U.S. Department of Labor

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

BRB No. 21-0388 BLA

LINDA F. SMITH (Widow of REAFORD SMITH) Claimant-Respondent v. EASTERN COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/27/2023 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits on Modification of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits on Modification (2017-BLA-05407) 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 Claimant's second request for modification of the denial of a survivor's claim filed on July 5, 2006.[1]

In a December 23, 2010 Decision and Order, ALJ Richard T. Stansell-Gamm credited the Miner with eighteen years of coal mine employment but found the evidence did not establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He thus found Claimant could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Further, he found Claimant failed to establish the Miner had pneumoconiosis and denied benefits. 20 C.F.R. §718.202(a).

Claimant timely requested modification; she did not submit any new evidence. In a November 17, 2015 Decision and Order, ALJ Larry W. Price found Claimant failed to

[1] Claimant is the widow of the Miner, who died on June 17, 2006, while his claim was pending with the Office of Administrative Law Judges. Director's Exhibit 1 at 360. Claimant's survivor's claim was consolidated with the miner's claim, and both claims were denied, first by ALJ Richard T. Stansell-Gamm, then by ALJ Larry W. Price in a decision denying Claimant's first request for modification. Director's Exhibits 110, 137. Claimant's current modification request pertains solely to her survivor's claim. Decision and Order at 2. Therefore, in this decision we will not recount the prior ALJs' findings regarding the miner's claim. Because the miner's claim was denied, Claimant is not eligible for benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits. 30 U.S.C. §932(*l*).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner died due to pneumoconiosis if he had 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); *see* 20 C.F.R. §718.305.

establish a mistake in a determination of fact in ALJ Stansell-Gamm's prior decision and denied benefits. 20 C.F.R. §725.310.

Claimant again timely requested modification of the denial of her survivor's claim, and she did not submit new evidence. ALJ Kane (the ALJ) found Claimant established the Miner had more than fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. In addition, he found Employer did not rebut the presumption. Thus, he concluded Claimant established a mistake in a determination of fact. 20 C.F.R. §725.310. He further found granting modification would render justice under the Act and awarded benefits.

On appeal, Employer contends the ALJ failed to conduct a proper modification analysis. It also asserts he erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption, and that it failed to rebut the presumption. Additionally, it argues the ALJ did not adequately consider whether granting Claimant's modification request would render justice under the Act.[3] Claimant responds, urging affirmance of the ALJ's award. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the ALJ's determination that granting modification would render justice under the Act.

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).

Modification—Legal Standard

Employer asserts ALJ Kane erred by finding a mistake of fact established without identifying a "bona fide judicial mistake" by either ALJ Stansell-Gamm or ALJ Price, both

[3] We affirm as unchallenged the ALJ's finding that the Miner had more than fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

of whom previously denied benefits when considering the same evidence as ALJ Kane. Employer's Brief at 6. We disagree.

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). A party need not submit new evidence on modification because an 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). In *Worrell*, the United States Court of Appeals for the Sixth Circuit explained that:

> If a claimant merely alleges that the ultimate fact (disability due to pneumoconiosis [or death due to pneumoconiosis]) was wrongly decided, the deputy commissioner [or ALJ] may, if he chooses, accept this contention and modify the final order accordingly. "There is no need for a smoking-gun factual error, changed conditions, or startling new evidence."

27 F.3d at 230 (quoting *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993)).

Thus, given the breadth of mistake-of-fact modification, Claimant was entitled to seek modification of the ultimate fact of entitlement, and she did not need to submit additional evidence to obtain review of the merits of her request. *O'Keeffe*, 404 U.S. at 256; *Worrell*, 27 F.3d at 230; 20 C.F.R. §725.310(c) (ALJ must consider whether the evidence of record demonstrates a mistake of fact "regardless of whether the parties have submitted new evidence"). And, contrary to Employer's additional contention, because ALJ Kane was authorized to find a mistake as to the ultimate fact of entitlement based on his review of the evidence initially submitted, he was not required to explain why he reached a different conclusion than the prior ALJs; he needed only to explain his own findings and conclusions.[5] *See Worrell*, 27 F.3d at 230; Director's Response at 3 ("The ALJ's decision and order speaks for itself."). We therefore reject Employer's allegation

[5] Furthermore, on the pertinent issues of the length of the Miner's coal mine employment and total disability necessary to invoke the Section 411(c)(4) presumption, ALJ Kane identified several of the earlier ALJs' findings with which he found "a mistake in fact" (e.g., the overall finding of total disability) and "no mistake in fact" (the years of coal mine employment, and the weighing of pulmonary function and blood gas studies). Decision and Order at 5-8.

that the ALJ did not properly consider whether Claimant established a mistake in a determination of fact.

Invocation of the Section 411(c)(4) Presumption—Total Disability

A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented 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 qualifying pulmonary function studies, qualifying arterial blood gas studies,[6] 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). The ALJ found the Miner was totally disabled based on the medical opinions, his medical treatment records, and the evidence as a whole.[7] 20 C.F.R. §718.204(b)(2); Decision and Order at 5-8.

Employer asserts "[t]he decision to find pulmonary disability and then invocation is not supported by substantial evidence," Employer's Brief at 17, but it alleges no specific error in the ALJ's findings regarding total disability. *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). We therefore affirm those findings and 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 nor clinical pneumoconiosis,[8] or "no part

[6] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The ALJ found the pulmonary function studies and blood gas studies, standing alone, do not support total disability and there is insufficient evidence to support a finding of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 5.

[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

of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[9]

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)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit holds Employer can "disprove the existence of legal pneumoconiosis by showing 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. Rosenberg and Vuskovich. Dr. Rosenberg opined the Miner's pulmonary condition was due to smoking and heart disease. Director's Exhibit 101 at 73. Dr. Vuskovich opined that the Miner had emphysema due to smoking and a pulmonary impairment due to cardiac disease. *Id.* at 27, 40. The ALJ found neither opinion sufficiently credible to rebut the presumed existence of legal pneumoconiosis. Decision and Order at 12-14.

Employer argues the ALJ erred in discrediting the opinions of Drs. Rosenberg and Vuskovich. Employer's Brief at 10-14. We disagree.

Drs. Rosenberg and Vuskovich diagnosed the Miner with emphysema but opined it was due to smoking. Director's Exhibit 101 at 27, 114-15. We see no error in the ALJ's

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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).

[9] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(B); Decision and Order at 9-10.

conclusion that neither physician adequately explained why the Miner's "substantial coal dust exposure also was not a contributing factor" to his emphysema. *See Young*, 947 F.3d at 407; Decision and Order at 13-14. The ALJ accurately noted the Department of Labor's position in the preamble to the 2001 regulatory revisions that the effects of smoking and coal mine dust exposure may be additive and permissibly found their opinions insufficiently reasoned because they did not adequately explain how they concluded the Miner's coal mine dust exposure did not contribute to his emphysema along with smoking. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000).

Further, Dr. Vuskovich opined that the Miner's overall pulmonary impairment was caused by heart disease. Director's Exhibit 101 at 40. Contrary to Employer's contention, the ALJ permissibly accorded less weight to his opinion because he is not a cardiologist or a Board-certified pulmonologist.[10] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993). Meanwhile, Dr. Rosenberg opined that although the Miner was diagnosed with chronic obstructive pulmonary disease (COPD), he did not actually have COPD because his obstructive impairment responded to bronchodilators. Director's Exhibit 101 at 114-15. The ALJ permissibly found Dr. Rosenberg's reliance on a bronchodilator response to be unpersuasive, given that the record demonstrates the Miner was hospitalized multiple times for exacerbations of COPD and several treatment record x-rays document the presence of COPD. *See Barrett*, 478 F.3d at 356.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012). Employer's arguments that Drs. Rosenberg and Vuskovich provided well-reasoned opinions on legal pneumoconiosis are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because the ALJ acted within his discretion in discrediting the opinions of Drs. Rosenberg and Vuskovich, we affirm his finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(A); Decision and Order at 14. 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)(2)(i).

[10] Dr. Vuskovich is Board-certified in Occupational Medicine only. Director's Exhibit 101 at 6, 32, 35.

Death Causation

The ALJ next considered whether Employer established "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(ii); Decision and Order at 14-15. Contrary to Employer's argument, the ALJ permissibly discredited Drs. Rosenberg's and Vuskovich's opinions on death causation because the doctors failed to diagnose legal pneumoconiosis, contrary to his finding that Employer did not disprove the Miner had the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 15. Therefore, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's death was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and thereby also affirm his finding that Claimant established a mistake in a determination of fact in the prior decision denying her survivor's claim. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §725.310.

Justice Under the Act

Employer argues the ALJ erred in determining that reopening the claim renders justice under the Act because he did not adequately explain his analysis of the relevant factors. Employer's Brief at 4-5, 7. It contends that, because Claimant did not submit new evidence, the ALJ failed to consider that her motive in seeking modification was "simply [to] look[] for a different ALJ," *id.* at 5, and he should have afforded greater weight to finality. *Id.* at 6, 18-19. We disagree.

Assessing whether granting modification would render justice under the Act is committed to the broad discretion of the ALJ. *O'Keeffe*, 404 U.S. at 255-56. Therefore, the Board reviews an ALJ's findings in this regard under an abuse of discretion standard. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). Employer has not demonstrated an abuse of discretion in this case.

In *Kinlaw v. Stevens Shipping & Terminal Co.*, the Board held that an ALJ's authority to reopen a case based on any mistake in fact "is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." 33 BRBS 68, 72 (1999) (citing *Wash. Soc'y for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991)). Courts have recognized that, in considering whether to reopen a claim, an adjudicator must exercise the discretion granted under 20 C.F.R. §725.310 by assessing factors relevant to rendering justice under the Act. *Sharpe v. Director, OWCP* (*Sharpe I*), 495 F.3d 125, 132-33 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547 (7th Cir. 2002); *D.S.* [*Stiltner*] *v. Ramey*

Coal Co., 24 BLR 1-33, 1-38 (2008). These factors include the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *Sharpe*, 495 F.3d at 132-33; *Hilliard*, 292 F.3d at 547; *Stiltner*, 24 BLR at 1-38.

The ALJ noted the need to consider Claimant's diligence and motive, as well as whether her modification request is futile or moot. Decision and Order at 3. He found that "justice under the Act would be served by the consideration of this modification request." *Id.* at 3-4 (citing *Branham* and noting its holding that the modification provision displaces traditional notions of res judicata and collateral estoppel).

Initially, we reject Employer's argument that an ALJ is required to first evaluate whether granting modification would render justice under the Act before considering whether the prior denial contained a mistake in a determination of fact. Employer's Brief at 4. There is no requirement that an ALJ conduct a threshold analysis in a request for modification, particularly since accuracy is a relevant factor in determining whether granting modification would render justice under the Act.[11] *See Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F.3d 317, 330 (4th Cir. 2012) (The search for "justice under the Act" should be guided, first and foremost, by the need to ensure accurate benefit distribution.); 20 C.F.R. §725.310(c) ("In any case forwarded for a hearing, the [ALJ] . . . *must consider* . . . whether the evidence of record demonstrates a mistake in a determination of fact.") (emphasis added); 65 Fed. Reg. at 79975 (rejecting limits on modification because Congress's overriding concern in enacting the Act was to ensure that miners who are totally disabled due to pneumoconiosis arising out of coal mine employment receive compensation).

Further, remand is not required for the ALJ to more specifically address each of the justice under the Act factors as we can discern why he concluded they weighed in favor of modification. *See Adams*, 694 F.3d at 802; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (An ALJ's "duty of explanation" is satisfied if "a reviewing court can discern what the ALJ did and why he did it."). Once the ALJ determined Claimant invoked the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis and Employer failed to rebut it, Claimant showed her

[11] The ALJ therefore erred by considering at the threshold of his decision whether granting modification would render justice under the Act. However, because he ultimately addressed the merits of Claimant's modification request, the error was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

modification request was not futile, and the need for accuracy became the overriding factor supporting granting her modification request. *See Hilliard*, 292 F.3d at 547.

Employer alleges Claimant's motive is suspect because she did not submit additional evidence with her modification request. Employer's Brief at 19. But as we discussed above, Claimant was not required to submit new evidence for the ALJ to grant her modification request. *O'Keeffe*, 404 U.S. at 256; 20 C.F.R. §725.310(c). 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." *Worrell*, 27 F.3d at 230. The ALJ properly reweighed all the evidence regarding whether Claimant invoked the Section 411(c)(4) presumption and whether Employer rebutted it, and Employer has not demonstrated any improper motive by Claimant in seeking modification. Additionally, although Employer contends the ALJ did not afford proper consideration to finality, he correctly noted that the modification provision displaces traditional notions of finality. Decision and Order at 4; *see Sharpe I*, 495 F.3d at 133 n.15 (Although "finality interests may sometimes be relevant," the "principle of finality just does not apply to . . . black lung claims as it does in ordinary lawsuits."); *Branham*, 20 BLR at 1-32; Employer's Brief at 6, 18-19.

As Employer has not shown the ALJ abused his discretion, we affirm his determination that granting modification renders justice under the Act. *See O'Keeffe*, 404 U.S. at 255; *Sharpe II*, 692 F.3d at 330; Decision and Order at 3-4, 15.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits on Modification.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge