U.S. Department of Labor

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

BRB No. 22-0057 BLA

ALBERTA HOLIDAY (o/b/o ALBERT HOLIDAY, deceased) Claimant-Respondent v. PEABODY COAL COMPANY and PEABODY INVESTMENTS, INCORPORATED Employer/Carrier-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 Order Denying Petition for Modification and Amended Decision and Order on Commencement of Benefits of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

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

Michael A. Pusateri and Patricia C. Karppi (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Jeffrey S. Goldberg (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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Susan Hoffman's Order Denying Petition for Modification and Amended Decision and Order on Commencement of Benefits (2008-BLA-05493) 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 miner's claim[1] filed on May 14, 2007, and is before the Benefits Review Board for a third time.[2]

The Board most recently affirmed ALJ William S. Colwell's award of benefits, finding Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act[3] and Employer failed to rebut the presumption. However, the case was remanded for ALJ Colwell to properly determine the commencement date for benefits, taking into consideration whether Claimant was engaged in comparable and gainful employment after he filed his claim. *Holiday v. Peabody Coal Co.*, BRB No. 14-0061 BLA, slip op. at 7-10 (August 19, 2014) (unpub.).

While the case was on remand to the Office of Administrative Law Judges, Employer filed a timely petition for modification on May 4, 2015. Director's Exhibit 43.

[1] Claimant is the daughter of the Miner, who died on January 6, 2021, and she is pursuing the miner's claim on behalf of her father's estate. June 16, 2021 Order Granting, in Part, Motion for Reconsideration and Modifying Order Denying Petition for Modification at 1; Claimant's January 19, 2021 and March 23, 2021 Letters to the ALJ.

[2] We incorporate the procedural history of this case as set forth in *Holiday v. Peabody Coal Co.*, BRB No. 14-0061 BLA (August 19, 2014) (unpub.) and *Holiday v. Peabody Coal Co.*, BRB No. 11-0690 BLA (July 24, 2012) (unpub.).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner was totally disabled 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.

The district director processed the modification request and the case was assigned to ALJ Hoffman (the ALJ). Director's Exhibits 45, 46.

The ALJ scheduled an in person hearing for May 28, 2020, but later agreed to hold a telephonic hearing on June 9, 2020. January 21, 2020 Notice of Hearing and Prehearing Order.[4] On April 29, 2020, Claimant's new counsel filed a notice of appearance and a Motion for Summary Decision alleging that Employer was required to make a threshold showing that it had not abused the modification process and it could not do so because it was not diligent, its motive was suspect, and its request for modification was futile. Claimant's Motion for Summary Decision at 3-5. In the alternative, Claimant's counsel requested a continuance of the June 9, 2020 hearing and that a new in-person hearing be scheduled. On May 11, 2020, Employer opposed Claimant's motion for summary judgment on the grounds that there were genuine issues of material fact to be resolved and renewed its request for a telephonic hearing.

The ALJ subsequently rescheduled an in-person hearing for March 2, 2021. June 11, 2020 Order Continuing Hearing. However, on January 15, 2021, prior to the scheduled hearing and the deadline to exchange evidence, the ALJ issued an order denying Employer's modification request on the merits.[5] Order Denying Petition for Modification at 18. Employer requested reconsideration, but the ALJ found no clear error in her denial of Employer's modification request and only modified her order to further reflect Employer "abused the modification process." June 16, 2021 Order Granting, in part, Motion for Reconsideration and Modifying Order Denying Petition for Modification at 2-3.

On June 22, 2021, the parties filed a joint motion for a decision on the record regarding the Board's remand order for a redetermination of the commencement date for benefits. The ALJ granted the motion and set a briefing schedule. Following receipt of the parties' briefs, she issued an October 6, 2021 Amended Decision and Order on Commencement of Benefits, finding the Miner did not engage in comparable and gainful

[4] The ALJ advised the parties that they were required to exchange evidence at least twenty days before the hearing. January 21, 2020 Notice of Hearing and Prehearing Order at 4 (citing 20 C.F.R. §725.456(b)(2)). She also directed the parties to serve evidence summary forms on opposing counsel fifty calendar days before the hearing and to submit the same form to her at least twenty calendar days before the hearing. *Id.* at 5.

[5] The ALJ noted the hearing would continue as scheduled on the issue of the commencement date for benefits. January 15, 2021 Order Denying Petition for Modification at 18.

employment subsequent to the filing date of his claim and thus awarded benefits as of May 2007. Amended Decision and Order at 6-7.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because the removal provisions applicable to the ALJ rendered her appointment unconstitutional. It also argues the ALJ prematurely denied its petition for modification and applied the wrong legal standards. Further, it asserts the ALJ erred in determining the commencement date for benefits and demonstrated bias that prejudiced her legal determinations. Claimant responds in support of the award of benefits and the Order Denying Petition for Modification. The Director, Office of Workers' Compensation Programs (the Director), responds urging the Board to reject Employer's constitutional challenge. Employer replied to Claimant's and the Director's briefs, reiterating its contentions on appeal.

The Board's scope of review is defined by statute. We must affirm the ALJ's Order Denying Petition for Modification and Amended Decision and Order on Commencement of Benefits if they are rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs.[7] Employer's Brief at 31-36; Employer's Reply to Claimant's Brief at 1; Employer's

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

[7] We reject Employer's assertion that the Board lacks authority to decide constitutional issues. Employer's Brief at 31 (citing *Carr v. Saul*, 141 S. Ct. 1352 (2021)); Employer's Reply to the Director's Brief at 1-2. Employer's reliance on *Carr* is misplaced as its holding is not on point. In *Carr*, the United States Supreme Court held that Social Security procedures did not require claimants for Social Security disability benefits to raise their Appointments Clause challenge to their respective Social Security Administration ALJs. 141 S. Ct. at 1356, 60-62.

We also reject Employer's general assertion that the Ninth Circuit has addressed administrative agencies' authority to address constitutional issues. Employer's Reply to the Director's Brief at 1-2 (citing *Flores v. Garland*, No. 19-72559, slip op. at 2 (9th Cir. Feb. 18, 2022) (unpub.) (noting there are "certain constitutional challenges that are not within the competence of administrative agencies to decide")). In *Flores*, the Ninth Circuit

Reply to the Director's Brief at 1-5. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 34-35. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and on Justice Gorsuch's concurring opinions in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 594 U.S. , 141 S. Ct. 1970 (2021) and *Collins v. Yellen*, 141 S. Ct. 1761 (2021). *Id.* at 35-36. It also asserts the Ninth Circuit wrongly decided *Decker Coal Co. v. Pehringer*, 8 F.4th 1123 (9th Cir. 2021), because it ignored the practical realities of Department of Labor (DOL) adjudications. *Id.* at 36; Employer's Reply to the Director's Brief at 4-5. For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , 22-0022 BLA, slip op. at 3-5 (May 26, 2023) and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Modification

Employer contends the ALJ prematurely denied its Petition for Modification without allowing for evidentiary development or holding a hearing. Employer's Brief at

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specifically observed that the Board of Immigration Appeals and immigration judges lack the jurisdiction to resolve constitutional issues. No. 19-72559, slip op. at 2 (citing *Matter of C-*, 20 I. & N. Dec. 529, 532 (B.I.A. 1992)).

Contrary to Employer's assertion, the Board has both the inherent authority and vested authority to consider constitutional questions arising in cases before it. *See McCluseky v. Zeigler Coal* Co., 2 BLR 1-1248, 1-1258-62 (1981); *see also Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984); *Carozza v. U.S. Steel Corp.*, 727 F.2d 74 (3d Cir. 1984). In addition, the United States Court of Appeals for the Sixth Circuit has held that the Board may address timely-raised Appointments Clause challenges. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 753 (6th Cir. 2019).

We also note Employer generally asserts that ALJs need to be properly appointed but does not raise any specific arguments other than challenging the ALJ's removal protections, which are addressed herein. Employer's Brief at 32.

[8] *Lucia* involved an Appointments Clause challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

7-17. It also contends that the ALJ applied the wrong legal standard in considering whether justice under the Act foreclosed consideration of Employer's modification request prior to considering the actual merits of that request. We agree with Employer's contentions.

The sole basis on which an ALJ may grant modification in a deceased miner's claim is that a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). An ALJ has broad discretion to grant modification based on a mistake of fact, including the ultimate fact of entitlement to benefits. *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). Moreover, a party is not required to submit new evidence because an ALJ 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 v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

In addition to addressing whether there has been a change in condition or a mistake in a determination of fact, caselaw dictates that the ALJ must also determine whether granting a modification claim ultimately would "render justice under the Act." *O'Keeffe*, 404 U.S. at 255; *see 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, 541 (7th Cir. 2002); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). Courts have identified several factors relevant to the "justice under the Act" inquiry. *See Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 330 (4th Cir. 2012); *Sharpe I*, 495 F.3d at 128.

The Act and regulations mandate that an ALJ must hold a hearing on any claim or modification petition whenever a party requests such a hearing, *see* 20 C.F.R. §§725.421(a), 725.450, 725.451, unless one of the following exceptions applies: (1) the right to a hearing is waived, in writing, by the parties, 20 C.F.R. §725.461(a); (2) a party requests summary judgment and the ALJ determines there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, 20 C.F.R. §725.452(c); or (3) the ALJ notifies the parties by written order of her belief that a hearing is not necessary, allowing at least thirty days for the parties to respond, and no party requests that a hearing be held, 20 C.F.R. §725.452(d). *See Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000) (ALJ must hold a hearing whenever a party requests one, unless the parties waive the hearing or a party requests summary judgment). The right to a hearing, if requested, extends to petitions for modification.[9] *See Robbins v. Cyprus*

[9] On modification, parties may submit new evidence into the record, subject to evidentiary limitations. *See* 20 C.F.R. §§725.414, 725.310(b); *Rose v. Buffalo Mining Co.*, 23 BLR 1-221 (2007). Additionally, Section 725.456(b)(2) provides that "documentary

Cumberland Coal Co., 146 F.3d 425, 428-29 (6th Cir. 1998); *Arnold v. Peabody Coal Co.*, 41 F.3d 1203, 1208-09 (7th Cir. 1994).

In her January 15, 2021 Order Denying Petition for Modification, the ALJ declined to admit Employer's new evidence or conduct a *de novo* review of the existing record and denied Employer's modification request on the merits because she found that granting modification would not render justice under the Act. January 15, 2021 Order Denying Petition for Modification at 12, 15-18; *see also* June 16, 2021 Order Granting, in part, Motion for Reconsideration and Modifying Order Denying Petition for Modification at 2-3. We agree with Employer that the ALJ erred by failing to follow the regulatory requirements.

Employer correctly asserts that it was entitled to a hearing on its modification request as none of the regulatory exceptions discussed above apply. Specifically, the parties did not ask for waiver of the hearing or a decision on the record; the ALJ gave no notice that she was cancelling the hearing; and she declined to issue a summary judgment ruling as she explicitly recognized Claimant's motion for summary decision "functions" as a motion opposing the merits of Employer's modification petition. *See* 20 C.F.R. §§725.310(c), 725.421(a), 725.450, 725.451, 725.452(c), (d), 725.461(a). But the ALJ was foreclosed from granting summary judgment because she did not have a complete record before her, having considered Claimant's motion for summary decision without waiting for the time permitted under 20 C.F.R. §725.456(b)(2) for the parties to exchange evidence to expire. January 15, 2021 Order Denying Petition for Modification; June 11, 2020 Order Continuing Hearing; Employer's Brief at 14-17.

Additionally, contrary to the ALJ's analysis for justifying her preemptive Order, she was not required to make a "threshold" determination of whether granting modification would render justice under the Act prior to admitting any evidence or holding a hearing. January 15, 2021 Order Denying Petition for Modification at 12; Employer's Brief at 7-14. Because accuracy is a relevant factor, it follows that an ALJ must normally consider the evidence and render findings first on the merits to properly assess whether modification is warranted, unless a party has filed the modification request in obvious bad faith. *See Pehringer*, 8 F.4th at 1140-41 (citing *Hilliard*, 292 F.3d at 547) ("ALJ must not give weight only to the concern of finality but also to accuracy"); *see also Sharpe II*, 692 F.3d at 335 (search for "'justice under the Act' should be guided, first and foremost, by the need to

material, including medical reports, which was not submitted to the district director, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least [twenty] days before a hearing is held in connection with the claim." 20 C.F.R. §725.456(b)(2).

ensure accurate benefit distribution"); *D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33, 1-38 (2008).

Moreover, Employer was not required to allege any specific error or explain prior to the hearing how any of its evidence supports modification, as the ALJ held. January 15, 2021 Order Denying Petition for Modification at 5-7, 17-18; Employer's Brief at 7-10. Employer's general allegation of a mistake in a determination of fact was sufficient to invoke the ALJ's "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 256; *Worrell*, 27 F.3d at 230 ("Once 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."); *Eifler v. Director, OWCP*, 926 F.2d 663, 667 (7th Cir. 1991) (ALJ should have considered mistake as grounds for modification although petitioner did not plead mistake); Director's Exhibit 43 at 3 (unpaginated). The applicable regulation specifically provides:

> In any case forwarded [from the district director] for a hearing, the administrative law judge assigned to hear such case *shall* consider whether any additional evidence submitted by the parties demonstrates a change in condition, and *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 (emphasis added).

Because the ALJ did not comply with the aforementioned regulatory requirements, we vacate her denial of Employer's modification request. Having vacated the ALJ's Order Denying Petition for Modification regarding the Miner's underlying award of benefits, we also vacate her Decision and Order regarding the commencement date for benefits. Decision and Order at 6-7.

Reassignment

Employer has asked that this case be assigned to a different ALJ because the current ALJ's "rulings and rhetoric . . . reflect a lack of objectivity and impartiality." Employer's Brief at 28. Employer cites to her statements that "the award was correct because it was 'analyzed multiple times by Judge Colwell and all findings have been reviewed by the Board" and that "[i]n no way has Employer persuaded me that the accuracy of the determination of benefits is at stake here" -- despite the fact the ALJ by her own admission dismissed the modification petition as a threshold finding before discovery closed. *Id*. at

28 (citing January 15, 2021 Order Denying Petition for Modification at 12-13). The ALJ further criticized Employer for pursuing its modification request, characterizing its actions as resulting "in aggressive on-going litigation" and "a manipulation of the process." Employer's Brief at 28-29 (citing January 15, 2021 Order Denying Petition for Modification at 13-14); *see also* June 16, 2021 Order Granting, in part, Motion for Reconsideration and Modifying Order Denying Petition for Modification at 3 ("Without some limitations on the scope of Section 22 modifications, every case has the potential to take on Dickensian proportions, as this one has."). Employer further highlights the ALJ's comment that "[i]t looks to me like Employer filed an opportunistic and cursory petition, used it as a license to go fishing for more evidence and then complained that Claimant did not cooperate with its expedition." Employer's Brief at 29 (citing January 15, 2021 Order Denying Petition for Modification at 18).

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has stated that an appellate court may:

> exercise its inherent power to administer the system of appeals and remands by ordering a case reassigned on remand. The basis for the reassignment is not actual bias on the part of the judge but rather a belief that the healthy administration of the judicial and appellate processes, as well as the appearance of justice, will best be served by such reassignment.

United States v. Sears, Roebuck & Co., 785 F.2d 777, 780 (9th Cir.), *cert. denied*, 479 U.S. 988 (1986).

Consequently, in light of the ALJ's comments, made without holding the required hearing and affording Employer an opportunity to submit evidence,[10] we find it appropriate to direct that this case be reassigned to a different ALJ on remand in order to avoid any potential appearance of bias[11] in the re-adjudication of Employer's modification petition.[12]

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[10] The ALJ ruled on Employer's petition for modification prior to the deadline for submitting evidence but stated "[i]n the absence of any argument or evidence that calls into question the previous determinations of fact, Employer's prospects for success appear low." January 15, 2021 Order Denying Petition for Modification at 17.

[11] The ALJ acknowledged that her "use of cliched or colorful language" was "perhaps regrettable in the context of clear and effective writing." October 6, 2021 Amended Decision and Order on Commencement of Benefits at 10.

[12] As we are reassigning the case to a new ALJ, we decline to address Employer's argument that the ALJ's conduct showed actual bias. *See* Employer's Brief at 26-31.

20 C.F.R. §§802.404(a), 802.405(a); *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992).

Remand Instructions

On remand, the new ALJ is instructed to reschedule the hearing in this matter pursuant to Employer's Petition for Modification. *See* 20 C.F.R. §§725.421(a), 725.450, 725.451, 725.452, 725.461(a); *Robbins*, 146 F.3d at 428-29; *Pukas*, 22 BLR at 1-72. Following the completion of evidentiary development, the new ALJ is further directed to consider whether Employer is entitled to modification based on a mistake in fact, after his or her *de novo* review of the record. 20 C.F.R. §725.310.[13]

[13] We note the revised regulation requiring employers to pay all benefits due under any effective order before seeking modification only applies to petitions for modification filed on or after May 26, 2016. 20 C.F.R. §725.310(e)(2)(i), (7). Employer filed its Petition for Modification on May 4, 2015. Director's Exhibit 43.

If the new ALJ finds Employer has demonstrated a mistake of fact, the new ALJ should then consider whether granting its modification request would render justice under the Act. *See O'Keeffe*, 404 U.S. at 256. If the modification request is denied, the new ALJ must determine the commencement date for benefits in accordance with the Board's prior remand instructions. *See Holiday*, BRB No. 14-0061 BLA, slip op. at 7-10.

Accordingly, we vacate the ALJ's Order Denying Petition for Modification and Order Granting, in part, Motion for Reconsideration and Modifying Order Denying Petition for Modification and remand the case to be reassigned to a new ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge