U.S. Department of Labor

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

BRB No. 21-0484 BLA

FRED F. WILLIAMS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SIDNEY COAL COMPANY, INCORPORATED c/o ANR INCORPORATED	)	
	)	DATE ISSUED: 5/30/2023
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2020-BLA-05213) 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 Claimant's request for modification of a claim filed on March 22, 2016.

In his February 25, 2019 Decision and Order Denying Benefits, ALJ Larry A. Temin found the evidence insufficient to establish complicated pneumoconiosis and thus concluded Claimant was unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Although ALJ Temin accepted the parties' stipulation that Claimant had at least twenty years of underground coal mine employment and simple clinical pneumoconiosis, he found Claimant did not establish a totally disabling respiratory or pulmonary impairment and thus could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4)[1] or establish entitlement under 20 C.F.R. Part 718. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.202(a), 718.204(b)(2). Accordingly, ALJ Temin denied benefits.

Claimant timely requested modification on August 1, 2019, and the case was assigned to ALJ Golden (the ALJ). In his May 26, 2021 Decision and Order, which is the subject of the current appeal, the ALJ accepted the parties' stipulation of twenty years of underground coal mine employment and found Claimant established complicated pneumoconiosis, thereby invoking the irrebuttable presumption and establishing a mistake in a determination of fact. 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 725.310(a). The ALJ further found Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203. After determining granting modification would render justice under the Act, he awarded benefits.

On appeal, Employer argues the ALJ erred by considering Dr. Crum's deposition and relying on it to find Claimant has complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

The Benefits Review 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

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

accordance with applicable law.[2] 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 (1965).

An ALJ may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, the ALJ may correct any mistake, including the ultimate issue of benefits eligibility. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Evidentiary Issue

ALJs exercise broad discretion in resolving procedural and evidentiary matters. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). A party seeking to overturn the disposition of an evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Employer asserts the ALJ erred by considering Dr. Crum's deposition, arguing that because neither party designated Dr. Crum's opinion as evidence, the ALJ was precluded from considering it. Employer's Brief at 11-16. We agree.

The regulations provide that no physician may testify at a hearing or deposition unless he has prepared a written medical report in connection with the claim, but that a physician's testimony may be admitted in lieu of a written report if consideration of the physician's opinion would not otherwise violate the evidentiary limitations. 20 C.F.R. §§725.414(c), 725.457(c). The evidentiary limitations of 20 C.F.R. §725.414 apply to modification proceedings, and they work in tandem with the evidentiary limitations governing the submission of new evidence on modification at 20 C.F.R. §725.310(b). *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007). On modification, therefore, "each party may submit its full complement of medical evidence allowed by 20 C.F.R. §725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit the additional medical evidence allowed by 20 C.F.R. §725.310(b)." *Id.* at 1-228. Further, the ALJ is obligated to enforce the evidentiary limitations even if no party objects. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver).

[2] We will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 52.

In the initial proceedings on this claim, Employer submitted a medical report from Dr. Basheda as well as the depositions of Drs. Meyer and Crum. Order Regarding Evidence at 2 (Feb. 12, 2019). ALJ Temin admitted Dr. Meyer's deposition in lieu of a medical report, but because Employer's evidentiary slots for two affirmative medical reports were full, he declined to admit Dr. Crum's deposition as it exceeded the evidentiary limitations. *Id.*

During the hearing on modification, the ALJ admitted a broad swath of evidence, including Dr. Crum's deposition, without specifically identifying the content of that evidence or noticing the parties as to his intent to consider evidence not designated by them.[3] *See* Hearing Tr. at 34-35. In his Decision and Order, the ALJ noted Dr. Crum's deposition, though not designated by either party, remained "in evidence" and stated it provided him "with a more complete picture of Claimant's condition." Decision and Order at 5 n.20. He further noted that Employer's medical expert, Dr. Meyer, reviewed and commented on Dr. Crum's deposition during his own deposition. *Id.* (citing Director's Exhibit B35). Finally, he noted that consideration of Dr. Crum's deposition would not exceed the evidentiary limitations, as Claimant had not submitted his full complement of medical reports. *Id*. He therefore considered Dr. Crum's deposition. *Id.* This was error.

The ALJ admitted the evidence subject to the evidentiary limitations. *See Rose*, 23 BLR at 1-227; 20 C.F.R. §§725.414, 725.310(b). ALJ Temin previously had ruled inclusion of Dr. Crum's deposition would exceed the evidentiary limitations and thus properly excluded it. *See* 20 C.F.R. §725.414; Order Regarding Evidence at 2 (Feb. 12, 2019). Because Employer, not Claimant, proffered Dr. Crum's deposition and its slots were full, the ALJ could consider Dr. Crum's deposition only if he found good cause existed to exceed the evidentiary limitations.[4] *See* 20 C.F.R. §725.456(b)(1); *Smith*,

[3] The ALJ admitted Director's Exhibits A1 through A54 and B1 through B40. Dec. 9, 2020 Hearing Tr. at 34-35. Employer maintained its Motion to Strike Dr. Crum's July 17, 2018 reading and October 6, 2020 rereading of the August 13, 2016 x-ray found at Director's Exhibit B37 and Claimant's Exhibit 2, but neither the parties nor the ALJ discussed admitting or considering Dr. Crum's deposition in their briefings, orders, or at the hearing on modification. *See id.*; Order on Employer's Motion to Strike (Jan. 11, 2021); Employer's Post-Hearing Brief; Claimant's Post-Hearing Brief; Employer's Motion to Strike Claimant's Submission of Dr. Crum's Previously Stricken Re-Reading of 8/13/16 X-ray (Nov. 18, 2020).

[4] We note that, so long as Claimant had available evidentiary slots, he arguably could have designated Dr. Crum's deposition as his own or resubmitted it as his own evidence on modification. *See* 20 C.F.R. §§725.413(d), 725.414, 725.456. However, he

23 BLR at 1-74. The ALJ did not make such a finding in the present case. Rather, the ALJ reasoned Dr. Crum's deposition provides him with a "more complete picture of Claimant's condition," and that this usefulness therefore provided grounds for its admission. Decision and Order at 5 n.20. However, relevancy alone is insufficient to satisfy the requirements for good cause. *See Blake*, 480 F.3d. at 297 n.18 (if relevancy were enough to meet the good cause standard for exceeding black lung evidentiary limitations at Section 725.414, it would render those limitations "meaningless").

Moreover, "consistent with principles of fairness and administrative efficiency," an ALJ should issue evidentiary rulings on the admissibility of medical evidence prior to issuance of a decision so the parties have opportunity to conform their evidence to the evidentiary limitations, to make arguments for and against the admission of evidence, and to make their arguments on the merits based on the evidence of record once the evidence to be considered is known. *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-55 (2008) (en banc). Here, the prior ALJ excluded the evidence and neither party proffered the evidence on modification, designated it on their Evidence Summary Forms, or raised arguments concerning that evidence. The ALJ thus erred by sua sponte redesignating and considering Dr. Crum's deposition without first allowing the parties to address the issue of its admission, making a finding as to whether there was good cause for its admission, and making that finding known to the parties prior to briefing.[5]

We therefore vacate the ALJ's designation of Dr. Crum's deposition. Because the ALJ relied on it in finding complicated pneumoconiosis, we must also vacate his determination that Claimant invoked the irrebuttable presumption that Claimant is totally disabled due to pneumoconiosis. *See* 20 C.F.R. §718.304; Decision and Order at 20. Thus,

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did not do so in the present case. It was not within the authority of the ALJ to redesignate the evidence and ascribe it to a party who had not submitted it.

[5] Employer further contends "ALJ Temin's exclusion order was never set aside or modified," and, citing 20 C.F.R. §725.309(c)(2), argues that, because ALJ Temin declined to consider Dr. Crum's deposition, "[it]was not then—and still is not now—contained in the evidentiary record such that a factfinder could consider it in adjudicating this modification petition." Employer's Brief at 14. However, Employer's reliance on 20 C.F.R. §725.309 is misplaced, as that provision applies to subsequent claims, where the prior rulings have become final, whereas this case concerns a request for modification, where finality does not apply. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993); 20 C.F.R. §725.310.

we further vacate the ALJ's finding that modification would render justice under the Act and the award of benefits.[6]

Remand Instructions

On remand, the ALJ must reconsider whether Claimant has established complicated pneumoconiosis without considering Dr. Crum's deposition. 20 C.F.R. §718.304(c). If the ALJ finds the evidence sufficient to establish that Claimant has complicated pneumoconiosis, he must determine if it arose out of Claimant's coal mine employment.[7] 20 C.F.R. §718.203. If the ALJ finds it did, Claimant will have invoked the Section 411(c)(3) irrebuttable presumption and be entitled to benefits. If the ALJ again finds Claimant has established a mistake in a determination of fact at 20 C.F.R. §725.310, he should also address whether granting modification would render justice under the Act.

[6] Our colleague contends that the ALJ did nothing wrong, except that he failed to give the parties proper notice. To the contrary, the ALJ sua sponte redesignated the evidence and allocated it to Claimant without Claimant's request. The ALJ's actions constituted an improper usurpation of Claimant's role which cannot now be rectified merely by providing notice to the parties. *See Shapell v. Director, OWCP*, 7 BLR 1-304, 306-07 (1984) (ALJ's role in Black Lung adjudications is that of an impartial arbiter of the evidence the parties present and not that of an advocate); *see also* 5 U.S.C. §556(b) (2018) (adjudicators must perform their function in an impartial manner); 20 C.F.R. §725.455 (ALJ shall conduct hearing in manner which affords the parties an opportunity for a fair hearing); 29 C.F.R. §18.90(b) (after the record has closed, no new evidence may be admitted unless it is new and material and could not have been discovered with reasonable diligence before the record closed).

[7] If Claimant establishes complicated pneumoconiosis, the disease is presumed to have arisen out of the Miner's coal mine employment because he worked more than ten years as a coal miner; the burden will then be on Employer, as the party opposing entitlement, to disprove disease causation. 20 C.F.R. §718.203(b).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority opinion, with the exception of its determination that the ALJ is outright prohibited from considering Dr. Crum's deposition on remand. In modification proceedings, ALJs are vested with broad discretion to correct an earlier ALJ's mistakes, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971). Likewise, ALJs exercise broad discretion in making decisions regarding procedural and evidentiary matters. *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-63 (2004) (en banc). Given these broad authorities, there is nothing suspect about the ALJ's decision to reconsider whether the prior ALJ erred in refusing to admit Dr. Crum's deposition testimony; nor was it improper for him to weigh the deposition against the other relevant evidence of record after finding it admissible. 30 U.S.C. §923(b) ("all relevant evidence shall be considered"). The ALJ's sole error was making this evidentiary determination without notifying the parties and giving them an opportunity to raise arguments for or against its admission, and, if admitted, for or against its credibility. *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-55 (2008) (en banc). As such, the Board need not, and indeed should not, limit the ALJ's discretion to consider Dr. Crum's deposition on remand. The appropriate remedy, consistent with *Preston*, is to

remand the claim with instructions for the ALJ to provide the parties with an opportunity to address the admissibility and probative value of that evidence, prior to rendering a decision.

GREG J. BUZZARD
Administrative Appeals Judge