U.S. Department of Labor

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

BRB No. 21-0324 BLA

TERESA LILLY (o/b/o VIRGIL R. LILLY)	)	
Claimant-Respondent	)	
v.	)	
RANGER FUEL CORPORATION	)	DATE ISSUED: 7/28/2022
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 Denying Modification of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

Employer appeals Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Denying Modification (2019-BLA-05152) rendered on a claim filed on November 6, 2008, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In a May 4, 2012 decision awarding benefits, ALJ Michael P. Lesniak found the Miner had twelve years of coal mine employment and established total disability due to pneumoconiosis under 20 C.F.R. Part 718. Director's Exhibit 59. On June 1, 2012,

Employer appealed the award to the Benefits Review Board, and the Board affirmed ALJ Lesniak's decision on April 25, 2013. Director's Exhibits 60; *see Lilly v. Ranger Fuel Corp.*, BRB No. 12-0447 BLA (Apr. 25, 2013) (unpub.). On July 3, 2013, Employer requested modification, submitting new evidence and alleging a mistake in determination of fact. Director's Exhibit 69. The district director denied Employer's request on December 17, 2013, and Employer requested a hearing before an ALJ on January 16, 2014. Director's Exhibits 75, 76. The case was then assigned to ALJ Timlin (the ALJ). March 19, 2019 Notice of Hearing and Pre-Hearing Order.

In her decision on modification that is the subject of this appeal, the ALJ found Employer's new x-ray evidence violates the evidentiary limitations and Employer failed to establish a mistake in determination of fact in ALJ Lesniak's decision. Decision and Order at 10 (citing 20 C.F.R. §§725.310(b), 725.414(a)(2)(ii)), 18. She further found granting Employer's request for modification would not render justice under the Act. Accordingly, the ALJ denied Employer's request for modification. 20 C.F.R. §725.310.

On appeal, Employer argues the ALJ erred in delaying her evidentiary ruling to exclude the x-ray evidence Employer proffered in support of modification until issuing her Decision and Order and in failing to find it established a mistake in a determination of fact sufficient to warrant modification of ALJ Lesniak's award of benefits. Employer further argues the ALJ erred in concluding that granting its request for modification would not render justice under the Act. Neither Claimant[1] nor the Director, Office of Workers' Compensation Programs, filed 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 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 Assocs., Inc.*, 380 U.S. 359 (1965).

Where an employer seeks modification to terminate an award of benefits, it bears the burden to establish a change in conditions or a mistake of fact with regard to at least one element of entitlement. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139

[1] The Miner died on November 7, 2011. Director's Exhibit 57. Claimant is the Miner's widow and is pursuing this claim on his behalf. Director's Exhibits 3, 4.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine work in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1 at 206-207, 238.

(1997); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-25 (4th Cir. 1993); *D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33, 1-38 (2008); 20 C.F.R. §725.310(a). In assessing whether there was a mistake in a determination of fact, the ALJ is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence. *See Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). The ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *see Jessee*, 5 F.3d at 725. Thus, the 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).

Exclusion of Evidence

On modification, the parties "are each entitled to submit no more than one additional chest X-ray interpretation, one additional pulmonary function test, one additional arterial blood gas study, and one additional medical report in support of its affirmative case 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). The evidentiary limitations of 20 C.F.R. §725.414 apply to modification proceedings, and work in tandem with the evidentiary limitations governing the submission of new evidence on modification at 20 C.F.R. §725.310(b). *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007). On modification, therefore, "each party may submit its full complement of medical evidence allowed by 20 C.F.R. §725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit the additional medical evidence allowed by 20 C.F.R. §725.310(b)." *Id.* at 1-228.

In the initial claim proceedings before ALJ Lesniak, Employer submitted its full complement of x-ray evidence, which ALJ Lesniak weighed in conjunction with all of the designated x-ray evidence in finding that the preponderance of x-rays established clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).[3]

On modification, Employer sought to revise its prior designation of evidence by substituting for its initial proffer of Dr. Zaldivar's negative B reader reading of the May 6,

[3] In its June 23, 2011 Evidence Summary Form, Employer designated two negative readings of a May 6, 2009 x-ray as its affirmative evidence; two negative readings of a March 4, 2010 x-ray as its rebuttal evidence; and one rebuttal reading of the Department-sponsored February 3, 2009 x-ray. Director's Exhibit 50.

2009 x-ray the negative reading of Dr. Wiot, a dually qualified Board-certified radiologist and B reader. Director's Exhibit 50; Employer's July 29, 2019 Evidence Summary Form. It also offered, as new evidence in support of modification, an additional negative reading of the March 4, 2010 x-ray by Dr. Tarver, a dually-qualified radiologist. Director's Exhibit 54 at 3; Employer's Exhibits 5, 7; Employer's July 29, 2019 Evidence Summary Form; Dec. 19, 2019 Employer's Closing Brief at 5.

The ALJ found Employer's attempt to remove and redesignate x-ray evidence underlying ALJ Lesniak's decision "problematic" because "[t]he regulations do not permit this sort of substitution," and Employer designated two new affirmative x-ray interpretations (Dr. Wiot's interpretation of the May 6, 2009 x-ray and Dr. Tarver's interpretation of the March 4, 2010 x-ray) on modification where it was entitled to submit only one additional x-ray reading.[4] Decision and Order at 10. Despite finding one of Employer's new readings exceeds the evidentiary limitations, the ALJ did not make a ruling as to which one did so and would be excluded from consideration and inconsistently excluded both new readings from her mistake-in-fact analysis. *Id.* at 16, 18.

Contrary to Employer's contention, the ALJ properly found the regulations do not permit substitution of evidence that constituted the basis of the original award of benefits. *Rose*, 23 BLR at 1-228 (on modification, party may submit the full complement of medical evidence permitted by 20 C.F.R. §725.414 "to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed"). Therefore, as Employer submitted its full complement of x-ray readings before ALJ Lesniak, and as Claimant did not designate any new affirmative x-ray readings on modification, the ALJ properly determined Employer was permitted to submit only one additional x-ray reading on modification. *See* 20 C.F.R. §§725.310(b), 725.414; *Rose*, 23 BLR at 1-227.

Nevertheless, we agree with Employer's argument that the ALJ erred in excluding both of its proffered new x-ray readings within the context of her decision on the merits. Employer's Brief at 8. As Employer correctly asserts, the ALJ should have rendered her evidentiary ruling prior to issuing a decision. *See Preston v. Amherst Coal Co.*, 24 BLR 1-55, 1-63 (2008) (en banc) (consistent with principles of fairness and administrative efficiency underlying the evidentiary limitations, if the ALJ determines evidentiary limitations preclude consideration of proffered evidence, the ALJ should render her evidentiary rulings and allow parties to make good cause arguments under Section

[4] The ALJ explained there were no open slots for Employer to submit additional affirmative or rebuttal x-ray readings as Employer submitted the full complement of x-ray interpretations before ALJ Lesniak and Claimant did not submit any affirmative x-ray readings on modification. Decision and Order at 10.

725.456(b)(1) before issuing a decision); Decision and Order at 3, 10, 18; Employer's Brief at 8.

Mistake in a Determination of Fact

We also agree with Employer's argument that ALJ Timlin's ruling that evidence submitted on modification cannot establish a mistake in determination of fact in ALJ Lesniak's initial decision is contrary to law. Employer's Brief at 10-13. Employer correctly asserts new evidence submitted on modification may establish a mistake in determination of fact in the prior award.

Despite stating she would consider Employer's new evidence, "[e]videntiary limitations notwithstanding," Decision and Order at 11, the ALJ did not weigh the new evidence as if it were part of the record. Rather, in rejecting Employer's assertion that the new evidence, when considered in conjunction with the prior evidence already included in the record, shows ALJ Lesniak made a mistake in determination of fact because it shows the Miner did not have clinical pneumoconiosis, the ALJ stated:

> The undersigned does not agree with Employer. The newly submitted evidence does not establish that Judge Lesniak erred. Employer has only shown that *had* Judge Lesniak considered the record as presently constituted, he *may* have determined that Miner did not have clinical pneumoconiosis. Employer has not shown (nor even alleged) that Judge Lesniak made a mistake in determination of fact based on the evidence that was before him. Rather, what Employer is asking the undersigned to do is to set aside Judge Lesniak's analysis and conclusions because it has developed additional medical evidence. That is not the purpose of a request for modification.

Decision and Order at 18 (emphasis included).

Contrary to the ALJ's statements, the intended purpose of modification based on a mistake in fact is to vest the factfinder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe*, 404 U.S. at 257. Modification is a "de novo process" that amounts to a "new adjudication," where the factfinder is "in no way bound by the findings supporting the original [decision]." *Stanley*, 194 F.3d at 499. Further, a request for modification need not specify the precise basis for modification; rather, it "may simply allege the ultimate fact – disability due to pneumoconiosis – was mistakenly decided." *Jessee*, 5 F.3d at 725. Thus, "[o]nce a request for modification is filed, no matter the grounds stated, if any, the [ALJ] has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions." *Consolidation*

Coal Co. v. Worrell, 27 F.3d 227, 230 (6th Cir. 1994). Because the ALJ did not conduct a de novo review of the cumulative record, we vacate her finding that Employer did not establish a mistake in determination of fact. 20 C.F.R. §725.310; *see O'Keeffe*, 404 U.S. at 257; *Stanley*, 194 F.3d at 498-99; Decision and Order at 18.

Justice Under the Act

While an ALJ has the authority to reopen a case based on any mistake in fact, an ALJ's exercise of that authority is discretionary and requires consideration of competing equities in order to determine whether reopening the case will render justice under the Act. *Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 327- 28 (4th Cir. 2012); *Kinlaw v. Stevens Shipping & Terminal Co*., 33 BRBS 68, 72 (1999). In making that determination, the ALJ must consider several factors, including the need for accuracy, the quality of the new evidence, the moving party's diligence and motive, and whether a favorable ruling would still be futile. *Sharpe v. Dir., OWCP* [*Sharpe I*], 495 F.3d 125, 132-33 (4th Cir. 2007). The paramount concern in granting modification is whether the entitlement determination is accurate. *See Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547 (7th Cir. 2002). However, "the interest in finality rightly carries a great deal of weight" if the modification request is "belatedly made with an improper motive and without compelling new evidence." *Sharpe II*, 692 F.3d at 330. The ALJ has broad discretion in deciding whether modification is warranted. *Id.* at 335. Thus, the party opposing an ALJ's determination to grant or deny modification bears the burden of establishing the ALJ committed an abuse of discretion. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

As the ALJ predicated her analysis on her mistaken belief that newly submitted evidence on modification cannot establish a mistake in determination of fact, we agree with Employer's argument that we must vacate the ALJ's finding. *Sharpe II*, 692 F.3d at 328 (modification determination "guided by erroneous legal principals" constitutes an abuse of discretion).

Remand Instructions

On remand, the ALJ must allow Employer to designate one of its two proffered new x-ray readings as its modification evidence. 20 C.F.R. §725.310(b), *see Rose*, 23 BLR at 1-228. The ALJ properly determined Employer submitted its full complement of x-ray evidence under 20 C.F.R. §725.414(a)(3) when the case was pending before ALJ Lesniak; therefore, prior to issuing her decision on remand, she must provide Employer an opportunity to argue good cause supports admitting its second new additional x-ray reading on modification and must allow Claimant the opportunity to respond. 20 C.F.R. §§725.414(a), 725.456(b)(1); *see Preston*, 24 BLR at 1-63. With regard to the merits of

Employer's modification request, the ALJ must consider all evidence of record and determine whether Employer established a mistake in determination of fact with wholly new evidence, cumulative evidence, or upon further reflection of the evidence initially submitted. *O'Keeffe,* 404 U.S. at 256. If she finds Employer established a mistake in a determination of fact and therefore a basis for granting modification pursuant to 20 C.F.R. §725.310, she must evaluate, in accordance with the criteria set forth in *Sharpe I,* whether granting modification of the prior award would render justice under the Act. *See Sharpe I,* 495 F.3d at 132-33.[5] The ALJ must explain her findings in accordance with the Administrative Procedure Act (APA).[6]

[5] Notably, the ALJ stated she was required to make a "threshold" determination of whether granting modification would render justice under the Act prior to considering the modification petition on the merits. Decision and Order at 15 (citing *Sharpe I,* 495 F.3d at 128). However, while *Sharpe I* held an ALJ must consider the question before ultimately granting *the relief* requested in a modification petition, nothing in *Sharpe I* establishes an ALJ may 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).

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

Accordingly, the ALJ's Decision and Order Denying Modification is vacated, and the case is remanded to the ALJ for further consideration consistent with this decision.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge