U.S. Department of Labor

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

BRB No. 19-0264 BLA

ROBERT S. WOOD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVERY COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 06/25/2020
AMERI HEALTH CASUALTY SERVICES	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Denying 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.

Paul Paterson (Mascelli & Paterson), Scranton, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Modification Denying Benefits (2018-BLA-05305) of Administrative Law Judge Drew A. Swank rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of a claim filed on January 30, 2014.

In the initial decision, the administrative law judge credited claimant with 14.99 years of coal mine employment.[1] He therefore found claimant could not invoke the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). Considering claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found the evidence established legal pneumoconiosis[3] and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a), 718.204(b)(2). However, he found claimant's total disability was not due to legal pneumoconiosis, 20 C.F.R. §718.204(c), and denied benefits.

Claimant timely requested modification. 20 C.F.R. §725.310; Director's Exhibit 31. In a Decision and Order on Modification dated February 5, 2019, the administrative law judge determined consideration of claimant's request for modification would render justice under the Act. After reconsidering claimant's new testimony and evidence regarding the length of his coal mine employment, the administrative law judge credited claimant with 13.96 years of coal mine employment. He therefore again found claimant could not invoke the Section 411(c)(4) presumption. Considering the claim without the benefit of the Section 411(c)(4) presumption, the administrative law judge again found the existence of legal pneumoconiosis and a totally disabling respiratory or pulmonary

[1] Claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The administrative law judge found the evidence did not establish clinical pneumoconiosis. 20 C.F.R. §718.202(a).

impairment. He found claimant did not establish total disability due to legal pneumoconiosis, however, and denied benefits.

On appeal, claimant contends the administrative law judge erred in crediting him with less than fifteen years of coal mine employment and therefore erred in determining he could not invoke Section 411(c)(4) presumption. Claimant also argues the administrative law judge erred in finding the evidence did not establish total disability due to legal pneumoconiosis. Employer and its carrier (employer) respond in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Because they are unchallenged on appeal, we affirm the administrative law judge's findings of legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4), 718.204(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order on Modification Denying Benefits if it is rational, supported by substantial evidence and in accordance with applicable law. 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, 361-62 (1965).

The 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, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497 (4th Cir. 1999); *see Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 954 (6th Cir. 1999); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Section 411(c)(4) Presumption

The administrative law judge's determination of the length of coal mine employment is relevant to whether claimant can invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Claimant bears the burden of proof to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination on length of coal mine employment based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In his initial decision, the administrative law judge credited claimant with 14.99 years of coal mine employment. Decision and Order at 4. Although the administrative law

judge indicated his finding was based upon "a totality of the evidence," he did not explain the basis for his determination.[4] Decision and Order at 4.

In support of his request for modification, claimant submitted new evidence alleging additional coal mine employment with Apollo Paving for one to three months in 1973. In his Decision and Order on Modification, the administrative reconsidered the length of claimant's coal mine employment.

For claimant's pre-1978 coal mine employment, the administrative law judge relied on claimant's Social Security Administration (SSA) earnings records and permissibly credited claimant with coal mine employment for every quarter of a year in which he had earnings from coal mine operators that exceeded $50.00. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); Decision and Order on Modification at 8. Using this method of calculation, the administrative law judge found claimant's coal mine employment earnings exceeded $50.00 for three quarters in 1974 and all four quarters for the years 1975 to 1977, for a total of 3.75 years. *Id.*; Director's Exhibit 6.

Addressing claimant's coal mine employment from 1978 onward, the administrative law judge noted claimant's SSA earnings records indicated he was continuously employed by a single employer during two periods of time: from 1978 to 1981 with Pike Coal and from 1986 to 1989 with Avery Coal. Decision and Order on Modification at 8. Because the administrative law judge determined claimant worked for at least 125 days during each of these years, he credited claimant with 8.0 years of coal mine employment for these time periods. *Id.*

Where the evidence did not establish the exact beginning and ending dates of claimant's post-1978 employment, the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii).[5] Decision and Order on Modification at 9. He divided

[4] The administrative law judge apparently based his determination on a finding of 14.99 years of coal mine employment set forth in the district director's Proposed Decision and Order. *See* Director's Exhibit 21.

[5] 20 C.F.R. § 725.101(a)(32)(iii) provides if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS data is reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*.

claimant's yearly income found in claimant's SSA earnings records by the coal mine industry's average daily earnings for that year as set forth in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual* to determine the number of days claimant worked. *Id.* He then divided the number of days claimant worked by an estimated 250-day work year divisor. *Id*. Applying this method of calculation, he found claimant established 0.79 years for 1982, 0.53 years for 1983, 0.62 years for 1984, and 0.13 for 1985, for an additional 2.07 years of coal mine employment. *Id.* Thus, based on claimant's previously submitted evidence, the administrative law judge credited claimant with a total of 13.82 years of coal mine employment. *Id.*

The administrative law judge next considered claimant's new evidence, alleging an additional three months of coal mine employment with Apollo Paving in 1973. Decision and Order on Modification at 9-10. Giving claimant the benefit of the doubt that he worked three days a week for three months hauling coal for Apollo Paving in 1973, the administrative law judge credited claimant with 36 days of work for Apollo Paving. *Id.* Dividing the 36 days worked by a 250-day work year divisor, the administrative law judge found claimant entitled to an additional 0.14 year of coal mine employment, for a total of 13.96 years of coal mine employment. *Id.*

Claimant contends the administrative law judge was required by collateral estoppel to add the 0.14 year of coal mine employment that he found established by the new evidence to the 14.99 years of coal mine employment that he credited in the initial decision. We disagree. On modification, an administrative law judge 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." *O'Keeffe*, 404 U.S. at 256. Moreover, because the issue of the length of claimant's coal mine employment was not adjudicated in any previous claim, the doctrine of collateral estoppel is not applicable.[6] *Howard Hess Dental Lab, Inc. v. Dentsply Int'l Inc.*, 602 F.3d 237, 247-48 (3d Cir. 2010).

Claimant also argues the administrative law judge's "analysis is inconsistent as he applies different methods to different years of [c]laimant's employment." Claimant's Brief at 4-5. Alleging that records indicate he worked for more than 125 days during each year from 1974 to 1977, claimant contends the administrative law judge should have credited him with a total of 4.0 years of coal mine employment during this period, not the 3.75 years

[6] Contrary to claimant's contention, employer's failure to challenge the administrative law judge's initial finding of 14.99 years of coal mine employment did not render it "final." Claimant's Brief at 4. Moreover, because the administrative law judge's finding of 14.99 years of coal mine employment was not adverse to employer, it had no incentive to challenge this finding.

he credited. *Id.* Claimant, however, has not explained how the additional 0.25 years of coal mine employment (13.96 + 0.25 = 14.21) would assist him in establishing the fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (dismissing error as harmless when appellant fails to explain how "error to which he points could have made any difference"). We therefore affirm the administrative law judge's finding that claimant established less than fifteen years of coal mine employment. Consequently, we affirm his determination that claimant did not invoke the Section 411(c)(4) presumption.

Total Disability Due to Legal Pneumoconiosis

To be entitled to benefits under the Act, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant contends the administrative law judge erred in failing to find total disability was due to pneumoconiosis. 20 C.F.R. § 718.204(c). Claimant maintains the administrative law judge erred in discrediting the opinions of Drs. Zlupko, Rasmussen, and Cohen who attributed his disability to his pneumoconiosis. Claimant's Brief at 5-9.

Prior to evaluating the medical opinions, the administrative law judge articulated the proper standard, consistent with the regulations, for establishing disability causation, *i.e.*, claimant must prove that pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); Decision and Order on Modification at 27-28. But he applied an erroneous standard in his analysis

of whether the medical opinions of Drs. Zlupko,[7] Rasmussen,[8] and Cohen[9] satisfy claimant's burden on this issue.[10] Instead of focusing on the contribution which *pneumoconiosis* makes to claimant's total respiratory disability at 20 C.F.R. §718.204(c)(1), the administrative law judge revisited the issue of the extent claimant's

[7] Dr. Zlupko diagnosed a moderate obstructive pulmonary impairment. Dr. Zlupko opined this impairment was due to smoking with "some impact caused by coal mine dust exposure." Director's Exhibit 11 at 4. He opined claimant was "completely impaired from doing his previous job in the coal industry." *Id.* He found it difficult to assess how much claimant's obstructive impairment contributed to his pulmonary disability. He suspected most of claimant's "lung function impairment" was related to smoking. *Id.* at 5.

[8] Dr. Rasmussen diagnosed chronic obstructive pulmonary disease (COPD)/emphysema. Dr. Rasmussen opined claimant "has chronic lung disease sufficient to prevent his performance of his last regular coal mine job." Claimant's Exhibit 3 at 3. Although he opined claimant's cigarette smoking was "obviously of greater significance than his coal mine dust exposure," he determined claimant's coal mine dust exposure "must be considered a minimal, but significant co-contributor." *Id.* at 4. Dr. Rasmussen concluded "a diagnosis of legal pneumoconiosis (i.e. COPD/emphysema caused at least minimally by coal mine dust exposure) is established, which contributes to [claimant's] disabling chronic lung disease." *Id.* at 4.

[9] Dr. Cohen diagnosed chronic bronchitis due to coal mine dust exposure and cigarette smoking. Claimant's Exhibit 2 at 9. He also opined claimant has a severe obstructive impairment and severe diffusion impairment. *Id.* He determined claimant's coal mine dust exposure was "significantly contributory to his obstructive lung disease and severe diffusion impairment." *Id.* at 10. He concluded these combined impairments are totally disabling." *Id.* at 11.

[10] The administrative law judge found Dr. Zlupko provided no explanation for his brief statement that claimant's total disability is "difficult to access" and mostly due to smoking. Decision and Order on Modification at 28. The administrative law judge found Dr. Rasmussen's opinion, that claimant's obstructive impairment was caused "at least minimally" by his coal mine dust exposure, was not sufficient to establish claimant's impairment was significantly related to, or substantially aggravated by, coal mine dust exposure. *Id.* The administrative law judge discounted Dr. Cohen's opinion because he did not explain why, in claimant's particular circumstances, he considered claimant's coal mine dust exposure a significant contributory cause of his obstructive lung disease and diffusion impairment. *Id.* at 28-29.

respiratory impairment is attributable to *coal dust exposure*,[11] which is the relevant inquiry in establishing the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(2). Decision and Order at 20-22. This was error. Having determined legal pneumoconiosis was established, the administrative law judge should have considered whether that condition is a substantially contributing cause of claimant's disability. 20 C.F.R. §718.204(c).

If claimant's chronic obstructive pulmonary disease, which the administrative law judge found constituted legal pneumoconiosis, was the only respiratory or pulmonary impairment claimant had causing his total disability, it would be sufficient to establish claimant's total disability was due to pneumoconiosis. But the record contains evidence indicating claimant also has heart disease and was a smoker, which could potentially cause or contribute to his disability.[12] Because the administrative law judge is required to examine and weigh all relevant medical evidence and render findings that comport with the proper legal standard, we vacate the administrative law judge's findings at 20 C.F.R. §718.204(c) and remand this case for the administrative law judge to consider all of the relevant evidence of record and determine whether claimant has established disability causation. In assessing the credibility of the medical opinion evidence, the administrative law judge must set forth a rationale that comports with the requirements of the Administrative Procedure Act in determining whether each opinion is well-reasoned and sufficient to meet claimant's burden. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[11] The questions posed in determining the existence of legal pneumoconiosis and disability causation are similar, but not identical. *Compare* 20 C.F.R. §718.201(a)(2), (b) *with* 20 C.F.R. § 718.204(c)(1).

[12] Dr. Cali opined claimant has a cardiomyopathy. Employer's Exhibit 9 at 3. He opined claimant could not return to work because of his COPD and cardiac disease. *Id.* Dr. Rasmussen opined claimant's "cardiac disease is quite significant and further impairs [him]." Claimant's Exhibit 3 at 4. Dr. Cohen noted claimant has significant cardiovascular disease "which is likely contributing to his dyspnea." Claimant's Exhibit 2 at 9. Dr. Levinson also noted claimant "appears to have substantial cardiac issues." Employer's Exhibit 5 at 2.

Accordingly, the administrative law judge's Decision and Order on Modification Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge 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