U.S. Department of Labor

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

BRB No. 16-0386 BLA

ALLEN R. MADDEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	DATE ISSUED: 05/18/2017
	)	
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 Awarding Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Sarah M. Hurley (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, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05593) of Administrative Law Judge Richard M. Clark, rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The relevant procedural history is as follows:

Claimant filed an initial claim on December 9, 2002, which was denied by the district director on November 24, 2003, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim on February 5, 2005, which was denied by Administrative Law Judge Alan L. Bergstrom on September 27, 2007, because claimant again failed to establish any element of entitlement.[1] *A.M.* [*Madden*] *v. Consol. of Ky., Inc.*, OALJ No. 2006-BLA-05299 slip op. at 3, 18-22 (Sept. 27, 2007)(unpub.).

Claimant requested modification of that decision on April 3, 2008, which the district director denied by reason of abandonment on September 12, 2008. *Madden v. Consol of Ky., Inc.*, OALJ No. 2009-BLA-05196 slip op. at 1 (Nov. 5, 2009)(Order)(unpub.). At claimant's request, the case was forwarded to the Office of Administrative Law Judges (OALJ) for a hearing and was assigned to Administrative Law Judge Theresa C. Timlin. *Id*. However, pursuant to claimant's motion to withdraw his hearing request, Judge Timlin issued an Order on November 5, 2009 canceling the hearing and advising the parties that "this matter is administratively closed and the file will be returned to the [d]istrict [d]irector for appropriate handling." *Id*. at 2.

Claimant filed this subsequent claim on May 21, 2012. Director's Exhibit 3. The district director awarded benefits and employer requested a hearing, which Administrative Law Judge Richard M. Clark (the administrative law judge) held on August 26, 2015.

Following the hearing, employer moved for a summary decision, arguing that the claim should be dismissed as untimely because claimant testified at the hearing that Dr. Rasmussen told him in 2001 or 2002, and in 2006 and 2007 that he was totally disabled due to pneumoconiosis, more than three years before claimant filed this claim. Employer

[1] The record of claimant's second claim is not part of the record. To summarize that claim's procedural history, the Board has relied on a copy of the September 27, 2007 Decision and Order denying benefits, and a copy of the November 5, 2009 Order granting withdrawal of claimant's request for a hearing on modification, which the parties attached to pleadings they filed with the administrative law judge in this claim.

contended that claimant's second claim was withdrawn and was thus considered not to have been filed, pursuant to 20 C.F.R. §725.306(b), meaning that Dr. Rasmussen's opinions could not be deemed misdiagnoses due to Judge Bergstrom's 2007 decision denying benefits. Instead, employer argued, because the second claim must be considered not to have been filed, Dr. Rasmussen's opinions were medical determinations of total disability due to pneumoconiosis that triggered the three-year statute of limitations for filing the current claim. *See* 30 U.S.C. §932(f); 20 C.F.R. §725.308(c). Claimant responded that his claim was timely filed.

The administrative law judge denied the motion for summary decision on December 22, 2015. The administrative law judge rejected employer's argument that claimant's second claim was withdrawn and was thus considered not to have been filed, pursuant to 20 C.F.R. §725.306. The administrative law judge noted that adjudication officers lack the power to grant withdrawal of a claim once a decision on the merits becomes effective. Order Denying Summary Decision (Order) at 3, citing *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193, 1-200 (2002)(en banc). The administrative law judge further noted that, consistent with *Clevenger*, Judge Timlin's November 5, 2009 Order did not purport to grant withdrawal of claimant's second claim but, rather, granted only claimant's motion to withdraw his request for a hearing after the district director denied modification. Order at 3. The administrative law judge therefore concluded that since Judge Bergstrom's September 27, 2007 Decision and Order denied claimant's second claim, Dr. Rasmussen's opinions, which were considered and rejected by Judge Bergstrom, were misdiagnoses. Thus the administrative law judge found that they were insufficient to trigger the statute of limitations. *Id*.

In a Decision and Order issued on April 5, 2016, which is the subject of this appeal, the administrative law judge again addressed whether the claim was timely filed. Specifically, the administrative law judge rejected employer's argument that the failure by the Director, Office of Workers' Compensation Programs (the Director), to make the evidence in the second claim a part of the record was a concession by the Director that the second claim was withdrawn and thus treated as if it were never filed. Decision and Order at 5. The administrative law judge found that the absence of the record of claimant's second claim was not a concession by the Director that the second claim was never filed. Therefore, the administrative law judge reiterated that, because Judge Bergstrom denied the second claim in September 2007, Dr. Rasmussen's prior opinions were misdiagnoses incapable of triggering the statute of limitations, and claimant's current claim was timely filed.[2]

[2] The administrative law judge also rejected employer's argument that it was prejudiced by the Director's failure to include the evidence from the second claim, noting that the same law firm represented employer in both the current claim and the second

The administrative law judge then credited claimant with twenty-two years of coal mine employment,[3] at least 16.5 years of which took place in underground coal mines. Additionally, the administrative law judge accepted employer's concessions that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Decision and Order at 2, 16 n.17; Hearing Transcript (Hr'g Tr.) at 6. Based on those findings, and the filing date of the claim, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that this subsequent claim is not barred by the statute of limitations. Employer further asserts that the award of benefits must be vacated because the record is incomplete. Specifically, employer argues that the administrative law judge erred in adjudicating this claim on the merits based on a record that does not contain the evidence from claimant's 2005 denied subsequent claim. Employer asserts that the absence of this evidence constitutes a due process violation requiring that employer be dismissed from the case, and that liability for the payment of benefits be transferred to the Black Lung Disability Trust Fund (the Trust Fund). Alternatively, employer argues that "[e]ntitlement to benefits is not justified," because "there is not convincing evidence that [claimant] is totally disabled due to pneumoconiosis." Employer's Brief at 25.

Both claimant and the Director respond, urging affirmance of the administrative law judge's finding that this claim was timely filed. The Director, however, agrees with

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claim, and that employer thus would have had access to the documents filed in the second claim. Decision and Order at 5.

[3] Claimant's last coal mine employment was in Kentucky. Director's Exhibits 1, 4, 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

employer that the decision awarding benefits must be vacated and the case remanded for inclusion of the evidence from claimant's second claim.[5] The Director argues further that a remand for inclusion of this evidence does not amount to a due process violation justifying transfer of liability to the Trust Fund. Claimant states that he does not oppose a remand for the inclusion of the second claim file, but urges affirmance of the administrative law judge's findings as to the new medical evidence submitted in this claim. In a reply brief, employer reiterates its previous contentions with respect to the timeliness of the subsequent claim and its allegations of a due process violation.

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. 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).

I. TIMELINESS OF CLAIM

Pursuant to Section 422(f) of the Act, "[a]ny 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 requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c).

To rebut the presumption of timeliness, employer must show by a preponderance of the evidence that 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); *see Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95, 25 BLR 2-273, 2-282 (6th Cir. 2013). A medical determination of total disability due to pneumoconiosis predating a final denial of benefits is legally insufficient to trigger the running of the three-year time limit for filing a subsequent claim, because the medical determination must be deemed a misdiagnosis in view of the superseding denial of benefits. *See Brigance*, 718 F.3d at 595-96, 25 BLR at 2-283 (explaining that "if it is determined that a claimant does not meet the criteria for an award of benefits under the [Black Lung Benefits Act], then the claimant is handed a clean slate for purpose[s] of the . . . statute of limitations"); *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483, 24 BLR 2-135, 2-153-54 (6th Cir. 2009).

[5] The Director informs the Board that "the missing exhibits from the 2005 claim are in existence. They can be submitted to the [administrative law judge] on remand for inclusion in the record." Director's Brief at 4 n.4.

To support its assertion that this subsequent claim was untimely, employer relied on the hearing testimony of claimant and his wife. Claimant testified that he saw Dr. Rasmussen four times in connection with his prior claims, and that every time he saw Dr. Rasmussen, the physician told him that he had "black lung" and was totally disabled by it.[6] Hr'g Tr. at 23-26.

In finding the claim timely, the administrative law judge first rejected employer's contention that claimant's 2005 subsequent claim was withdrawn when it was before Judge Timlin. Decision and Order at 4-8. Having found that the 2005 subsequent claim was not withdrawn, the administrative law judge found that any communication of total disability due to pneumoconiosis that predated Judge Bergstrom's September 27, 2007 decision denying benefits was a misdiagnosis incapable of triggering the statute of limitations. *Id*. at 4-8. Therefore, the administrative law judge found that employer did not meet its burden to rebut the presumption that this claim was timely filed. *Id*. at 7-8.

We reject employer's arguments that the administrative law judge should have found that the 2005 subsequent claim was withdrawn, and that this claim was therefore untimely, given claimant's testimony that Dr. Rasmussen told him that he was totally disabled due to pneumoconiosis more than three years before claimant filed this claim. Employer's Brief at 10, 16-25. Once a decision on the merits becomes effective, the underlying claim associated with that decision cannot be withdrawn. *Clevenger*, 22 BLR 1-193, at 1-199-200; *Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-190-91 (2002) (en banc). Judge Bergstrom issued his Decision and Order denying benefits on September 27, 2007, and that decision became effective when it was filed in the office of the district director.[7] 20 C.F.R. §§725.478, 725.479(a), 725.502(a)(2). Therefore, claimant could not withdraw his claim when it was before Judge Timlin on modification two years later. *See Clevenger*, 22 BLR at 1-199-200. Further, because Judge Bergstrom's September 27, 2007 Decision and Order determined that claimant was not totally disabled due to

[6] According to claimant, the first time he saw Dr. Rasmussen was ten to twelve years before the hearing in 2015, but he then stated that it was "around" 2000 or 2001. Hearing Transcript (Hr'g Tr.) at 24-25. He then saw Dr. Rasmussen again two to three years later, or "around" 2003 or 2004. *Id*. at 25-26. The third time he saw Dr. Rasmussen was in 2005 or 2006. *Id*. at 26. Claimant's wife testified that claimant saw Dr. Rasmussen in 2004, 2006, and 2007, and that after claimant's benefits were denied in September of 2007 and he sought modification, he again saw Dr. Rasmussen, and he was also sent to Dr. Baker. Hr'g Tr. at 34-37.

[7] The Director states that he "has been informed by the DOL claims examiner that the decision was filed in the district director's office on October 2, 2007." Director's Brief at 2 n.3.

pneumoconiosis, the administrative law judge correctly concluded that Dr. Rasmussen's prior opinions to the contrary were misdiagnoses that could not trigger the statute of limitations. *See Brigance*, 718 F.3d at 595-96, 25 BLR at 2-283; *Hatfield*, 556 F.3d at 483, 24 BLR at 2-153-54.

However, we are unable to affirm the administrative law judge's finding that this subsequent claim is timely filed, as the record in this case is incomplete. As set forth below, we must vacate the award of benefits and remand the case for the admission of the evidence from claimant's 2005 subsequent claim, which could include evidence that was offered in connection with claimant's modification request that was filed after Judge Bergstrom's 2007 decision. On remand, the administrative law judge should address whether testimony in the instant case or any evidence that was submitted by the parties on modification, which postdates Judge Bergstrom's September 2007 denial of benefits, supports employer's burden of rebutting the presumption that claimant's subsequent claim was timely filed.[8]

II. REMAND FOR INCLUSION OF THE SECOND CLAIM RECORD

When a miner files a subsequent claim, "any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." 20 C.F.R. §725.309(c)(2). As the parties have indicated, when this matter was forwarded to the OALJ from the district director, the record did not contain the evidence from claimant's 2005 subsequent claim, his second claim.

The administrative law judge found that claimant invoked the Section 411(c)(4) presumption,[9] and that employer did not rebut the presumption. When considering

[8] As employer correctly points out, it is not necessary that the medical determination be provided in writing or that it be a reasoned opinion. *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594, 25 BLR 2-273, 2-280 (6th Cir. 2013); *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 425-26, 23 BLR 2-321, 2-330 (4th Cir. 2006). It is only necessary that it be communicated to the claimant and that it address the elements set forth in the statute and regulations. *Brigance*, 718 F.3d at 593, 25 BLR at 2-279. Further, there is no requirement that the claimant be shown to have understood it. *See id*.

[9] Employer does not challenge the finding that claimant established at least 16.5 years of underground coal mine employment, and it conceded that claimant is totally disabled at 20 C.F.R. §718.204(b)(2) and has established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). Therefore, those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, we also

whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge considered both the new x-ray evidence and medical opinion evidence submitted in this claim, and summaries of the prior x-ray evidence and medical opinion evidence as set forth in Judge Bergstrom's 2007 decision. The administrative law judge then set forth his findings and credibility determinations with respect to both the new evidence and the evidence summarized in the second claim. Decision and Order at 17-21. Both employer and Director argue that this approach was improper, because an administrative law judge may not consider evidence that has not been properly exchanged and included in the record. Employer's Brief at 5-9; Director's Brief at 4, citing 20 C.F.R. §§725.456(b)(3), 725.464. The Director argues that the regulations require that the second claim file be included in the record, and he requests that this case be remanded so that the evidence can be submitted. Director's Brief at 3, citing 20 C.F.R. §725.309(c)(2).

Based on our review of the administrative law judge's findings and the parties' arguments on appeal, we vacate the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption. The regulations mandate that any evidence submitted in connection with any prior claim be made a part of the record in the subsequent claim. 20 C.F.R. §725.309(c)(2). The administrative law judge's attempt to remedy that omission by relying on summaries of the evidence set forth in Judge Bergstrom's September 27, 2007 decision was not consistent with the regulations requiring that the evidence upon which the administrative law judge relies for decision be incorporated into the record. *See* 20 C.F.R. §§725.456(b)(3), 725.464. The Director explains that the evidence from the 2005 claim has been located and "can be submitted to the [administrative law judge] on remand for inclusion in the record." Director's Brief at 4 n.4. Therefore, we remand this case for the administrative law judge to admit all evidence from claimant's 2005 subsequent claim that was not excluded in the adjudication of that claim, and to reconsider whether employer has rebutted the Section 411(c)(4) presumption.

Because we are remanding this case for the evidence from claimant's 2005 claim to be included in the record, employer's argument that the omission of that evidence violated its due process rights is moot. Notwithstanding, we reject employer's argument that, because the record did not include the 2005 claim evidence when this case was before the administrative law judge, employer was denied a fair hearing and must now be dismissed and any liability for benefits transferred to the Trust Fund. Employer's Brief at 18-19. Due process "is concerned with procedural outrages, not procedural glitches." *Energy West Mining v. Oliver*, 555 F.3d 1211, 1219, 24 BLR 2-155, 2-168 (10th Cir.

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affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption.

2009). Employer argues that the Director's failure to comply with 20 C.F.R. §725.309(c)(2) was a procedural outrage. Employer's Brief at 19. Employer's argument lacks merit. *See Oliver*, 555 F.3d at 1220, 24 BLR at 2-169 (holding that failure to submit prior claim record was not sufficient, "by itself," to establish a due process violation). Employer must demonstrate that it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84, 22 BLR 2-25, 2-44-45 (6th Cir. 2000); *see also Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184, 21 BLR 2-545, 2-560-61 (4th Cir. 1999). Employer has not shown that it was deprived of that opportunity. Its due process argument is therefore rejected.

We have vacated the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption and are remanding this case for further consideration, to include the evidence from claimant's second claim that the Director will make a part of the record pursuant to 20 C.F.R. §725.309(c)(2). Therefore, we decline to address, as premature, the administrative law judge's findings regarding his weighing of the medical evidence on rebuttal at 20 C.F.R. §718.305(d)(1)(i), (ii).

III. CONCLUSION

We vacate the award of benefits and remand this case for the administrative law judge to admit the evidence from claimant's 2005 subsequent claim pursuant to 20 C.F.R. §725.309(c)(2). The administrative law judge should then address whether any testimony, or any evidence that was submitted in that claim on modification that post-dates the September 27, 2007 Decision and Order denying benefits supports employer's burden to rebut the presumption of timeliness under 20 C.F.R. §725.308(a). If the administrative law judge determines that employer has rebutted the presumption that claimant's subsequent claim was timely, entitlement to benefits is precluded. If the administrative law judge finds that the claim was timely filed, then the administrative law judge must reconsider whether employer has rebutted the Section 411(c)(4) presumption, taking into account all of the relevant evidence of record. The burden will be on employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[10] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of

[10] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "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." 20 C.F.R. §718.201(a)(1).

the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and this case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge