

BRB No. 07-0702 BLA

J.G.)
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 Claimant-Petitioner)
)
 v.)
)
 POE COAL COMPANY)
) DATE ISSUED: 05/29/2008
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

J.G., Berry, Alabama, *pro se*.

Rita A. Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank
James, Acting 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
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order
Denying Benefits (2006-BLA-05642) of Administrative Law Judge Robert D. Kaplan
(the administrative law judge) rendered 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). The administrative law judge issued a decision on the record
pursuant to claimant's waiver of oral hearing, and excluded Dr. Schonfeld's medical
report and supporting documentation from the record by Order issued on February 22,

2007. The administrative law judge adjudicated claimant's most recent claim, filed on November 4, 2004, as a subsequent claim under 20 C.F.R. §725.309(d), and applied the regulations at 20 C.F.R. Part 718. The administrative law judge adopted the district director's finding that claimant had ten years and eleven months of qualifying coal mine employment. Decision and Order at 2. The administrative law judge found that the new x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and thus established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 5-7. Considering the entire record, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), but insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, contending that the November 4, 2004 claim is not the operative claim herein, as claimant's second claim, filed on July 31, 1995, is still viable.¹

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.² 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we will address the administrative law judge's exclusion of Dr. Schonfeld's medical report and supporting documentation from the record. Following claimant's waiver of oral hearing, the administrative law judge closed the evidentiary record on January 10, 2007. Upon claimant's subsequent submission of Dr. Schonfeld's

¹ The amendments to the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, became effective on January 19, 2001. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The law of the United States Court of Appeals for the Eleventh Circuit is applicable, because the miner was employed in the coal mine industry in Alabama. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5-6.

report, the administrative law judge admitted this evidence into the record by Order issued on January 24, 2007, and granted employer's motion to have claimant examined by a physician designated by employer. When claimant refused to submit to a physical examination by employer's designated physician, however, the administrative law judge excluded Dr. Schonfeld's report and corresponding documentation from the record by Order issued on February 22, 2007.

The administrative law judge has broad discretion in procedural matters, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), and reasonably ordered claimant to submit to an examination by employer's designated physician, consistent with the administrative law judge's obligation to ensure that both parties are afforded their due process right to a full and fair hearing, including the opportunity to respond to medical evidence. *See* 20 C.F.R. §§725.414 (2000), 725.456 (2000); *Blackstone v Clinchfield Coal Co.*, 10 BLR 1-27 (1987). As claimant refused to undergo any scheduled examination, the administrative law judge acted within his discretion in excluding Dr. Schonfeld's report and supporting documentation from the record.³ *See Clark*, 12 BLR at 1-153.

Next, the Director contends that the administrative law judge erred in assuming that claimant's 1995 claim was no longer viable. We agree. The administrative law judge accurately reviewed the procedural history of this case as follows: Claimant's original claim for benefits, filed on February 8, 1983, was denied by the district director on June 15, 1983. Decision and Order at 3; Director's Exhibit 1. Claimant filed a duplicate claim for benefits on July 31, 1995, and Administrative Law Judge Gerald M. Tierney denied the claim on January 15, 1998 for failure to establish any element of entitlement. *Id.* Claimant filed a timely request for modification on September 17, 1998, and on June 14, 2001, Judge Tierney found that claimant established a change in conditions through new evidence supporting a finding of total disability, but denied modification because claimant failed to establish the existence of pneumoconiosis. *Id.* The Board affirmed Judge's Tierney's denial of benefits on December 19, 2002, and claimant filed a timely appeal to the United States Court of Appeals for the Eleventh Circuit on January 24, 2003. *Id.* After the Eleventh Circuit dismissed claimant's appeal on October 2, 2003, and denied claimant's motion to reinstate the appeal on October 31, 2003, claimant filed a third claim on May 24, 2004, which was returned to claimant by

³ Claimant has also submitted Dr. Schonfeld's report and corresponding medical evidence directly to the Board. However, the Board's review is limited to the evidence contained within the record before the administrative law judge. *See White v. New White Coal Co.*, 23 BLR 1-1 (2004). Therefore, Dr. Schonfeld's report was not considered in this appeal, and will be returned to claimant.

the district director under the mistaken belief that an appeal was still pending. *Id.* Claimant then filed a fourth claim for benefits on November 4, 2004. Director's Exhibit 2. Because the May 24, 2004 claim was submitted within one year of the Eleventh Circuit's dismissal of claimant's appeal, however, it must be considered a request for modification of the denial of claimant's 1995 duplicate claim. See 20 C.F.R. §§725.309(d) (2000), 725.310 (2000); *Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987); see also *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999). Thus, the November 4, 2004 claim merged with the pending 1995 claim. See 20 C.F.R. §725.309(d) (2000).

We disagree, however, with the Director's assertion that because the administrative law judge found that the weight of the evidence of record failed to establish total disability, the administrative law judge's error, in assuming that the miner's 1995 claim was no longer viable, was harmless. A review of the record reveals that the administrative law judge did not consider all the evidence of record, including the medical report and objective testing conducted by Dr. Strickland, which formed the basis of Judge Tierney's finding of total disability and a change of conditions on June 14, 2001. See Director's Exhibit 1. Consequently, we vacate the administrative law judge's denial of benefits, and remand this case for the administrative law judge to address all relevant evidence of record in adjudicating claimant's request for modification of the denial of his 1995 duplicate claim. Additionally, as claimant contested the district director's findings on the issue of the length of coal mine employment, the administrative law judge must adjudicate this issue *de novo* on remand.

Accordingly, the Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge