U.S. Department of Labor

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

BRB No. 20-0310 BLA

FONSO J. MCINTOSH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY CARBON PROCESSING COMPANY	)	
	)	
	)	
and	)	DATE ISSUED: 07/19/2021
	)	
LIBERTY MUTUAL MIDDLE MARKET	)	
	)	
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 on Modification Awarding Benefits and the Order Denying Request for Reconsideration of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Reynolds), Norton, Virginia, for Claimant.

William A. Lyons (Lewis & Lewis Law Firm), Hazard, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Steven D. Bell's Decision and Order on Modification Awarding Benefits and Order Denying Request for Reconsideration (2018-BLA-05946) on a claim filed on October 29, 2012 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In an October 24, 2017 Decision and Order Denying Benefits, Administrative Law Judge Joseph E. Kane credited Claimant with nineteen years of underground coal mine employment but found he failed to establish that he is totally disabled. Director's Exhibit 92. Thus, Judge Kane 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); Director's Exhibit 92. Because Claimant failed to establish total disability, an essential element of entitlement, Judge Kane denied benefits. Director's Exhibit 92. Claimant timely requested modification, Director's Exhibit 98, and the case was assigned to Judge Bell (the administrative law judge), whose decision is the subject of this appeal.

The administrative law judge credited Claimant with at least nineteen years of coal mine employment and found Claimant established total disability at 20 C.F.R. §718.204(b)(2). Thus, he found Claimant established a mistake in a determination of fact, 20 C.F.R. §725.310, and invoked the Section 411(c)(4) presumption. He further found Employer did not rebut the presumption and, after determining that granting modification would render justice under the Act, awarded benefits.

On appeal, Employer contends the administrative law judge improperly invoked the Section 411(c)(4) presumption based on an erroneous finding that Claimant is totally disabled. Employer also argues he erred in finding it did not rebut the presumption. 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

[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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

evidence, and in accordance with applicable law.[2] 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).

An administrative law judge 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). When a request for modification is filed, the administrative law judge may correct any mistake, "including the ultimate issue of benefits eligibility." *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

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). The administrative law judge 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). 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 administrative law judge considered the results of eleven pulmonary function studies that the parties initially submitted before Judge Kane. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Modification at 8-10. The November 30, 2010, September 6, 2012, November 29, 2012, April 4, 2013, March 6, 2014, April 10, 2014, April 2, 2015, and May 4, 2015 studies produced qualifying values,[3] while the February 22, 2011, February 23, 2012, and December 4, 2014 studies did not. Directors Exhibits 11, 13; Claimant's Exhibits 1, 3; Employer's Exhibits 8, 13.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant last performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 10.

[3] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

Judge Kane found the November 30, 2010 and March 6, 2014 pulmonary function studies invalid based on the opinions of Drs. Dahhan and Fino. Director's Exhibit 92 at 9. He also found the validity of the November 29, 2012 and May 4, 2015 testing inconclusive based on the contradictory opinions of Drs. Forehand, Werchowski, Dahhan, and Fino. *Id.* at 9-10. Judge Kane further found the validity of the September 6, 2012, April 4, 2013, April 10, 2014, and April 2, 2015 testing inconclusive because it was not clear whether the testing was performed during a period of exacerbation. *Id.* Judge Kane found all of the qualifying pulmonary function studies to be of inconclusive validity and thus did not establish total disability. *Id.* at 10.

The administrative law judge found no mistake of fact regarding the validity of the November 30, 2010, March 6, 2014, and May 4, 2015 testing. Decision and Order at 8-11. Contrary to Judge Kane's finding, however, he credited Dr. Forehand's opinion that the November 29, 2012 study is valid. Decision and Order at 10; Director's Exhibit 46. The administrative law judge further disagreed with Judge Kane's conclusion that the validity of the September 6, 2012, April 4, 2013, April 10, 2014, and April 2, 2015 testing is inconclusive, noting that there is no evidence these studies were performed during periods of exacerbation and no evidence of other factors affecting their reliability. Decision and Order at 9. Finally, he credited the opinions of the administering technician and Dr. Sikder that the April 2, 2015 study was valid over that of Dr. Dahhan that it is not. *Id*. Because he found the September 6, 2012, November 29, 2012, April 4, 2013, April 10, 2014, and April 2, 2015 studies are valid and produced qualifying values, he concluded the pulmonary function study evidence establishes total disability.[4] *Id.*; Director's Exhibit 65; Employer's Exhibit 11.

The administrative law judge also considered the medical opinions of Drs. Forehand and Werchowski that Claimant is totally disabled and those of Drs. Dahhan and Fino that he is not.[5] Director's Exhibits 11-13, 25, 46; Claimant's Exhibit 1; Employer's Exhibits 9-12. He discounted the opinions of Drs. Dahhan and Fino because they based their opinions, in part, on their conclusion that the November 29, 2012 pulmonary function study is invalid, contrary to his finding that the study is valid. Decision and Order at 10; Order

[4] The administrative law judge further noted he would find the pulmonary function study evidence established total disability even if the April 2, 2015 study were invalid. Decision and Order at 9 n.4.

[5] The administrative law judge found no mistake in Judge Kane's determination that Claimant did not establish total disability based on the arterial blood gas study evidence, Director's Exhibit 92 at 10, and he further found there is no evidence of cor pulmonale with right-sided heart failure. 20 C.F.R. §718.204(b)(2)(ii)-(iii); Decision and Order at 9.

Denying Reconsideration at 3-4; Employer's Exhibits 10-12. The administrative law judge gave the greatest weight to Dr. Forehand's opinion because it is consistent with his finding the November 29, 2012 pulmonary function study valid and with Dr. Sikder's opinion and treatment notes which establish that Claimant has severe chronic obstructive pulmonary disease requiring supplemental oxygen.[6] Decision and Order at 11; Director's Exhibits 11, 25, 46, 65. He thus found the medical opinion evidence establishes total disability. Decision and Order at 11. Considering the evidence as a whole, he concluded Claimant established the existence of a totally disabling respiratory or pulmonary impairment and invoked the Section 411(c)(4) presumption. *Id.*

Employer asserts the administrative law judge erred in reconsidering whether the pulmonary function study evidence establishes total disability because Claimant did not specifically challenge that issue in his request for modification. Employer's Brief at 11. It further asserts he erred by not considering "the entire body of prior evidence" in finding Claimant established total disability. *Id.* at 11-12. We disagree.

Contrary to Employer's assertion, Claimant need not specify the precise basis for modification or submit new evidence. *See O'Keeffe*, 404 U.S. at 256. Claimant "may simply allege the ultimate fact [of the denial of benefits] . . . was mistakenly decided." *Worrell*, 27 F.3d at 230; *Nataloni*, 17 BLR at 1-84. "If a claimant merely alleges that the ultimate fact (disability due to pneumoconiosis) was wrongly decided, the [adjudicator] may, if he chooses, accept this contention and modify the final order accordingly." *Worrell*, 27 F.3d at 230. Moreover, an administrative law judge is not required to adopt the original analysis of the evidence from any prior decision. He must consider, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact. 20 C.F.R. §725.310(c). Thus, the administrative law judge acted within his discretion in reevaluating the pulmonary function study evidence to determine if Claimant established a mistake in fact. *See Banks* v. *Chicago Grain Trimmers Assn.*, 390 U.S. 459, 464 (1968); *O'Keeffe*, 404 U.S. at 256; *Worrell*, 27 F.3d at 230; 20 C.F.R. §725.310.

We further reject Employer's general assertion that the administrative law judge "selectively review[ed]" the evidence and did not consider the totality of the record on the issue of total disability. Employer's Brief at 11-12. It is well established that a party

[6] The administrative law judge acknowledged that "a physician need not phrase his or her opinion in terms of 'total disability' to support a finding of total disability under 20 C.F.R. Section 718.204(b)(2)(iv)." Therefore, he permissibly declined to follow Judge Kane in rejecting medical opinions, like those of Dr. Sikder, that do not use the specific terminology of "total disability." Decision and Order at 10; *see Scott* v. *Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995); *McMath* v. *Director, OWCP*, 12 BLR 1-6 (1988).

challenging the administrative law judge's decision must demonstrate with some degree of specificity the manner in which the administrative law judge's decision is unsupported by the facts or contrary to law. 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Aside from vaguely asserting that the administrative law judge selectively analyzed the evidence, Employer offers no explanation and points to no evidence to substantiate its argument.

As the trier-of-fact, the administrative law judge has broad discretion to weigh the evidence, draw inferences, and determine credibility. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Employer essentially asks the Board to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). We therefore affirm the administrative law judge's finding that Claimant established a totally disabling respiratory or pulmonary impairment and a mistake in a determination of fact. *See Worrell*, 27 F.3d at 230; *Anderson*, 12 BLR at 1-112; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); 20 C.F.R. §725.310; Decision and Order at 11.

Because we affirm the administrative law judge's finding that Claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), we affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i)-(iii); Decision and Order at 11.

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 nor clinical pneumoconiosis,[7] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in

[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). "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).

[20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that Employer failed to establish rebuttal by either method.[8]

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 Corp*., 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit holds this standard requires Employer show that 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).

Employer relies on the opinions of Drs. Fino and Dahhan, both of whom opined Claimant does not have a respiratory or pulmonary impairment related to coal mine dust exposure. Director's Exhibits 12-13; Employer's Exhibits 9-12. The administrative law judge found their opinions inadequately reasoned because they did not explain why Claimant's history of coal mine dust exposure did not contribute to his impairment. Decision and Order at 15.

Employer first argues the administrative law judge erred in "plac[ing] the entire burden on employer's experts to disprove the requirements for benefit eligibility, rather than weighing the evidence under the preponderance of the evidence standard." Employer's Brief at 15. Contrary to Employer's assertion, the administrative law judge applied the proper legal standard. As the administrative law judge correctly noted, once the Section 411(c)(4) presumption is invoked, the burden shifts to Employer to establish "that Claimant does not have clinical or legal pneumoconiosis, or that no part of his respiratory or pulmonary total disability was caused by pneumoconiosis." Decision and Order at 12; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013). He properly considered whether Employer met its burden by a preponderance of the evidence. Decision and Order 4, 11, 12, 15.

Employer next generally asserts that legal pneumoconiosis was not established and that, "even if afforded by presumption, it was overcome." Employer's Brief at 12-16. However, Employer raises no specific challenge to the administrative law judge's

[8] The administrative law judge found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 13.

determinations that the opinions of its medical experts, Drs. Dahhan and Fino, were not credible.[9] We therefore affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge next considered whether Employer established "no part of [Claimant'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). He permissibly discredited the disability causation opinions of Drs. Dahhan and Fino because they did not diagnose legal pneumoconiosis, contrary to his finding Employer failed to disprove Claimant has the disease. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d

[9] Employer asserts that it "put forth the preponderance of the evidence on legal cwp and thus overcame" the Section 411(c)(4) presumption and that the administrative law judge "afforded less weight to the Employer's experts on the issue of legal cwp because they reached the same conclusion" as Judge Kane. Employer's Brief at 14, 16. Employer does not specifically identify, however, any alleged error in the administrative law judge's credibility determinations.

Cir. 2004); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Ogle*, 737 F.3d at 1074; Decision and Order at 30-31. Employer raises no specific challenge to the administrative law judge's credibility determinations, *see Skrack*, 6 BLR at 1-711, and we therefore affirm his conclusion that Employer failed to disprove disability causation. 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order on Modification Awarding Benefits and his Order Denying Request for Reconsideration are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge