U.S. Department of Labor

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

BRB Nos. 15-0348 BLA
and 15-0348 BLA-A

ELSTER McCLANAHAN Claimant-Petitioner v. BREM COAL COMPANY, LLC and KENTUCKY EMPLOYERS MUTUAL INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Cross-Petitioner	)	DATE ISSUED: 07/07/2016 DECISION and ORDER

Appeals of the Orders of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals, the Orders (13-BLA-5128) of Administrative Law Judge Alan L. Bergstrom directing claimant to attend a third physical examination for employer in connection with 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 claim filed on December 12, 2011. Initially, claimant attended a pulmonary evaluation conducted by Dr. Habre on behalf of the Department of Labor (DOL) on February 9, 2012. Claimant's Brief at 4; Director's Brief at 3-4. Thereafter, claimant attended two pulmonary evaluations on behalf of employer. *Id.* Claimant was examined by Dr. Fino on April 18, 2012, and by Dr. Dahhan on June 8, 2012. *Id.* The district director awarded benefits on September 4, 2012. Claimant's Brief at 5. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing, which was scheduled for August 26, 2015. *Id.*

By letter dated April 28, 2015, employer informed claimant that it had scheduled him for a third pulmonary evaluation with Dr. Jarboe on June 25, 2015. Claimant's Brief at 5. On May 1, 2015, employer moved to compel claimant to attend this medical examination, noting that the most recent evidence concerning claimant's respiratory condition was "nearly three (3) years old." Employer's Motion to Compel Third Examination at 2. Employer indicated that it wanted to obtain "the most accurate information concerning the miner's health." *Id*. In response, Cindy Viers, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, argued that employer was not entitled to a third medical examination of claimant. Claimant's Brief at 6. Ms. Viers, however, indicated that claimant was willing to sign medical authorization forms so that employer could have access to claimant's most current medical information. *Id.*

By Order dated May 11, 2015, the administrative law judge found that the requested medical examination was "relevant and material to the issues involved in [the] case." Administrative Law Judge's May 11, 2015 Order Granting Motion to Compel

Claimant to Submit to Medical Examination at 3. The administrative law judge, therefore, granted employer's motion to compel claimant to attend the third medical examination requested by employer. *Id.* at 4.

Ms. Viers, on behalf of claimant, and the Director filed separate motions for reconsideration of the administrative law judge's May 11, 2015 Order. Ms. Viers and the Director each argued that employer's request for a third medical examination exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414. Ms. Viers again indicated claimant's willingness to sign medical authorization forms so that employer could have access to the most current medical information. *Id.*

By Order dated June 4, 2015, the administrative law judge found that the Director had confused the "regulatory limits on [the] submission of evidence with the gathering of evidence by the [p]arties." Administrative Law Judge's June 4, 2015 Order Denying Director's Motion for Reconsideration at 2. The administrative law judge found that "the best interests of justice" would be served by claimant's participation in the scheduled third medical examination. *Id.* at 3. The administrative law judge, therefore, denied the Director's motion for reconsideration.[1]

Claimant filed an interlocutory appeal with the Board on June 23, 2015. By Order dated June 24, 2015, the administrative law judge stayed further proceedings pending resolution of claimant's interlocutory appeal to the Board. In addition, the Director filed a separate interlocutory appeal with the Board on July 6, 2015. By Order dated October 20, 2015, the Board accepted both of the interlocutory appeals. *McClanahan v. Brem Coal Co.,* BRB Nos. 15-0348 BLA and 15-0348 BLA-A (Oct. 20, 2015) (Order) (unpub.).

On appeal, claimant and the Director contend that the administrative law judge erred in granting employer's motion to compel claimant to undergo a third medical examination. Employer responds in support of the administrative law judge's order compelling a third medical examination. In a reply brief, claimant reiterates his previous contentions.

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[1] The administrative law judge stated that he did not consider the motion for reconsideration filed by Cindy Viers (or her earlier objection to employer's motion to compel claimant to attend a third medical examination) because she had not filed a written request to be approved as a non-attorney representative pursuant to 20 C.F.R. §725.363(b). Administrative Law Judge's May 11, 2015 Order Granting Motion to Compel Claimant to Submit to Medical Examination at 3; Administrative Law Judge's June 4, 2015 Order Denying Director's Motion for Reconsideration at 2 n.2.

The administrative law judge's procedural rulings are reviewed for abuse of discretion. 20 C.F.R. §725.455(c); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

In granting employer's motion to compel a third medical examination, the administrative law judge noted that pneumoconiosis is a progressive disease, and that claimant's most recent pulmonary evaluation occurred three years ago. June 4, 2015 Order at 3. The administrative law judge, therefore, found that requiring claimant to undergo a third medical examination at employer's request was "appropriate to determine [claimant's] current respiratory and/or pulmonary condition." *Id.* Consequently, the administrative law judge found that "the best interests of justice" were served by "[c]laimant appearing and participating in the currently scheduled June 25, 2015 medical examination before Dr. T.M. Jarboe." *Id.*

Claimant and the Director contend that, absent a finding of good cause, the evidentiary limitations set forth at 20 C.F.R. §725.414 limit employer to *obtaining* two pulmonary evaluations. Section 725.414 provides, in pertinent part, that "[t]he responsible operator . . . shall be entitled *to obtain* and submit, in support of its affirmative case, no more than . . . two medical reports." 20 C.F.R. §725.414(a)(3)(i) (2015) (emphasis added).[2] Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

We agree with the Director that the regulation by its plain language limits employer to obtaining two pulmonary evaluations. As noted by the Director, the word "obtain" is defined as "to gain or attain [usually] by planned action or effort[,]" and clearly has a different meaning than "submit." Director's Brief at 8-9, *citing Webster's New Collegiate Dictionary* 786 (1979). Allowing an employer to obtain more than two pulmonary evaluations of claimant, as long as it ultimately submits no more than two medical reports, would effectively read the word "obtain" out of the regulation. *Id.* We, therefore, reject employer's contention that the regulation merely limits the amount of evidence that it may ultimately submit in support of its case. *See TRW Inc. v. Andrews*,

[2] Subsequent to the issuance of the administrative law judge's Orders, this regulation was revised, and now provides, in pertinent part, that "[t]he responsible operator . . . *is* entitled to obtain and submit, in support of its affirmative case, no more than . . . two medical reports." 20 C.F.R. §725.414(a)(3)(i) (emphasis added reflecting that the words "shall be" in the former version were replaced by the word "is" in the current version).

534 U.S. 19, 31 (2001) (recognizing that a statute ought to be construed "so that no clause, sentence, or word shall be superfluous, void, or insignificant"); *see also City of Fredericksburg, Va. v. Fed. Energy Regulatory Comm'n*, 876 F.2d 1109, 1112 n.3 (4th Cir. 1989) (recognizing that a regulation should be given an interpretation that gives effect to all of its words).

The Director further notes that, when the evidence-limiting rules were first proposed in 1997, it was the expressed intent of the DOL to limit "the number of physically demanding and often invasive pulmonary evaluations that a claimant has to undergo [in the evaluation of his entitlement]." Director's Brief at 10, *quoting* 62 Fed. Reg. 3356, 3360 (Jan. 22, 1997). Moreover, the Director notes that the DOL, in promulgating the final rule, made it clear that the rule was intended to protect claimants from unnecessary medical testing: "The Department recognizes that . . . testing may be difficult for some claimants. In the absence of good cause, the [new rule] limit[s] the maximum total number of tests to five in the vast majority of cases involving a designated operator . . . ." Director's Brief at 10, *quoting* 65 Fed. Reg. 79,920, 79,992 (Dec. 20, 2000). The five evaluations referred to are the DOL-sponsored pulmonary evaluation, the two pulmonary evaluations allowed to claimant, and the two pulmonary evaluations allowed to the responsible operator.

We note that an agency's interpretation of its own regulations is entitled to deference, and must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (2004); *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62 (1994). Consequently, to the extent that there is any ambiguity present in the language of 20 C.F.R. §725.414(a)(3)(i), we defer to the Director's interpretation of the regulation, as it is not plainly erroneous or inconsistent with the regulation. We, therefore, hold that Section 725.414 limits an employer (in the absence of a showing of good cause) to obtaining two pulmonary evaluations.[3]

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[3] The administrative law judge, in granting employer's motion to compel claimant to undergo a third employer-sponsored pulmonary evaluation, relied upon language set forth by the Department of Labor (DOL) in its notice of proposed rulemaking regarding the full disclosure of medical information held by the parties:

> Currently, parties to a claim are free to develop medical information to the extent their resources allow and then select from that information those pieces they wish to submit into evidence, subject to the evidentiary limitations set out in [20 C.F.R.] §725.414.

In this case, claimant has already submitted to two employer-sponsored pulmonary evaluations. Consequently, employer is precluded from compelling claimant to submit to a third medical evaluation, unless it can make a showing of good cause.[4] 20 C.F.R. §725.456(b)(1).

It is employer's burden to demonstrate good cause to justify the admission of additional evidence. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-62 (2004) (en banc). Although the administrative law judge did not make an explicit good cause determination, employer contends that it has made such a showing because all of the evidence is approximately three years old and a third medical evaluation is needed "in order to obtain the most accurate evidence and to properly evaluate the merits of the claim." Employer's Brief at 9. Employer further notes that "more recent evidence will provide a more accurate picture of the [c]laimant's pulmonary ability." *Id.*

We hold that employer's proffered basis for establishing "good cause" for exceeding the evidentiary limitations set forth at 20 C.F.R. §725.414 is insufficient as a matter of law. Employer essentially asserts that it should be able to develop additional evidence based upon its relevance. As the United States Court of Appeals for the Fourth

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June 4, 2015 Order at 3, *quoting* 80 Fed. Reg. 23,743, 23,745 (Apr. 29, 2015). We note that the language relied upon by the administrative law judge, regarding the amount of medical evidence that the parties are free to develop, is expressly made "subject to the evidentiary limitations set out in [20 C.F.R.] §725.414." Moreover, we note that the DOL subsequently revised its statement when it published its final rule, indicating that:

> Currently, parties may develop medical information (*subject to certain limits on examinations of the miner*) in excess of the evidentiary limitations set out in [20 C.F.R.] §725.414, and then select from that information those pieces they wish to submit into evidence.

81 Fed. Reg. 24,464, 24,469 (Apr. 26, 2016) (emphasis added).

[4] The Board declines to address employer's assertion that it is entitled to obtain more than two medical examinations because it can obtain and submit two x-rays, two pulmonary function studies, and two blood gas studies, and, according to employer, could therefore potentially submit claimant to at least six examinations by six different doctors who could individually perform each test. *See* Employer's Brief at 6-7. As claimant points out, this fact pattern did not arise in the instant case. Claimant's Reply Brief at 5-6 (unpaginated).

Circuit has recognized, if good cause exists to permit all evidence that is relevant, the good cause exception found in 20 C.F.R. §725.456 would render the evidence-limiting rules of 20 C.F.R. §725.414 "meaningless." *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297 n.18, 23 BLR 2-430, 2-460-61 n.18 (4th Cir. 2007). A mere assertion that evidence is relevant does not, therefore, establish good cause to exceed the evidentiary limitations set forth at 20 C.F.R. §725.414.[5] *Dempsey*, 23 BLR at 1-62. Because employer has not put forth any other basis for demonstrating good cause to exceed the evidentiary limitations, we reverse the administrative law judge's orders compelling claimant to attend a third medical evaluation on behalf of employer.[6]

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[5] Although employer asserted that a new medical evaluation was necessary because the prior evaluations occurred in 2012, it did not demonstrate that the prior evaluations were insufficient to permit the administrative law judge to determine claimant's eligibility for benefits. Moreover, as the Director, Office of Workers' Compensation Programs, notes, given the progressive nature of pneumoconiosis, it is more likely that claimant, not employer, would be the party aggrieved by having to rely on older evidence. Director's Brief at 14 n.11.

[6] Because employer has not demonstrated a valid basis for establishing good cause, we need not remand the case to the administrative law judge for consideration of this issue. *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249, 19 BLR 2-123, 2-133 (6th Cir. 1995) ("If the outcome of a remand is foreordained, we need not order one.").

Accordingly, the administrative law judge's May 11, 2015 and June 4, 2015 Orders directing claimant to attend a third physical examination for employer in connection with this claim are reversed, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge