U.S. Department of Labor

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

BRB No. 21-0334 BLA

DIANE F. HAIGHT, deceased (Widow of ROBERT A. HAIGHT) Claimant-Respondent v. HELEN MINING COMPANY Employer -Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	))))))))))))))))	 DATE ISSUED: 8/15/2022 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.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

Before: ROLFE, GRESH, JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2018-BLA-06097) 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 survivor's claim. Claimant filed her survivor's claim on March 25, 2014.[1]

This case was originally before ALJ Natalie A. Appetta, who issued an April 3, 2017 Decision and Order Denying Benefits. She found the evidence insufficient to establish complicated pneumoconiosis and thus concluded Claimant was unable to invoke the irrebuttable presumption that the Miner's death was 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 Appetta credited the Miner with at least twenty-two years and four months of underground coal mine employment, she found the evidence insufficient to establish that he was totally disabled and thus Claimant could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4).[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2). Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the Miner suffered from clinical pneumoconiosis but not legal pneumoconiosis or that the Miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205(b). Accordingly, ALJ Appetta denied benefits.

Claimant filed a timely request for modification on March 26, 2018. The district director denied it, and the case was assigned to ALJ Swank (the ALJ) in conjunction with Claimant's request for a formal hearing. In his February 10, 2021 Decision and Order, which is the subject of the current appeal, the ALJ credited the Miner with twenty-two years of coal mine employment based on the parties' stipulation. He found Claimant established complicated pneumoconiosis arising from the Miner's coal mine employment. 20 C.F.R. §§718.203, 718.304. Thus, he found Claimant invoked the irrebuttable presumption that the Miner's death was due to pneumoconiosis and established modification based on a mistake in a determination of fact. 20 C.F.R. §§718.304, 725.310.

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[1] Claimant is the widow of the Miner, who died on December 21, 2013. Director's Exhibits 8, 9. The Miner filed one previous claim for benefits, which he withdrew; therefore, it is considered not to have been filed. *See* 20 C.F.R. §725.306(b); February 11, 2003 Order Granting Withdrawal of Claim. Because the Miner was not awarded benefits on a claim filed prior to his death, Claimant is not eligible for benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits. 30 U.S.C. §932(*l*).

[2] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the Miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b).

Further finding that granting Claimant's request for modification rendered justice under the Act, the ALJ awarded benefits.

On appeal, Employer asserts the ALJ erred in admitting evidence that exceeded the evidentiary limits. Employer also contends the ALJ did not adequately explain his credibility findings in determining Claimant established complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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.[4] 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).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). Moreover, a party need not submit new evidence because an ALJ 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'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption that the Miner's death was due to pneumoconiosis if he suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The ALJ must weigh together all of the evidence relevant to the

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[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-two years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5; Hearing Transcript 5.

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

presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc). Autopsy evidence can support a finding of complicated pneumoconiosis where a physician diagnoses massive lesions or where an evidentiary basis exists for the ALJ to make an equivalency determination between the autopsy findings and x-ray findings. *See* 20 C.F.R. §718.304(b); *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 16 (3d Cir. 1981). Claimant bears the burden of proof to establish the existence of complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994).

Evidentiary Challenge on Modification

The regulations set limits on the number of specific types of medical evidence the parties can submit into the record. *See* 20 C.F.R. §§725.414; 725.456(b)(1). Medical evidence that exceeds those limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). Each party may submit, in support of its affirmative case, no more than two chest x-ray interpretations, two pulmonary function studies, two arterial blood gas studies, one report of autopsy, one report of each biopsy, and two medical reports. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). In a modification proceeding, each party is entitled to submit one additional x-ray interpretation, pulmonary function study, blood gas study, and medical report as its affirmative case evidence, "along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414." 20 C.F.R. §725.310(b).

Dr. Caffrey reviewed autopsy slides and Claimant's March 5, 2014 application for survivor's benefits, the Miner's death certificate, and Dr. Goldblatt's autopsy report in preparing his report. Claimant's Exhibit 1. He diagnosed complicated pneumoconiosis based on his identification of two lesions greater than one centimeter on the autopsy slides. *Id.* But he indicated he could not offer an opinion on the Miner's respiratory condition or the cause of any such condition without additional clinical information. Nonetheless, he ruled out coal workers' pneumoconiosis as a cause of death based on the death certificate and autopsy report. *Id.* Because his report could constitute both an autopsy report and a medical report, each portion of his opinion must comply with the evidentiary regulations. *See* 20 C.F.R. §725.414(a)(2)(i); *Keener v. Peerless Eagle Coal Co*., 23 BLR 1-229, 1-239 (2007) (en banc) (report constitutes both an autopsy report and a medical report when a physician reviews autopsy slides and additional medical records, and then bases his report on both the pathological and clinical evidence); *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).

In support of her survivor's claim before ALJ Appetta, Claimant initially designated the report of Dr. Goldblatt, the autopsy prosector, as her affirmative autopsy report. Director's Exhibit 10; *see* Claimant's October 24, 2016 Black Lung Evidence Summary Form. Employer initially designated Dr. Oesterling's report as its rebuttal autopsy report and, for its affirmative case, identified select treatment records of the Miner's and noted "TBD" for its medical report. Director's Exhibits 12, 13; *see* Employer's October 11, 2016 Black Lung Evidence Summary Form. On November 8, 2016, Employer amended its Evidence Summary Form, designating Dr. Oesterling's biopsy report and Dr. Spagnolo's medical report as part of its affirmative case. Director's Exhibits 12, 26; *see* Employer's November 8, 2016 Black Lung Evidence Summary Form.

On November 29, 2016, the day of the hearing, Claimant amended her Evidence Summary Form by designating Dr. Caffrey's opinion as an affirmative medical report. Claimant's Exhibit 1; *see* Claimant's November 29, 2016 Black Lung Evidence Summary Form. Employer objected to the admission of Dr. Caffrey's report on the grounds that it was untimely submitted and because it included an autopsy slide review. Director's Exhibit 26 (Employer's Brief Regarding Evidentiary Issues before ALJ Appetta at 2-4; *see* Hearing Before ALJ Appetta at 8-11). After briefing from the parties, ALJ Appetta excluded Dr. Caffrey's report because, in her view, it was untimely, exceeded the evidentiary limitations for autopsy reports and, separately, did not constitute a medical report. She further found Claimant failed to establish good cause for its admission into the record. Director's Exhibit 26 (Order Excluding Dr. Caffrey's Autopsy Report at 2-4).

In conjunction with her current modification request before the ALJ, Claimant resubmitted Dr. Caffrey's opinion and designated it as an affirmative medical report. Claimant's Exhibits 1, 2; *see* Claimant's June 29, 2020 Black Lung Evidence Summary Form. At the July 21, 2020 hearing, the ALJ admitted Dr. Caffrey's report over Employer's objection that it exceeded Claimant's allowable number of autopsy reports, was properly excluded in the initial proceeding as a duplicative autopsy report and therefore could not form a basis for modification, and does not separately meet the regulatory definition of a medical report. Hearing Transcript at 7-13. Notwithstanding Employer's objections, in admitting the report, the ALJ stated only that he did so based on "his reading of the regulations and the case law" and that if he was "wrong," the Board "will send it back." Hearing Transcript at 12-13. The ALJ did not further explain the basis for his evidentiary ruling or address any of Employer's specific challenges to its admissibility.

Employer argues the ALJ's decision does not comply with the Administrative Procedure Act (APA).[5] It further asserts that because the ALJ credited Dr. Caffrey's report in finding the Miner had complicated pneumoconiosis, the Board must vacate the ALJ's award of benefits and remand this case for him to resolve the evidentiary issues before reconsidering Claimant's entitlement to benefits. Employer's Brief at 8-9, 13-14. Because we cannot not identify the basis for the ALJ's evidentiary ruling, we agree.

The ALJ erred in admitting Dr. Caffrey's report without explaining, as the APA requires, why he believed it complied with the evidentiary limitations.[6] Alternatively, in the event that he determines the report exceeds the evidentiary limitations, the ALJ did not explain whether good cause exists for its admission. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Keener*, 23 BLR at 1-236; *Wojtowicz*, 12 BLR at 1-165; Claimant's Brief at 7; Hearing Transcript at 11.

We therefore vacate the ALJ's determination that Dr. Caffrey's report was properly admitted. And because the ALJ relied on it in finding complicated pneumoconiosis, we also vacate his determination that Claimant invoked the irrebuttable presumption that the Miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.304; Decision and Order at 7, 11-12. Thus, we further vacate the ALJ's finding that modification would render justice under the Act and the award of benefits.

Remand Instructions

On remand, the ALJ must initially determine whether Dr. Caffrey's report is admissible under 20 C.F.R. §§725.414(a), 725.310(b); if not, he must determine whether Claimant has established good cause for its admission under 20 C.F.R. §725.456(b)(1). If

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[5] The APA provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[6] As Claimant submitted Dr. Goldblatt's report as her affirmative autopsy report, to the extent that Dr. Caffrey's report constitutes an autopsy report, it does not appear to comply with the evidentiary limitations. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Additionally, as Employer did not submit an affirmative autopsy report, Dr. Caffrey's report is not admissible as rebuttal evidence, as Claimant maintains. Claimant's Brief at 7; *see* 20 C.F.R. §725.414(a)(2)(ii); *Keener*, 23 BLR at 1-240. In addition, as Employer alleges, the ALJ did not address its contention that Dr. Caffrey's report also fails to meet the regulatory definition of a medical report. Employer's Brief at 7; Employer's Reply Brief at 3-5.

the ALJ finds Claimant has demonstrated good cause, he must provide Employer an opportunity to respond to that evidence. 20 C.F.R. §725.456(b)(4); *see also North American Coal Co. v. Miller*, 870 F.2d 948 (3d Cir. 1989); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). If the ALJ finds Dr. Caffrey's report admissible as a medical report, but not as an autopsy report, he must consider the extent to which Dr. Caffrey's opinion is tainted by his review of the inadmissible, autopsy-related evidence. *See Keener*, 23 BLR at 1-240-42 (when a medical report is based, in whole or in part, on inadmissible evidence, the ALJ may, in his discretion, exclude that report, redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the opinion is entitled).

Once the evidentiary record is complete, the ALJ must reconsider whether Claimant has established complicated pneumoconiosis based on the autopsy, biopsy, and medical opinion evidence. 20 C.F.R. §718.304(b), (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. The ALJ must critically analyze the record and adequately explain his findings as the APA requires. *See Wojtowicz*, 12 BLR at 1-165. 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.[8]

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[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).

[8] Employer argues modification is not justified in this case because Claimant is merely attempting to introduce a medical report properly excluded at the initial hearing before ALJ Appetta. Employer's Brief at 8-10; Employer's Reply Brief at 7-8.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge