U.S. Department of Labor

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

BRB No. 20-0400 BLA

BARRY M. LILLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 08/31/2021
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-05548) rendered on a claim filed pursuant to Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act). This case involves a

second request for modification of a claim filed on January 18, 2013. Director's Exhibit 2.

In his May 18, 2015 Decision and Order Denying Benefits, Judge Swank (the ALJ) found Claimant was not entitled to benefits because he failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 33.

Claimant timely requested modification. Director's Exhibit 34. ALJ Thomas M. Burke subsequently issued a Decision and Order Denying Benefits on Modification on April 28, 2017, finding Claimant did not establish total disability or pneumoconiosis. Director's Exhibit 54.

Claimant filed a second timely request for modification.[1] Director's Exhibit 57. In his June 26, 2020 Decision and Order Awarding Benefits, the subject of this appeal, the ALJ accepted the parties' stipulation that Claimant has 21.9 years of qualifying coal mine employment and established a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the Section 411(c)(4) presumption,[2] 30 U.S.C. §921(c)(4) (2018), and established a basis for modification. 20 C.F.R. §725.310. The ALJ further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is total disabled and thus invoked the Section 411(c)(4) presumption. It further argues he erred in finding it failed to rebut the presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response.

The 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

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[1] Claimant filed an appeal of the April 28, 2017 Decision and Order Denying Benefits on Modification with the Benefits Review Board. Director's Exhibit 55. He subsequently filed a motion to withdraw the appeal, which the Board granted. Director's Exhibit 56.

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

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant has 21.9 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5; Director's Exhibit 30 at 7.

with applicable law.[4] 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).

The ALJ may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310. An ALJ has broad discretion to grant modification based on a mistake of fact, including the ultimate fact of entitlement to benefits. *See Keating v. Director, OWCP*, 71 F.3d 1118 (3d Cir. 1995).

Invocation of the Section 411(c)(4) Presumption: Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). An ALJ must consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based on the new pulmonary function testing and medical opinion evidence, as well as the evidence as a whole.[5] Decision and Order at 15; *see* 20 C.F.R. §718.204(b)(2)(i), (iv).

Employer generally asserts the ALJ erred in determining Claimant is totally disabled. Employer's Brief at 4. We decline to address this issue, as Employer makes no explicit supporting arguments and does not challenge the ALJ's specific findings.[6] 20

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[4] This case arises within the jurisdiction of United States Court of Appeals for Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 6.

[5] The ALJ found the arterial blood gas studies do not support total disability. Decision and Order at 12; 20 C.F.R. § 718.204(b)(ii). He further found there is no evidence Claimant suffers from cor pulmonale with right-sided congestive heart failure or complicated pneumoconiosis. Decision and Order at 8, 12; *see* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.204(b)(1), (b)(2)(iii).

[6] The ALJ accurately found the only valid pulmonary function study submitted on modification was qualifying for disability, and therefore found the new pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and

C.F.R. §802.211; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). We therefore affirm the ALJ's determination that the evidence establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 15. Consequently, we affirm the ALJ's determination that Claimant has invoked the Section 411(c)(4) presumption, 20 C.F.R. §718.305, and therefore has established a basis for modification. 20 C.F.R. §725.310.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal[7] nor clinical pneumoconiosis[8] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method. Decision and Order at 22.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-159 (2015).

In determining whether Employer rebutted the existence of legal pneumoconiosis, the ALJ considered the new medical opinions of Drs. Cohen and Fino. Decision and Order

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Order at 11; Director's Exhibit 57. He further found the new uncontradicted medical opinions of Drs. Cohen and Fino establish Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv); Director's Exhibits 57, 61; Employer's Exhibits 1, 2.

[7] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[8] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

at 20-21. Dr. Cohen diagnosed Claimant with legal pneumoconiosis in the form of chronic bronchitis and emphysema due to coal mine dust exposure. Director's Exhibit 57 at 8-9. Dr. Fino opined he did not have a "definitive diagnosis," but diagnosed Claimant with restrictive lung disease and opined he "does qualify as having a picture consistent with legal pneumoconiosis." Director's Exhibit 61 at 7-8; Employer's Exhibit 2 at 21. The ALJ concluded Employer failed to rebut legal pneumoconiosis, as neither physician's opinion assisted Employer in rebutting the existence of legal pneumoconiosis. Decision and Order at 20-22.

Employer argues the ALJ erred in his consideration of the medical opinion evidence. Employer's Brief at 4-11. We disagree.

Notwithstanding the ALJ's weighing of Dr. Cohen's opinion, Employer must affirmatively establish the absence of legal pneumoconiosis to meet its rebuttal burden. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011) (rebuttal requires an affirmative showing that the claimant does not suffer from pneumoconiosis); *see also Consolidation Coal Co. v. Director, OWCP* [*Noyes*], 864 F.3d 1142, 1150 (10th Cir. 2017); *Minich*, 25 BLR at 1-150. Contrary to Employer's arguments, nowhere does Dr. Fino conclude Claimant does not have legal pneumoconiosis; instead, he opined Claimant "does qualify as having a picture consistent with legal pneumoconiosis." Director's Exhibit 61 at 8; Employer's Exhibit 2 at 21; Employer's Brief at 4-8. Because it is Employer's burden to affirmatively establish Claimant does not have legal pneumoconiosis, we affirm the ALJ's determination that Employer did not rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i)(A); *Morrison*, 644 F.3d at 480; *Noyes*, 864 F.3d at 1150; *Minich*, 25 BLR at 1-150.

Disability Causation

The ALJ next considered whether Employer established "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 22. He rationally found Dr. Fino's opinion, repeatedly indicating he could not rule out a contribution from coal mine dust exposure in causing Claimant's totally disabling impairment, is not sufficient to rebut the presumption.[10] 20 C.F.R. §718.305(d)(1)(ii); *Morrison*, 644 F.3d at

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[9] Because Employer failed to rebut legal pneumoconiosis, we need not address its allegations of error regarding clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[10] The ALJ accurately noted Dr. Cohen's opinion does not assist Employer in rebutting the presumption. Decision and Order at 22; Director's Exhibit 57.

480; *Noyes*, 864 F.3d at 1150; Decision and Order at 22; Director's Exhibit 61 at 8; Employer's Exhibit 2 at 20-21. Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 22.

Accordingly, the ALJ's Decision and Order Awarding Benefits on Modification is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge