U.S. Department of Labor

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

BRB No. 17-0047 BLA

GARY G. COX Claimant-Respondent v. DRUMMOND COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/30/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

James E. Fleenor, Jr. (Fleenor & Green LLP), Tuscaloosa, Alabama, for claimant.

Jeannie B. Walston and Philip G. Piggott (Starnes Davis Florie LLP), Birmingham, Alabama, for employer.

Emily Goldberg-Kraft (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 (2015-BLA-05266) of Administrative Law Judge Lystra A. Harris, 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 subsequent claim filed on September 11, 2013.[1]

The administrative law judge found that claimant's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308.[2] The administrative law judge also found that claimant is entitled to benefits on the merits, consistent with employer's concession that claimant established all of the elements of entitlement pursuant to 20 C.F.R. Part 718.[3] Accordingly, the administrative law judge awarded benefits.[4]

On appeal, employer argues that the administrative law judge erred in finding that claimant's September 11, 2013 subsequent claim was timely filed. Claimant responds in

[1] This is claimant's second claim. Director's Exhibit 3. Claimant's prior claim, filed on November 18, 2010, was denied by the district director on February 8, 2011 by reason of abandonment. Director's Exhibit 1.

[2] Prior to the hearing, employer twice moved for summary judgment seeking dismissal of the claim as untimely filed. The administrative law judge denied both motions on the grounds that there remained a genuine issue of material fact as to whether a diagnosis of total disability due to pneumoconiosis was communicated to the miner more than three years prior to his filing of his September 11, 2013 claim. *See* Order Denying Employer's Summary Judgment Motion (Sept. 24, 2015) at 3; Order Denying Employer's Renewed Motion for Summary Decision (Dec. 11, 2015) at 2.

[3] At the January 26, 2016 hearing and in employer's post-hearing brief, employer conceded that claimant established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Hearing Tr. at 5-7; Employer's Post-Hearing Brief at 2, 19. Employer also conceded that claimant worked for fifteen years in underground coal mine employment. Hearing Tr. at 6.

[4] Based on the district director's determination that claimant and employer entered into an Alabama workers' compensation settlement agreement, the administrative law judge found that claimant's benefits were subject to offset by claimant's concurrent state award, pursuant to 20 C.F.R. §725.535. Decision and Order at 12; Director's Exhibit 20. The agreement reflects that claimant is entitled to compensation for having contracted occupational pneumoconiosis while working for employer, but notes that the parties disputed the extent of claimant's disability. Director's Exhibits 8, 9.

support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's findings that claimant's subsequent claim was timely filed. Employer filed a reply brief, reiterating its arguments 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.[5] 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).

Timeliness of Claim

Employer contends that the administrative law judge erred in finding that claimant's September 11, 2013 subsequent claim was timely filed. Employer's Brief at 4-7. Section 422(f) of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years of "a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). In addition, 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).

Considering whether employer satisfied its burden to rebut the presumption of timeliness at 20 C.F.R. §725.308, the administrative law judge summarized all of the medical evidence of record, together with claimant's deposition and hearing testimony. The administrative law judge initially found that Dr. Westerman, claimant's treating physician, rendered a medical determination that claimant is totally disabled due to pneumoconiosis.[6] Decision and Order at 9; Employer's Exhibits 3 at 69, 119; 4 at 26.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as claimant's coal mine employment was in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 7.

[6] The administrative law judge noted that Dr. Westerman's treatment records reflect that he diagnosed coal workers' pneumoconiosis, in the form of interstitial lung disease arising out of coal dust exposure, beginning in May 18, 2004; that on June 16,

Additionally, the administrative law judge found that Dr. Westerman communicated his diagnosis of pneumoconiosis to claimant in June 2004,[7] and communicated to claimant that he was totally disabled in either late 2004 or early 2005.[8] Decision and Order at 5, 11. The administrative law judge further found, however, that neither the medical evidence nor claimant's testimony establishes that Dr. Westerman communicated to claimant that he is totally disabled due to pneumoconiosis. *Id*. at 10-12. Consequently, the administrative law judge concluded that employer failed to rebut the presumption that claimant's September 11, 2013 subsequent claim was timely filed. *Id*. at 12.

Employer argues that the administrative law judge erred in finding that Dr. Westerman did not communicate his medical determination of total disability due to pneumoconiosis to claimant. Employer's Brief at 5-7. Employer asserts that the "rational and reasonable interpretation" of claimant's October 20, 2015 deposition testimony is that Dr. Westerman's determination of total disability due to pneumoconiosis was communicated to claimant in 2004 or 2005, more than three years before he filed his September 11, 2013 subsequent claim. *Id.* at 7, *referencing* Employer's Exhibit 2 at 23-24. The Director argues that the administrative law judge

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2005 Dr. Westerman stated that claimant's has "interstitial lung disease" and is "disabled indefinitely;" and that in his May 23, 2006 deposition, Dr. Westerman confirmed that claimant's pneumoconiosis renders him totally disabled. Decision and Order at 9, *citing* Employer's Exhibits 3 at 69, 119; 4 at 26.

[7] In his June 16, 2004 treatment note, Dr. Westerman stated that he "spent at least 35 minutes" with claimant and his daughter discussing "all issues related to his interstitial lung disease, occupational related lung disease (coal workers' pneumoconiosis), and severe dyspnea with cor pulmonale." Employer's Exhibit 4 at 113; *see* Decision and Order at 6. The administrative law judge also noted that during his deposition, claimant acknowledged that Dr. Westerman told him that he had interstitial lung disease due to coal dust exposure. Decision and Order at 5, *referencing* Employer's Exhibit 2 at 15, 18, 21.

[8] The administrative law judge noted that during his October 20, 2015 deposition, "[c]laimant estimated that Dr. Westerman told him that he was disabled at the end of 2004, beginning of 2005, before [c]laimant left coal mine employment." Decision and Order at 5, referencing Employer's Exhibit 2 at 23-24.

reasonably determined that the evidence is too ambiguous to establish that Dr. Westerman told claimant that he was totally disabled due to pneumoconiosis.[9]

We agree that the administrative law judge's determination was permissible. Whether the evidence is sufficient to rebut the presumption of timeliness involves factual findings that are to be made by the administrative law judge. *See United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-374-75; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). Moreover, the weight to be accorded to hearing testimony is within the sound discretion of the administrative law judge. *See Taylor v. Ala. By–Products Corp.*, 862 F.2d 1529, 1531 n.1, 12 BLR 2-110, 2-112 n.1 (11th Cir. 1989) ("We do not question the weight accorded to the evidence by the [administrative law judge], for such is not within our scope of review.").

Here, the administrative law judge fully considered claimant's deposition testimony, including the passages referenced by employer,[10] stating:

[9] The Director, Office of Workers' Compensation Programs (the Director), also asserts that it was unnecessary for the administrative law judge to address whether Dr. Westerman's determination of total disability due to pneumoconiosis was communicated to claimant. Director's Brief at 6. The Director explains that because the district director denied claimant's prior claim on February 8, 2011 by reason of abandonment, claimant effectively did not establish any of the applicable conditions of entitlement. Director's Brief at 6, *citing* 20 C.F.R. §725.409(c). The Director therefore argues that claimant was found not totally disabled due to pneumoconiosis. Consequently, the Director asserts that the 2011 denial of claimant's first claim renders Dr. Westerman's earlier medical determination of total disability due to pneumoconiosis a misdiagnosis that cannot defeat the timeliness of claimant's 2013 claim. *Id.*, *citing Eighty Four Mining Co. v. Director, OWCP* [*Morris*], 812 F.3d 308, 313, 25 BLR 2-821, 2-829 (3d Cir. 2016); *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483, 24 BLR 2-135, 2-153-54 (6th Cir. 2009); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618, 23 BLR 2-345, 2-365 (4th Cir. 2006). As the administrative law judge did not dispose of the timeliness issue on that basis, however, we decline to address the Director's alternative argument.

[10] Employer relies, in pertinent part, on the following October 20, 2015 exchange between claimant and employer's counsel:

> Q: All right. So, Westerman told you that you had interstitial lung disease caused by coal dust, is that what you said?

In his deposition testimony, [c]laimant testified that Dr. Westerman told him that he is totally disabled. EX 2 at 23. Following up on [c]laimant's response, [e]mployer's counsel asked[,] "[h]e told you you're totally disabled due to your interstitial lung disease that he said was due to coal work or coal dust?" EX 2 at 24. In the middle of [e]mployer's counsel's question, [c]laimant interrupted and attempted to explain what Dr. Westerman told him. *Id*. at 24. After [e]mployer's counsel finished asking the question, [c]laimant said "[t]hat's what it had to pertain from, that's what I was doing." *Id*. Based on claimant's response, it is unclear if he was confirming that Dr. Westerman told him that his interstitial lung disease was due to coal mine dust exposure or confirming that Dr. Westerman told him that he is totally disabled due to pneumoconiosis.

A: That's it.

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Q: Did any doctor ever tell you that you're totally disabled?
A: Yeah.
Q: Who was that?
A: Westerman[.]

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Q: Do you remember what year it was possibly or how long ago it was?
A: It was in – the last 2004, first of 2005 . . . .

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Q: Okay. He told you you're totally disabled due to your interstitial lung disease that he said was due to coal work -
A: He said -
Q: - - coal dust?
A: That's what it had to pertain from, that's what I was doing.
Q: That's what he told you?
A: Yeah.

Employer's Brief at 6-7; *see* Decision and Order at 5, *referencing* Employer's Exhibit 2 at 18, 23-24.

Decision and Order at 11, *referencing* Employer's Exhibit 2 at 23-24. A review of claimant's deposition testimony indicates that, for the reasons she supplied, the administrative law judge permissibly concluded that the meaning of claimant's ultimate response was ambiguous. Employer's Exhibit 2 at 23-24. Thus, the administrative law judge permissibly determined that claimant's October 20, 2015 testimony did not definitively establish that a diagnosis of total disability due to pneumoconiosis was communicated to him. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-589, 2-606 (4th Cir. 1999) (explaining that the meaning of an ambiguous word or phrase and the weight to give the testimony of an uncertain witness are questions for the trier-of-fact); *Clark*, 12 BLR at 1-152; Decision and Order at 11; Director's Brief at 7-8. The administrative law judge also permissibly found, and employer does not dispute, that when asked about his deposition testimony at the hearing, claimant's "inconsistent, ambiguous . . . response[s] to leading questions" did not clarify whether Dr. Westerman told claimant that he was totally disabled due to pneumoconiosis.[11] *See Mays*, 176 F.3d at 764, 21 BLR at 2-606; *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); Decision and Order at 11, *referencing* Hearing Tr. at 16.

Substantial evidence supports the administrative law judge's conclusion that claimant's October 20, 2015 deposition testimony is ambiguous and thus fails to establish that a diagnosis of total disability due to pneumoconiosis was communicated to claimant more than three years prior to the filing of his 2013 claim. *See Mays*, 176 F.3d at 764, 21 BLR at 2-606; *Clark*, 12 BLR at 1-52. Further, the record reflects that the administrative law judge properly considered all of the remaining relevant evidence, and explained her determination that it does not establish when claimant was told he was totally disabled

[11] The administrative law judge noted:

> At hearing, [c]laimant confirmed that he recalled giving this testimony. In response to the question "do you dispute that testimony?" [c]laimant stated "I just said I was disabled." *Id.* Employer's counsel asked whether [c]laimant was disabled as a result of his coal mine employment and [c]laimant said 'yes." *Id.* It is unclear if [c]laimant was confirming what Dr. Westerman told him or confirming his belief as to the cause of his disability. Furthermore, [c]laimant's response "I just said I was disabled," does not support his earlier statement that Dr. Westerman told him he is totally disabled due to pneumoconiosis.

Decision and Order at 11, *referencing* Hearing Tr. at 16.

due to pneumoconiosis.[12] *See Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Jordan*, 876 F.2d at 1460, 12 BLR at 2-374-75; *Clark*, 12 BLR at 1-52. We therefore affirm that administrative law judge's finding that claimant's subsequent claim was timely filed. *See* 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). Furthermore, we affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is entitled to benefits under Act. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[12] We note that employer does not identify any other evidence to support its contention that Dr. Westerman's determination of total disability due to pneumoconiosis was communicated to claimant more than three years before the filing of his 2013 subsequent claim.