U.S. Department of Labor

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

BRB No. 14-0251 BLA

JAMES H. MCINTOSH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING COMPANY	)	DATE ISSUED: 03/18/2015
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Striking Claimant's Medical Opinion Evidence for Failure to Show Cause of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Margaret M. Scully (Thompson Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Striking Claimant's Medical Opinion Evidence for Failure to Show Cause (2013-BLA-5751) of Administrative Law Judge Drew A. Swank with respect to a claim filed on June 22, 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 case is as follows: On August 18, 2012, claimant was examined by Dr. Celko, who performed a complete pulmonary evaluation for the Department of Labor and diagnosed claimant with clinical and legal pneumoconiosis and a totally disabling pulmonary impairment. On January 10, 2013, claimant was examined at employer's request by Dr. Pickerill, who diagnosed a significant respiratory impairment and disability due to chronic obstructive pulmonary disease and asthma. The district director issued a Proposed Decision and Order awarding benefits on April 9, 2013. Employer requested a hearing and the case was assigned to Judge Swank (the administrative law judge).

Prior to the hearing, employer notified claimant that it had scheduled him for a medical examination pursuant to 20 C.F.R. §725.414(a)(3)(i) with Dr. Basheda on February 5, 2014, in Canonsburg, Pennsylvania. Claimant informed employer that he is dependent on oxygen and that his treating family physician, Dr. Holsinger, advised him not to travel to Canonsburg for the physical examination due to shortness of breath and fatigue.[1] Employer responded that Dr. Holsinger's note did not constitute a reasoned medical opinion sufficient to excuse claimant from attending the examination, and employer offered to provide medical transport to the examination, if claimant could show that it was medically necessary. Employer subsequently filed with the administrative law judge a motion to compel claimant to submit to an examination by Dr. Basheda. Claimant responded, arguing that, regardless of employer's willingness to provide medical transport, Dr. Holsinger's opinion cannot be overruled by non-medical personnel.

On January 31, 2014, the administrative law judge rejected claimant's contention that he could not overrule Dr. Holsinger's medical opinion, noting that failure to comply with discovery requests would interfere with the orderly and just resolution of the matter, and that the regulations specifically allow for an examination by a physician of employer's choosing. The administrative law judge, therefore, issued a discovery order directing claimant to either attend the examination or expect action to be taken pursuant to 20 C.F.R. §725.414(a)(3)(i)(B).[2] Claimant filed a motion for reconsideration of the

[1] Dr. Holsinger faxed a note on a prescription pad stating, "Pt [patient] is unable to travel to Canonsburg for pe [physical examination] due to sob [shortness of breath] and fatigue." Exhibit 3 to Motion to Compel.

[2] The regulation at 20 C.F.R. §725.414(a)(3)(i)(B) states that if a miner unreasonably refuses to submit to an evaluation or test requested by the district director or the responsible operator, the miner's claim may be denied by reason of abandonment. 20 C.F.R. §725.414(a)(3)(i)(B).

administrative law judge's discovery order, which the administrative law judge denied. Claimant did not attend the examination, and employer filed a motion to dismiss the claim, to which claimant responded.

On February 13, 2014, the administrative law judge issued an Order to Show Cause why the claim should not be dismissed for claimant's failure to comply with the January 31, 2014 discovery order. Without providing any medical rationale from Dr. Holsinger, claimant responded, arguing: (1) that because interim benefits were being paid, the administrative law judge had no authority to dismiss the claim without the agreement of the Director, pursuant to 20 C.F.R. §725.465(d);[3] (2) that requiring claimant to attend the examination was an improper substitution of the administrative law judge's untrained opinion for that of Dr. Holsinger; (3) that a claim is subject to dismissal by reason of abandonment only where the miner's refusal to submit to an examination is unreasonable; and (4) that the administrative law judge failed to determine whether employer made a showing of substantial prejudice based on the miner's refusal to submit to a second examination at employer's request. Employer responded, arguing that claimant failed to prove that his refusal to attend the examination was reasonable, especially in light of the accommodation offered by employer. The Director, Office of Workers' Compensation Programs (the Director), responded, declining to agree to dismissal of the case and suggesting that, under the circumstances presented, a records review would be an acceptable alternative to an additional medical examination. The Director further suggested that the administrative law judge could direct claimant to present additional medical evidence regarding his ability to travel by medical transport.

On April 9, 2014, the administrative law judge issued his Order Striking Claimant's Medical Opinion Evidence[4] for Failure to Show Cause (Order Striking Evidence), in which he found that claimant failed to show good cause for his violation of the discovery order, and that the appropriate sanction for such failure was exclusion of claimant's medical opinion evidence from the record. Claimant filed an appeal of the administrative law judge's order, which the Board accepted, over employer's motion to

[3] The regulation at 20 C.F.R. §725.465(d) states that no claim shall be dismissed in a case with respect to which payments prior to final adjudication have been made to the claimant in accordance with [20 C.F.R.] §725.522, except upon the motion or written agreement of the Director. 20 C.F.R. §725.465(d).

[4] Claimant's evidence summary form indicates that he intended to submit medical opinions from Dr. Houser dated December 31, 2013, and Dr. Rasmussen dated February 7, 2014, along with post-hearing depositions from both doctors. The doctors based their opinions on a medical records review, rather than an examination of claimant. Claimant's Brief at 7; Administrative Law Judge's Exhibit 2.

dismiss, on the ground that it met the three-prong test for allowing interlocutory appeals. *McIntosh v. Keystone Coal Co.*, BRB No. 14-0251 BLA (Aug. 19, 2014)(Order)(unpub.).

In claimant's Petition for Review and Brief, he argues that the administrative law judge erred in finding that good cause was not established for claimant's failure to attend the examination, and in excluding claimant's medical opinion evidence from the record. Employer responds, urging affirmance of the administrative law judge's order, as within a proper exercise of his discretion. The Director has filed a response brief, asserting that the administrative law judge abused his discretion in finding that claimant's refusal to attend the examination was unreasonable, and in striking all of claimant's medical opinion evidence.

The Board's scope of review is defined by statute. An administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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). Additionally, based on the broad discretion given to administrative law judges in resolving procedural matters, the Board will determine whether the party seeking to overturn an administrative law judge's rulings in these matters has established that the administrative law judge abused his discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986).

In his Order Striking Evidence, the administrative law judge reviewed the sequence of events leading to his order, and concluded that claimant failed to provide a reasonable basis for his failure to submit to the examination as directed. The administrative law judge noted that "claimant has had numerous opportunities to submit additional documentation explaining Dr. Holsinger's reason for disallowing further examination of claimant but he has failed to do so." Order Striking Evidence at 3. Further noting that employer is entitled to a second medical opinion under the regulations, the administrative law judge found that claimant's refusal to attend the examination limited employer's ability to obtain evidence of its choosing. The administrative law judge determined that "because claimant's choice to refuse to undergo examination limits the evidence available to employer, fairness dictates that claimant's evidence must also be limited." Order Striking Evidence at 4. The administrative law judge held that none of claimant's medical opinion evidence would be admitted into the record at the hearing.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

Claimant contends that the administrative law judge's Order Striking Evidence must be reversed, arguing that claimant's refusal to appear for a medical examination was reasonable and that the administrative law judge's order is overly harsh. In support of his argument, claimant asserts that requiring him to attend the second examination against Dr. Holsinger's orders is an improper substitution of the administration law judge's untrained opinion for that of a physician. Claimant further maintains that employer failed to demonstrate, and the administrative law judge failed to address, whether claimant's refusal to attend the examination was unreasonable under the circumstances, particularly since claimant did not travel for a medical examination of his own, but merely obtained record reviews. Lastly, claimant asserts that the administrative law judge accepted employer's due process argument without determining whether employer would be prejudiced by obtaining only one physical examination of claimant, rather than two. Claimant's Brief at 5-9.

The Director concurs with the allegations of error raised by claimant regarding the administrative law judge's determination that claimant's failure to attend the examination was unreasonable, and that his order striking claimant's medical opinion evidence was overly harsh. The Director maintains that the administrative law judge abused his discretion both by failing to consider all relevant evidence before finding claimant's refusal to attend the examination unreasonable, and by striking all of claimant's medical opinion evidence from the record. The Director urges the Board to vacate the administrative law judge's order, and remand the case for further consideration. Director's Brief at 4-6.

Employer responds that the administrative law judge did not abuse his discretion, arguing that claimant has not offered any further medical statement or explanation in support of his refusal to attend the examination. Employer asserts that the administrative law judge reasonably ordered claimant to submit to an examination as required under the regulations and consistent with the provisions of the Administrative Procedure Act, granting parties the right to present evidence in support and in defense of their case. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer also argues that exclusion of claimant's evidence was within the administrative law judge's discretion, given claimant's "unreasonable refusal" to attend the examination and his failure to comply with the administrative law judge's lawful order. Employer's Brief at 7-12.

After reviewing the administrative law judge's orders and the parties' arguments on appeal, we are persuaded that claimant and the Director are correct in asserting that the administrative law judge abused his discretion, and that remand is required for further findings. As the administrative law judge acknowledged that claimant is not represented by an attorney, the administrative law judge should have explained more specifically to

claimant what additional information was needed in order to document his inability to attend the examination, and the administrative law judge should have given claimant the opportunity to respond with that information before taking any further action. Additionally, the Director notes that claimant underwent a Department of Labor examination by Dr. Celko on August 17, 2012, and was examined by Dr. Pickerill on behalf of employer on January 10, 2013, with both doctors stating that claimant suffers from a totally disabling pulmonary impairment. As this uncontradicted evidence and claimant's hospitalization records, in addition to Dr. Holsinger's opinion, are relevant to the consideration of whether claimant is unable to travel the approximately 97 miles to the examination, just shy of the 100 miles which would automatically have excused claimant, *see* 20 C.F.R. §725.414(a)(3)(i), the administrative law judge erred in failing to consider all relevant evidence prior to finding that claimant's refusal to attend the examination was unreasonable.

We also find merit in the assertion by claimant and the Director that striking all of claimant's medical opinion evidence from the record, without considering "whether lesser sanctions would better serve the interests of justice," is an extreme sanction and an abuse of discretion in this case. *See French v. California Stevedore & Ballast*, 27 BRBS 1, 6 (1993).

Accordingly, the administrative law judge's Order Striking Claimant's Medical Opinion Evidence for Failure to Show Cause is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge