U.S. Department of Labor

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

BRB No. 16-0524 BLA

DARRELL L. BOYD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 07/28/2017
	)	
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 Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Michelle S. Gerdano (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: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05537) of Administrative Law Judge Pamela J. Lakes, rendered on a claim filed on March 19,

2012, 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 of this claim is as follows: After claimant was examined by Dr. Forehand as part of the Department of Labor (DOL)-sponsored pulmonary evaluation, the district director issued a Proposed Decision and Order awarding benefits based on Dr. Forehand's opinion. Director's Exhibit 21. Employer requested a hearing before the administrative law judge, which was scheduled to be held on September 16, 2015. Prior to the hearing, employer submitted medical reports from Drs. Fino and Dahhan.

Seven weeks before the hearing, the Director, Office of Workers' Compensation Programs (the Director), filed a motion with the administrative law judge, requesting leave to submit a supplemental medical report from Dr. Forehand because the Director foresaw that the supplemental report would be untimely submitted. The Director explained that this case met the criteria to obtain a supplemental report from Dr. Forehand pursuant to a DOL pilot program.[1] Director's Motion to Admit Late Evidence (Motion) at 1, 4. As described by the Director, under this program the doctor who conducts the DOL-sponsored examination is asked to review subsequently-developed evidence submitted by the parties and address any disparities between this evidence and the doctor's original opinion. *Id*. at 3.

The Director further explained that he did not expect Dr. Forehand's supplemental report to be available in time to meet the regulatory deadline requiring that evidence be exchanged with the other parties at least twenty days prior to the hearing.[2] Motion at 1,

[1] The Director, Office of Workers' Compensation Programs (the Director), indicated that for "cases pending before the Office of Administrative Law Judges," the criteria for inclusion in the pilot program are: 1) the miner had at least fifteen years of underground coal mine employment or substantially similar surface coal mine employment and is thus eligible to invoke the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012); 2) the district director issued a Proposed Decision and Order awarding benefits; 3) the operator submitted medical evidence that appears contrary to the district director's award of benefits; and 4) the claimant is not represented by an attorney. Director's Motion to Admit Late Evidence (Motion) at 2-3. The Director indicated that "[s]lightly different criteria apply to cases pending before the district director." Motion at 3 n.2.

[2] Documentary evidence not pertaining to the identification of the responsible operator that was not submitted to the district director "may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least [twenty] days before a hearing is held . . . ." 20 C.F.R. §725.456(b)(2). If such

citing 20 C.F.R. §725.456(b)(2),(3). The Director argued, however, that good cause existed for his late submission of a supplemental report.[3] *Id*. at 1, 4. Employer opposed the request, arguing that the Director did not establish good cause to submit late evidence. Employer's Response in Opposition at 2-3. Employer also argued that the supplemental report should not be admitted because the pilot program under which it was developed was not authorized by the Act or regulations, and because this case did not meet the criteria for inclusion in the program, as claimant had a lay representative. *Id*. at 4-5. Alternatively, if the administrative law judge admitted the late evidence, employer requested the opportunity to develop additional medical evidence in response to Dr. Forehand's supplemental report. *Id*. at 5.

At the September 16, 2015 hearing, the administrative law judge informed the parties that she would take their positions under advisement should she receive the evidence in question. Hearing Transcript at 7-8. Two weeks after the hearing, the Director submitted a supplemental medical report from Dr. Forehand and requested that the report be admitted. Letter from Associate Regional Solicitor, dated Sept. 29, 2015, at 1; Director's Exhibit 28. In the supplemental report, dated September 24, 2015, Dr. Forehand reviewed and commented on the opinions of Drs. Fino and Dahhan, and indicated that a review of this evidence did not cause him to change his opinion that claimant is totally disabled due to pneumoconiosis. Director's Exhibit 28 at 2-5. Employer renewed its objections to the admission of Dr. Forehand's supplemental report.[4] Employer's Renewed Response in Opposition at 2-5.

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documentary evidence is not timely exchanged and the parties do not waive the twenty-day requirement, the evidence may not be admitted absent "a showing of good cause why such evidence was not exchanged in accordance with" the twenty-day rule. 20 C.F.R. §725.456(b)(3).

[3] The Director stated that the Department of Labor (DOL) was originally represented by the Philadelphia Office of the Solicitor of Labor, which sent correspondence to employer in 2013 regarding its designation as the responsible operator. Motion at 4. However, the Director noted that employer sent the medical evidence it developed to the Arlington Office of the Solicitor of Labor. *Id*. The Director further noted that although the Philadelphia office later transferred the case to the Arlington office, the file did not contain any of employer's exhibits. *Id*. The Director requested additional copies from employer, which he indicated were received on July 27, 2015. *Id*.

[4] Thereafter, employer reiterated its objections and renewed its request for an opportunity to respond if the late evidence was admitted. Employer's Post-Hearing Brief at 2 n.3.

On May 27, 2016, the administrative law judge issued her Decision and Order, which is the subject of this appeal. The administrative law judge found that the Director established good cause for the late submission of Dr. Forehand's supplemental report, and admitted it over employer's objection. Decision and Order at 3 n.6. The administrative law judge denied employer's request to respond to the supplemental report, finding that the request was "vague." *Id*.

The administrative law judge then credited claimant with at least nineteen years of underground coal mine employment,[5] and found that the evidence established 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).[6] 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 good cause established for the late submission of Dr. Forehand's supplemental report. Employer also argues that, even if the administrative law judge did not err in finding good cause established, she improperly denied employer's request to respond to the supplemental report. Employer further asserts that the administrative law judge erred in resolving this evidentiary issue at the same time she issued her Decision and Order on the merits of entitlement. Additionally, employer contends that Dr. Forehand's supplemental report should have been excluded in any event because the DOL was not authorized to institute the pilot program, and because this claim did not meet the criteria for inclusion in the program. Thus, employer maintains that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption.[7]

[5] Claimant's coal mine employment was in West Virginia. Director's Exhibits 3, 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] 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.

[7] Employer does not challenge the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption. That determination is therefore

Claimant has not filed a response brief. The Director responds, asserting that there is no merit to employer's arguments that the pilot program is unauthorized and that this claim does not meet the criteria for inclusion in the program. The Director, however, agrees with employer that the administrative law judge erred by failing to provide a valid reason for finding good cause established and by failing to allow employer an opportunity to respond to the supplemental report. Therefore, the Director argues that the award of benefits should be vacated and the case remanded to the administrative law judge for further consideration.

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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *McClanahan v. Brem Coal Co.*, 25 BLR 1-165, 1-167 (2016); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc).

I. Evidentiary Issues

We agree with employer and the Director that the administrative law judge abused her discretion in admitting Dr. Forehand's supplemental report. Specifically, the administrative law judge's basis for finding that the Director established good cause for the late submission of this evidence was erroneous.

Where documentary evidence is exchanged less than twenty days before the hearing, "the administrative law judge shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence[,]" unless the other parties waive the requirement or good cause is shown for failure to comply with the twenty-day rule. 20 C.F.R. §725.456(b)(3). The Director explained to the administrative law judge that "administrative inadvertence" led to the delay in obtaining the supplemental report from Dr. Forehand. Director's Brief at 4; *see* n.3, *supra*. Without addressing whether the Director's explanation established good cause, the administrative law judge found good cause to admit Dr. Forehand's supplemental report because it "w[ould] assist" her "in assessing Dr. Forehand's opinion in the absence of a deposition." Decision and Order at 3 n.6. In essence, the administrative law judge found good cause established because Dr. Forehand's supplemental report was relevant.

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affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7-12.

In *Conn v. White Deer Coal Co.*, 6 BLR 1-979, 1-982 (1984), the Board held that "mere reference to the relevance of the evidence" does not establish good cause for a party's failure to timely exchange that evidence under 20 C.F.R. §725.456(b). Moreover, in the context of the evidentiary limitations at 20 C.F.R. §725.414, the United States Court of Appeals for the Fourth Circuit has recognized that if good cause exists to admit all evidence that is relevant, the good cause exception at 20 C.F.R. §725.456(b)(1) would render the evidentiary limitations "meaningless." *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); *accord McClanahan*, 25 BLR at 1-169-70. Therefore, we hold that the administrative law judge erred in finding good cause established merely because Dr. Forehand's supplemental report was relevant.

Upon finding good cause for admitting the late evidence, the administrative law judge further erred in denying employer's request to respond to Dr. Forehand's supplemental report. The administrative law judge explained that employer "made no showing that it will be prejudiced" by admission of the late evidence "nor . . . indicated what evidentiary development it would want to complete if the report were admitted." Decision and Order at 3 n.6. The regulations do not require such a showing. Rather, 20 C.F.R. §725.456(b)(4) mandates that "a medical report which is not" timely exchanged "shall not be admitted into evidence in any case unless the hearing record is kept open for at least [thirty] days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence." 20 C.F.R. §725.456(b)(4); *see Pendleton v. U.S. Steel Corp.*, 6 BLR 1-815, 1-819 (1984). Therefore, having admitted Dr. Forehand's supplemental report, the administrative law judge should have allowed employer the opportunity to respond.

The administrative law judge also erred in failing to resolve the pertinent evidentiary issue before issuing her Decision and Order. *See L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc). As the Board explained in *Preston* in the context of the evidentiary limitations, in accordance with the principles of fairness and administrative efficiency, "the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order." *Id*. The failure to do so in this case precluded employer from having the opportunity to respond to Dr. Forehand's criticisms of its physicians' opinions as set forth in the supplemental report. Moreover, employer was prevented from being able to properly address the evidence and the administrative law judge's evidentiary ruling in its post-hearing brief, since it neither knew that the evidence was admitted nor the grounds on which it was admitted. In light of the foregoing errors, we must vacate the administrative law judge's decision to admit Dr. Forehand's supplemental report.

Further, we agree with employer and the Director that the administrative law judge's errors were not harmless because the administrative law judge relied on Dr.

Forehand's supplemental report in finding that employer did not rebut the Section 411(c)(4) presumption.[8] Decision and Order at 19-20. Therefore, we must also vacate the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption, and remand this case to the administrative law judge for further consideration.

II. Employer's Additional Argument Regarding Rebuttal of the Section 411(c)(4) Presumption

For the reasons discussed above, we have vacated the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. Because the administrative law judge must reconsider on remand whether employer has rebutted the presumption, in the interest of judicial economy we will also address one of employer's arguments relevant to issues that do not involve the admission of Dr. Forehand's supplemental report.

In order to rebut the Section 411(c)(4) presumption, employer must establish that claimant has neither legal nor clinical pneumoconiosis,[9] or that "no part of [claimant'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)(i), (ii). Employer argues that the administrative law judge erred in finding that it failed to establish that claimant does not have clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). We agree.

[8] When considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge summarized Dr. Forehand's supplemental report, noting Dr. Forehand's criticisms of the reasoning set forth by Drs. Fino and Dahhan when they opined that claimant does not have pneumoconiosis and is not totally disabled due to pneumoconiosis. Decision and Order at 19-20. The administrative law judge found Dr. Forehand's opinion to be "the most well-reasoned and compelling of the medical opinions submitted with regard to legal pneumoconiosis," and determined that the opinions of Drs. Fino and Dahhan, that claimant does not have legal pneumoconiosis, were "less well-reasoned than Dr. Forehand's opinion." *Id*.

[9] "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 administrative law judge found that the analog x-ray and medical opinion evidence did not rebut the existence of clinical pneumoconiosis, but that the digital x-ray and computed tomography (CT) scan evidence was sufficient to establish that claimant does not have the disease. Decision and Order at 13-18, 20-24. Although the administrative law judge ultimately found that employer was unable to rebut the presumed fact of clinical pneumoconiosis, she failed to explain her basis for crediting the analog x-ray and medical opinion evidence over the digital x-ray and CT scan evidence. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53, 25 BLR 2-779, 2-788 (4th Cir. 2016); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-323, 2-334-35 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439, 21 BLR 2-269, 2-272 (4th Cir. 1997). Therefore, on remand, the administrative law judge should reconsider whether employer has established that claimant does not have clinical pneumoconiosis, and set forth the basis for her finding, as required by the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We decline to address employer's arguments alleging error in the administrative law judge's weighing of the medical opinion evidence regarding the presumed facts of legal pneumoconiosis and disability causation, as the content of the evidentiary record in this regard may change on remand.[10]

III. Remand Instructions

On remand, before issuing her Decision and Order on the merits of entitlement, the administrative law judge must resolve the outstanding evidentiary issues in an interlocutory order. *See Preston*, 24 BLR at 1-63. The administrative law judge must first determine whether the Director has established good cause to admit Dr. Forehand's supplemental report over employer's twenty-day rule objection pursuant to 20 C.F.R. §725.456(b)(3), without regard merely to whether the report is relevant. *Conn*, 6 BLR at 1-981-82. If the administrative law judge finds that the Director has not established good cause for the submission of Dr. Forehand's supplemental report, "the administrative law

[10] Employer points out that to rebut the existence of legal pneumoconiosis, it need only show by a preponderance of the evidence that claimant does not have a chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Employer's Brief at 21-23. Employer is correct. *See* 20 C.F.R. §718.201(b). We note, however, that the administrative law judge accurately defined legal pneumoconiosis in her opinion and correctly stated that employer must prove that claimant "has neither clinical nor legal pneumoconiosis" in order to establish rebuttal under 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 12, 18.

judge [should] either exclude the [report] from the record" and reconsider whether employer has rebutted the Section 411(c)(4) presumption, or "remand the claim to the district director for consideration of such evidence." 20 C.F.R. §725.456(b)(3).

If the administrative law judge finds that the Director has established good cause under 20 C.F.R. §725.456(b)(3), the administrative law judge should address employer's arguments that Dr. Forehand's supplemental report should not be admitted because the pilot program under which it was developed is not authorized and because this claim does not meet the program criteria. The administrative law judge should also address the Director's and claimant's responses to those arguments, if any.[11] If the administrative law judge determines that Dr. Forehand's supplemental report should be admitted, she must allow employer the opportunity to respond. 20 C.F.R. §725.456(b)(4); *see Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 148-49, 16 BLR 2-1, 2-5 (4th Cir. 1991); *N. Am. Coal Co. v. Miller*, 870 F.2d 948, 951-52, 12 BLR 2-222, 2-228-29 (3d Cir. 1989).

Once the evidentiary record is complete, the administrative law judge should reconsider whether employer has rebutted the Section 411(c)(4) presumption, based on her consideration of all the relevant evidence. *See Addison*, 831 F.3d at 252-53, 25 BLR at 2-788. The administrative law judge must resolve the conflicts in the evidence, take

[11] We decline to address, as premature, the arguments the parties have raised on appeal concerning the pilot program under which Dr. Forehand's supplemental report was developed. The issue is moot if the administrative law judge excludes Dr. Forehand's supplemental report on remand, based on a determination that the Director has not established good cause for its untimely submission. Moreover, the parties raised the issue of the DOL pilot program and the inclusion of this case in the program in their pleadings before the administrative law judge, but the administrative law judge did not make a ruling on that issue. In order to determine whether the administrative law judge erred in resolving this issue, the Board must have before it the administrative law judge's "reasons or basis therefor . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998) (observing that a function of Section 557(c)(3)(A) is to permit appellate review); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989). Consequently, on remand the administrative law judge should make a proper determination on these issues, if she determines that the Director established good cause for the untimely submission of Dr. Forehand's supplemental report.

into consideration the respective physicians' explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge