BRB No. 05-0946 BLA

EVERETT J. STAMPER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
WESTERMAN COAL COMPANY, INCORPORATED, KENTUCKY COAL PRODUCERS	)	DATE ISSUED: 07/26/2006
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Michelle S. Gerdano (Howard M. Radzely, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2003-BLA-6457) of Administrative Law Judge Pamela Lakes Wood on a 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). In a Decision and Order dated July 26, 2005, the administrative law judge initially noted that claimant indicated on his claim form that he had filed a prior claim, but that it had been withdrawn. Decision and Order at 1. The administrative law judge further noted, however, that a review of the Case Tracking System for the Office of Administrative Law Judges revealed three prior claims: "Case Nos. 95-BLA-01025 (Judge Mosser, 8/5/1995 remand or dismissal), 97-BLA 01116 (Judge Roketenetz, benefits denied 5/28/99, and 01-BLA-00370 (Judge Hillyard, withdrawn)." The administrative law judge then concluded: "The prior files were not enclosed in the record; inclusion of a prior file is not required when the claim is withdrawn." Decision and Order at 1 n.1. Turning to the merits of entitlement, the administrative law judge credited claimant with ten and three-quarter years of coal mine employment[1] and found that both the x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(4). The administrative law judge further determined that employer did not rebut the presumption of 20 C.F.R. §718.203(b), that claimant's pneumoconiosis arose out of coal mine employment. Finally, the administrative law judge found that both the pulmonary function and medical opinion evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1). Accordingly, the administrative law judge awarded benefits.

On appeal, employer initially contends that the instant claim is a subsequent claim, and that, therefore, the administrative law judge erred by failing to adjudicate this claim pursuant to 20 C.F.R. §725.309(d).[2] Employer's Brief at 9. Specifically, employer asserts that the administrative law judge failed to determine whether claimant met his threshold burden to establish a change in an applicable condition of entitlement since the prior denial, as required by 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp v. Ross*, 42

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. 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, 1-202 (1989)(*en banc*).

[2] The regulations provide that where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him), and further failed to consider all of the relevant evidence of record, including the record evidence submitted with the prior denied and withdrawn claims. *See Hall v. Director, OWCP*, 12 BLR 1-80 (1988); Employer's Brief at 10, 13-16. Employer contends that the consideration of this claim, without the complete records associated with the prior claims, violated employer's right to due process by undermining employer's ability to present its case fairly. Therefore, employer asserts, any liability for payment of benefits must be transferred to the Black Lung Trust Fund. Employer's Brief at 11. Employer next asserts that the revised regulation at 20 C.F.R. §725.414[3] is invalid, and, if valid, the administrative law judge erred by admitting medical evidence submitted by claimant in excess of the evidentiary limits imposed by revised Section 725.414. Employer's Brief at 22-24. Specifically, employer asserts that the administrative law judge erred in admitting into evidence Dr. Baker's report dated October 5, 2000, and in considering a July 18, 2000 report by Dr. Ducu to be a medical treatment note, and thus, not subject to the limitations on evidence as set forth in the regulations. Employer's Brief at 24-26. Employer further asserts that the administrative law judge erred in according less weight to the opinions of Drs. Broudy and Westerfield, on the ground that, pursuant to Section 725.414,[4] their opinions were based in part on evidence outside the record. Employer's Brief at 18-24. Employer contends that, pursuant to Section 725.309(d)(1), the additional evidence reviewed by the physicians may be contained in the prior claim records, and, if so, would constitute admissible evidence under the regulations.[5] Employer's Brief at 19. Regarding the merits of entitlement, employer asserts that the administrative law judge erred in finding that claimant established ten and three-quarter years of coal mine employment, and also erred in her analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4). Employer's Brief at 26, 31. Employer also contends that in considering the evidence relevant to the issue of total disability, the administrative law judge erred in her evaluation of the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i), in part, employer asserts, because she offered no valid basis for discounting the non-

[3] Revised 20 C.F.R. §725.414 applies to this claim because the claim was filed on February 8, 2001, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

[4] Section 725.414 provides that "[a]ny chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i).

[5] When a living miner files a subsequent claim, all the evidence from the first miner's claim is specifically made part of the record. *See* 20 C.F.R. §725.309(d).

qualifying test results of Dr. Ducu, which were only three months older than one of the four "most recent" pulmonary function studies she credited. Employer's Brief at 37, 39. Finally, employer challenges the administrative law judge's evaluation of the medical opinion evidence relevant to the issues of total disability and disability causation at 20 C.F.R. §718.204(b)(2)(iv), 718.204(c). Employer's Brief at 39, 41.

The Director, Office of Workers' Compensation Programs (the Director), responds, acknowledging that the instant claim appears to be a subsequent claim and that the record in the instant claim contains none of the documents from any preceding claims. Director's Brief at 1. The Director further acknowledges that Section 725.309(d) requires that "any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim," but asserts that, contrary to employer's argument, Section 725.309(d) does not require inclusion of the records from any prior withdrawn claims, as the regulations provide that withdrawn claims are "considered not to have been filed." 20 C.F.R. §§725.306(b), 725.309(d); Director's Brief at 2, 3. The Director contends, however, that having failed to raise an objection at the hearing, employer is now foreclosed from challenging, for the first time, the Department of Labor's apparent failure to include the record of any prior denied claims in this record. Director's Brief at 2. The Director further contends that, if reached, the proper remedy for this oversight is a remand of the case so that the prior claim records may be included in this record, if warranted, and not a transfer of liability to the Trust Fund, as employer requests. Director's Brief at 2-3. Finally, the Director disagrees with employer's assertion that the revised regulations at Section 725.414 are invalid, but agrees with employer that the administrative law judge erred in finding Dr. Ducu's July 18, 2000 letter to be a treatment note and, thus, not subject to the limitations on evidence set forth in the regulations. Director's Brief at 4.

Employer has filed a reply brief, reiterating its contentions and further asserting that the requirements for the inclusion of prior records as set forth at Section 725.309(d) are mandatory and cannot be waived. Employer further contends that, in any event, employer did not waive a challenge to Section 725.309(d), but specifically contested this issue, in writing, before the district director on May 16, 2003. Claimant has not submitted a brief in this appeal.

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. 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Turning first to employer's assertions regarding the administrative law judge's application of Section 725.414 to this claim, we initially reject employer's argument that the regulation is invalid because it violates Section 923(b) of the Act and Section 556(d) of the Administrative Procedure Act. Employer's Brief at 22-23. The Board has rejected this argument and held that Section 725.414 is a valid regulation. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-58-59 (2004)(*en banc*). To this argument, employer adds the contention that, if valid, the administrative law judge erred in applying Section 725.414(a) to allow the admission of Dr. Baker's report dated October 5, 2000, in excess of the limitations, and further erred in considering Dr. Ducu's July 18, 2000 letter to be a treatment note, and, therefore, not subject to the limitations on evidence. Employer's Brief at 24. While the administrative law judge permissibly considered Dr. Baker's October 5, 2000 report to be a supplemental opinion, in that it simply expounds on Dr. Baker's May 29, 1997 examination and report, which was admitted as one of claimant's affirmative medical reports pursuant to 20 C.F.R. §725.414(a)(2)(i), *see Brasher v. Pleasant View mining Co.*, BRB No 05-0570 (Apr. 28, 2006), we agree with employer and the Director that the administrative law judge erred in finding that Dr. Ducu's July 18, 2000 report constitutes a medical treatment note, admissible "notwithstanding" the limitations on evidence.[6] Decision and Order at 5 n.14, 12-13, 17.

Dr. Ducu's letter summarizes claimant's condition as it has developed since she began treating the miner in 1999, it contains her rationale for her diagnosis of black lung disease, and attempts to explain to the reader why she believes claimant is 100% totally and permanently disabled due to pneumoconiosis. As such, Dr. Ducu's letter constitutes "a physician's written assessment of the miner's respiratory or pulmonary condition," and not a simple record of the miner's "medical treatment for a respiratory or pulmonary or related disease" as contemplated by 20 C.F.R. §725.414(a)(4). The administrative law judge therefore erred in considering Dr. Ducu's July 18, 2000 letter subject to the treatment note exception to the evidentiary limitations. Decision and Order at 5 n.14, 17. We cannot say that the error was harmless, as the administrative law judge fully

[6] "Notwithstanding the limitations" of Section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4).

considered Dr. Ducu's July 18, 2000 letter pursuant to Section 718.202(a)(4) and Section 718.204(b)(2)(iv) and relied almost exclusively on Dr. Ducu's July 18, 2000 letter in finding disability causation established at Section 718.204(c). Decision and Order at 23, 33. Hence, we vacate the administrative law judge's award of benefits and remand the case for further consideration.

Prior to reconsidering the evidence on remand, however, as a preliminary matter, the administrative law judge should determine whether, as employer asserts, this claim additionally requires adjudication pursuant to Section 725.309. The record reflects that, in accordance with 20 C.F.R. §725.463(a), on May 16, 2003, employer controverted, in writing, the district director's May 6, 2003 proposed decision and order awarding benefits. Director's Exhibit 30. Employer specifically challenged the district director's finding that claimant established a change in condition pursuant to Section 725.309(d), and requested a hearing. Director's Exhibit 30. At the hearing, however, neither the administrative law judge nor the parties discussed the potential applicability of Section 725.309 to this claim.[7] In light of these facts, the administrative law judge should determine, initially, whether the issue of Section 725.309(d) was properly before her, and, if so, resolve it accordingly. Should the administrative law judge determine that adjudication pursuant to Section 725.309 is necessary, the records of any prior denied or dismissed claims, but not withdrawn claims,[8] shall be made part of the record of the instant claim, and that physicians in the instant claim may review any evidence contained in those prior denied or dismissed claims. *See* 20 C.F.R. §§725.306(b), 725.309(d)(1), 725.414(a)(2)(i), (a)(3)(i).

[7] The record reflects that the statement of contested issues prepared by the district director, prior to transmittal of the case to the Office of Administrative Law Judges, does not indicate that employer contested Section 725.309. Director's Exhibit 34.

[8] As the Director correctly points out, Section 725.306(b) provides that "[w]hen a claim has been withdrawn . . . the claim will be considered not to have been filed." 20 C.F.R. §725.306(b); *see Bailey v. Dominion Coal Corp.*, 23 BLR 1-85 (2005). The effect of treating the claim as if it had never been filed precludes the automatic inclusion of the evidence from that claim in the record of any subsequently filed claim.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge