U.S. Department of Labor

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

BRB No. 15-0066 BLA

JUANITA HELTON (o/b/o the Estate of ESTIL HELTON, SR.)	)	
Claimant-Respondent	)	
v.	)	
MANALAPAN MINING COMPANY	)	DATE ISSUED: 11/20/2015
and	)	
CONNECTICUT INDEMNITY COMPANY	)	
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 Reinstating Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan and Richard Couch, Harlan, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (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, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Reinstating Benefits (2011-BLA-06295) of Administrative Law Judge Stephen R. Henley, in a subsequent claim filed on January 25, 2010,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). This case is before the Board for the second time. In its prior decision, the Board affirmed the administrative law judge's findings that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and that he is entitled to the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4), 30 U.S.C. §921(c)(4).[2] *Helton v. Manalapan Mining Co.*, BRB No. 13-0395 BLA, slip op. at 3 n.6 (Mar. 31, 2014) (unpub.). The Board further affirmed the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption. *Id*. at 9-10.

The Board vacated the award of benefits, however, because the administrative law judge did not properly consider whether employer established that the claim was

[1] Claimant submitted his first claim for federal black lung benefits on March 26, 1986. Director's Exhibit 1. On July 13, 1986, the district director denied the claim because claimant did not establish any of the elements of entitlement. Director's Exhibit 1. Less than a year later, on April 16, 1987, claimant filed a second claim for benefits, which was treated as a request for modification. *Id*. Administrative Law Judge Daniel Mosser denied benefits in a Decision and Order issued on July 29, 1988, finding that claimant proved that he has pneumoconiosis, but did not establish that he is totally disabled by the disease. *Id*. Claimant took no further action until filing his subsequent claim. Director's Exhibit 3.

[2] Pursuant to amended Section 411(c)(4), there is a rebuttable presumption of total disability due to pneumoconiosis if the miner establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in substantially similar conditions, and that he or she has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b).

untimely by demonstrating that claimant filed his subsequent claim at least three years after receiving a medical determination that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §725.308. *Helton*, BRB No. 13-0395 BLA, slip op. at 7. The Board observed that, although the administrative law judge found that claimant's 2011 deposition testimony established his receipt of the required communication, the administrative law judge did not specifically address when this event occurred. *Id*. Accordingly, the Board remanded the case to the administrative law judge with instructions to render a finding on this issue. *Id*. On remand, the administrative law judge found claimant's deposition testimony insufficient to rebut the presumption, set forth in 20 C.F.R. §725.308(c), that his subsequent claim was timely filed. Therefore, the administrative law judge reinstated the award of benefits.

On appeal, employer argues that the administrative law judge erred in finding the evidence insufficient to establish that claimant's subsequent claim was untimely filed. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's contention. Rather than file a response brief, claimant submitted a Notice of Adoption and Reliance Upon Director's Brief in Response, requesting joinder in the arguments advanced by the Director. The Board granted claimant's request. *Helton v. Manalapan Mining Co.*, BRB No. 15-0066 BLA (July 22, 2015) (unpub. Order).

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).

On remand, the administrative law judge reviewed the evidence relevant to the issue of timeliness, which consists of Dr. Miller's report of his examination of claimant on November 11, 1985, treatment records from Dr. Miller and other physicians, and claimant's December 15, 2011 deposition testimony. In Dr. Miller's 1985 report, he determined that claimant "is totally and permanently disabled as a result of coal workers' pneumoconiosis." Director's Exhibit 23. In treatment records from Clover Fork Clinic, dated January 24, 1989 and June 10, 1992, Dr. Miller diagnosed "coal workers' pneumoconiosis" and "black lung disease," without indicating whether claimant was totally disabled. Employer's Exhibit 2. Treatment records from other physicians, dated

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

between December 20, 2004 and May 1, 2006, do not contain diagnoses of total disability due to pneumoconiosis.[4] Employer's Exhibits 1-3. Claimant's 2011 deposition includes the following exchanges:

> Q. And between 1990 and today, has any doctor told you that you have pneumoconiosis or black lung disease?
>
> A. Yeah
>
> Q. What doctor?
>
> A. Several of them. Dr. Penn, Dr. Miller, Dr. Jones.
>
> . . .
>
> Q. And from 1990 on into the future, you understood that you had pneumoconiosis?
>
> A. Yes. All the doctors [who] saw me saw it.

[4] In a treatment record from University of Kentucky Health Care (UKHC) dated December 20, 2004, Dr. Minion opined that claimant's February 3, 2005 chest x-ray was "suggestive of silicosis or coal worker's pneumoconiosis," and listed black lung disease as one of claimant's medical problems. Employer's Exhibit 3. Dr. Patterson, also of UKHC, reported on February 9, 2005 that claimant had diminished air flow in the right lung and recommended a program of "pulmonary hygiene" to clear his airways. *Id*. On January 5, 2006, Dr. Eubank noted, in a record from Clover Fork Clinic, "claimant was breathing okay with medications and producing yellow sputum," and identified claimant's current problems as heart failure, anemia, and dyspepsia. Employer's Exhibit 2. Dr. Yalamanchi, a physician at the Appalachian Heart Center, created a treatment record dated May 1, 2006, that pertains to claimant's heart condition and lists "black lung" as a preexisting respiratory condition. Employer's Exhibit 1. In another treatment record from Clover Fork Clinic, Dr. Eubank observed on December 15, 2006, "claimant felt that his breathing was better, and denied fatigue or weakness." *Id*. On December 29, 2006, Dr. Eubank reported "no shortness of breath with usual exertion, breathing okay with medication, and exercising in the house, not using nebulizer, thinks medicine makes him worse, so he does not use them." *Id*.

Q. In 1991, and this was after you'd already quit working for the mines, at that point, did you understand that you had pneumoconiosis and that you were totally disabled from pneumoconiosis?

A. Yeah, Dr. Miller told me.

Employer's Exhibit 6 at 28, 30, 32.

Based on a review of this evidence, the administrative law judge found that employer failed to rebut the presumption of timely filing set forth in 20 C.F.R. §725.308(c). Employer argues that the administrative law judge erred in relying on speculation to determine that claimant's deposition testimony described his recollection of Dr. Miller's 1985 report, rather than a communication that occurred in 1991. Employer also asserts that the administrative law judge had no basis for requiring that Dr. Miller's alleged 1991 communication appear in written form in the record. In support of these contentions, employer cites the decision of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 25 BLR 2-273 (6th Cir. 2013). Employer maintains the court's holding, that a claimant's testimony alone can constitute evidence sufficient to trigger the limitations period, is controlling in this case. In response, the Director contends that the administrative law judge reasonably found that employer did not rebut the presumption of timeliness pursuant to 20 C.F.R. §725.308(c).

We hold that employer's allegations of error are without merit. The key issue in this appeal is whether claimant's deposition testimony is sufficient to establish that Dr. Miller communicated to claimant a medical determination of total disability due to pneumoconiosis subsequent to the 1988 denial of his initial claim, and more than three years before the filing of his 2010 subsequent claim.[5] 20 C.F.R. §725.308(a), (c). Contrary to employer's contention, the administrative law judge did not rely on speculation to resolve this issue. Rather, the administrative law judge acted within his discretion as fact-finder in determining that the question that employer's counsel posed at claimant's deposition, "[i]n 1991 . . . did you understand that you had pneumoconiosis and that you were totally disabled from pneumoconiosis," was "inartfully phrased,"

[5] The administrative law judge properly determined that the diagnosis of total disability due to pneumoconiosis contained in Dr. Miller's 1985 medical report did not trigger the three-year limitations period because it constituted a misdiagnosis in light of the 1988 denial of claimant's initial claim for benefits. *See Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483, 24 BLR 2-135, 2-154 (6th Cir. 2009); Decision and Order on Remand at 6.

because counsel did not seek identification of the precise circumstances or content of the alleged communication. Employer's Exhibit 7 at 32; Decision and Order on Remand at 8; *see Cox v. Benefits Review Board*, 791 F.2d 445, 447, 9 BLR 2-46, 48 (6th Cir. 1986). The administrative law judge also rationally found that claimant's response, "[y]eah, Dr. Miller told me," was "ambiguous," due to the imprecise nature of the question. Employer's Exhibit 6 at 32; Decision and Order on Remand at 8; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990).

Moreover, employer is incorrect in asserting that the administrative law judge required Dr. Miller's alleged communication to appear in the record. The administrative law judge acted reasonably in reviewing claimant's testimony in the context of the treatment record evidence to determine whether there was any support for the conclusion that, in 1991, Dr. Miller told claimant that he was totally disabled due to pneumoconiosis. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order on Remand at 3-5, 7. The administrative law judge permissibly concluded that the absence of 1991 treatment records from Dr. Miller, and the absence of a diagnosis of total disability due to pneumoconiosis in Dr. Miller's 1989 and 1992 records, weighed against a finding that he communicated such a diagnosis to claimant in 1991. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Decision and Order on Remand at 8.

Finally, the administrative law judge rationally found *Brigance* distinguishable from the present case because the claimant in *Brigance* specifically testified that he read and submitted, in a state claim, a medical report containing diagnoses of total disability due to pneumoconiosis seven years prior to filing his federal claim, and his state claim was partially awarded. *See Brigance*, 718 F.3d at 592, 25 BLR at 2-277; Decision and Order on Remand at 7. In light of the administrative law judge's permissible exercises of discretion in weighing the evidence in this case, we affirm his determination that employer failed to rebut the presumption of timeliness pursuant to 20 C.F.R. §725.308(c).[6] *See Brigance*, 718 F.3d at 595, 25 BLR at 2-281; *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483, 24 BLR 2-135, 2-154 (6th Cir. 2009); Decision and Order on Remand at 7-8. We further affirm, therefore, the administrative law judge's reinstatement of the award of benefits.

[6] Because we have affirmed the administrative law judge's finding that claimant's 2011 deposition testimony is insufficient to establish that Dr. Miller communicated a medical determination of total disability due to pneumoconiosis to him in 1991, we decline to address employer's contention that a post-denial medical determination, based on pre-denial medical testing, can trigger the running of the three-year limitations period. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge