U.S. Department of Labor

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

BRB No. 16-0353 BLA

MARIAN MORGAN (on behalf of DONALD E. MORGAN, deceased)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 04/26/2017
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 on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Norman A. Coliane (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2012-BLA-5306) of Administrative Law Judge Drew A. Swank (the administrative law judge) on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves employer's request for modification of a subsequent miner's claim[1] filed on November 13, 2006, and is before the Board for the third time.[2]

In its last decision, the Board addressed employer's appeal of the administrative law judge's 2014 Decision and Order on Remand, Order Denying Reconsideration and his Decision and Order on Modification. The Board vacated the administrative law judge's 2014 Decision and Order on Remand because it failed to address employer's pending request for modification. The Board further held that the administrative law judge lacked jurisdiction to issue his Decision and Order on Modification after employer appealed the administrative law judge's 2014 Decision and Order on Remand and Order Denying Reconsideration to the Board. Consequently, the Board vacated the Decision and Order on Modification, and remanded the case for further consideration.[3]

The administrative law judge was instructed to issue a single decision considering employer's request for modification, while bearing in mind the Board's remand instructions set forth in its July 30, 2010 Decision and Order. The administrative law judge was also instructed to issue an Order ruling on the admissibility of the evidence

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[1] The miner's initial claim, filed on October 23, 2003, was finally denied by the district director because the miner failed to establish any element of entitlement. Director's Exhibit 1.

[2] We incorporate the procedural history of the case as set forth in the Board's prior decisions in *Morgan v. Consolidation Coal Co.*, BRB No. 09-0739 BLA (July 30, 2010) (unpub.), and *Morgan v. Consolidation Coal Co.*, BRB Nos. 14-0256 BLA and 14-0273 BLA (July 30, 2015) (unpub.).

[3] The Board noted that, in its first decision, it had affirmed Administrative Law Judge Michael P. Lesniak's June 30, 2009 finding that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), and that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior claim became final. *See Morgan v. Consolidation Coal Co.*, BRB No. 09-0739 BLA, slip op. at 3 n.4 (July 30, 2010) (unpub.). The Board also had rejected employer's allegations of error, and held that Judge Lesniak permissibly consulted the preamble to the 2001 regulations and accorded less weight to the opinions of Drs. Fino and Renn because he found that their opinions were inconsistent with the premises underlying the regulations. *Id.*, slip op. at 8.

submitted on modification and to provide an explanation for his determination regarding the admissibility of the 2013 supplemental deposition testimony of Drs. Fino and Renn submitted by employer. The administrative law judge was reminded that as the party seeking modification, employer bears the burden of establishing a mistake in a determination of fact with respect to the previously established facts in this case that it seeks to modify. Lastly, the administrative law judge was reminded that because the Board vacated the previous findings of pneumoconiosis and disability causation in Administrative Law Judge Michael P. Lesniak's June 30, 2009 Decision and Order, claimant retained the burden to establish those elements by a preponderance of the evidence, based on the record that the parties developed on modification. *Morgan v. Consolidation Coal Co.*, BRB Nos. 14-0256 BLA and 14-0273 BLA (July 30, 2015) (unpub.)(Boggs, J., concurring and dissenting).

On remand, the administrative law judge held a hearing at which the parties sought to admit evidence relevant to employer's request for modification. By Order dated January 26, 2016, the administrative law judge determined, *inter alia*, that the 2013 depositions of Drs. Fino and Renn were in excess of the evidentiary limitations pursuant to 20 C.F.R. §§725.414 and 725.310 and that employer failed to show good cause for their admission.

The administrative law judge subsequently issued his Decision and Order on Remand on March 23, 2016. The administrative law judge credited the miner with 13.33 years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Parts 718 and 725. The administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied employer's request for modification pursuant to 20 C.F.R. §725.310 and awarded benefits.

In the present appeal, employer contends that the administrative law judge erred in excluding the 2013 supplemental depositions of Drs. Fino and Renn on the ground that they exceeded the evidentiary limitations at 20 C.F.R. §725.414. Employer also contends that the administrative law judge erred in relying on the preamble to the 2001 regulations to discredit its medical witnesses on the issues of legal pneumoconiosis at Section 718.202(a) and disability causation at Section 718.204(c). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the award of benefits, arguing that any error in the administrative law judge's evidentiary ruling is harmless.

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.[4] 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. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Evidentiary Ruling

In his January 26, 2016 evidentiary Order, the administrative law judge noted that the regulations limit employer to the submission of two medical reports in support of its affirmative case, and one additional medical report in support of modification. Order at 2; *see* 20 C.F.R. §§725.414(a)(3)(i), 725.310(b). The administrative law judge determined that Judge Lesniak admitted Dr. Fino's October 4, 2007 report and August 12, 2008 deposition, and Dr. Renn's April 29, 2008 report and August 14, 2008 deposition, submitted by employer in support of its affirmative case in this subsequent claim. Order at 3; Director's Exhibits 41, 49. The administrative law judge further determined that Dr. Fino's May 1, 2011 report and Dr. Renn's April 24, 2011 report, submitted by employer at the April 9, 2013 hearing, were admissible as supplemental reports, and that Dr. Rosenberg's February 27, 2012 report and March 19, 2013 deposition were admissible as modification evidence. Order at 3; Employer's Exhibits 1-3, 7. The administrative law judge found that the 2013 depositions of Drs. Fino and Renn, however, could not be construed as "supplemental" to their 2008 depositions because "two depositions separated by years constitute two separate assessments of [the miner] at two different times." Order at 3; Employer's Exhibits 6, 8. Finding that employer failed to show good cause for exceeding the evidentiary limitations, the administrative law judge concluded that the 2013 depositions of Drs. Fino and Renn were inadmissible. *Id.*

Employer argues that the administrative law judge erred, contending that the 2013 depositions constitute permissible testimony under Section 725.414(c)[5] offered in conjunction with the supplemental reports of Drs. Fino and Renn. Employer maintains Drs. Fino and Renn did not consider new evidence with regard to their 2013 depositions, but "merely clarified previous opinions and addressed whether their opinions were consistent with the preamble." Employer's Brief at 29-31.

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

[5] Section 725.414(c) provides, in pertinent part, that a physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing or by deposition. 20 C.F.R. §725.414(c).

The Director counters that the 2013 depositions constitute cumulative evidence that merely reiterates or reaffirms the substance of the doctors' prior reports, depositions, and supplemental reports, all of which were considered by the administrative law judge at some point. Thus, the Director maintains that any error in excluding the 2013 depositions from the record is harmless, as it does not affect the outcome of the case. Director's Brief at 2 n.1.

On modification, the administrative law judge properly admitted the 2011 supplemental reports of Drs. Fino and Renn as continuations of their original 2008 medical reports for purposes of the evidence-limiting rules. *See* 20 C.F.R. §725.414(a)(1); 80 Fed. Reg. 24,464, 24,474 (Apr. 26, 2016) ; *Brasher v. Pleasant View Mining Co.,* 23 BLR 1-141, 1-146-47 (2006); *see also C.L.H.* [*Hill*] *v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA, slip op. at 4 (Oct. 31, 2007) (unpub.) (The Board deferred to the Director's position that supplemental medical reports based on a review of admissible evidence do not exceed the two-report limitation). The regulation governing the development of evidence provides that a physician who has prepared a medical report may testify with respect to a claim. 20 C.F.R. §725.414(c). As employer has offered the 2013 testimony in this claim of Drs. Fino and Renn, based on their 2011 supplemental reports, we agree with employer that the administrative law judge erred in determining that the supplemental depositions were in excess of the limitations set forth in Section 725.414. *See* 20 C.F.R. §725.414(c); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253-54, 25 BLR 2-779, 2-787-89 (4th Cir. 2016). We cannot say that the error is harmless in this instance, as the depositions included clarified and more complete explanations by the physicians of their opinions, which the administrative law judge did not consider and which could affect his weighing of the opinions on the issues of legal pneumoconiosis and disability causation. Consequently, we vacate the administrative law judge's evidentiary ruling, and remand this case for him to admit the 2013 depositions of Drs. Fino and Renn into the record.

Merits of Entitlement

Because we have vacated the administrative law judge's decision to exclude the 2013 supplemental depositions of Drs. Fino and Renn, we vacate the administrative law judge's findings that claimant established the existence of legal pneumoconiosis and disability causation pursuant to 20 C.F.R. §§ 718.202(a), 718.204(c). On remand, the administrative law judge must re-evaluate and weigh the evidence relevant to those issues.

In the interest of judicial economy, however, we will address employer's arguments regarding the administrative law judge's reliance on the preamble to the 2001 regulations and his weighing of Dr. Rosenberg's medical opinion.

Employer maintains that the administrative law judge's resort to the preamble in assessing the medical opinions of its witnesses is a violation of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), and resulted in a denial of employer's due process right to a full and fair hearing. Employer further alleges that, as applied by the administrative law judge, the preamble has been erroneously treated as a legislative rule, although it was not subject to notice and comment. Employer's Brief at 15-21.

We reject employer's contentions. The preamble to the regulations sets forth scientific evidence which the Department of Labor (DOL) has found credible. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-209-10 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-129-30 (4th Cir. 2012). Multiple circuit courts, and the Board, have held that an administrative law judge may evaluate expert opinions in conjunction with DOL's discussion of sound medical science in the preamble to the regulations. *J.O.* [*Obush*] *v. Helen Mining Co*., 24 BLR 1-117, 1-125-26 (2009), *aff'd*, *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *Looney*, 678 F.3d at 314-16, 25 BLR at 2-130-32; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

Contrary to employer's assertions, we find no error in the administrative law judge's use of the preamble to discount Dr. Rosenberg's opinion that the miner's obstructive lung disease was due solely to cigarette smoking. The administrative law judge noted that Dr. Rosenberg opined that claimant's reduced FEV_1 and FEV_1/FVC ratio were inconsistent with obstruction due to coal dust exposure but were "classic for a smoking-related form of obstructive lung disease." Decision and Order at 22; Employer's Exhibit 1 at 13. The administrative law judge reasonably found that the opinion conflicts with the medical science credited by the DOL, recognizing that coal dust exposure can cause clinically significant COPD with associated decrements in certain measures of lung function, "especially FEV_1 and the ratio of FEV_1/FVC." *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Sterling*, 762 F.3d at 491-92, 25 BLR at 2-644-45; Decision and Order at 26; Employer's Exhibits 1, 7. Because the administrative law judge permissibly found Dr. Rosenberg's opinion to be less credible based on his consideration of the preamble to the 2001 regulations, we affirm his decision to accord Dr. Rosenberg's opinion less weight.

On remand, we instruct the administrative law judge to admit the 2013 depositions of Drs. Fino and Renn into the record and to re-evaluate and weigh the evidence in determining whether claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §728.202(a) and disability causation pursuant to 20 C.F.R. §718.204(c). In rendering his decision on remand, the administrative law judge must set forth detailed

findings of fact and the bases for his credibility determinations, as required by APA, taking into account the quality of the reasoning provided by each of the physicians. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge