U.S. Department of Labor

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

BRB No. 16-0083 BLA

KENNETH L. McCORMICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL COAL CORPORATION	)	
	)	DATE ISSUED: 11/28/2016
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Orders of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Marshall W. Stair (Lewis, Thomason, King, Krieg & Waldrop, P.C.), Knoxville, Tennessee, for employer.

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

PER CURIAM:

Claimant appeals the Orders (2013-BLA-5301) of Administrative Law Judge Daniel F. Solomon directing claimant to undergo a computed tomography (CT) scan for employer in connection with a claim filed on February 17, 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 September 28, 2012, the district director issued a Proposed Decision and Order denying benefits.[1] Director's Exhibit 25. Claimant requested a hearing and the case was assigned to Administrative Law Judge Pamela J. Lakes who issued a Notice of Hearing and Prehearing Order on March 11, 2014, requiring the parties to designate and exchange their evidence. Director's Exhibits 26, 34. Prior to the hearing, by Order dated May 28, 2014, Judge Lakes remanded the case to the district director for further pulmonary testing pursuant to 20 C.F.R. §725.406.[2] On August 27, 2014, claimant underwent additional examination and testing by Dr. Ajjarapu. Director's Exhibit 40.

The case was subsequently transmitted back to the Office of Administrative Law Judges and assigned to Administrative Law Judge Daniel F. Solomon (the administrative law judge). Employer requested that claimant undergo a medical examination, including a pulmonary function study and a CT scan, with Dr. Banick. Claimant responded that he was willing to participate in the medical examination and the pulmonary function study, but not the CT scan.

On August 5, 2015, employer filed a motion asking the administrative law judge to compel claimant to submit to a CT scan. Employer's motion was supported by an affidavit from Dr. Banick who stated that "a CT scan is medically necessary to properly diagnose [claimant's] condition." Exhibit 1 to Employer's Motion at 2-3. Dr. Banick stated that without a CT scan he was unable to determine the characterization or exact location of the nodules that appear on x-ray, making it impossible to determine if claimant has pneumoconiosis or some other lung condition. Claimant responded, arguing, in pertinent part, that a CT scan was not required to diagnose his condition and that the decision to undergo a CT scan is one he and his personal physician alone should make.

By Order dated August 18, 2015, the administrative law judge granted employer's motion. The administrative law judge initially reviewed the regulation at 20 C.F.R.

[1] Claimant was represented by Ron Carson, a lay representative with Stone Mountain Health Services of St. Charles, Virginia. Director's Exhibit 17.

[2] Although claimant was provided with two Department of Labor pulmonary evaluations, Administrative Law Judge Pamela J. Lakes determined that additional testing was warranted because the validity of the objective test results was called into question by the reviewing physicians. Director's Exhibit 38.

§725.414, which sets forth the scope of evidence that may be submitted by each party. August 18, 2015 Order at 3. He noted that CT scans are not one of the enumerated tests that employers are normally allowed to obtain under the evidentiary limitations, but reasoned that the regulation "speaks to the exclusion of evidence and not to whether [an administrative law judge has] discretion to order CT scan testing." *Id.* Citing the preamble to 20 C.F.R. §718.202, which addresses the methods for establishing the existence of pneumoconiosis, the administrative law judge determined that it was claimant's burden to demonstrate that employer's request was "unreasonable." *Id.* The administrative law judge concluded that claimant could not meet his burden because claimant "did not submit anything from his physician to show that administration of the CT scan would be unreasonable." *Id.*

On September 1, 2015, claimant's counsel entered a Notice of Appearance and filed a motion for reconsideration, arguing that CT scan testing is unnecessarily dangerous, not mandated by the regulations, and contraindicated under the circumstances of this case. Thus, counsel argued, compelling a CT scan under such circumstances would be contrary to controlling law. Employer filed a response in support of its position.

A telephone hearing was held on September 8, 2015, during which the administrative law judge granted claimant until September 15 "to provide a medical report regarding the viability of the CT scan." *See* Order dated October 15, 2015. Following review of a September 14, 2015 statement from Dr. Ajjarapu, provided by claimant, the administrative law judge denied claimant's request for reconsideration on the sole ground that Dr. Ajjarapu "did not directly opine that claimant should not undergo a CT scan." Order dated October 15, 2015.

Claimant filed an interlocutory appeal of the administrative law judge's order, which the Board accepted over employer's motion to dismiss. *McCormick v. National Coal Corp.*, BRB No. 16-0083 BLA (May 4, 2016) (Order) (unpub.). On appeal, claimant contends that the administrative law judge erred in granting employer's motion to compel claimant to undergo a CT scan and that his order should therefore be reversed. Employer responds, urging affirmance of the administrative law judge's order as within a proper exercise of his discretion. The Director, Office of Workers' Compensation Programs, did not file a response brief. Claimant filed a reply brief in support of his position.

We agree with claimant. Although evidentiary matters are normally committed to an administrative law judge's discretion, an evidentiary ruling cannot be sustained when it is contrary to law. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 293, 23 BLR 2-430, 2-454 (4th Cir. 2007); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-

149, 1-153 (1989). As a threshold matter, the administrative law judge applied the wrong standard to employer's request to obtain the CT scan. Section 725.414(a)(3)(i) sets forth the specific types of evidence that employer is entitled to obtain in support of its affirmative case:

> The responsible operator . . . *shall be entitled to obtain and submit, in support of its affirmative case*, no more than two chest [x]-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports.

20 C.F.R. §725.414(a)(3)(i) (emphasis added). The regulations further specifically provide that medical evidence that exceeds the evidentiary limitations established by Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). It is thus employer's burden to demonstrate good cause to justify an order compelling the claimant to undergo a CT scan, and not, as the administrative law judge held, claimant's burden to demonstrate that employer's request is unreasonable. *McClanahan v. Brem Coal Co.*, BLR , BRB Nos. 15-0348 BLA and 15-0348 BLA-A slip op. at 6 (July 7, 2016) (reversing an administrative law judge's order compelling a claimant to undergo an additional pulmonary function test for failure to demonstrate good cause where employer's doctors argued that the test was necessary**)**; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-62 (2004) (en banc); *see* 20 C.F.R. §725.456(b)(1); 65 Fed. Reg. at 80,000 (stating that a party must "convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence.").

Employer's argument that 20 C.F.R. §718.107 permits it to compel claimant to submit to a CT scan as a part of its affirmative case, unless claimant can demonstrate that the scan is "unreasonable," is without merit.[3] Employer's Brief at 9. Section 718.107

[3] Employer points to language in the preamble to the 2001 regulations acknowledging that "a CT scan may provide reliable evidence in a particular claim that the miner does not have any evidence of the disease which can be detected by that particular diagnostic technique," and that "the adjudicator should determine whether a claimant's refusal to undergo a CT scan (or any other medical test) is reasonable in light of all relevant circumstances in the particular case." 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000); Employer's Brief at 11. Employer has taken the language of the preamble out of context. Contrary to employer's argument, the cited passages do not apply to the obtainment of affirmative evidence in excess of the evidentiary limitations, which is the dispositive issue here, but instead address the Department of Labor's position favoring

provides parameters for the *submission* of other medical tests not addressed by 20 C.F.R. §718.414. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1, 1-7-8 (2007) (en banc). It does not give employer a right to *obtain* a CT scan, as opposed to submitting a reading of a CT scan that has already been performed, as affirmative or rebuttal evidence. *See* 20 C.F.R. §718.107. Instead, as claimant contends, Section 725.414 is the relevant regulation here, and it limits both the amount and the specific types of medical evidence that employers can obtain.[4] 20 C.F.R. §725.414; *McClanahan*, BRB Nos. 15-0348 BLA and 15-0348 BLA-A, slip op. at 4 (holding that 20 C.F.R. §725.414 limits the evidence an employer can obtain, in addition to limiting the types of evidence it can submit, absent a showing of good cause).

Moreover, to the extent the administrative law judge's order could possibly be read to have found good cause to compel the CT scan, the administrative law judge abused his discretion on the facts of this case. Although the administrative law judge did not make an explicit good cause determination, employer's proffered basis is insufficient as a matter of law. To establish good cause under Section 725.456(b)(1), an operator must make a "particularized showing" as to why additional evidence is needed to decide a case. *See Blake*, 480 F.3d at 297 n.18, 23 BLR at 2-460 n.18. Employer simply has not done so here.

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consideration of new and more accurate diagnostic technologies as they become available in the future. *See* 65 Fed. Reg. at 79,945, citing the preamble to 20 C.F.R. §718.107, 62 Fed. Reg. 3338, 3343 (Jan. 22, 1997).

[4] We note that, when the evidence-limiting rules were first proposed in 1997, it was the expressed intent of the Department of Labor (DOL) to limit "the number of physically demanding and often invasive pulmonary evaluations that a claimant has to undergo [in the evaluation of his entitlement]." 62 Fed. Reg. 3356, 3360 (Jan. 22, 1997). Moreover, in promulgating the final rule the DOL made it clear that the rule was intended to protect claimants from unnecessary medical testing: "The Department recognizes that . . . testing may be difficult for some claimants. In the absence of good cause, the [new rule] limit[s] the maximum total number of tests to five in the vast majority of cases involving a designated operator . . . ." 65 Fed. Reg. 79,920, 79,992 (Dec. 20, 2000). The five evaluations referred to are the DOL-sponsored pulmonary evaluation, the two pulmonary evaluations allowed to claimant, and the two pulmonary evaluations allowed to the responsible operator.

Employer has not demonstrated why the specific facts of this case require a CT scan to diagnose claimant's condition instead of using the usual methods prescribed by the regulations. *See* 20 C.F.R. §718.202. As support for its motion, employer merely asserts the blanket proposition that "a CT scan is medically necessary to properly diagnos[e] [claimant's] condition," based on the affidavit of Dr. Banick, who generally opined that "without a CT scan I am unable to determine the characterization/makeup or exact location of the nodules which appear on his chest x-rays, making it impossible to determine if he has pneumoconiosis or another lung condition." Employer's Motion at 4, Exhibit 1 at 2-3. Employer has not submitted any evidence other than Dr. Banick's unsupported statement that a CT scan is required, and it has not attempted to demonstrate why less intrusive methods contemplated by the regulations, such as x-rays, are insufficient to diagnose claimant's condition.[5]

This type of general statement of medical necessity, without more, does not establish the particularized showing required to establish good cause to exceed the evidentiary limitations. In *Blake*, for example, the Fourth Circuit roundly rejected the argument that evidence exceeding the regulatory limitations is admissible simply because of its general relevance. *See Blake*, 480 F.3d at 288-97, 23 BLR at 2-445-60. And it specifically rejected the contention that an operator can establish good cause under Section 725.456(b)(1) based on nothing more than blanket statements, noting that if "[the operator's] contention is correct, good cause exists to permit all evidence that is relevant, and the good cause exception . . . would render [the limitations of Section] 725.414 meaningless." *Blake*, 480 F.3d at 297 n.18; 23 BLR at 2-460 n.18. We conclude that requiring claimant to undergo a CT scan based on employer's general statement that it is medically necessary, without more, would similarly eviscerate the evidentiary limitations. *McClanahan*, BRB Nos. 15-0348 BLA and 15-0348 BLA-A, slip op. at 6-7; *Dempsey*, 23 BLR at 1-61-62. Under the facts of this case, because employer has not put forth a valid basis for demonstrating good cause to obtain a CT scan, we reverse the administrative law judge's orders.

[5] Notably, Dr. Ajjarapu, who examined claimant on behalf of the Department of Labor, specifically disputes the necessity of a CT scan under the circumstances of this case. Claimant submitted a statement from Dr. Ajjarapu referencing studies showing that a CT scan can subject a patient to as much as one-hundred times the radiation of a typical x-ray. In light of the much higher potential risk of radiation, and the availability of other diagnostic modalities, Dr. Ajjarapu recommended that claimant undergo another chest x-ray rather than obtaining a CT scan.

Accordingly, the administrative law judge's August 18, 2005 and October 15, 2005 Orders directing claimant to undergo a CT scan for employer in connection with this claim are reversed, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.[6]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[6] Because employer has not demonstrated a valid basis for establishing good cause, we need not remand the case to the administrative law judge for consideration of this issue. *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123, 2-133 (6th Cir. 1995) ("If the outcome of a remand is foreordained, we need not order one.").