

BRB No. 09-0629 BLA

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| RODIE GALE VARNEY |) | |
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| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| SCOTTS BRANCH COAL COMPANY |) | DATE ISSUED: 10/15/2010 |
| |) | |
| Employer-Petitioner |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS’ |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Decision and Order – Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2008-BLA-05159) of Administrative Law Judge Robert B. Rae rendered on a request for modification of the denial of a subsequent claim,¹ filed pursuant to the provisions of the

¹ Claimant’s initial claim for benefits, filed on October 10, 1990, was denied on March 11, 1991, for failure to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Claimant withdrew his claim and the file was closed on June 6, 1991. Director’s Exhibit 1. On January 20, 1998, claimant filed a new claim, which was denied by the district director on May 21,

Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended* by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932 (I)) (the Act). Upon a stipulation of the parties, the administrative law judge credited claimant with eleven years of coal mine employment, and adjudicated this claim, filed on March 1, 2001, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found that the claim was timely filed, and concluded that consideration of the current request for modification was proper. The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. 725.309(d), as the newly submitted evidence was sufficient to establish the presence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Considering the entire record, the administrative law judge found the evidence sufficient to establish that claimant was totally disabled from legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b), (c). Accordingly, the administrative law judge granted modification pursuant to 20 C.F.R. §725.310, based upon a change in conditions, and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the current claim was timely filed. Employer argues that multiple modification requests are disallowed, and that the administrative law judge should not have considered claimant's second request for modification of the denial of the underlying subsequent claim. Employer also asserts that the administrative law judge erroneously considered evidence submitted in support of modification that exceeded the evidentiary limitations at 20 C.F.R. §725.414. Additionally, employer challenges the administrative law judge's weighing of the evidence in determining that the newly submitted evidence established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d), by demonstrating the existence of legal pneumoconiosis. Claimant responds in support of

1998, for failure to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. On November 16, 1998, following claimant's submission of evidence, the district director reaffirmed his prior decision denying benefits, and the claim was closed. Claimant filed the instant claim on March 1, 2001. The district director denied the claim on July 2, 2002, for failure to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Claimant filed a request for modification on June 27, 2003, which was denied on January 20, 2004. 20 C.F.R. §725.310. On July 29, 2004, claimant submitted an additional medical report that post-dated the previous denial of modification, which was considered as a new request for modification. Director's Exhibit 45. On February 1, 2005, the district director issued a proposed Decision and Order granting claimant's request for modification and awarding benefits. Director's Exhibit 58. Employer requested a hearing, and on June 29, 2007, Administrative Law Judge Thomas F. Phalen, Jr. remanded the case to the district director for further development of medical evidence. Director's Exhibit 69. The case was subsequently assigned to Administrative Law Judge Robert B. Rae, and a hearing was held on July 16, 2008. Decision and Order at 2-3.

the award of benefits, to which employer has replied in support of its position. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a response brief in this case.²

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.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Timeliness of the Claim

Employer initially contends that the administrative law judge erred in finding that the March 1, 2001 claim was timely filed. We disagree. Section 422(f), 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis which has been communicated to the miner. The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). The question of whether the evidence is sufficient to establish rebuttal of the presumption of timely filing of a claim pursuant to Section 725.308(a) involves factual findings that are appropriately made by the administrative law judge. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The United States Court of Appeals for the Sixth Circuit stated in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the claimant]" more than three years prior to the filing of the claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

² Claimant, employer, and the Director, Office of Workers' Compensation Programs, have correctly indicated that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as the claim was filed prior to January 1, 2005. Moreover, as the parties have stipulated to less than fifteen years of coal mine employment, entitlement is precluded under newly revived Section 411(c)(4), 30 U.S.C. §921(c)(4). Director's Exhibit 2; Decision and Order at 3.

³ As claimant's last coal mine employment occurred in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 5; Director's Exhibit 1 at 84, 296.

In finding that the Section 725.308 presumption of timeliness had not been rebutted in this case, the administrative law judge stated:

Employer argued that Claimant testified in a previous claim that he was told that he had pneumoconiosis and that he was totally disabled by Dr. Bill Clarke. While there is a report from Dr. Clarke dated 1989 on the record that states that Claimant is totally disabled due to pneumoconiosis, Claimant testified in the hearing for the current claim that he cannot recall if he was told that he was totally disabled. There is no further evidence on the record that this specific communication was communicated to the miner, and the mere presence of Dr. Clarke's 1989 report in the record does not create the assumption that this was the report that triggered the statute of limitations. Thus, Claimant's instant claim was timely filed[.]

Decision and Order at 4.

Employer asserts that "the report of Dr. Clarke speaks for itself," and that "it is clear that the Claimant was aware of and understood Dr. Clarke's report when it was issued." Employer's Petition at 3. Employer contends, therefore, that the administrative law judge's finding is erroneous and requires reversal of the award of benefits. We disagree. First, the fact that the report is in the record does not establish that its contents were communicated to the claimant, since "communication to the miner" requires that the medical determination "is actually received by the miner." *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993). An administrative law judge is charged with determining the credibility of all witnesses and their respective testimony. *See Harris v. Director, OWCP*, 3 F.3d 103, 106, 18 BLR 2-1, 2-5 (4th Cir. 1993); *Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985). Here, the administrative law judge's determination to credit the claimant's hearing testimony, that the claimant did not recall if he was ever told that he was totally disabled, constitutes substantial evidence in support of the administrative law judge's finding that the evidence does not establish that the diagnosis was communicated to the miner. *See Brigance v. Peabody Coal Co.*, 23 BLR 1-170 (2006). Second, a medical determination of total disability due to pneumoconiosis predating a prior denial of benefits is legally insufficient to trigger the running of the three-year time limit for filing a subsequent claim, because the medical determination must be deemed a misdiagnosis in view of the superceding denial of benefits. *Arch of Ky. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117 (2009). In this case, the district director's final determination, that claimant was not totally disabled due to pneumoconiosis as of November 16, 1998, necessarily repudiated the 1989 opinion of Dr. Clarke that claimant was totally disabled due to pneumoconiosis. Consequently, the 1989 medical report of Dr. Clarke could not trigger the running of the three-year time limit for filing claimant's 2001 claim. *Hatfield*, 556 F.3d at 483, 24 BLR at 2-135. Finally, employer has not alleged that there is any other medical evidence that could trigger the three-year statute of limitations; any such

argument is, therefore, waived. *Lawson v. Sec’y of HHS*, 688 F.2d 436, 440, 4 BLR 2-151, 2-157-58 (6th Cir. 1982). Accordingly, we affirm the administrative law judge’s finding that employer failed to rebut the presumption of timeliness, and further affirm his determination that the claim was timely filed.

Second Motion for Modification

Employer urges reversal of the administrative law judge’s decision, arguing that while Section 725.310 allows for modification within one year of the denial of a claim, a claimant may not perpetually seek benefits by filing repeated requests for modification. Employer asserts that multiple requests for modification are disallowed, and that only a single request for modification may be made in each claim. We disagree. The administrative law judge properly addressed, and rejected, employer’s argument, based on the plain language of the regulation at Section 725.310, allowing modification proceedings, on the grounds of a change in conditions or a mistake in a determination of fact, at any time before one year after the denial of a claim. Decision and Order at 4; 20 C.F.R. §725.310(a). Moreover, a new petition for modification may be filed within one year of the denial of a prior petition for modification; the availability of the modification process is, therefore, not limited. See *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); see also *Garcia v. Director, OWCP*, 12 BLR 1-24 (1988). Consequently, employer’s argument is rejected.

Evidentiary Limitations at 20 C.F.R. §725.414

Next, employer argues that the administrative law judge improperly considered evidence in excess of the evidentiary limitations at Section 725.414. Employer contends that, on modification, claimant was precluded from entering into evidence any medical opinion other than the February 2004 report by Dr. Forehand, “as opposed to multiple reports from Dr. Forehand and multiple reports from Dr. Fannin.” Employer’s Brief at 10; Employer’s Reply Brief at 4. Consequently, employer argues that the administrative law judge should have excluded all of Dr. Fannin’s evidence. Employer’s Brief at 9; Employer’s Reply Brief at 2, 4. While we reject employer’s specific arguments, we agree that this case must be remanded to the administrative law judge for further evidentiary rulings and a readjudication of claimant’s entitlement to benefits.

The administrative law judge acknowledged that the regulations impose limitations on the submission of medical evidence, and that each party is entitled to submit no more than one additional chest x-ray, pulmonary function study, arterial blood gas study, and medical report in support of a request for modification pursuant to 20 C.F.R. §725.310(b). The administrative law judge further acknowledged that claimant can file rebuttal evidence and additional statements as authorized by 20 C.F.R. §725.414(a)(2)(ii) and (a)(3)(ii). The administrative law judge then stated:

I will therefore consider the newly submitted chest x-rays, medical opinions and other evidence offered in this case. Where, as here, the newly submitted evidence exceeds the evidentiary limitations set forth in the regulations, I considered the most recent evidence for my analysis.

Decision and Order at 5.

The administrative law judge determined that the record in claimant's second request for modification contained three newly submitted medical opinions, consisting of the opinion of Dr. Broudy submitted by employer, and the opinions of Drs. Forehand and Fannin submitted by claimant, which included Dr. Forehand's February 2, 2004 pulmonary evaluation report and documentation, Dr. Forehand's June 20, 2006 pulmonary evaluation report and documentation, Dr. Forehand's letter to claimant dated March 5, 2007, Dr. Fannin's letter of July 10, 2006, Dr. Fannin's letter dated May 14, 2007 with attached echocardiogram results, and Dr. Fannin's medical opinion form dated June 25, 2008. Decision and Order at 6-8; Director's Exhibit 43; Claimant's Exhibits 8-10, 12. The administrative law judge determined that a fourth medical opinion, the Department of Labor (DOL) pulmonary evaluation, deposition and clarification by Dr. Baker, "does not qualify as newly submitted because it was written prior to the decision in the previous denial of the request for modification, and shall not be considered with regards to a change in a condition of entitlement." Decision and Order at 6.

In *Rose v. Buffalo Mining Co.*, 23 BLR 1-221 (2007), the Board held that 20 C.F.R. §725.310(b) must be read in tandem with 20 C.F.R. §725.414. Thus, if a party did not submit the full complement of evidence allowed by Section 725.414 in its affirmative case in support of the underlying claim, that party would be permitted, on modification, to submit any additional evidence allowed under Section 725.414, as well as the additional medical evidence allowed by Section 725.310(b). *Id.* In the instant case involving claimant's second request for modification, each party is allowed a full complement of four medical reports as affirmative case evidence under the regulations [two pursuant to Section 725.414, and one pursuant to each of the modification requests at Section 725.310(b)], as well as four x-ray interpretations, the results of four pulmonary function tests, and the results of four arterial blood gas studies. 20 C.F.R. §§725.414(a)(2)(i), (a)(3)(i), 725.310(b). Further, Section 725.414(a)(1) defines a medical report as a "written assessment of the miner's respiratory or pulmonary condition" that is "prepared by a physician who examined the miner and/or reviewed the available admissible evidence," with no requirement that the physician's assessment comprise a single document, or that a supplemental report based on a review of admissible evidence be considered a separate medical report. 20 C.F.R. §725.414(a)(1); *see generally Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006). In addition, any record of a miner's hospitalization, or medical treatment, for a respiratory or pulmonary or related disease may be received into evidence, notwithstanding the regulatory limitations. *See* 20 C.F.R. §725.414(a)(4).

In the present case, a review of the record reveals that, in addition to the evidence considered by the administrative law judge, claimant submitted a February 12, 2004 pulmonary evaluation report by Dr. Forehand, with attached test results, in support of claimant's second request for modification. Director's Exhibit 43. Further, in support of claimant's first request for modification, claimant submitted an August 13, 2002 letter from Dr. Fannin, with medical records attached, and an October 15, 2003 progress record from Dr. Forehand, including a pulmonary function study, a list of current medications, and physical examination findings. Director's Exhibits 33, 40. As the administrative law judge failed to make any evidentiary rulings as to the admissible evidence in this case, and failed to identify whether the evidence submitted constituted separate medical reports, supplemental reports, or medical treatment records, the Board has no basis for review of the administrative law judge's findings on the various issues herein. Moreover, while Dr. Baker's DOL examination report of August 10, 2001 cannot establish a change in conditions with regard to claimant's second modification request in 2004,⁴ the administrative law judge was required to consider the report, as well as Dr. Baker's subsequent deposition and December 3, 2004 clarification upon review of additional evidence, Director's Exhibits 11, 53, 54, Employer's Exhibit 2, in order to determine, prior to review of the merits of the instant subsequent claim, whether new evidence submitted after the final denial of claimant's January 20, 1998 claim has established a change in an applicable condition of entitlement pursuant to Section 725.309(d), *see White v. New White Coal Co.*, 23 BLR 1-1 (2004); and whether claimant has established a mistake in a prior determination of fact, as a basis for modification pursuant to Section 725.310.⁵ Consequently, we vacate the administrative law judge's findings pursuant to Sections 725.309(d), 725.310, and his findings on the merits of entitlement at Sections 718.202, 718.204(b), (c), and remand this case for the administrative law judge to: identify the admissible evidence herein pursuant to Section 725.414; determine whether claimant has established a change in an applicable condition of entitlement pursuant to Section 725.309(d) with regard to his underlying subsequent claim; and consider the newly submitted admissible evidence in conjunction with the earlier evidence and

⁴ In considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

⁵ In reviewing the record as a whole on modification at Section 725.310, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971).

determine whether claimant has established a basis for modification pursuant to Section 725.310.

In the interest of judicial economy, we will also address employer's argument that the administrative law judge improperly combined the elements of entitlement in evaluating Dr. Fannin's opinion, and erred in relying on the opinion to establish the existence of legal pneumoconiosis, total respiratory disability, and disability causation, without critically examining the opinion for the adequacy of its documentation and reasoning with regard to each element. In crediting Dr. Fannin's opinion, the administrative law judge determined that this treating physician's diagnosis of cor pulmonale was supported by physical findings, symptoms and an echocardiogram showing increased borderline cardiac size and a right ventricular dimension which exceeded the normal range of dimensions; and that his diagnosis of legal pneumoconiosis was supported by claimant's thirteen years of coal dust exposure, and the physical findings and symptoms indicative of cor pulmonale. The administrative law judge ultimately concluded that the opinion was sufficient to establish every element of entitlement, finding that it was well-reasoned, well-documented, and "consistent with claimant's test results and symptoms in the record." Decision and Order at 10; Claimant's Exhibits 10-13; Director's Exhibit 33. However, the administrative law judge appears to have equated a diagnosis of cor pulmonale with a diagnosis of legal pneumoconiosis, and he failed to explicitly identify the test results in the record that supported Dr. Fannin's diagnosis of legal pneumoconiosis. While cor pulmonale with right-sided congestive heart failure may be caused by pneumoconiosis and may establish total respiratory disability pursuant to Section 718.204(b)(2)(iii) when weighed against any contrary probative evidence of record, *see Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), a diagnosis of cor pulmonale is not a diagnosis of pneumoconiosis, and thus cannot establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Consequently, after identifying the admissible evidence of record on remand, the administrative law judge is instructed to reevaluate each medical opinion in light of the extent and quality of its documentation, the comprehensiveness of its underlying rationale, and the treating physician guidelines contained at 20 C.F.R. §718.104(d), where applicable. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge must make separate findings under the appropriate standards regarding the issues of the existence of pneumoconiosis at Section 718.202(a), total respiratory disability under Section 718.204(b), *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*), and disability causation at Section 718.204(c), *see Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), and must explain his supporting rationale relative to each finding.

Accordingly, the Decision and Order–Awarding Benefits is affirmed in part, vacated in part, and this 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

BETTY JEAN HALL
Administrative Appeals Judge