U.S. Department of Labor

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

BRB No. 19-0113 BLA

JAMES C. MCGLOTHLIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HIOPE MINING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 03/27/2020
	)	
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 Awarding Benefits on Modification of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Ashley M. Harmon and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Modification (2017-BLA-05466) of Administrative Law Judge Carrie Bland 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 the denial of a subsequent claim filed on August 23, 2010.[1]

In a Decision and Order Denying Benefits dated August 18, 2015, Administrative Law Judge John P. Sellers, III, credited claimant with at least thirty-seven and a half years of qualifying coal mine employment, but found he did not establish a totally disabling respiratory or pulmonary impairment. Therefore, he found that claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] or establish a change in the applicable condition of entitlement at 20 C.F.R. §725.309[3] and denied benefits. Director's Exhibit 56. The Board dismissed claimant's appeal of Judge Sellers's denial as untimely filed. *McGlothlin v. Hope Mining, Inc.*, BRB No. 16-0041 BLA (Apr. 22, 2016) (Order) (unpub.). Claimant timely filed a request for modification on June 3, 2016. Director's Exhibit 62. Following the district director's denial of benefits, the case was referred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Carrie Bland (the administrative law

[1] This is claimant's third claim for benefits. On August 4, 2006, the district director denied his most recent prior claim, filed on December 16, 2005, because he failed to establish total respiratory disability. Director's Exhibit 2. Claimant did not take any further action before filing his current claim. Director's Exhibit 5.

[2] Under Section 411(c)(4) of the Act, claimant is presumed totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish total disability. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, he had to establish this element of entitlement.

judge). Director's Exhibits 71, 72. Both claimant and employer submitted new evidence at the hearing on February 9, 2017. Claimant's Exhibits 1-10; Employer's Exhibits 1-5.

In the Decision and Order Awarding Benefits on Modification that is the subject of the current appeal, the administrative law judge found claimant established thirty-nine and a half years of coal mine employment, all but two of which were underground. She further found the new evidence submitted on modification, in conjunction with the evidence previously submitted in this subsequent claim, established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Thus she found claimant established a change in conditions at 20 C.F.R. §725.310, a change in the applicable condition of entitlement at 20 C.F.R. §725.309, and invoked the Section 411(c)(4) presumption. She further found employer did not rebut the presumption. Finally, she determined that granting modification would render justice under the Act and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief in this appeal.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits on Modification if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

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." *O'Keeffe v. Aerojet-General*

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least thirty seven and a half years of underground coal mine employment, total respiratory disability, a change in the applicable condition of entitlement at 20 C.F.R. §725.309, and invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia and West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Hearing Transcript at 25.

Shipyards, Inc., 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[6] or that "no part of [his] 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

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 Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Hippensteel and Basheda that claimant does not have legal pneumoconiosis but has asthma unrelated to coal mine dust exposure.[7] Decision and Order at 23-25; Director's Exhibits 12, 54; Employer's Exhibits 2, 5. Finding their opinions

[6] 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). This definition encompasses 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).

[7] The administrative law judge also considered the opinions of Dr. Fino that claimant has legal pneumoconiosis and Dr. Rasmussen that coal mine dust exposure likely contributed to claimant's obstructive respiratory impairment. Decision and Order at 14, 22; Director's Exhibit 10; Employer's Exhibit 1. She correctly noted that their opinions do not assist employer in rebutting the Section 411(c)(4) presumption. Decision and Order at 22. As employer does not challenge this finding, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

inadequately explained, the administrative law judge determined employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 23-25.

We reject employer's assertion the administrative law judge improperly required Drs. Basheda and Hippensteel to "rule out" coal mine dust exposure as a cause of claimant's respiratory impairment. Employer's Brief at 17. Contrary to employer's assertion, the administrative law judge did not find their opinions insufficient to disprove legal pneumoconiosis because they failed to "rule out" coal mine dust exposure as a cause of claimant's respiratory impairment. Decision and Order at 23-25. Rather, she found their opinions not credible based on the rationale each physician provided for why claimant does not have legal pneumoconiosis.[8] *Id*.

The administrative law judge accurately noted that Drs. Basheda and Hippensteel relied in part on the partial reversibility of claimant's impairment after the administration of a bronchodilator as a basis to conclude claimant's impairment is due to asthma unrelated to coal mine dust exposure. Decision and Order at 11-13, 23; Director's Exhibit 70; Employer's Exhibit 5 (Dr. Basheda's deposition) at 29-30; Employer's Exhibit 5 (Dr. Hippensteel's October 8, 2013 report) at 10-11; Employer's Exhibit 14 at 8. Further, both opined asthma is a condition not caused by coal dust exposure. Decision and Order at 13, 23; Employer's Exhibit 5 (Dr. Basheda's deposition) at 20; Employer's Exhibit 14 at 8. The administrative law judge found, within her discretion, Dr. Basheda failed to adequately explain why the irreversible portion of claimant's pulmonary impairment was not related to coal mine dust exposure.[9] *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v.*

[8] The administrative law judge initially stated correctly that employer "must establish the absence of any respiratory or pulmonary impairment arising out of coal mine employment, including chronic pulmonary disease resulting from respiratory or pulmonary impairment significantly related to or substantially aggravated by dust exposure in coal mine employment." Decision and Order at 19; *see* 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(a)(2), (b). Any error in also referencing the phrases "not due, at least in part, to," "played no role," "played no part," and "played absolutely no role," Decision and Order at 23, 24, are harmless, as the administrative law judge ultimately did not reject the opinions of employer's experts for failing to satisfy a particular rebuttal standard. Rather, she concluded that employer's experts did not disprove the existence of legal pneumoconiosis because the bases for their opinions were not credible. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 23-25.

[9] The administrative law judge accurately noted that claimant's July 18, 2014 pulmonary function study, which Dr. Basheda reviewed, produced qualifying results even

Barrett, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

The administrative law judge further permissibly discredited both physicians' opinions because, even assuming coal mine dust does not cause asthma, neither adequately explained why claimant's almost forty years of underground coal mine dust exposure did not aggravate his asthma or otherwise contribute, along with his asthma, to his obstructive impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322-24 (4th Cir. 2013); *Minich*, 25 BLR at 1-150; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Decision and Order at 23-24.

Substantial evidence supports the administrative law judge's credibility determinations and the Board is not empowered to reweigh the evidence. *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000)*; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As the administrative law judge permissibly discredited the only opinions supportive of a finding claimant does not have legal pneumoconiosis,[10] we affirm her finding employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.[11] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next addressed whether employer established that "no part" of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 25-26. She permissibly discredited the opinions of Drs. Hippensteel and Basheda because neither physician diagnosed legal pneumoconiosis, contrary to her finding that employer failed to disprove that claimant has

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after the administration of a bronchodilator. Decision and Order at 10, 23; Claimant's Exhibit 4; Employer's Exhibit 5 at 8-9.

[10] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Basheda and Hippensteel, any error in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to their opinions.

[11] Therefore we need not address employer's allegations of error in the administrative law judge's finding that employer also failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 8-13.

the disease. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 144 (4th Cir. 2015); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons"); Decision and Order at 25. We therefore affirm the administrative law judge's finding employer failed to prove that no part of claimant's total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 25-26. Finally, we affirm the administrative law judge's rational determination that granting modification renders justice under the Act. *See Sharpe*, 495 F.3d at 125, 24 BLR at 2-56; *Stanley*, 194 F.3d at 497; *Worrell*, 27 F.3d at 230; Decision and Order at 3-4, 26.

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut it, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Modification is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge