U.S. Department of Labor

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

BRB No. 16-0684 BLA

FORGY PANNELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 07/11/2017
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Motion for Summary Decision, Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Motion for Summary Decision (2014-BLA-5907) of Administrative Law Judge Patrick M. Rosenow, rendered on a

subsequent claim filed on May 25, 2010, 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 the case is as follows. Claimant filed an initial claim on May 10, 2005, which was denied by the district director on February 17, 2006, because claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. On May 3, 2006, claimant's physician, Dr. Williams, diagnosed claimant as being "totally disabled from working in the coal mines or other occupation secondary to pneumoconiosis." Director's Exhibit 14. Claimant next filed claims on July 11, 2007 and May 15, 2008, but withdrew each claim.[1] Director's Exhibit 67.

Claimant filed this subsequent claim on May 25, 2010. Director's Exhibit 3. Administrative Law Judge Stephen R. Henley determined in a June 24, 2013 Decision and Order that the claim was not timely filed based on claimant's failure to file his claim within three years of Dr. Williams' diagnosis. Claimant appealed the denial to the Board, but upon claimant's request, the appeal was dismissed to allow claimant to seek modification. *Pannell v. Clinchfield Coal Co.*, BRB No. 13-0482 BLA (Mar. 5, 2014) (Order) (unpub.). Claimant filed his modification request on January 2, 2014, asserting that the district director did not act in claimant's best interest in approving the withdrawal of his 2007 and 2008 claims. Director's Exhibit 65. In a letter dated July 31, 2014, the district director advised that because claimant had not submitted any new evidence on modification, his case was being forwarded to the Office of Administrative Law Judges (OALJ) for consideration of whether claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Director's Exhibit 66. Upon return to the OALJ, the case was assigned to Judge Rosenow (the administrative law judge), who scheduled a hearing for June 20, 2016.

[1] The record does not contain the files pertaining to the withdrawn claims. However, the parties indicate that the district director approved withdrawal of the July 11, 2007 claim in a proposed decision and order issued on October 18, 2007, and approved the withdrawal of the May 15, 2008 claim in a proposed decision and order issued on October 27, 2008. *See* 20 C.F.R. §725.419(d); Employer's Response Brief at 1; Claimant's June 1, 2016 Response to Employer's Motion for Summary Judgment at 1; Employer's Motion for Summary Judgment at 1. The Administrative Law Judge cited the regulatory provisions relating to issuance and response to proposed decisions and orders as authority for his decision. Before the Board, neither party contends that the actions of the district director approving withdrawal were not issued in the form of proposed decisions and orders, that those decisions were appealed within thirty days of their issuance, or that requests for their modification were filed within one year of their issuance.

Prior to the hearing, employer filed a motion for summary judgment, asserting that there was no genuine dispute as to any material issues of fact regarding whether claimant's May 25, 2010 subsequent claim was timely filed. Claimant responded on June 10, 2016. In his July 19, 2016 Decision and Order Granting Motion for Summary Decision,[2] which is the subject of this appeal, the administrative law judge agreed with Judge Henley's finding that the current subsequent claim is time barred pursuant to 20 C.F.R. §725.308. Accordingly, employer's motion was granted and benefits were denied.

On appeal, claimant argues that the administrative law judge erred in granting employer's motion for summary judgment because he did not reach the relevant issue in dispute, which is whether the district director acted in his best interest in permitting the withdrawal of the prior claims filed in 2007 and 2008. Employer responds, asserting that there is no basis for review of the proposed decisions and orders in which the district director approved the withdrawal of the prior claims. Employer asserts that the administrative law judge properly granted its motion for summary judgment because there is no factual dispute that the May 25, 2010 claim was untimely filed. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response brief. However, the Director indicated his agreement with the administrative law judge that the proposed decisions and orders issued by the district director are no longer open to challenge. Director's January 27, 2017 Letter at 1 n.1.

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.[3] 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).

In a miner's claim, the administrative law judge may grant modification based on a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake of fact may be corrected, including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999), *citing Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

[2] The administrative law judge references employer's motion for summary judgment as a motion for summary decision.

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

Pursuant to Section 422(f) of the Act, "[a]ny 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). 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 Consolidation Coal Co. v. Director, OWCP* [*Williams*], 453 F.3d 609, 617-618, 23 BLR 2-345, 2-364-65 (4th Cir. 2006); *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95, 25 BLR 2-273, 2-282 (6th Cir. 2013). A medical determination of total disability due to pneumoconiosis predating a final denial of benefits is legally insufficient to trigger the running of the three-year time limit for filing a subsequent claim, because such a medical determination is deemed a misdiagnosis in view of the superseding denial of benefits. *See Williams*, 453 F.3d at 617-618; 23 BLR at 2-364-65.

The crux of claimant's argument on modification is that if he had not been allowed to withdraw either or both of his prior claims, they would have been denied by the district director and, therefore, Dr. Williams' medical determination would constitute a "misdiagnosis" under the applicable law. Thus, claimant seeks to have the case remanded to the administrative law judge for a specific determination as to whether the district director properly concluded that withdrawal of the 2007 and 2008 claims was in his best interest pursuant to 20 C.F.R. §725.306.[4]

Contrary to claimant's contention, the administrative law judge properly found that he did not have authority to reconsider the final orders of withdrawal by the district director to determine if they were issued in claimant's best interest. A proposed decision and order by the district director becomes final within thirty days of issuance of the order, and all rights to further proceedings are waived, except as provided in the modification procedures set forth at 20 C.F.R. §725.310. 20 C.F.R. §725.419(d). Claimant did not take any action on either of the proposed decisions and orders permitting withdrawal of his claims until he filed his current request for modification. The effect of claimant's failure to challenge the proposed decisions and orders within thirty days of their issuance, or to request modification within one year of their issuance, is that those proposed decisions and orders became final several years before the filing of claimant's request for

[4] The regulations provide that a claim may be withdrawn if "[t]he appropriate adjudication officer approves the request for withdrawal on the grounds that it is in the best interests of the claimant[.]" 20 C.F.R. §725.306(a)(2).

modification. *Id*. Thus, the administrative law judge correctly found that the claim before him was claimant's May 25, 2010 claim and "that the window to reconsider the withdrawals of the 2007 and 2008 claims based on [claimant's] best interests argument has closed." 2016 Decision and Order at 4; *see* 20 C.F.R. §725.310.

We also see no error in the administrative law judge's granting of employer's motion for summary judgment, as there are no relevant unresolved factual issues. 20 C.F.R. §725.452(c).[5] The administrative law judge correctly observed that the effect of the withdrawal of the prior claims is that they are considered not to have been filed. 2016 Decision and Order at 4, *citing* 20 C.F.R §725.306(b). Claimant does not dispute that he received a medical determination of total disability due to pneumoconiosis from Dr. Williams by letter dated May 3, 2006. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 2016 Decision and Order at 4. Consequently, the three-year statute of limitations was triggered by Dr. Williams' May 3, 2006 medical determination. 20 C.F.R. §725.308(a); *Williams*, 453 F.3d at 617-618, 23 BLR at 2-364-65; *see Brigance*, 718 F.3d at 594-95, 25 BLR at 2-282; 2016 Decision and Order at 4. Because more than three years elapsed between the time claimant received Dr. Williams' May 3, 2006 medical determination and the time he filed the current subsequent claim on May 25, 2010,[6] the subsequent claim is not timely filed. 20 C.F.R. §725.308(a). Thus, the administrative law judge properly concluded that summary judgement was warranted in this case, as there is no basis to modify Judge Henley's June 24, 2013 Decision and Order denying benefits. 20 C.F.R. §§725.310, 725.452(c).

[5] The regulation provides that "[a] full evidentiary hearing need not be conducted if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to the relief requested as a matter of law." 20 C.F.R. §725.452(c).

[6] Further, we note that there was no decision which rendered Dr. Williams' determination a misdiagnosis by operation of law. *See Consolidation Coal Co. v. Director, OWCP* [*Williams*], 453 F.3d 609, 617-618, 23 BLR 2-345, 2-364-65 (4th Cir. 2006).

Accordingly, the administrative law judge's Decision and Order Granting Motion for Summary Decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge