U.S. Department of Labor

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

BRB No. 19-0456 BLA

SARAH POWELL (Executrix of the Estate of ROGER RICHARDSON)	)	
Claimant-Respondent	)	
v.	)	
GARRETT MINING, INCORPORATED	)	
and	)	DATE ISSUED: 08/31/2020
AMERICAN INTERNATIONAL	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Cameron Blair (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry W. Price's Decision and Order (2012-BLA-05298) 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 a request for modification of a claim filed on December 26, 2007.

In her February 25, 2011 Decision and Order Denying Benefits, Administrative Law Judge Pamela J. Lakes found the Miner did not establish complicated pneumoconiosis. Director's Exhibit 77. Therefore he did not 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). He also did not establish a totally disabling respiratory or pulmonary impairment and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2); Director's Exhibit 77. Because the Miner failed to establish an essential element of entitlement, Judge Lakes denied benefits. Director's Exhibit 77.

The Miner requested modification of that denial on July 20, 2011. Director's Exhibit 78. The Miner, however, died on April 7, 2016, while his request for modification was pending. July 12, 2016 Telephone Conference Transcript at 9-10. Claimant, the Miner's daughter, is pursuing the claim on behalf of his estate. *Id.*

In his June 28, 2019 Decision and Order that is the subject of this appeal, Judge Price (the administrative law judge) credited the Miner with twenty-one years of coal mine employment and found there was no mistake in a determination of fact in Judge Lakes's denial. He found, however, Claimant established a change in conditions by establishing the Miner had complicated pneumoconiosis. 20 C.F.R. §§718.304, 725.310. Thus she invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). He further determined the Miner'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 commencing July 2011, the month the Miner filed his request for modification.

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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.

On appeal, Employer argues the administrative law judge applied the incorrect standard in determining the date for commencement of benefits.[2] Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

There is no merit in Employer's contention the administrative law judge erred in determining the commencement date for benefits. Because the administrative law judge granted modification based on a change in conditions, benefits commence as of the month of onset of the Miner's total disability due to pneumoconiosis, "provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge." 20 C.F.R. §725.503(d)(2). If the date of onset of the Miner's total disability due to pneumoconiosis is not ascertainable, benefits are payable "from the month in which [the Miner] requested modification." *Id*. Where a miner suffers from complicated pneumoconiosis, the fact-finder must consider whether the evidence establishes the onset of the disease. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989).

We first reject Employer's argument that the administrative law judge was required to find the benefits commencement date is the month in which the Miner's complicated pneumoconiosis was first diagnosed in the record. Employer's Brief at 9-12. As the Board explained in *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990), the onset date is not established by the first medical evidence of record indicating total disability, as such medical evidence shows only that the Miner became totally disabled at some time

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Because the Miner'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, 1-202 (1989) (en banc); Decision and Order at 2; June 18, 2019 Joint Pre-Hearing Statement.

prior to the date of such medical evidence.[4] *See also Meraschoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985).

In evaluating the issue of complicated pneumoconiosis, the administrative law judge found x-rays taken on March 13, 2008, October 14, 2008, and August 28, 2011 insufficient to establish complicated pneumoconiosis, but a more recent CT scan taken on February 5, 2015 established complicated pneumoconiosis. Decision and Order at 3-7, 10-13. Weighing all of the evidence, the administrative law judge found the CT scan evidence more probative of whether the Miner had complicated pneumoconiosis because he credited "the opinions of Drs. Adcock and Meyer that CT scans are more reliable than [x]-rays in confirming or refuting the presence of complicated pneumoconiosis." *Id*. at 13; *see* Claimant's Exhibits 4, 5. Although the administrative law judge found the February 5, 2015 CT scan established the Miner had complicated pneumoconiosis, he permissibly found he "cannot ascertain when Miner [first] developed complicated pneumoconiosis" based on the evidence of record. Decision and Order at 14; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Because it is supported by substantial evidence, we affirm the commencement date of benefits finding of July 2011, the month in which the Miner filed his request for modification. 20 C.F.R. §725.503(d)(2).

[4] Employer's relies on the Board's holding in *Truitt v. N. Am. Coal Corp*, 2 BLR 1-199, 1-203-04 (1979), *appeal dismissed sub nom. Director, OWCP v. N. Am. Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980) to support its argument. Employer's Brief at 9-12. In *Truitt*, however, the Board held the administrative law judge logically used the month in which complicated pneumoconiosis was first diagnosed to find the named responsible operator could not be held liable for the payment of benefits, because the miner had complicated pneumoconiosis and thus was irrebuttably presumed totally disabled due to pneumoconiosis prior to commencing work with that employer. *Truitt*, 2 BLR at 1-203-04. The Board did not address the determination of the miner's benefits commencement date. *Id*. Therefore, *Truitt* is not applicable to this case. Nor is Employer assisted by the Board's decisions in *Swanson v. R.G. Johnson Co.*, 15 BLR 1-49, 1-51 (1991) and *Estes v. Wash Ridge Coal Co*., BRB No. 98-1063 (Apr. 30, 1999) (unpub.), as both cases relate to the same responsible operator issue discussed in *Truitt*.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge