U.S. Department of Labor

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

BRB No. 21-0551 BLA

KATHY BLANKENSHIP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JUSTUS COAL CORPORATION	)	
	)	DATE ISSUED: 04/17/2023
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Granting Employer's Motion to Dismiss of William P. Farley, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe and Cameron Blair (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, District of Columbia, for Employer.

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

BUZZARD and ROLFE, Administrative Appeals Judges:

Claimant appeals Administrative Law Judge (ALJ) William P. Farley's Order Granting Employer's Motion to Dismiss (2020-BLA-05856) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a twelfth modification request of a survivor's claim filed on July 11, 2005.

The relevant procedural history is as follows. The Miner filed a living miner's claim for benefits on March 27, 1998, which the district director denied on April 5, 2000. Director's Exhibit 1. The Miner died on April 4, 2005. *Id.* Claimant filed her initial claim for survivor's benefits on July 11, 2005. *Id.* On March 1, 2006, the district director denied the survivor's claim because Claimant failed to establish the Miner's death was due to pneumoconiosis. *Id.* On August 17, 2006, Claimant filed her first modification request with a medical report dated August 12, 2006, from Dr. Perper opining the Miner had complicated pneumoconiosis. *Id.* On September 6, 2006, the district director denied the modification request, finding there was no mistake of fact in his prior March 1, 2006 decision. *Id.*

On November 13, 2006, January 8, 2008, July 21, 2008, October 8, 2009, March 21, 2010, and March 31, 2011, Claimant filed six additional requests for modification, all of which the district director respectively denied on April 27, 2007, April 28, 2008, April 23, 2009, February 24, 2010, August 4, 2010, and July 19, 2011, finding no mistake in fact in the prior decisions. *Id.* To support her third modification request, Claimant submitted a supplemental report by Dr. Perper dated April 5, 2008. *Id.* Claimant did not submit any additional medical evidence for her second, fourth, fifth, sixth, or seventh modification requests.

On April 27, 2012, Claimant filed an eighth modification request, which the district director denied on August 7, 2012, for failure to establish a mistake of fact in the prior decision. Director's Exhibit 1. Claimant did not submit additional medical evidence for this modification request. Claimant requested a formal hearing before an ALJ on August 30, 2012. Director's Exhibit 1.

In his November 30, 2016 Decision and Order – Denying Request for Modification for Survivor's Claim for Benefits, ALJ Alan L. Bergstrom credited the Miner with ten years of coal mine employment and thus found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] Director's Exhibit 3. ALJ Bergstrom further found Claimant could not invoke the irrebuttable presumption that the Miner's death was due to complicated pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304; Director's Exhibit 3. Considering entitlement under 20 C.F.R. Part

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

718, he found the Miner had pneumoconiosis and was totally disabled, but determined Claimant did not establish the Miner's disability or death was due to pneumoconiosis or establish a mistake in a determination of fact in the district director's July 19, 2011 decision. 20 C.F.R. §§718.202(a), 718.204(c), 718.205(b), 725.310(a); Director's Exhibit 3. Thus he denied Claimant's modification request. *Id.*

On May 31, 2017, Claimant filed her ninth modification request and submitted a supplemental report by Dr. Perper dated May 25, 2017. Director's Exhibits 7, 10. On April 4, 2018, the district director denied Claimant's ninth modification request for failure to establish a mistake of fact in ALJ Bergstrom's decision. Director's Exhibit 11. On June 21, 2018 and April 18, 2019, Claimant filed her tenth and eleventh modification requests without submitting additional medical evidence. Director's Exhibits 13, 18. The district director denied these requests on December 17, 2018 and April 18, 2019, respectively, finding Claimant failed to establish a mistake of fact in the district director's prior decisions. Director's Exhibits 16, 20.

On October 29, 2019, Claimant filed her current, twelfth request for modification but did not submit additional medical evidence. Director's Exhibit 22. On March 9, 2020, the district director denied Claimant's modification request for failure to establish a mistake in a determination of fact. Director's Exhibit 25. Claimant requested a formal hearing before an ALJ on March 16, 2020. Director's Exhibits 27, 28, 29.

On March 2, 2021, Employer filed a Motion to Dismiss, arguing Claimant's twelve requests for modification are an abuse of the remedy. Claimant did not file a response to Employer's Motion. On June 3, 2021, ALJ William P. Farley (the ALJ) issued an Order to Show Cause as to why Employer's Motion should not be granted. On June 23, 2021, Claimant filed a response to the Order to Show Cause. At 4:00 p.m. on June 28, 2021, the day before the scheduled hearing, Claimant also filed a Motion to Continue the hearing or alternatively submit a post-hearing deposition of Dr. Perper.

At the June 29, 2021 telephonic hearing, the ALJ denied Claimant's motion for a continuance because it was "filed so late" and he "didn't want to put off the hearing," but stated he would subsequently issue a written ruling on Claimant's alternative request for additional time to conduct a post-hearing deposition of Dr. Perper. Hearing Transcript at 12, 24. On July 2, 2021, the ALJ issued an Order Granting Employer's Motion to Dismiss, wherein he denied Claimant's motion to submit a post-hearing deposition of Dr. Perper and dismissed Claimant's twelfth modification request. 20 C.F.R. §725.310.

On appeal, Claimant argues the ALJ erred in granting Employer's Motion to Dismiss and in denying her motion to continue the hearing or alternatively to submit a post-hearing deposition of her expert witness. Further, she alleges the ALJ erred in finding that granting modification would not render justice under the Act. Employer responds in

support of the dismissal. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 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).

Consistent with the stated purpose of the Act, "to ensure that . . . benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis," 30 U.S.C. §901(a), Congress "incorporat[ed] within the statute a broad reopening provision to ensure the accurate disposition of benefits." *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 546 (7th Cir. 2002). Parties to federal black lung claims are afforded the right to request modification without a specific limit as to the number of times that a request may be filed and need not submit new evidence in support of their requests.[3] *See* 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe,* 404 U.S. at 256. The implementing regulation, set forth at 20 C.F.R. §725.310, provides:

> In any case forwarded [from the district director] for a hearing, the administrative law judge assigned to hear such case *shall* consider whether any additional evidence submitted by the parties demonstrates a change in condition, and *regardless of whether the parties have submitted new evidence*, whether the evidence of record demonstrates a mistake in a determination of fact.

20 C.F.R. §725.310(c) (emphasis added). The use of mandatory language in the implementing regulation signifies that the ALJ is required to consider a request for modification and, when a survivor's claim is at issue, render a finding as to whether a

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1 at 633 and 1299, 3 at 9.

[3] Claimant notes that the United States Court of Appeals for the Fourth Circuit has recognized that "nothing bars or should bar claimants from filing claims *seriatim*, and the regulations recognize that many will." *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362 (4th Cir. 1996).

mistake in a determination of fact has been demonstrated. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989).

The modification inquiry does not end there, however. In addition to addressing whether there has been a change in condition or a mistake in a determination of fact, caselaw dictates that the ALJ must also determine whether granting a modification claim ultimately would "render justice under the Act." *O'Keeffe*, 404 U.S. at 255; *see Sharpe v. Director, OWCP* [*Sharpe I*], 495 F.3d 125, 132-33 (4th Cir. 2007); *Hilliard*, 292 F.3d at 541; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). Courts have identified several factors relevant to the "justice under the Act" inquiry. *See Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 330 (4th Cir. 2012); *Sharpe I*, 495 F.3d at 128.

Given the modification regulation's requirement for the ALJ to consider whether the denial of benefits was based on a mistake in fact even when no new evidence has been submitted, we agree with Claimant that the ALJ erred in disposing of her request for modification on a motion to dismiss pursuant to 20 C.F.R. §725.465(a).[4] We also agree with Claimant that the ALJ erred in concluding modification would not render justice under the Act without adequately considering the *Sharpe* factors.[5] Despite the ALJ's errors, it is

[4] It appears that the ALJ relied on subsection (a)(3), which permits an ALJ to dismiss a claim "for cause" where there has been "a prior final adjudication of the claim . . . and no new evidence is submitted." 20 C.F.R. §725.465(a)(3). But as noted, the modification regulation specifically requires an ALJ to consider a modification request even when no new evidence is submitted. 20 C.F.R. §725.310(c).

[5] We reject Claimant's assertion the ALJ erred in denying her motion for a continuance of the hearing. Claimant asserts a continuance was needed because Dr. Perper became ill and was hospitalized prior to his scheduled June 2, 2021 deposition. Claimant's Brief at 16-17. Despite being aware of Dr. Perper's hospitalization almost four weeks before the scheduled hearing and remaining "in frequent contact with [him] and his son prior to the hearing," Claimant does not explain why she waited to file her continuance request until 4:00 p.m. the day before the hearing. *Id*. We thus see no abuse of discretion in the ALJ's decision to not "put off the hearing" given that the request was filed "so late." Hearing Transcript at 12, 24. As for the ALJ's denial of her alternate request for additional time to submit Dr. Perper's deposition after the hearing, we need not address Claimant's assertion that the ALJ failed to render a specific finding as to why she did not establish good cause. Decision and Order at 2 n.14; Claimant's Brief at 15-18. In light of Employer's unchallenged assertion that Dr. Perper died in July 2021, Claimant has failed to explain how her argument would make a difference and what relief might be available. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how

not necessary to remand this case for further consideration as the ALJ rendered the findings necessary to comply with the requirement at 20 C.F.R. §725.310(c) to consider whether there was a mistake in fact.

Throughout his decision, the ALJ indicated he reviewed the record and the prior denials, considered Claimant's arguments and testimony at the hearing, and specifically concluded "[t]he undersigned's thorough review of the record indicates that the District Director has made no mistake to warrant modification." Order at 5. Claimant does not address the ALJ's mistake-in-fact finding or identify any error in it. Thus, because the ALJ conducted a hearing, provided Claimant an opportunity to be heard, considered her testimony and the prior denials, and rendered a mistake in fact finding, any error in disposing of this matter in response to a motion to dismiss or in analyzing the justice under the Act factors is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus we affirm the ALJ's finding that there was no mistake in fact in the earlier denials.

Accordingly, the ALJ's denial of Claimant's modification request is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

JONES, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority's decision to affirm the ALJ's denial of

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the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Response Brief at 16. Thus, any error by the ALJ in considering and denying Claimant's Motion for Continuance is harmless. *Larioni,* 6 BLR at 1-1278.

benefits. I agree with the majority that the ALJ erred in granting Employer's Motion to Dismiss pursuant to 20 C.F.R. §725.465(a). However, I disagree that the ALJ's error is harmless. Although the ALJ stated a "thorough review of the record indicates that the [d]istrict [d]irector has made no mistake to warrant modification," Decision and Order at 5, he failed to set forth what evidence he reviewed, render credibility findings, or sufficiently explain his conclusion that Claimant has not established a mistake in determination of fact to warrant granting her modification request. 20 C.F.R. §725.310. Because the ALJ failed to adequately explain why the evidence does not establish a mistake in a determination of fact, his denial of benefits does not comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[6] *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (ALJ has duty to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal bases for his decision); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998(1984) (fact finder's failure to discuss relevant evidence requires remand).

Consequently, I would vacate the denial of benefits and remand this case for further consideration.

MELISSA LIN JONES
Administrative Appeals Judge

[6] The Administrative Procedures Act (APA) requires every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).