U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0308 BLA

FOSTER MITCHELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
F&G TRUCKING	)	
	)	
and	)	
	)	
CENTURY WORKERS COMPENSATION	)	DATE ISSUED: 03/22/2018
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

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

Greg Richmond (Pohl & Aubrey, P.S.C.), Lexington, Kentucky, for employer/carrier.

Claire E. Kenny (Kate S. O'Scannlain, Solicitor of Labor; Maia S. 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, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order and Decision and Order on Reconsideration (2012-BLA-05826) of Administrative Law Judge Patrick M. Rosenow awarding benefits on 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 subsequent claim filed on June 28, 2011.[1]

The administrative law judge credited claimant with 12.57 years of coal mine employment,[2] and found that the new x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.[3] Therefore, the administrative law judge found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the old and new evidence together, the administrative law judge found that claimant established the existence of complicated pneumoconiosis arising out

[1] Claimant's first claim, filed on November 16, 2006, was denied as abandoned by the district director on February 5, 2007. Director's Exhibit 1. Claimant's second claim, filed on January 13, 2009, was finally denied by the district director on November 9, 2009, for failure to establish any element of entitlement. Director's Exhibit 2.

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 2 at 249. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 718.304 provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). 20 C.F.R. §718.304; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).

of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203(b). Accordingly, the administrative law judge awarded benefits. The administrative law judge found that claimant's benefits should commence as of July 2015, the month during which complicated pneumoconiosis was first diagnosed.

Claimant moved for reconsideration, asserting that the administrative law judge erred in setting the benefits commencement date based upon the first diagnosis of complicated pneumoconiosis. Claimant argued that the evidence established only that he developed complicated pneumoconiosis sometime prior to the July 9, 2015, positive x-ray that was credited by the administrative law judge. Claimant argued further that since the onset date of his complicated pneumoconiosis was not established, the administrative law judge should award benefits as of June 2011, the month in which claimant filed this claim, pursuant to 20 C.F.R. §725.503(b).

The administrative law judge agreed with claimant that the evidence did not establish when claimant's simple pneumoconiosis progressed to complicated pneumoconiosis and, therefore, that the onset date could not be determined. However, the administrative law judge rejected claimant's argument that he should award benefits as of the month of filing. Specifically, the administrative law judge found that credible x-ray evidence established that claimant had only simple pneumoconiosis as of January 20, 2012, subsequent to the filing date of his claim, and that it would be improper to award benefits during a period of non-entitlement.[4] Therefore, he reaffirmed his determination that benefits should commence in July 2015, based upon "[t]he first and only evidence of complicated pneumoconiosis." Decision and Order on Reconsideration at 3.

On appeal, the Director contends that the administrative law judge erred in awarding benefits as of July 2015, the month of the first x-ray evidence that diagnosed complicated pneumoconiosis.[5] The Director argues that the appropriate entitlement date is February 2012, the month following the period of simple pneumoconiosis. The Director requests

[4] The administrative law judge did not credit the medical opinion evidence that claimant is totally disabled due to simple pneumoconiosis. Decision and Order at 28 n. 84. The administrative law judge found that "claimant does not establish total disability due to pneumoconiosis apart from the finding of complicated pneumoconiosis in 2015," which was based solely on Dr. Crum's positive interpretation of the July 9, 2015 x-ray. *Id.*

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203(b), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Therefore, we affirm the award of benefits.

that the Board modify the administrative law judge's determination of the date from which benefits commence to February 2012. Claimant responds in support of the Director's position. Employer responds, urging affirmance of the administrative law judge's finding that benefits shall commence in July 2015.

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).

Once entitlement to benefits is established, the date for commencement of those benefits is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). In a case where a claimant is found entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the fact-finder must consider whether the evidence of record establishes the onset date of the claimant's complicated pneumoconiosis. In this case, that would be that date that claimant's simple pneumoconiosis progressed to complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-18, 1-30 (1989). If the evidence does not reflect that date, the date for the commencement of benefits is the month in which the claim was filed, unless the evidence affirmatively establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing. In that case, the date for the commencement of benefits follows the period of simple pneumoconiosis.[6] *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b).

In this case, the parties agree that the evidence does not establish when claimant's simple pneumoconiosis progressed to complicated pneumoconiosis. Specifically, the x-ray evidence indicates that claimant developed complicated pneumoconiosis at some point between January 20, 2012, and July 9, 2015,[7] and there is no probative evidence between

[6] In a subsequent claim, such as this one, the date for the commencement of benefits is determined as provided under 20 C.F.R. §725.503, with the additional rule that "no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(6).

[7] Claimant's x-ray dated January 20, 2012 was interpreted by Dr. DePonte as positive for simple pneumoconiosis in a 1/0 profusion, but negative for complicated pneumoconiosis. Claimant's Exhibit 2. Dr. Shipley read the same x-ray as negative for both simple and complicated pneumoconiosis. Employer's Exhibit 3. Claimant's July 9, 2015 x-ray was interpreted by Dr. Crum as positive for simple pneumoconiosis in a 2/1

the two dates to establish the onset date of the disease. Consequently, the parties agree the evidence is not sufficient to establish "the month of onset of total disability due to pneumoconiosis arising out of coal mine employment" pursuant to 20 C.F.R. §725.503(b). The parties further agree that the administrative law judge could not have defaulted to the June 2011 filing date pursuant to 20 C.F.R. §725.503(b), because the evidence establishes that claimant had only simple pneumoconiosis for a period subsequent to the date of filing.

The Director argues that the administrative law judge considered only whether to commence benefits either as of the month of filing, June 2011, or as of the first diagnosis of complicated pneumoconiosis, July 2015. Director's Brief at 7. The Director contends that the administrative law judge failed to consider a third alternative, namely, the month after the last evidence that claimant was not entitled to benefits, or February 2012. *Id*. The Director argues that this date is appropriate because it follows the period of simple pneumoconiosis. *Id.* at 9, *citing Williams*, 13 BLR at 1-30. Specifically, the Director notes that claimant did not suddenly develop Category "B" large opacities of pneumoconiosis on the day of his July 30, 2015 examination; his simple pneumoconiosis progressed to complicated pneumoconiosis sometime prior to July 2015. *Id*. at 11. The Director argues further that using the month following the last evidence of non-entitlement is consistent with the Department of Labor's reasoning behind using the claim filing date as a default entitlement date at 20 C.F.R. §725.503(b) where the evidence does not establish the onset date, in order to strike a reasonable balance between overcompensating and undercompensating a miner. *Id.* at 10, *citing* 65 Fed. Reg. 79920, 80012-13 (Dec. 20, 2000).

Employer responds that the administrative law judge's determination that benefits commence as of July 2015, the month of the first evidence affirmatively establishing that claimant was entitled to benefits, is rational. Employer's Brief at 5-6. Employer argues that the use of the first diagnosis of complicated pneumoconiosis is also consistent with *Williams*, as it follows the period of simple pneumoconiosis. Employer's Brief at 8. Employer further argues that, although claimant did not suddenly develop complicated pneumoconiosis in July 2015, it is also "nearly impossible to believe" that he progressed from simple pneumoconiosis, 1/0, as of January 20, 2012, to bilateral Category "B" large opacities by February 1, 2012. *Id.* at 7. Thus, employer contends, the Director's suggested entitlement date is arbitrary. *Id*. Employer contends that the administrative law judge reasonably selected the entitlement date that is supported by the evidence of record. *Id*.

Here, a three-year gap exists between the last evidence of simple pneumoconiosis and the first evidence of complicated pneumoconiosis. We cannot say that the

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profusion with the coalescence of small opacities, and as positive for Category "B" large opacities of complicated pneumoconiosis. Claimant's Exhibit 3.

administrative law judge's determination that benefits should commence as of the first and only diagnosis of complicated pneumoconiosis is irrational. *See Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989); *Lykins*, 13 BLR at 1-182-83. However, the Director's arguments are not without merit, and the Director proposes a benefits commencement date that the administrative law judge did not consider. Based upon the circumstances in this case, we vacate the determination that benefits should commence as of July 2015, and remand this case for the administrative law judge to consider the evidence in light of the Director's argument that the appropriate date of entitlement is February 2012.[8] On remand, the administrative law judge should address the parties' arguments, and render his findings in compliance with the requirements of the Administrative Procedure Act.[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[8] We reject employer's argument that the administrative law judge was required to find that claimant's benefits commencement date is the month in which complicated pneumoconiosis was first diagnosed. Employer's Brief at 8-9, *citing Truitt v. N. Am. Coal Corp*, 2 BLR 1-199, 1-203-04 (1979), *appeal dismissed sub nom. Director, OWCP v. N. Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). In *Truitt*, the Board held that the administrative law judge logically used the month in which complicated pneumoconiosis was first diagnosed to find that the named responsible operator could not be held liable for the payment of benefits, because the miner had complicated pneumoconiosis and thus was irrebuttably presumed totally disabled due to pneumoconiosis prior to commencing work with that employer. *Truitt*, 2 BLR at 1-203-04. The Board did not address the determination of a miner's benefits commencement date. *Id*. Therefore, *Truitt* is irrelevant to the case at bar.

[9] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, the Decision and Order on Reconsideration is vacated, 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

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge