U.S. Department of Labor

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

BRB No. 24-0479 BLA

JAMES G. HUDDLESTON Claimant-Respondent v. ISLAND CREEK KENTUCKY MINING, Self-insured through CONSOL ENERGY INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 08/12/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE, Administrative Appeals Judge, and ULMER, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2011-BLA-05063) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case

involves a claim filed on November 16, 2009, and is before the Benefits Review Board for the second time.[1]

In his May 1, 2020 Decision and Order Awarding Benefits, the ALJ accepted the parties' stipulation that Claimant has thirteen years of coal mine employment and thus found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish clinical pneumoconiosis, but established legal pneumoconiosis[3] and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.202, 718.204(b)(2), (c). Thus he awarded benefits.

In consideration of Employer's appeal, the Board found Employer forfeited its argument that the ALJ lacked the authority to hear and decide the case. *Huddleston v. Island Creek Ky. Mining*, BRB No. 20-0309 BLA, slip op. at 3-5 (Apr. 27, 2022) (unpub.). It vacated the ALJ's award of benefits, however, because he erroneously allowed a third Department of Labor-sponsored complete pulmonary evaluation of Claimant and supplemental opinion from Dr. Chavda to be developed and submitted into the record. *Id.* at 5-6. Further, although a majority of the Board's three-member panel affirmed the ALJ's finding that the pulmonary function study evidence supports total disability at 20 C.F.R. §718.204(b)(2), it nonetheless vacated his finding that Claimant established legal

[1] Acting Administrative Appeals Judge Glenn E. Ulmer is substituted on the panel for Administrative Appeals Judge Judith S. Boggs, who is no longer with the Board. 20 C.F.R. §802.407(a).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

pneumoconiosis, total disability, and total disability causation through the medical opinion evidence because his error with respect to the DOL-sponsored complete pulmonary evaluation affected these findings. *Id.* at 7-12; *see* 20 C.F.R. §§718.202, 718.204(b)(2), (c). In addition to instructing the ALJ to reconsider these elements of entitlement, the Board instructed him to clarify the evidentiary record with respect to whether Dr. Selby's deposition testimony had been admitted into the record.[4] *Huddleston*, BRB No. 20-0309 BLA, slip op. at 8 n.12.

In his Decision and Order Awarding Benefits issued on remand, the subject of this appeal, the ALJ stated Employer did not submit Dr. Selby's deposition and there is no indication it is in the record; thus he did not consider it. He again found Claimant is totally disabled due to legal pneumoconiosis and awarded benefits. 20 C.F.R. §§718.202, 718.204(b)(2), (c).

On appeal, Employer argues the ALJ erred by not considering Dr. Selby's deposition and in finding Claimant established legal pneumoconiosis. Neither Claimant nor the Acting Director, Office of Workers' Compensation Programs (the Director), has filed a response brief.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

Evidentiary Issue

The procedural background of the evidentiary issue is as follows.

At the June 23, 2015 hearing, Employer asked the ALJ to keep the record open for it to obtain Dr. Selby's deposition post-hearing. Hearing Tr. at 9-10. Employer stated it needed to reschedule Dr. Selby's deposition from May 19, 2015, to August 18, 2015, due

[4] Administrative Appeals Judge Boggs would have remanded the case to the Office of Administrative Law Judges to be reassigned to a new ALJ to take a "fresh look at the evidence" and render findings on all elements of entitlement. *Huddleston v. Island Creek Ky. Mining*, BRB No. 20-0309 BLA, slip op. at 12-13 (Apr. 27, 2022) (unpub.) (Boggs, J., concurring and dissenting).

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

to a conflict with Claimant's schedule. *Id.* Claimant did not object and the ALJ gave Employer until September 1, 2015, to submit Dr. Selby's deposition as Employer's Exhibit 18. *Id.* at 10, 44. In its post-hearing brief dated October 9, 2015, Employer stated it submitted Dr. Selby's deposition on September 10, 2015. Employer's Post-Hearing Brief at 1. It acknowledged Dr. Selby's deposition exhibit was "submitted after the date set for this evidence to be exchanged," but asserted Claimant did not object and there was no prejudice in admitting the exhibit into the record. *Id.* Thus, it requested the ALJ admit this evidence into the record and consider it. *Id.*

Without addressing whether Employer's Exhibit 18 was admitted into the record, the ALJ remanded the case for a complete pulmonary evaluation. Feb. 19, 2016 Order. After Claimant's complete pulmonary evaluation, the ALJ stated in his initial Decision and Order that Employer's Exhibits 1 through 18 were submitted at the hearing and included in the Director's Exhibits. Initial Decision and Order at 2 n.6. However, in considering Employer's first appeal, the Board recognized the ALJ did not "discuss or cite to" Dr. Selby's deposition and his deposition did "not appear in the record." *Huddleston*, BRB No. 20-0309 BLA, slip op. at 8 n.12. Thus in remanding the case, the Board instructed the ALJ to "determine if Dr. Selby's deposition was admitted into the record and, if so, [to] address this evidence." *Id.*

On remand, the ALJ stated Employer's Exhibit 18 was "admitted pending its filing after the hearing." Decision and Order at 2 n.7; *see* Hearing Tr. at 9-10, 43-44. He noted Employer mentioned the exhibit in its post-hearing brief and on appeal but "there is no record that it was ever filed post hearing" and concluded it is therefore "not within evidence and not considered." Decision and Order at 2 n.7, 11 n.32.

Employer argues the ALJ erred in not considering Dr. Selby's deposition because, while it was filed late, the ALJ gave Employer time to file the exhibit after the hearing, it did so,[6] and the ALJ's first Decision and Order indicated it is part of the record. It also

[6] There is some indication that Employer filed Dr. Selby's deposition as Employer's Exhibit 18. It appears Employer requested that the ALJ rule on this evidence before he remanded the claim on February 19, 2016. In its current brief to the Board, Employer attached a letter dated September 10, 2015, requesting the ALJ admit Dr. Selby's deposition as Employer's Exhibit 18 because there was a "delay from the court reporter in preparing the transcript and the intervening Labor Day holiday." Employer's Brief at 10 (unpaginated). Employer also attached a Certificate of Service dated September 10, 2015, indicating it mailed its request and Employer's Exhibit 18 to the ALJ, Claimant, and the Director. *Id.* at 11 (unpaginated). Additionally, when the case was previously before the

asserts the ALJ erred in failing to give it the opportunity to address the exhibit's inclusion in the record before issuing his Decision and Order on remand excluding it. Employer's Brief at 3 (citing *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-55, 1-63 (2008) (en banc)).

In *Preston*, the Board held, "consistent with principles of fairness and administrative efficiency," an ALJ "should render his or her evidentiary rulings before issuing the Decision and Order." 24 BLR at 1-63. The stated purpose of that guidance was to give the aggrieved party an opportunity to make a "good cause" argument for why the evidence should be admitted into the record or to "otherwise resolve issues regarding the application of the evidentiary limitations[.]" *Id.*

The ALJ erred in rendering his evidentiary ruling in his Decision and Order issued on remand. Consistent with principles of fairness and administrative efficiency, the ALJ should have given the parties the opportunity to address whether Dr. Selby's deposition is included in the record prior to making his evidentiary ruling. *Preston*, 24 BLR at 1-63. His failure to do so precluded Employer from presenting a good cause argument for the admission of the untimely filed exhibit or to clarify whether it is in the record, and prevented Claimant and the Director from having the opportunity to respond. Thus we vacate the ALJ's evidentiary ruling that Dr. Selby's deposition is not a part of the record.[7]

Because Dr. Selby's deposition is relevant to the issue of legal pneumoconiosis, we vacate the ALJ's finding Claimant established legal pneumoconiosis and a totally disability respiratory or pulmonary impairment due to pneumoconiosis.[8] We thus vacate the award of benefits.

Remand Instructions

On remand, the ALJ must give the parties the opportunity to address Employer's assertions that Dr. Selby's deposition is part of the record or that it should be admitted into the record for good cause even though it was filed after the deadline the ALJ set. *See*

Board, Employer states it provided the exhibit to the Board and thus believed it was in the record when the case was remanded to the ALJ. Employer's Brief at 3.

[7] We reject Employer's assertion that this case should be reassigned to a different ALJ for a "fresh look" at the evidence because he has not yet weighed the credibility of all the evidence. Employer's Brief at 3; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537 (4th Cir. 1998); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992).

[8] Consequently, we decline to address, as premature, Employer's arguments on the issue of legal pneumoconiosis. Employer's Brief at 4-8.

Preston, 24 BLR at 1-63; Employer's Brief at 3; Employer's Post-Hearing Brief at 1. After rendering his findings on the evidentiary issue, the ALJ must then determine whether Claimant established entitlement to benefits based on the medical evidence of record. 20 C.F.R. §718.202(a)(4).

Accordingly, we vacate the ALJ's Decision and Order Awarding Benefits and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge