BRB No. 06-0925 BLA

E.R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PIKE COUNTY COAL CORPORATION c/o ACORDIA EMPLOYERS SERVICE	)	DATE ISSUED: 09/12/2007
	)	
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–Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Carl M Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits (2005-BLA-5626) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) on a

subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*.(the Act).[1] The administrative law judge found that this subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge also found that a coal mine employment history of thirty-one and three-quarter years was established. Considering the newly submitted medical opinion of Dr. Forehand in conjunction with the newly submitted qualifying blood gas studies, the administrative law judge found that the presence of a totally disabling respiratory impairment was established pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), and thus, a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d). Considering the claim on the merits, the administrative law judge reviewed the record evidence and determined that claimant established the existence of pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§718.202(a)(4), 718.203(b), that claimant was totally disabled, 20 C.F.R. §718.204(b), and that his total disability was due to pneumoconiosis, 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that this subsequent claim was timely filed pursuant to 20 C.F.R. §725.308 and in finding that the new medical opinion of Dr. Forehand supported a finding of total disability pursuant to Section 718.204(b)(2)(iv) and thus a change in an applicable condition of entitlement pursuant to Section 725.309(d).[2] Employer also contends that the administrative law judge erred in finding that the existence of pneumoconiosis was established on the merits, based on the medical opinion evidence of record at Section 718.202(a)(4). Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), while taking no position on the ultimate issue of entitlement, challenges employer's assertion that this subsequent claim was not timely filed.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a);

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[1] Claimant filed his first claim on May 29, 2002. That claim was denied because, although claimant established the existence of pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§718.202(a), 718.203(b), he failed to establish a totally disabling respiratory impairment, 20 C.F.R. §718.204(b). Director's Exhibit 1. Claimant took no further action until the filing of the subsequent claim on March 23, 2004. Director's Exhibit 3.

[2] Employer does not challenge the administrative law judge's finding that the newly submitted blood gas study evidence tends to support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv).

O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

We first address employer's contention that this subsequent claimant was not timely filed pursuant to Section 725.308. Employer contends that the administrative law judge erred in finding that the first diagnosis of totally disabling pneumoconiosis was Dr. Baker's April 2002 report. Employer contends that the administrative law judge erred in failing to consider all the relevant evidence of record on this issue. Employer contends that the record shows that claimant admitted that he was first diagnosed with pneumoconiosis by Dr. Sundaram in 1996. Employer further contends that the record shows that claimant also stated that he left mining in 1998 because his family physician told him that he should no longer work in the mines. Thus, employer contends that claimant was informed that he was totally disabled due to pneumoconiosis in 1998, *i.e.*, more than three years prior to the filing of this subsequent claim in 2004. Employer contends, therefore, that the claim is barred as untimely pursuant to the regulations at Section 725.308.[3]

In finding that this subsequent claim was timely filed pursuant to Section 725.308, the administrative law judge first noted that employer failed to set forth its argument as to why the instant claim was untimely. Nonetheless, considering the evidence of record, the administrative law judge found that claimant testified that he seldom went to the doctor and that no physician ever told him that he was totally disabled due to pneumoconiosis. In addition, the administrative law judge found that the record did not contain a physician's opinion, submitted in conjunction with claimant's first claim, opining that claimant was totally disabled due to pneumoconiosis. The administrative law judge therefore found that this subsequent claim was timely filed.

Contrary to employer's assertion, there is no evidence in the record that claimant was

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[3] Section 725.308 provides, in relevant part, that:

> (a) [a] claim for benefits. . .shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner....
>
> (c) [t]here shall be a rebuttable presumption that every claim for benefits is timely filed. However, . . . the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308.

informed that he was totally disabled due to pneumoconiosis more than three years prior to the filing date of the subsequent claim. The only evidence in the record diagnosing claimant as totally disabled due to pneumoconiosis is the medical opinion of Dr. Forehand dated June 7, 2004, after the filing date of the subsequent claim. Director's Exhibit 13. Further, the record does not contain opinions from either Dr. Sundaram or Dr. Baker. In addition, there is no evidence in the record demonstrating that the miner was previously diagnosed with a totally disabling respiratory impairment and or that such a diagnosis was communicated to claimant at least three years prior to the filing of the subsequent claim. Accordingly, we affirm the administrative law judge's finding that this subsequent claim was timely filed.[4] 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *see also Brigance v. Peabody Coal Co.*, 23 BLR 1-170 (2006).[5]

With respect to the merits of the claim, employer argues, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), that the administrative law judge erred in finding that Dr. Forehand's opinion supported a finding of total disability at Section 718.204(b)(2)(iv) because Dr. Forehand did not have any knowledge of the physical requirements of claimant's usual coal mine employment. Employer argues that Dr. Forehand acknowledged that he had no description of claimant's work duties other than his job title of "mechanic shuttle car" and that the physician merely speculated that this position would involve lifting parts and tool boxes. Employer further contends that Dr. Forehand admitted that he had no idea as to what kind of weights claimant was required to lift or carry. Employer further notes that while the administrative law judge referred to claimant's description of his job duties, Director's Exhibit 5, as evidence that Dr. Forehand had adequate knowledge of claimant's work duties, there is no indication in the record that Dr. Forehand ever reviewed this exhibit. Employer further contends that the administrative law judge erred in relying on the opinion of Dr. Forehand to find total disability as Dr. Forehand offered no explanation as to how his clinical findings supported his diagnosis of total

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[4] Given the absence of evidence to support employer's assertion that the subsequent claim was not timely filed, the Director, Office of Workers' Compensation Programs (the Director), notes that employer "appears to have confused the miner's case with another claim." The Director notes that "[n]either Dr. Baker nor Dr. Sundaram offered opinions in this case" and that claimant "testified that he left coal mine employment in 2001, not 1998." Director's Brief at 4.

[5] The record shows that the miner was last employed in the coal mine industry in Kentucky. Accordingly, 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 (1989)(*en banc*).

disability.

The administrative law judge noted the exertional requirements of claimant's usual coal mine employment, *i.e.*, that claimant was required to bend, crawl, lift and carry as described in a questionnaire filled out by claimant, Director's Exhibit 5. The administrative law judge found that Dr. Forehand was aware that claimant's job required him to lift and carry parts and tool boxes. The administrative law judge concluded, therefore, that Dr. Forehand's opinion was sufficient to establish that claimant was totally disabled.

As employer contends, however, it is not clear that Dr. Forehand was aware of the specific exertional requirements of claimant's usual coal mine employment, as set forth by the claimant in Director's Exhibit 5. In response to the question, on deposition, as to whether claimant had described his usual coal mine employment, Dr. Forehand, referring to claimant's file, testified that claimant's usual coal mine employment was as a mechanic and shuttle car operator, requiring a certain amount of physical labor, including lifting and carrying parts and lifting and carrying tool boxes.[6] Dr. Forehand did not, however, otherwise describe the requirements of claimant's usual coal mine employment; nor, did he refer to the questionnaire filled out by claimant describing the exertional requirements of his usual coal mine employment, Director's Exhibit 5, or otherwise discuss the basis for his finding that claimant could not perform his regular coal mine employment. Accordingly, we vacate the administrative law judge's finding that Dr. Forehand provided a sufficient basis upon which to make a finding of total disability, and consequently, that a change in an applicable condition of entitlement was established. This case is, therefore, remanded for the administrative law judge to consider the basis of Dr. Forehand's opinion that claimant could not perform his regular coal mine employment. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124. Moreover, since we must remand this case for the administrative law judge to reconsider the basis for Dr. Forehand's opinion that claimant could not perform his usual coal mine employment, we also remand this case for the administrative law judge to consider whether Dr. Forehand adequately discussed the medical data which supported his finding that claimant was totally disabled. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated and the case is remanded for the administrative law judge to reconsider Dr. Forehand's opinion and to determine whether it supports a finding of total disability at Section 718.204(b) and; consequently, a change in an applicable condition of entitlement at Section 725.309.

Employer also contends that the administrative law judge erred in finding that the

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[6] Dr. Forehand acknowledged that claimant did not describe to him what sort of weights he would have to lift and carry. Forehand Deposition at 14.

medical opinion evidence of record established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) on the merits. Employer argues that in reaching this determination, the administrative law judge improperly relied upon the opinion of Dr. Forehand as the physician provided no "clear explanation" for why he found that claimant suffered from a respiratory impairment related to coal dust exposure. Employer argues that Dr. Forehand's opinion that the presence of crackles indicated that "something might be evolving" was impermissibly vague and did not provide adequate documentation for the physician's conclusion. Employer's Brief at 6.

If reached, we agree with employer that the administrative law judge must consider the basis upon which Dr. Forehand relied to find pneumoconiosis established.[7] *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988) (*en banc*); *Clark*, 12 BLR at 1-155; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp*. 8 BLR 1-46 (1985); *Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984).

[7] Dr. Forehand opined that claimant had coal workers' pneumoconiosis and that his respiratory impairment was due to coal mine employment. Director's Exhibit 13; Employer's Exhibit 2.

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge