U.S. Department of Labor

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

BRB No. 18-0107 BLA

VADIS FIELDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ABERRY COAL INCORPORATED	)	DATE ISSUED: 03/26/2019
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Richard M. Clark, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for employer/carrier.[1]

[1] On January 23, 2018, a petition for review and brief was filed by John C. Morton and Austin P. Vowels (Morton Law LLC) on behalf of employer/carrier. On April 24, 2018, James M. Poerio filed a notice of appearance, indicating that he had been retained to

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Awarding Benefits (2012-BLA-05470) of Administrative Law Judge Richard M. Clark, rendered on a subsequent claim filed on July 13, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a second time.[2]

In his initial Decision and Order Awarding Benefits, the administrative law judge determined that the claim was timely filed and that claimant established entitlement to benefits pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] In consideration of employer's appeal, the Board held that the administrative law judge's finding that Dr. Rasmussen's opinion[4] was not sufficiently "reasoned" to trigger the statute of limitations was contrary to *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95 (6th Cir. 2013). *Fields v. Aberry Coal*, BRB No. 16-0349 BLA, slip op. at 5 (Apr. 27, 2017). The Board further held that the administrative law judge erred by not considering all the evidence relevant to whether a medical determination of total disability due to pneumoconiosis was communicated to claimant more than three years prior to the filing of his subsequent claim. *Id*. at 5-6. Consequently, the Board vacated the award of

represent employer/carrier in this case. We hereby substitute Mr. Poerio as counsel for employer/carrier. 20 C.F.R. §802.202(c).

[2] We incorporate the procedural history of the case as set forth in *Fields v. Aberry Coal*, BRB No. 16-0349 BLA, slip op. at 3-6 (Apr. 27, 2017) (unpub.).

[3] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he has 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); *see* 20 C.F.R. §718.305.

[4] In support of its burden to rebut the presumption of timeliness, employer submitted the June 26, 3003 medical report of Dr. Rasmussen, who examined claimant on behalf of the Department of Labor in conjunction with claimant's May 9, 2003 claim that was withdrawn on December 16, 2003. Employer's Exhibit 4.

benefits and remanded the case to the administrative law judge to reconsider whether claimant timely filed his claim and, if it was untimely filed, to consider whether extraordinary circumstances exist to justify waiver of the statute of limitations. *Id*. at 6.

The Board also addressed the administrative law judge's findings on the merits of the claim, affirming his determinations that claimant established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Fields*, slip op. at 13 n.21. The Board held, however, that the administrative law judge did not adequately explain the bases for his determination that claimant established at least fifteen years of coal mine employment and therefore vacated his finding that claimant invoked the Section 411(c)(4) presumption.[5] *Id*. at 11-12. Additionally, the Board affirmed the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. *Id*. at 15-16. Thus, the Board instructed the administrative law judge on remand to reconsider whether claimant established at least fifteen years of coal mine employment and could invoke the Section 411(c)(4) presumption, or whether he could establish entitlement to benefits under 20 C.F.R. Part 718. *Id*. at 16.

On remand, in considering the timeliness issue, the administrative law judge found Dr. Rasmussen's 2003 opinion did not constitute a medical determination of total disability due to pneumoconiosis and it was not communicated to claimant. The administrative law judge alternatively found that assuming the claim was untimely filed, extraordinary circumstances justified waiver of the statute of limitations. Thus, the administrative law judge concluded that employer failed to rebut the presumption that claimant's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. Turning to the merits of the claim, the administrative law judge found that claimant established at least fifteen and one-half years of underground coal mine employment and thereby invoked the Section 411(c)(4) presumption. Accordingly, the administrative law judge reinstated the award of benefits.

On appeal, employer contends that the administrative law judge erred in finding the claim timely filed. Employer also argues that the administrative law judge erred in finding claimant established fifteen years of coal mine employment and invoked the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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,

[5] The Board also affirmed the administrative law judge's finding that all of claimant's coal mine employment was underground, as it was unchallenged on appeal. *Fields*, slip op. at 7 n.9.

and in accordance with applicable law.[6] 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).

Timeliness of Claim

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); *Brigance*, 718 F.3d at 594-95. The Board has held that only those medical opinions using the phrase "total disability due to pneumoconiosis" or otherwise clearly indicating a medical determination of total disability due to pneumoconiosis should be found sufficient to trigger the statutory time limit. *Adkins v. Donaldson Mine Co.*, 19 BLR 1-34, 1-43 (1993) ("terminology used in the medical determination must be such that the miner was aware, or in the exercise of reasonable diligence, should have been aware that he was totally disabled due to pneumoconiosis arising out of coal mine employment").

In conjunction with his 2003 examination of claimant, Dr. Rasmussen obtained a positive chest x-ray for pneumoconiosis, 1/1, a pulmonary function study showing "minimal, partially reversible obstructive ventilatory impairment" and an arterial blood gas study showing "minimal impairment in oxygen transfer during moderate exercise." Employer's Exhibit 4. Under "cardiopulmonary diagnoses," he stated that claimant has "CWP – 18 + years of coal mine employment and x-ray evidence of pneumoconiosis. COPD [Chronic obstructive pulmonary disease] – Chronic productive cough and airflow obstruction." *Id*. When asked the "degree of severity of the impairment," Dr. Rasmussen stated that claimant "has at least minimal loss of function. He does not retain the pulmonary capacity to perform his last regular coal mine job." *Id*. Dr. Rasmussen further stated that the two risk factors for claimant's "impaired lung function" were coal mine dust

[6] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction 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).

exposure and cigarette smoking. *Id*. He concluded that claimant's "coal mine dust exposure is a significant cause of his impaired lung function." *Id*.

In reviewing Dr. Rasmussen's 2003 opinion, the administrative law judge accurately found that "Dr. Rasmussen did not state anywhere on the [Form CM-988] examination [report] that [c]laimant had a totally disabling respiratory impairment due to pneumoconiosis or black lung." Decision and Order on Remand at 4. Thus, the issue is whether the terminology used by Dr. Rasmussen was such that claimant could reasonably infer that he was totally disabled due to pneumoconiosis.[7] *See Adkins*, 19 BLR at 1-43.

The administrative law judge determined that claimant could not have known that he was totally disabled due to pneumoconiosis based on the disjunctive statements by Dr. Rasmussen. As the administrative law judge noted, "upon an integrated reading of Dr. Rasmussen's report" an attorney might recognize that Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of COPD due to coal dust exposure. Decision and Order on Remand at 5. Because claimant is neither an attorney nor a physician, the administrative law judge permissibly found he "could not be expected to appreciate the significance of Dr. Rasmussen linking COPD to coal dust exposure as a finding of '[legal] pneumoconiosis,' and thus understand that Dr. Rasmussen was indicating that he was totally disabled due to legal pneumoconiosis." *Id*.; *see Adkins*, 19 BLR at 1-43; *Stewart v. Cliffco Enter.*, BRB No. 14-0118 BLA (Nov. 25, 2014) (unpub.) (a medical determination that met the regulatory definition of legal pneumoconiosis not sufficient to trigger the statute of limitations because it did not explicitly diagnose pneumoconiosis).

The question of whether the evidence establishes rebuttal of the presumption of timeliness involves factual findings appropriately made by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). The administrative law judge rationally found that Dr. Rasmussen's opinion is insufficient to trigger the statute of limitations because Dr. Rasmussen did not specifically state that

[7] We reject employer's assertion that any analysis of what claimant understood goes beyond the analysis permitted in *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95 (6th Cir. 2013). The Sixth Circuit made clear in *Brigance* that "[c]onstruing the text of the statute as written" was necessary and that there must be "a diagnosis of total disability due to pneumoconiosis" in order to trigger the statute of limitations. *Id*. at 594. The Board has also held that in the absence of an explicit diagnosis of total disability due to pneumoconiosis, an administrative law judge must consider the miner's ability to comprehend a physician's opinion in determining whether a diagnosis of total disability was communicated to the miner. *Adkins v. Donaldson Mine Co.*, 19 BLR 1-34, 1-43 (1993).

claimant is totally disabled due to pneumoconiosis and he did not clearly link claimant's respiratory disability to pneumoconiosis.[8] *See Adkins*, 19 BLR at 1-43. Employer's arguments to the contrary amount to a request that we reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Thus, we affirm the administrative law judge's finding employer did not rebut the presumption that claimant's 2011 claim was timely filed.[9] 20 C.F.R. §725.308(a); *see Brigance*, 718 F.3d at 594-95.

Length of Coal Mine Employment

Claimant bears the burden of proof to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold an administrative law judge's determination that is based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The Board previously affirmed the administrative law judge's finding that claimant established 13.75 years of underground coal mine employment based on earnings reflected in the Social Security Administration (SSA) records from 1970-1990. On remand, the administrative law judge credited claimant with one-half year of coal mine employment with employer in 1991, which we affirm as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 7. Employer argues, however, that the administrative law judge erred in crediting claimant with five quarters of coal mine employment with Flat Gap Coal Company (Flat Gap) because it is not shown on the SSA records. Contrary to employer's contention, the administrative law judge

[8] Employer concedes that Dr. Rasmussen did not state that claimant is totally disabled due to pneumoconiosis anywhere in his report. Employer's Brief at 9. Employer further concedes that while Dr. Rasmussen diagnosed chronic obstructive pulmonary disease (COPD), claimant "may not have understood that COPD met the regulatory definition of legal pneumoconiosis." *Id*. at 10.

[9] Based on our affirmance of the administrative law judge's finding that Dr. Rasmussen's 2003 opinion did not constitute a medical determination of total disability due to pneumoconiosis, we need not address employer's additional arguments that the administrative law judge erred in finding that Dr. Rasmussen's 2003 opinion was not communicated to the miner and that waiver of the statute of limitations is warranted. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order on Remand at 5-6; Employer's Brief at 11-13.

reasonably found that while the SSA earnings records did not reflect employment with Flat Gap in 1969-1970, claimant credibly testified that he was paid in cash by Flat Gap. *See Wensel v. Director, OWCP*, 888 F.2d 14, 17, 13 BLR 2-88, 2-93 (3d Cir. 1989); Decision and Order on Remand at 9-10; Aug. 25, 2015 Hearing Transcript at 17, 22-23; Director's Exhibit 8 at 3. Because claimant had no reported earnings during the third and fourth quarters of 1969, or in the first quarter of 1970, the administrative law judge rationally found that the SSA records did not contradict claimant's description of having undocumented work with Flat Gap during that period. Decision and Order on Remand at 8-9. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Moreover, we affirm the administrative law judge's finding that claimant established coal mine employment with Flat Gap for at least the third and fourth quarters of 1969 and the first quarter of 1970, as supported, in part, by claimant's statement in an affidavit to obtain his mine foreman certificate that he worked for Flat Gap from March 1969 until May 1970. Director's Exhibit 6 at 2. The administrative law judge permissibly credited claimant's affidavit over any contrary evidence[10] because it was completed in 1977, closest in time to his work at Flat Gap. *See Aberry Coal, Inc. v. Fleming*, 843 F.3d 219, 224 (6th Cir. 2016), *amended on reh'g*, 847 F.3d 310, 315-16 (6th Cir. 2017); *Hutnick v. Director, OWCP*, 7 BLR 1-326, 1-329 (1984); Decision and Order on Remand at 9-10.

Consequently, as the administrative law judge reasonably credited claimant with .75 years of coal mine employment with Flat Gap in addition to the 14.25 years established, we affirm the administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment.[11] We therefore affirm the administrative law

[10] We reject employer' contention that because claimant made "varying" statements regarding when he started work with Flat Gap, none of his testimony should have been credited. Employer's Brief at 17. The administrative law judge permissibly concluded that claimant's testimony "is credible and more than sufficiently detailed to support a finding that he worked for Flat Gap for at least 5 quarters." Decision and Order on Remand at 10; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (the administrative law judge is granted broad discretion in evaluating the credibility of the evidence, including witness testimony).

[11] Contrary to employer's characterization, although the administrative law judge noted employer's stipulation of eighteen years of coal mine employment in claimant's Kentucky state workers' compensation claim, the administrative law judge did not rely on the stipulation. Rather he properly determined the length of claimant's coal mine employment based on the record evidence. Decision and Order on Remand at 8 n.5; Employer's Brief at 17-19.

judge's determination that claimant invoked the Section 411(c)(4) presumption. In light of the Board's prior affirmance of the administrative law judge's determination that employer is unable to rebut the presumption, we affirm the administrative law judge's finding that claimant is entitled to benefits.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge