U.S. Department of Labor

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

BRB No. 21-0512 BLA

ROBERT NEAL SALYER (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLOVERLICK COAL COMPANY, LLC	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE	)	DATE ISSUED: 02/22/2023
	)	
Employer/Carrier-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 Claimant's Request for Modification of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Claimant's Request for Modification (2019-BLA-05538) rendered on a claim filed on January 27, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

In an October 11, 2017 Decision and Order Denying Benefits, ALJ Adele Higgins Odegard credited the Miner with at least twenty-two years of underground coal mine employment, but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), or establish entitlement to benefits.

The Miner timely requested modification. Director's Exhibit 83. In her Decision and Order Awarding Claimant's Request for Modification, ALJ Timlin (the ALJ) found the Miner was totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4). Furthermore, she found Employer did not rebut the presumption, Claimant established a change in conditions at 20 C.F.R. §725.310, and granting modification would render justice under the Act. Thus she awarded benefits.

On appeal, Employer argues its due process rights were violated because the Miner died after the record closed and Claimant did not inform the other parties or the ALJ before she issued her Decision and Order. It also argues the ALJ erred in allowing new testimony regarding the exertional requirements of the Miner's usual coal mine employment and thus erred in finding Claimant established total disability, thereby invoking the Section 411(c)(4) presumption. Further, it asserts the ALJ erred in finding it did not rebut the presumption. Finally, it contends the ALJ erred in finding that granting modification would

[1] The Miner died on January 17, 2021, while his request for modification was pending before the ALJ, and Claimant, his surviving widow, is pursuing this claim on his behalf. *See* Claimant's Motion to Substitute a Party.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled 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 at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

render justice under the Act.[3] 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 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).

Due Process

Employer contends its due process rights have been violated because Claimant's counsel did not inform the other parties or the ALJ that the Miner died several months before the ALJ issued her Decision and Order. Employer's Brief at 6-7. We disagree.

Due process requires a party be given notice and the opportunity to respond. *See Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998). Employer was afforded that opportunity.

The ALJ held a hearing on November 5, 2019, during which she admitted Employer's Exhibits 1-5 and Director's Exhibits 1-93 into the record. Hearing Tr. at 16-25. Further, the Miner testified at the hearing, and Employer had an opportunity to cross-examine him. *Id.* at 28-47. The ALJ informed the parties she would close the record on February 7, 2020, and instructed them to submit their post-hearing briefs by March 9, 2020. *Id*. at 47-48. Employer submitted a post-hearing brief on March 9, 2020. The Miner died on January 17, 2021. Employer's Brief at 6. Thereafter, the ALJ issued her Decision and Order on May 25, 2021. Because Employer submitted evidence challenging entitlement to benefits, had the opportunity to cross-examine the Miner, and submitted a post-hearing

[3] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 28-29; Hearing Tr. at 6, 12.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 n.3; Hearing Tr. at 27.

brief, it had notice and opportunity to respond. *See Hatfield*, 556 F.3d at 478; *Lockhart*, 137 F.3d at 807. Thus, its due process argument fails.[5]

Modification

The 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). In considering whether a change in conditions has been established, the ALJ is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement that defeated an award in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). An ALJ may correct any mistake of fact, "including the ultimate issue of benefits eligibility." *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 954 (6th Cir. 1999); *Consol. Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). A party is not required to submit new evidence because an ALJ has the authority "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."[6] *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

[5] Employer contends Claimant's counsel's representation ended when the Miner died and counsel was precluded from taking "any further steps in connection with the matter unless and until [he or] she is authorized to do so by the deceased's duly qualified personal representative." Employer's Brief at 6. It also alleges the ALJ did not issue her Decision and Order within three months of the close of the record. *Id*. But Employer has not explained how these actions resulted in it being deprived of notice or opportunity to respond. Thus we are not persuaded by these arguments. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b).

[6] Contrary to Employer's argument, the Miner was not required to specifically indicate to the district director whether he was seeking modification based on a change in conditions or a mistake in a determination of fact. Employer's Brief at 12-13. An ALJ must determine whether a change in conditions or a mistake of fact has been established even where no specific allegation has been asserted. *Jessee v. Director, OWCP*, 5 F.3d 723, 724-26 (4th Cir. 1993). The ALJ is granted "broad discretion" in making a mistake

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 and comparable gainful 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). The ALJ must weigh all relevant supporting evidence against all relevant 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant established total disability based on the pulmonary function studies, arterial blood gas studies, medical opinions, and the evidence as a whole. 20 C.F.R. §718.204(b)(2)(i), (ii), (iv); Decision and Order on Modification at 9-30.[7] Employer does not allege any specific error in the ALJ's finding that the pulmonary function and blood gas study evidence establishes total disability. Thus we affirm it. *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §802.211(b).

With respect to the medical opinions, the ALJ found Drs. Baker, Nader, Castle, Dahhan, and Rosenberg "all agree that [the Miner was] totally disabled," but disagree as to what caused his disability. Decision and Order on Modification at 29; 20 C.F.R. §718.204(b)(2)(iv). Employer does not dispute that all the doctors opined the Miner was totally disabled. Thus we affirm the ALJ's finding. *Skrack*, 6 BLR at 1-711.

Instead, Employer takes issue with the ALJ's finding that the Miner's work "entailed heavy labor," arguing she erred in allowing the Miner to testify about the exertional requirements of his usual coal mine employment even though ALJ Odegard had already found such work was "mostly moderate – but sometimes heavy" in her prior

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of fact finding; "[t]here is no need for a smoking-gun factual error, changed conditions, or startling new evidence." *Consol. Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994).

[7] The ALJ found there is no evidence the Miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order on Modification at 13.

decision. Employer's Brief at 7-13. According to the Employer, the ALJ was required to make a threshold finding that modification would render justice under the Act prior to addressing the merits and Claimant's alleged bad faith in filing for modification should have prevented her from reaching the merits in this case. *Id.* at 9; *see Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 327- 28 (4th Cir. 2012) (discussing justice under the Act); *Sharpe v. Dir., OWCP* [*Sharpe I*], 495 F.3d 125, 132-33 (4th Cir. 2007) (same).

We disagree. While *Sharpe I* held an ALJ must consider justice under the Act before ultimately granting *the relief* requested in a modification petition, nothing in *Sharpe I* or *Sharpe II* establishes that an ALJ must make the determination at the outset, before *considering the merits* of the petition. While it might make sense to make a threshold determination in cases of obvious bad faith, it does not follow that a threshold determination is appropriate in cases where there is no indication of improper motive. Rather, because accuracy is a relevant factor, it follows that an ALJ must consider the evidence and render findings on the merits to properly assess whether modification is warranted. *See* 65 Fed. Reg. at 79,920, 79,975 (Dec. 20, 2000) (rejecting limits on modification because Congress's overriding concern in enacting the Act was to ensure miners who are totally disabled due to pneumoconiosis arising out of coal mine employment receive compensation); *Sharpe II*, 692 F.3d at 330 (search for "justice under the Act" should be guided, first and foremost, by the need to ensure accurate benefits distribution).

Contrary to Employer's argument, there is no indication of bad faith here or any indication that Claimant was motivated by anything other than a desire to correct what Clamant saw as inaccuracies in ALJ Odegard's original decision. The ALJ thus was not required to consider the question prior to considering the merits. *Sharpe II*, 692 F.3d at 330. And given the ALJ's broad discretion in considering modification requests, her duty to consider all relevant evidence, and her authority to base her decision on even wholly new evidence, we hold that the ALJ did not abuse her discretion in admitting the Miner's testimony or err in rendering a finding on the exertional requirements of his usual coal mine work. 30 U.S.C. §923(b) (ALJ must consider all relevant evidence); *O'Keeffe*, 404 U.S. at 256; *Worrell*, 27 F.3d at 230; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc) (ALJs exercise broad discretion in resolving procedural and evidentiary matters); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

While Employer also alleges the Miner's testimony about his job's exertional requirements is not credible because it "departed from the statements [he] made to ALJ Odegard," Employer has not identified how his testimony was conflicting or how such alleged inconsistency undermines the ALJ's discretion to credit it. Employer's Brief at 14; *see Rowe*, 710 F.2d at 255 (ALJ is granted broad discretion in evaluating the credibility of

the evidence, including witness testimony); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017). Nor has it identified a meaningful difference between the ALJ's finding that the Miner's job "entailed heavy labor" and ALJ Odegard's earlier finding that it was at least "sometimes heavy." Decision and Order on Modification at 9; Director's Exhibit 83 at 6; *see Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991) (in evaluating the exertional requirements of a miner's usual coal mine employment, an ALJ must determine the exertional requirements of the most difficult job the miner performed).

Finally, Employer has not explained how the errors it alleges with respect to the exertional requirements of the Miner's job make a difference in her total disability finding insofar as they do not undermine the qualifying pulmonary function or arterial blood gas testing, and all the physicians found him totally disabled. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.204(b)(2) (qualifying evidence under any category "shall establish a miner's total disability" absent "contrary probative evidence").

We thus affirm her finding that the Miner was totally disabled. *See Shedlock*, 9 BLR at 1-198; 20 C.F.R. §718.204(b)(2). Consequently, we affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal[8] nor clinical pneumoconiosis,[9] or that "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); *Minich v. Keystone*

[8] "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).

[9] "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).

Coal Mining Corp., 25 BLR 1-149, 1-150 (2015). The ALJ found Employer failed to establish rebuttal by either method.[10]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did 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*, 25 BLR at 1-155 n.8. The Sixth Circuit holds this standard requires Employer to show the miner's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

The ALJ considered the opinions of Drs. Castle, Dahhan, and Rosenberg that the Miner did not have legal pneumoconiosis.[11] All three doctors opined the Miner had a moderately severe obstructive impairment due to cigarette smoking and airway remodeling caused by bronchospasm. Employer's Exhibits 3-5. The ALJ found their opinions entitled to little weight because they did not "persuasively eliminate the effects of [the Miner's] thirty years of coal mine dust exposure in the development of his pulmonary or respiratory impairment." Decision and Order on Modification at 35. Thus she found Employer did not meet its burden of disproving legal pneumoconiosis. *Id.*

Employer initially contends the ALJ applied the wrong legal standard on the issue of rebuttal of legal pneumoconiosis. Employer's Brief at 16-17. Contrary to Employer's argument, the ALJ correctly found Employer has the burden to disprove legal pneumoconiosis. Decision and Order on Modification at 31. She recognized legal pneumoconiosis is defined as "any chronic lung disease or impairment that arises from coal mine employment. '[A] disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'" *Id*., *quoting* 20

[10] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order on Modification at 10.

[11] Drs. Baker and Nader diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD), hypoxemia, and chronic bronchitis due to tobacco smoking and coal mine dust exposure. Director's Exhibit 8; Claimant's Exhibit 2.

C.F.R. §718.201(a)(2), (b); *see Minich*, 25 BLR at 1-155 n.8. Moreover, she discredited the opinions of Employer's experts because she found they are not well-reasoned as to why they excluded coal mine dust as a cause of the Miner's impairment, not because they failed to meet a heightened legal standard. *See Young*, 947 F.3d at 405; *Groves*, 761 F.3d at 600; Decision and Order on Modification at 35-37.

We disagree with Employer that the ALJ erred in finding their opinions unpersuasive. All three doctors cited the Miner's elevated carboxyhemoglobin levels and use of long-acting bronchodilator medication as a basis to conclude his obstructive impairment was caused by the effects of cigarette smoking and asthma associated with bronchospasms. Employer's Exhibits 3-5. The ALJ permissibly found that even assuming cigarette smoking and bronchospasm are more likely the cause of the Miner's obstructive impairment, none of the doctors persuasively explained why his impairment was not also significantly related to, or substantially aggravated by, coal mine dust exposure in light of the additive effects of cigarette smoking and coal mine dust exposure. *See Young*, 947 F.3d at 405; *Crisp*, 866 F.2d at 185; *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017); 65 Fed. Reg. at 79,941; Decision and Order on Modification at 35-37.

Because the ALJ permissibly discredited Drs. Castle's, Dahhan's, and Rosenberg's opinions,[12] the only opinions supportive of Employer's burden on rebuttal, we affirm her finding Employer did not disprove legal pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 37, 41. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer did not rebut the presumption by establishing "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis

[12] We need not address Employer's argument that the ALJ erred in determining the length of the Miner's smoking history. Employer's Brief at 15-16. Any error in her finding is harmless given our affirmance of her rationale for discrediting the physicians' opinions independent of a finding regarding the length of the Miner's smoking history. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[13] As Drs. Baker and Nader diagnosed legal pneumoconiosis, their opinions do not support Employer's burden to disprove the disease; we therefore need not address Employer's contentions regarding the ALJ's consideration of their opinions. *Larioni*, 6 BLR at 1-1278; Employer's Brief at 15-16.

as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Modification at 41-42. Because Employer raises no specific allegations of error regarding the ALJ's findings on disability causation, we affirm her determination that Employer failed to establish no part of the Miner's respiratory or pulmonary total disability was due to legal pneumoconiosis. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Modification at 41-42. We therefore 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).

Justice Under the Act

Finally, Employer argues the ALJ erred in finding that granting modification renders justice under the Act because the ALJ abused her discretion by applying the wrong legal standard in assessing modification. Employer's Brief at 8-13. Employer also asserts the ALJ should have given greater weight to the factors of diligence, motive, and quality of evidence than to accuracy. *Id.* To the extent we have not already addressed Employer's contentions above, we disagree.

Assessing a request for modification is committed to the broad discretion of the ALJ. *O'Keeffe*, 404 U.S. at 256. The party opposing modification, therefore, bears the burden of establishing the ALJ committed an abuse of discretion. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

The ALJ properly applied the factors relevant to determining whether granting modification renders justice under the Act. Decision and Order on Modification at 42. Contrary to Employer's argument, she permissibly determined that because the evidence established the Miner's entitlement to benefits, "reopening this claim on modification would satisfy the need for accuracy." Decision and Order on Modification at 42; *see Hilliard*, 292 F.3d at 546. She also permissibly found Claimant demonstrated that reopening this claim "would not be futile." *Id*.

As the ALJ did not abuse her discretion, we affirm her determination that granting modification renders justice under the Act. *See O'Keeffe*, 404 U.S. at 255; *Worrell*, 27 F.3d at 230; *Branham*, 20 BLR at 1-34; Decision and Order on Modification at 42. Consequently, we affirm her award of benefits.

Accordingly, the ALJ's Decision and Order Awarding Claimant's Request for Modification is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge