U.S. Department of Labor

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

BRB No. 17-0071 BLA

WILLIAM TOMASEK, SR. (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY	)	DATE ISSUED: 11/17/2017
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Norman A. Coliane (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer/carrier.

Ann Marie Scarpino (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Consolidation Coal Company (Consolidation Coal or employer) appeals the Decision and Order Awarding Benefits (2012-BLA-5667) of Administrative Law Judge Thomas M. Burke rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on January 12, 2011, and is before the Board for the second time.[1]

In the prior claim, filed on May 27, 1999, Administrative Law Judge Richard A. Morgan found that United States Steel Mining Company (United States Steel) was the properly designated responsible operator. Judge Morgan further found, however, that claimant failed to establish any element of entitlement, and in a decision dated March 23, 2001 he denied benefits. Claimant did not further pursue the 1999 claim.

In adjudicating the 2011 subsequent claim, the district director named Consolidation Coal as the responsible operator, but determined that claimant was not entitled to benefits. Director's Exhibit 33. Claimant requested a hearing and the case was forwarded to the Office of Administrative Law Judges, and assigned to Administrative Law Judge Drew A. Swank. Prior to the scheduled hearing, however, the Director, Office of Workers' Compensation Programs (the Director), filed a motion asking Judge Swank to find Consolidation Coal to be the responsible operator that would be liable for any benefits awarded to claimant. Consolidation Coal responded, asserting that collateral estoppel barred the Director from designating it as the responsible operator.[2] By Order dated May 3, 2013, Judge Swank agreed with Consolidation Coal,

[1] The Board set forth the full procedural history of this case in its prior decision. *Tomasek v. Consolidation Coal Co.*, BRB No. 13-0422 BLA, slip op. at 2-3 (June 4, 2014) (unpub.).

[2] Under the doctrine of collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979); *accord Howard Hess Dental Lab, Inc. v. Dentsply Int'l Inc.*, 602 F.3d 237, 247-48 (3d Cir. 2010).

denied the Director's motion, and dismissed Consolidation Coal as a party. Judge Swank denied the Director's motion for reconsideration on May 21, 2013. The Director filed an interlocutory appeal with the Board.

In its decision dated June 4, 2014, the Board held that Judge Swank erred in finding that collateral estoppel barred the Director from designating Consolidation Coal as the responsible operator and in dismissing it as a party to this claim. Accordingly, the Board vacated Judge Swank's Order, reinstated Consolidation Coal as a party to the claim, and remanded the case for a formal hearing and adjudication of the 2011 claim. *Tomasek v. Consolidation Coal Co.*, BRB No. 13-0422 BLA (June 4, 2014) (unpub.).

On remand, the case was assigned to Administrative Law Judge Thomas M. Burke (the administrative law judge). The Director again moved to have Consolidation Coal designated as the responsible operator. After considering Consolidation Coal's objections, by Order dated November 23, 2015, the administrative law judge granted the Director's Motion for Partial Summary Decision, and designated Consolidation Coal as the responsible operator in this case.

In a decision dated October 6, 2016, the administrative law judge addressed the merits of entitlement.[3] The administrative law judge credited claimant with twenty-seven years of underground coal mine employment and found that the evidence established that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found 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] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). The administrative law judge also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits commencing January 2011, the month in which claimant filed this subsequent claim.

[3] Claimant died on January 6, 2015, prior to the scheduled hearing in the current claim. Claimant's daughter is pursuing the claim on his behalf and requested a decision on the record, to which employer agreed. Decision and Order at 2-3.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

On appeal, employer again contends that collateral estoppel precludes its designation as the responsible operator. Employer further contends that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption, and in awarding benefits commencing January 2011. Claimant responds, urging affirmance of the award of benefits. The Director filed a limited response, urging the Board to reject employer's argument that it is not the properly designated responsible operator.[5]

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.[6] 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).

Responsible Operator

Employer argues that collateral estoppel precludes its designation as the responsible operator in this case. Employer's Brief at 9-12. Employer avers that Judge Morgan's designation of United States Steel as the responsible operator in the prior claim constitutes "a critical and necessary part of the decision." Employer's Brief at 11. Employer asserts that Judge Swank correctly found that the Director is collaterally estopped from re-litigating the responsible operator issue, that the designation of United States Steel is binding, and that Consolidation Coal should be dismissed as a party to this claim. We disagree.

In the prior appeal the Board rejected employer's argument and held that Judge Swank erred in finding that collateral estoppel barred the Director from designating Consolidation Coal as the responsible operator and in dismissing it as a party to this claim. *Tomasek, slip op*. at 5. In relevant part, the Board held that because Judge Morgan denied benefits in the prior claim, his determination that United States Steel was the responsible operator was not necessary to support the judgment and, therefore, the doctrine of collateral estoppel was not applicable. *Tomasek, slip op*. at 4-5, *citing*

[5] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant invoked the Section 411(c)(4) presumption, and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] 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 1.

Howard Hess Dental Lab, Inc. v. Dentsply Int'l Inc., 602 F.3d 237, 247-48 (3d Cir. 2010); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (en banc). As the Director asserts, the Board's holdings on this issue constitute the law of the case, and employer has not shown that an exception to the doctrine applies here.[7] *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting); Director's Brief at 1 n.1. We, therefore decline to address employer's argument.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[8] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to rebut the presumption by either method.[9]

[7] In order for the Board to alter a previous holding, employer must set forth an exception to the law of the case doctrine, *i.e.*, a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's initial decision was either clearly erroneous or a manifest injustice. *See Church v. Eastern Associated Coal Corp*., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting).

[8] "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).

[9] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 15.

Relevant to the existence of legal pneumoconiosis the administrative law judge considered the medical opinions of Drs. Fino[10] and Renn,[11] that claimant did not suffer from legal pneumoconiosis.[12] Decision and Order at 15-16; Director's Exhibit 18; Employer's Exhibits 1, 2. The administrative law judge found their opinions to be inadequately explained and, therefore, "insufficient to meet [e]mployer's burden" to disprove the existence of legal pneumoconiosis. *Id*.

Employer argues that the administrative law judge failed to provide a proper basis for discrediting the opinion of Dr. Renn.[13] Employer's Brief at 15-17. We disagree. The administrative law judge permissibly discredited Dr. Renn's opinion, in part, because he failed to provide any explanation for how he eliminated claimant's years of coal mine dust exposure as a cause of his obstructive pulmonary impairment.[14] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14, 25 BLR 2-115, 2-128 (4th Cir. 2012); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); Decision and Order at 15-16; Employer's Exhibit 1. As substantial evidence supports the administrative law judge's determination,

[10] Dr. Fino opined that claimant did not suffer from legal pneumoconiosis, but suffered from idiopathic fibrosis, unrelated to coal mine dust exposure. Employer's Exhibit 2.

[11] Dr. Renn diagnosed claimant with a "moderate but significantly bronchoreversible obstructive ventilatory defect," attributable to asthma. Employer's Exhibit 1. Dr. Renn added that "pneumoconiosis does not exist." *Id.*

[12] The administrative law judge also considered the opinions of Drs. Knight, Begley and Schaaf that claimant suffered from disabling obstructive lung disease due, in part, to coal dust exposure. Decision and Order at 16; Director's Exhibit 16; Claimant's Exhibits 1, 6, 7. The administrative law judge found that these opinions support a finding of legal pneumoconiosis. *Id.*

[13] Employer does not challenge the administrative law judge's decision to discredit Dr. Fino's opinion relevant to the existence of legal pneumoconiosis. Decision and Order at 15. Therefore, this finding is affirmed. *See Skrack*, 6 BLR at 1-711.

[14] Employer asserts that Dr. Renn "illustrates quite clearly why he does not think that [c]laimant has coalworkers' pneumoconiosis." Employer's Brief at 16. Contrary to employer's contention, a review of Dr. Renn's January 23, 2012 report reveals that beyond diagnosing asthma, and stating that "pneumoconiosis does not exist," Dr. Renn did not address why coal dust did not cause or contribute to claimant's obstructive impairment. Employer's Exhibit 1.

it is affirmed. *See Soubik v. Director, OWCP*, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584, 21 BLR 2-215, 2-234 (3d Cir. 1997); Decision and Order at 15-16; Employer's Exhibit 1.

Because we have affirmed the administrative law judge's determinations to discredit the opinions of Drs. Fino and Renn, the only opinions supportive of a finding that claimant did not suffer from legal pneumoconiosis,[15] we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A).[16] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next addressed whether employer rebutted the Section 411(c)(4) presumption by showing that "no part of 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); Decision and Order at 16-17. The administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Fino and Renn that claimant did not suffer from legal pneumoconiosis also undercut their opinions that claimant's disabling impairment was unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Kennard*, 790 F.3d at

[15] Employer also argues that the administrative law judge erred in not addressing medical evidence from the prior claim. Employer's Brief at 12-13. Employer, however, has not explained how medical evidence from the prior claim, which predates claimant's invocation of the rebuttable presumption of total disability due to pneumoconiosis, is relevant to whether employer has rebutted the presumption. *See Cooley v. Island Creek Coal Co*., 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988) (holding that it is illogical to find rebuttal established based on evidence that predates the evidence on which invocation is based); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). Thus, under the facts of this case, we find no error in the administrative law judge's decision not to discuss the prior claim evidence at rebuttal.

[16] Employer argues that the opinions of Drs. Knight, Begley and Schaaf that claimant had legal pneumoconiosis are not well-reasoned. Employer's Brief at 14-16. These opinions do not assist employer in rebutting the Section 411(c)(4) presumption, and the administrative law judge did not rely upon these opinions when he found that the opinions of Drs. Fino and Renn were "insufficient to meet employer's burden" to disprove the existence of legal pneumoconiosis. Decision and Order at 15-16. Therefore, we need not address employer's arguments regarding the opinions of Drs. Knight, Begley and Schaaf. *See* 20 C.F.R. §718.305(d)(1)(i).

668, 25 BLR at 2-741; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-73 (6th Cir. 2013); Decision and Order at 28. Moreover, employer raises no specific challenge to this determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's finding that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption that he was totally disabled due to pneumoconiosis and employer did not rebut the presumption, we affirm the administrative law judge's finding that claimant established entitlement to benefits.

Date for the Commencement of Benefits

Once entitlement to benefits is established, the date for their commencement is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In a subsequent claim, the date for the commencement of benefits is determined pursuant to 20 C.F.R. §725.503, with the additional rule that no benefits may be paid for any time period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

The administrative law judge found that the evidence of record does not clearly establish the onset of total disability due to pneumoconiosis and, therefore, awarded benefits beginning January 2011, the month in which the subsequent claim was filed. Decision and Order at 17. Employer challenges that determination, asserting that because the May 12, 2011 medical opinion of Dr. Knight is the first evidence of total pulmonary disability in the record, benefits should commence as of May 12, 2011. Employer's Brief at 17-18. We disagree.

The medical evidence shows that Dr. Knight opined that claimant was totally disabled from a respiratory standpoint. Director's Exhibit 16. However, Dr. Knight's opinion does not indicate when total disability began. Contrary to employer's argument, the first evidence of disability does not establish the date of onset of such disability but merely indicates that claimant became totally disabled at some point prior to that date.

Owens, 14 BLR at 1-50. Further, substantial evidence supports the administrative law judge's finding that the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis. *See Soubik*, 366 F.3d at 233, 23 BLR at 2-97; *Mancia*, 130 F.3d at 584, 21 BLR at 2-234. We therefore affirm the administrative law judge's determination that benefits are payable from January 2011, the month in which claimant filed his subsequent claim. 20 C.F.R. §725.503(b).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge