 2-62-3; *Jessee*, 5 F.3d at 724-5, 18 BLR at 2-28. If the administrative law judge finds the newly submitted evidence sufficient to establish the existence of pneumoconiosis and, thus, a change in the applicable conditions of entitlement at 20 C.F.R. §725.309, she must then consider all the evidence of record in determining whether it is sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203, total disability at 20 C.F.R.

§718.204(b), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c)(2), on the merits of the claim.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Modification and the Decision and Order on Reconsideration are affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge