

U.S. Department of Labor

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



BRB No. 22-0185 BLA

RANDY G. HOOVER)

Claimant-Petitioner)

v.)

DATE ISSUED: 01/19/2023

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR)

Respondent)

DECISION and ORDER

Appeal of the Order Granting Director’s Motion for Reconsideration and Amended Decision and Order Denying Benefits on Modification 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.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers’ Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank’s Order Granting Director’s Motion for Reconsideration and Amended Decision and Order Denying Benefits on Modification (2020-BLA-05655) 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 second request for modification of a miner’s claim filed on April 22, 2015.

On October 4, 2016, ALJ Natalie A. Appetta issued a Decision and Order Denying Benefits. The ALJ credited Claimant with at least thirty-seven years of underground coal mine employment but found he did not establish a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant 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). Considering entitlement under 20 C.F.R. Part 718, she found Claimant established clinical and legal pneumoconiosis, but failed to establish total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(c). She therefore denied benefits.

Claimant timely requested modification of the decision denying benefits and submitted new evidence. 20 C.F.R. §725.310; Director's Exhibits 38, 40. The district director denied Claimant's request for modification. Director's Exhibit 41. Claimant requested a hearing, and the district director forwarded the case to the Office of Administrative Law Judges (OALJ). Director's Exhibits 44, 45. Judge Appetta scheduled a hearing for October 16, 2018.² Claimant, however, requested a decision on the record because he had previously testified at a deposition and had no further evidence to submit. Director's Exhibit 54. As the Director, Office of Workers' Compensation Programs (the Director), did not object, Judge Appetta granted Claimant's request and cancelled the October 16, 2018 hearing.

In her Decision and Order on Modification Denying Benefits dated January 9, 2019, Judge Appetta found the evidence did not establish a totally disabling respiratory or pulmonary impairment and therefore Claimant failed to establish a mistake in a determination of fact or a change in conditions. 20 C.F.R. §725.310. As she found no basis for modification, she again denied benefits.

On January 2, 2020, Claimant filed a second timely request for modification. Director's Exhibit 63. The district director forwarded Claimant's modification request to the OALJ and the case was assigned to Judge Swank (the ALJ), who held a hearing on September 10, 2021. In his Decision and Order Awarding Benefits on Modification dated November 30, 2021, the ALJ found Claimant established forty years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R.

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

² ALJ Appetta originally scheduled the hearing for August 30, 2018, but subsequently rescheduled it for October 16, 2018. Director's Exhibits 52, 53.

§718.204(b)(2). Thus, he found Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. He further found the Director did not rebut the presumption and awarded benefits.

On February 4, 2022, the Director filed a Motion for Reconsideration, arguing the ALJ erred in finding Claimant totally disabled. On February 14, 2022, the ALJ issued an Order Granting Director's Motion for Reconsideration and an Amended Decision and Order Denying Benefits on Modification, the subjects of the current appeal. He reiterated his prior determination that Claimant established forty years of underground coal mine employment but found Claimant did not establish a totally disabling respiratory impairment, and thus, could not invoke the Section 411(c)(4) presumption. Considering entitlement under 20 C.F.R. Part 718, he found Claimant established clinical and legal pneumoconiosis, but failed to establish total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(c). Thus, he denied benefits.

On appeal, Claimant argues the ALJ erred in granting the Director's Motion for Reconsideration as it was untimely filed. The Director agrees with Claimant that his motion was untimely and therefore urges the Benefits Review Board to vacate the ALJ's February 14, 2022 decision denying benefits and reinstate his November 30, 2021 decision awarding benefits.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Orders if they are 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'Keefe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

The applicable regulation governing filing deadlines for reconsideration in federal black lung claims is 20 C.F.R. §725.479(b), which provides a thirty-day time limit within which a party may seek reconsideration of an ALJ's Decision and Order.⁴ 20 C.F.R.

³ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Hearing Transcript at 11.

⁴ The regulation at 20 C.F.R. §725.479(b) states:

Any party may, within 30 days after the filing of a decision and order under [20 C.F.R.] §725.478, request a reconsideration of such decision and order by the administrative law judge. The

§§725.479(b), 802.206(b)(2); *see Amax Coal Co. v. Director, OWCP [Oxendine]*, 892 F.2d 578, 580 (7th Cir. 1989).

The ALJ erred in finding the Director timely filed his Motion for Reconsideration. Claimant's Brief at 3-4; Director's Response letter at 1-2. The ALJ issued his Decision and Order Awarding Benefits on Modification on November 30, 2021. The Director filed his motion for reconsideration on February 4, 2022,⁵ well beyond the thirty-day time limit for the Director to request reconsideration of the ALJ's November 30, 2021 Decision and Order. As the Director concedes, his Motion for Reconsideration was untimely filed.⁶ *See* 20 C.F.R. §§725.479(b), 802.206(b)(2). We therefore vacate the ALJ's granting of the Director's reconsideration request and his Decision and Order on Modification Denying Benefits.

Accordingly, the ALJ's Amended Decision and Order Denying Benefits on Modification and Order Granting Director's Motion for Reconsideration are vacated and

procedures to be followed in the reconsideration of a decision and order shall be determined by the administrative law judge.

20 C.F.R. §725.479(b).

⁵ On reconsideration, the ALJ incorrectly stated the Director filed his Motion for Reconsideration on January 4, 2022. Amended Decision and Order at 2. Nevertheless, as the Director concedes, he filed his Motion for Reconsideration on February 4, 2022. Director's Response Letter at 1 n.1.

⁶ The Director correctly notes the ALJ did not acknowledge the lateness of his filing nor did the ALJ cite or discuss any factors which would authorize consideration of the late motion or excuse its untimeliness. *See generally* Order Granting Director's Motion for Reconsideration and an Amended Decision and Order Denying Benefits on Modification; *see also* Director's Response Letter.

this case is remanded for reinstatement of the ALJ's November 30, 2021 Decision and Order Awarding Benefits on Modification.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge