U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0104 BLA

FARRELL REED	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DICKENSON-RUSSELL COAL COMPANY, LLC	)	DATE ISSUED: 02/24/2021
	)	
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 on Remand of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

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

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

Stefan Babich (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Patrick M. Rosenow's Decision and Order on Remand (2014-BLA-05874) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on July 29, 2013, and is before the Benefits Review Board for the second time.

In its previous decision based on Employer's appeal, a majority of the Board's three-member panel affirmed, as unchallenged, the administrative law judge's findings that Claimant established 35.48 years of underground coal mine employment and the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *Reed v. Dickenson-Russell Coal Co.*, BRB No. 17-0511 BLA, slip op. at 2 n.2 (Aug. 21, 2018) (unpub.) (Gilligan, J., dissenting). The Board vacated, however, the administrative law judge's finding that Employer did not rebut the presumption that the claim was timely filed and remanded the case for reconsideration of that issue.[1] *Reed*, BRB No. 17-0511 BLA, slip op. at 8-9.

On remand, the administrative law judge found Employer failed to rebut the presumption that the claim was timely filed. 20 C.F.R. §725.308. Thus, he reinstated the award of benefits.

On appeal, Employer contends the administrative law judge erred in finding the claim timely filed. Claimant and the Director, Office of Workers' Compensation Programs, respond urging the Board to uphold the administrative law judge's finding that the claim was timely.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 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 the Claim

"Any 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).

[1] Administrative Appeals Judge Ryan Gilligan would have held the claim was untimely filed and reversed the award of benefits. *Reed*, slip op. at 10-12.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as Claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 5, 8.

The medical determination must have "been communicated to the miner or a person responsible for the care of the miner" and a rebuttable presumption provides that every claim is timely filed. 20 C.F.R. §725.308(a), (c). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that an oral communication of a medical determination of total disability due to pneumoconiosis is sufficient to trigger the statute of limitations. *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426-27 (4th Cir. 2006); *see also Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 595-96 (6th Cir. 2013). To rebut the presumption, an 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). The Board has held that only medical opinions clearly indicating a medical determination of total disability due to pneumoconiosis are sufficient to trigger the statutory time limit. *Adkins v. Donaldson Mine Co.*, 19 BLR 1-34, 1-43 (1993) ("terminology used in the medical determination must be such that the miner was aware, or in the exercise of reasonable diligence, should have been aware that he was totally disabled due to pneumoconiosis arising out of coal mine employment").

The majority of the previous panel held the administrative law judge erred in considering whether the medical communications received by Claimant indicated he was totally disabled from performing both his usual coal mine work *and* comparable gainful work outside of the mines.[3] *Reed*, BRB No. 17-0511 BLA, slip op. at 7-8. It reasoned that once Claimant establishes he is unable to perform his coal mine work, a prima facie case for total disability exists, and it was therefore improper for the administrative law judge to also require the medical communication of total disability to address Claimant's ability to perform comparable non-mining work. *Id*. at 8, citing *Taylor v. Evans & Gambrel Co*., 12 BLR 1-83, 1-86-87 (1988).

On remand, the administrative law judge reviewed Dr. Robinette's treatment notes from 2008 to 2012, and considered whether the doctor's statements, in context, qualify as a

[3] The administrative law judge determined a communication was insufficient to trigger the statute of limitations,

> [a]bsent a medical opinion that [Claimant] could not engaging [sic] in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time. . . .

2017 Decision and Order at 14-16.

medical determination of total disability due to pneumoconiosis and, if so, whether such a determination was communicated to Claimant. Decision and Order on Remand at 4-9. He found none of Dr. Robinette's communications to Claimant before July 30, 2010, i.e., more than three years before he filed his July 29, 2013 claim, were legally sufficient to trigger the statute of limitations. *Id*. at 5-8. The administrative law judge determined the October 17, 2008, August 13, 2009, December 17, 2009, and April 19, 2010 treatment notes do not contain a diagnosis of total disability due to pneumoconiosis, and the November 4, 2008, November 14, 2008, January 14, 2009, and April 17, 2009 treatment notes do not contain a clear communication to Claimant of a diagnosis of total disability due to pneumoconiosis. *Id*. The administrative law judge therefore concluded Employer failed to rebut the presumption that Claimant's July 29, 2013 claim was timely. *Id*. at 17.

Employer initially argues the administrative law judge's decision to accord less weight to Claimant's deposition testimony is unexplained and in violation of the Administrative Procedure Act.[4] Employer's Brief at 12-15. It asserts Claimant admitted at his deposition that he was aware Dr. Robinette advised him to not work due to his pneumoconiosis, contradicting his statement at the hearing that Dr. Robinette "never did say I was totally disabled." *Id*. at 13, *quoting* Hearing Transcript at 19; *see* Employer's Exhibit 1 at 26-31.

The Board previously rejected Employer's arguments concerning the administrative law judge's weighing of the evidence. *Reed*, slip op. at 4-5. It noted the administrative law judge's determination "that while [C]laimant was a 'generally credible witness in terms of candor and honesty,' he was attempting to recall multiple conversations with Dr. Robinette that took place many years ago." *Id*. at 4, *quoting* 2017 Decision and Order at 13. The Board therefore affirmed his permissible finding that Dr. Robinette's contemporaneous treatment notes are more reliable than Claimant's testimony as they are "better evidence of specific dates and specific communications to Claimant."[5] Decision and Order on Remand

[4] Contrary to Employer's assertion, the administrative law judge did not state that Claimant's testimony is not credible and "entitled to no weight." *See* Employer's Brief at 12. Rather, as explained *infra*, the administrative law judge generally deemed Claimant a credible witness but found his memory concerning specifics of conversations was likely to be inaccurate due to the period of time that passed, especially "in the context of an adversarial process where his testimony can dramatically change his financial situation." 2017 Decision and Order at 13.

[5] Thus, contrary to Employer's contention, the administrative law judge explained his determination in compliance with the Administrative Procedure Act. *See* 2017 Decision and Order at 13; Employer's Brief at 15; Director's Brief at 11 n.11

at 5; 2017 Decision and Order at 13; *Reed*, slip op. at 5. The Board's previous resolution of this issue constitutes the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). As Employer has not demonstrated a valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition of this issue. *See Brinkley*, 14 BLR at 1-150-51.

Employer next argues Claimant received a diagnosis of total disability due to pneumoconiosis from Dr. Robinette more than three years before he filed his claim, and that a "reasonable person would have understood" this diagnosis. Employer's Brief at 2-8. Employer asserts the administrative law judge erroneously required that "Claimant must be unable to work and not be in fact working."[6] *Id*. at 8-10. Employer's arguments lack merit.

The administrative law judge summarized Dr. Robinette's treatment notes from October 17, 2008, through April 19, 2010. Decision and Order on Remand at 6-8. Dr. Robinette reported, in pertinent part, his conversations with Claimant as follows:

> October 17, 2008 - I explained to [Claimant] that clearly his x-ray is abnormal and that he must cease any dust exposure whether using a respiratory [sic] or being transferred to an alternate site in the mines.

Employer's Exhibit 3.

> November 4, 2008 – These [CT scan] findings were felt to be consistent with underlying silicosis and pneumoconiosis. . . I have explained to [Claimant] that he has evidence of severe pulmonary disease with interstitial pulmonary fibrosis related to an occupational pneumoconiosis. . . I explained to [Claimant] that [sic] is obviously disabled from working on the basis of his pulmonary disease alone. He could [sic] cease any and all dust exposure and I gave him a work exercise [sic] for a minimum of two weeks pending a follow-up evaluation in our office to ascertain if there is any reversible component to his problems that I have described.

Employer's Exhibit 2.

[6] Employer accurately asserts it does not need to prove Claimant was in fact totally disabled to trigger the statute of limitations. Employer's Brief at 10-12. The limitations period begins to run when a medical determination of total disability due to pneumoconiosis is communicated to a miner. Whether the diagnosis is well-reasoned or otherwise accurate is irrelevant for purposes of the statute of limitations. *Peabody Coal Co. v. Director, OWCP*, 718 F.3d 590, 594 (6th Cir. 2013).

> November 14, 2008 - Clearly, [Claimant] is disabled from working on the basis of his pulmonary disease. . . He has diffuse pneumoconiosis with evidence of a restrictive ventilatory defect and a reduction in his diffusion capacity. . . I have asked him to continue all medications as outlined. . . He is disabled from working.

Employer's Exhibit 6.

> January 14, 2009 – I felt that [Claimant] was disabled from working as an underground miner based on his pulmonary disease.

Id. at 2.

> April 17, 2009 – I did discuss with [Claimant] the fact that he is disabled from working on the basis of his pulmonary disease. He has severe restrictive lung disease due to his intrinsic pulmonary fibrosis and dust reticulation.

Id. at 3.

> August 13, 2009 - I have informed [Claimant] that he is disabled from working as an underground coal miner based on his radiographic abnormalities. Obviously, the differential diagnosis could include Caplan's syndrome. . . [Claimant] is disabled from working on the basis of his lung disease. He needs to stop working in the mining industry and apply for black lung disability.

Employer's Exhibit 6 at 4.

> December 17, 2009 - Clearly [Claimant] has evidence of complicated pneumoconiosis with progressive massive fibrosis. I have encouraged him to stop working in the mining industry because of his radiographic findings and his severe functional impairment.

Employer's Exhibit 6 at 5.

> April 19, 2010 – [Claimant] has been informed that he has significant radiographic abnormalities consistent with an occupational lung disease . . . [o]f course the differential diagnosis could include possible Caplan's syndrome . . . Clearly, he has evidence of occupational pneumoconiosis and should avoid any and all dust exposure.

Claimant's Exhibit 4 at 18.

In analyzing the evidence, the administrative law judge reviewed each note to determine whether it qualified as a medical determination of total disability due to pneumoconiosis, and whether it was communicated to Claimant. Decision and Order on Remand at 5-6. He accurately determined the November 14, 2008 and January 14, 2009 notes did not indicate any communication from Dr. Robinette to Claimant and therefore were insufficient to trigger the statute of limitations. Decision and Order on Remand at 7; Employer's Exhibit 6; *see* 20 C.F.R. §725.308(a). He also permissibly determined the October 17, 2008, December 17, 2009, and April 19, 2010 notes were insufficient to constitute a medical diagnosis of total disability because Dr. Robinette merely advised against further dust exposure or encouraged Claimant to stop working in the mines. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 669 (4th Cir. 2017) (where a physician informed a miner he should stop working to avoid lung damage, the physician was "merely advis[ing]" the miner); *see also Drummond Co., Inc. v. Cox*, 742 F. App'x 460, 462 (11th Cir 2018) (communication insufficient to constitute a medical determination of total disability where physician informed claimant he would be unable to go back to work "in the dust and all"); Decision and Order on Remand at 6-8; Claimant's Exhibit 4 at 18; Employer's Exhibits 3, 6.

The administrative law judge further found the November 4, 2008 note, considered in its entirety, insufficient to trigger the statute of limitations. Decision and Order on Remand at 6-7. He permissibly concluded that at best, this note could be interpreted as a warning that "continued exposure could result in Claimant becoming physically incapable of working," as Dr. Robinette told Claimant he was "obviously disabled" but also gave him a two week work excuse[7] "to ascertain if there is any reversible component" to his condition. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); Decision and Order on Remand at 6-7; Employer's Exhibit 2. Communicating a diagnosis of a pulmonary disease along with a suggestion that the disease could be reversible and treatable does not support that Claimant was permanently disabled.

With respect to the August 13, 2009 treatment note, the administrative law judge noted Dr. Robinette informed Claimant he was disabled from working as an underground miner "based on his radiographic abnormalities" and noted a differential diagnosis of

[7] Dr. Robinette indicates he gave Claimant a "work exercise" for a minimum of a two-week period. Employer's Exhibit 2. The context suggests this is a typographical error and he meant to note he gave Claimant a work "excuse." The administrative law judge similarly deemed this a typographical error, twice noting Dr. Robinette's use of the term "work exercise [*sic*]." Decision and Order at 6-7 (emphasis added).

Caplan's disease,[8] but did not identify those abnormalities as pneumoconiosis. Decision and Order on Remand at 8. The administrative law judge further found no indication that Dr. Robinette's opinion Claimant should stop working and apply for black lung benefits was communicated to Claimant. *Id*. He therefore permissibly determined this note did not indicate a clear diagnosis of total disability due to pneumoconiosis. *See Stallard*, 876 F.3d at 669 ("permanently disabled as a result of his impaired respiratory function" held insufficient to establish an underlying cause of pneumoconiosis); *Sewell Coal Co. v. Dempsey*, 429 Fed. Appx. 311, 314 (4th Cir. 2011) (finding a claimant was "totally and permanently disabled from any type of gainful employment due to his diagnoses stated above" was insufficient where it failed to specify which conditions caused the disability); Decision and Order on Remand at 8; Employer's Exhibit 6 at 4.

Similarly, the administrative law judge permissibly determined Dr. Robinette's April 17, 2009 note did not contain a clear communication of total disability due to pneumoconiosis, as the physician knew Claimant was still working at his usual coal mine job, described Claimant as "disabled" rather than "totally disabled" and did not mention pneumoconiosis as the cause of his disability. *See Stallard*, 876 F.3d at 669; *Dempsey*, 429 Fed. Appx. At 314; Decision and Order on Remand at 6-7; Employer's Exhibit 6 at 3. Moreover, approximately one year later, on April 19, 2010, Dr. Robinette still merely advised Claimant to avoid any dust exposure. Claimant's Exhibit 4 at 18. Thus the administrative law judge rationally found Claimant was not advised he was totally disabled due to pneumoconiosis more than three years before filing his claim. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order on Remand at 8.

We further reject Employer's argument that the administrative law judge erred in requiring a communication from Dr. Robinette to "comport[] with subsection one and subsection two of the regulation defining total disability"[9] and in requiring Claimant "to

[8] Caplan syndrome is a pulmonary fibrosis in people with rheumatoid arthritis who have been exposed to mining dusts such as coal, silica, and asbestos. *The Free Dictionary* (Feb. 8, 2021, 2:27 PM), https://medical-dictionary.thefreedictionary.com/Caplan+syndrome.

[9] As noted, the administrative law judge initially determined Dr. Robinette's communications could not trigger the statute of limitations because they did not address Claimant's ability to perform both coal mine work *and* comparable non-mining work. *See* 2017 Decision and Order at 14-15, 17; *Reed*, slip op. at 8; Decision and Order on Remand at 2, 4. On remand, however, he applied the standard as instructed by the Board, i.e., to consider whether Dr. Robinette communicated to Claimant that his pneumoconiosis renders him unable to perform his usual coal mining work. Decision and Order on Remand

have the technical understanding of total disability as defined in the regulations." Employer's Brief at 4-5. Contrary to Employer's assertion, on remand the administrative law judge correctly considered whether Claimant received any communication that he was unable to perform his usual coal mining job because of pneumoconiosis. *See* 20 C.F.R. §725.308(a); Decision and Order on Remand at 2, 5-8. Moreover, Employer cites to no portion of the administrative law judge's Decision and Order on Remand to support its argument.

Nor is there merit to Employer's argument that "under the administrative law judge's standard . . . a claimant must be unable to work and not be in fact working" to receive a valid communication of total disability. Employer's Brief at 8-9. Contrary to Employer's argument, the administrative law judge determined, based on the evidence in this case, Dr. Robinette's communications were insufficient to inform Claimant he was totally disabled, as opposed to advisory statements that he needed to stop working in the mines. *See* 20 C.F.R. §725.308(a); *Stallard*, 876 F.3d at 669; *see also Cox*, 742 F. App'x at 462; Decision and Order on Remand at 8.

The question of whether the evidence establishes rebuttal of the presumption of timeliness involves factual findings appropriately made by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). The administrative law judge permissibly found Dr. Robinette's treatment notes insufficient to trigger the statute of limitations because he did not clearly inform Claimant he is totally disabled due to pneumoconiosis. *See Adkins*, 19 BLR at 1-43. Thus, we affirm the administrative law judge's finding Employer did not rebut the presumption that Claimant's July 29, 2013 claim was timely filed, and affirm the award of benefits. *See* 20 C.F.R. §725.308(a); *Stallard*, 876 F.3d at 669; *Brigance*, 718 F.3d at 594-95.

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at 2. Employer has not explained what affect, if any, the administrative law judge's initial decision had on his subsequent decision on remand. 20 C.F.R. §802.211(b); *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge