U.S. Department of Labor

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

BRB Nos. 19-0170 BLA and
19-0171 BLA

BONNIE CUPP (o/b/o and Widow of LELAND CUPP) Claimant-Respondent v. TRINITY COAL CORPORATION OF VIRGINIA and AMERICAN INTERNATIONAL SOUTH/CHARTS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/23/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits to the Miner with a Resulting Automatic Award of Benefits in a Survivor's Claim both On Modification of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Cameron Blair and John W. Beauchamp (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits to the Miner with a Resulting Automatic Award of Benefits in a Survivor's Claim both On Modification (2016-BLA-05905, 2016-BLA-05906) of Administrative Law Judge Scott R. Morris on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a request for modification of a miner's claim filed on April 9, 2009, and a survivor's claim filed on February 1, 2013.[1]

Procedural History

Administrative Law Judge Stephen E. Reilly initially denied the miner's claim[2] because he found the evidence did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Pursuant to claimant's appeal, the Board vacated Judge Reilly's findings that the pulmonary function studies and medical opinions did not establish total disability and remanded the case for further consideration. *Cupp v. Trinity Coal Corp.*, BRB No. 13-0267 BLA (Jan. 31, 2014) (unpub.).

Due to Judge Reilly's retirement, the case was reassigned to Administrative Law Judge John P. Sellers, III. In a Decision and Order On Remand Denying Benefits dated January 28, 2015, Judge Sellers found that the evidence did not establish total disability. Director's Exhibit 81. Claimant timely requested modification. 20 C.F.R. §725.310; Director's Exhibit 82.

[1] Employer's appeal in the miner's claim was assigned BRB No. 19-0170 BLA, and its appeal in the survivor's claim was assigned BRB No. 19-0171 BLA. By Order dated March 15, 2019, the Board consolidated these appeals for purposes of decision only.

[2] The miner died on November 29, 2012, while his claim was pending before the Office of Administrative Law Judges. Director's Exhibit 93. Claimant, the miner's widow, is pursuing the miner's claim and a survivor's claim. Decision and Order at 2; Director's Exhibit 64.

In a Proposed Decision and Order dated November 26, 2013, the district director denied the survivor's claim. Director's Exhibit 111. The miner's claim and the survivor's claim were forwarded to the Office of Administrative Law Judges on August 1, 2016. Director's Exhibits 124, 125.

Administrative Law Judge's Decision and Order

In a decision and order dated November 29, 2018, Administrative Law Judge Scott R. Morris (the administrative law judge) determined justice under the Act would not be fulfilled without a full adjudication of the modified claim. The administrative law judge credited the miner with twenty-four years of underground coal mine employment[3] and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found claimant established a mistake in a determination of fact and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.310. He further found employer did not rebut the presumption and awarded benefits. Based on the award in the miner's claim, he found claimant entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[5] 30 U.S.C. §932(*l*) (2012).

On appeal, employer argues that the administrative law judge erred in finding the miner had a totally disabling respiratory impairment and therefore erred in finding the miner invoked the Section 411(c)(4) presumption. Employer also contends the administrative law judge erred in finding it did not rebut the presumption. Claimant did

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

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

[5] Section 422(*l*) provides the 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 without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

not file a response brief.[6]

The Director, Office of Workers' Compensation Programs, filed a limited response, arguing the Board should reject employer's argument that the administrative law judge lacked the authority to decide the claims. By Order dated October 31, 2019, the Board held that employer waived its opportunity to raise its Appointments Clause argument before the Board and denied its request to remand the case to the Office of Administrative Law Judges for reassignment to a different administrative law judge. *Cupp v. Trinity Coal Corp of Va.*, BRB Nos. 19-0170 BLA, 19-0171 BLA (Oct. 31, 2019) (Order) (unpub.). Despite employer's raising this issue again in its brief, it has been adjudicated, and we will only address employer's remaining contentions of error.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision and order awarding 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, 362 (1965).

The Miner's Claim

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). Moreover, a party is not required to submit new evidence because 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 v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see King v. Jericol Mining, Inc.*, 246 F.3d 822, 825 (6th Cir. 2001).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence,

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-four years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

disability is established by qualifying pulmonary function studies, qualifying arterial blood gas studies,[7] 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 administrative law judge must weigh the relevant evidence supporting a finding of total disability against the 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 record contains six pulmonary function studies. The three earliest studies conducted in 2009 produced non-qualifying values.[8] Decision and Order at 7; Director's Exhibits 12, 14, 54.

Although the administrative law judge noted that the February 15, 2011 pulmonary function study produced "ostensibly qualifying" results,[9] he found the study invalid due to an insufficient number of MVV trials. Decision and Order at 8; Claimant's Exhibit 4. Because it was possible that the miner's MVV could have been valid if additional tests were administered, he found it reasonable to give it no weight, rather than assume it is non-qualifying. *Id.*

Finally, the administrative law judge noted that the pulmonary function studies conducted on February 5, 2010, and January 26, 2012, are qualifying.[10] Decision and Order

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[7] 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).

[8] The March 30, 2009 pulmonary function study produced non-qualifying values before the administration of a bronchodilator. The May 15, 2009 pulmonary function study produced qualifying values before the administration of a bronchodilator, but non-qualifying values after administration of a bronchodilator. The November 3, 2016 pulmonary function study produced non-qualifying values both before and after the administration of a bronchodilator. Director's Exhibits 12, 14, 54.

[9] The FEV1 and MVV values from the February 15, 2011 pulmonary function study are qualifying, while the FVC value and FEV1/FVC ratio are non-qualifying.

[10] The administrative law judge found MVV results from the February 5, 2010 and January 26, 2012 pulmonary function studies were also invalid. Decision and Order at 8. However, these studies remain qualifying based on their respective FEV1 values and FEV1/FVC ratios. Claimant's Exhibits 5, 6.

at 7; Claimant's Exhibits 5, 6. The administrative law judge thus found the majority of the most recent studies are qualifying. Decision and Order at 9. According the greatest weight to the most recent study conducted on January 26, 2012, because it was conducted in the same year as the miner's death, he found the "preponderant pulmonary function test results" established total disability. *Id.*

Employer contends that, given the minimal amount of time between the February 15, 2011 and January 26, 2012 pulmonary function studies, the administrative law judge erred in crediting the qualifying January 26, 2012 pulmonary function study. Employer's Brief at 15-16. We disagree. Employer does not challenge the administrative law judge's determination that the February 15, 2011 pulmonary function study was entitled to no weight because its reported MVV value was invalid.[11] This finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Moreover, the administrative law judge permissibly credited the most current studies, finding the most recent one provided the best depiction of the miner's condition because it was the only one conducted in the same year of his death. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (a "later test or exam" is a "more reliable indicator of a miner's condition than an earlier one" where "a miner's condition has worsened" given the progressive nature of pneumoconiosis); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); Decision and Order at 9. Substantial evidence supports the administrative law judge's finding that the pulmonary function studies established total disability. 20 C.F.R. §718.204(b)(2)(i).

Employer also argues the administrative law judge erred in finding the medical opinions established total disability. Employer's Brief at 19-20. We disagree. The administrative law judge considered the opinions of Drs. Broudy, Baker, and Westerfield. Given Dr. Broudy's conflicting statements regarding the extent of the miner's respiratory impairment,[12] the administrative law judge permissibly found his opinion equivocal and

[11] Specific to pulmonary function studies, the quality standards provide that an administrative law judge "may consider" the fact that "one or more standards have not been met" in determining the evidentiary weight to be given to the results of the pulmonary function tests. 20 C.F.R. Part 718, Appendix B.

[12] Dr. Broudy initially opined the miner retained the respiratory capacity to perform his previous coal mine employment. Director's Exhibit 14 at 5. He subsequently reviewed additional evidence including the miner's most recent qualifying January 26, 2012 pulmonary function study. Employer's Exhibit 6. Although Dr. Broudy stated the additional medical evidence did "not dissuade [him] from [his] previous opinions," he opined "[t]here has been a decline in [the miner's] lung function such that he might no longer be able to do all the work of an underground coal miner or similarly arduous labor."

entitled to little weight. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-87 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 15; Director's Exhibit 14; Employer's Exhibit 6. He also permissibly credited Dr. Baker's opinion the miner was totally disabled over Dr. Westerfield's contrary opinion because he found it more consistent with the qualifying pulmonary function study evidence.[13] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 15; Director's Exhibits 12, 54; Employer's Exhibit 4. Substantial evidence supports the administrative law judge's finding that the medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(iv). We further affirm his finding that all of the relevant evidence, when weighed together, established total disability. *See Rafferty*, 9 BLR at 1-232.

In light of our affirmance of the administrative law judge's findings that the miner had twenty-four years of underground coal mine employment and was totally disabled, we affirm his determination claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis.

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[14] or that "no

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Id. at 5. The administrative law judge found Dr. Broudy "equivocated on his ultimate conclusion" regarding the miner's disability. *Id.*

[13] Dr. Baker opined the miner was totally disabled based on the qualifying pre-bronchodilator results from the pulmonary function study he conducted on May 15, 2009. Director's Exhibit 12. Although employer notes Dr. Baker did not review any pulmonary function study results after the date of his examination, the administrative law judge accurately found his opinion supported by the "preponderant pulmonary function test evidence of record." Decision and Order at 15. Conversely, the administrative law judge found Dr. Westerfield's opinion was not supported by the preponderant pulmonary function study evidence. *Id.*

[14] "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 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

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).

To establish the miner did not have legal pneumoconiosis, employer must demonstrate he 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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit has held that an employer may rebut 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). The "in part" standard requires employer to show that coal mine dust exposure "had at most only a *de minimis* effect on [the miner's] lung impairment." *Id.* at 407.

The administrative law judge considered the opinions of Drs. Broudy and Westerfield who opined the miner did not have legal pneumoconiosis. Drs. Broudy and Westerfield diagnosed chronic obstructive pulmonary disease (COPD) due solely to smoking and asthma. Director's Exhibit 14; Employer's Exhibits 3, 6. The administrative law judge found their opinions not well-reasoned because they did not credibly explain how they determined that the miner's years of coal mine dust exposure did not contribute, along with his smoking, to his COPD. Decision and Order at 18-19.

Employer asserts, without elaboration, that the opinions of Drs. Broudy and Westerfield "are the most reasoned and documented in the record."[15] Employer's Brief at 23-24. Employer's statements amount to a request to reweigh the evidence, which the Board cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Furthermore, the Board must limit its review to contentions of error that the parties specifically raise. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

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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).

[15] Employer alleges the miner did not have legal pneumoconiosis because his obstructive pulmonary impairment "is not in any way linked to his employment in the coal mines." Employer's Brief at 23. Employer therefore asserts claimant has not established the miner had legal pneumoconiosis. *Id.* at 24. However, because claimant invoked the Section 411(c)(4) presumption, she was not required to submit evidence establishing the miner had legal pneumoconiosis.

Because employer does not identify any specific error with regard to the administrative law judge's determination that the opinions of Drs. Broudy and Westerfield are not well-reasoned, we affirm his finding that employer failed to establish that the miner did not have legal pneumoconiosis, precluding a rebuttal finding that the miner did not have pneumoconiosis.[16] *See* 20 C.F.R. §718.305(d)(1)(i). In addition, because it is unchallenged on appeal, we affirm the administrative law judge's determination that employer failed to establish that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis and affirm the award of benefits in the miner's claim. *See* 20 C.F.R. §718.305(d)(1)(ii); *Skrack*, 6 BLR at 1-711.

Commencement Date of Benefits

The date for the commencement of benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-184 (1989). Where, as here, modification is based on the correction of a mistake in a determination of fact, the miner is entitled to benefits from the date he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim, unless credited evidence establishes that he was not disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(d)(1); *see Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989).

The administrative law judge found that the medical evidence did not establish when the miner became totally disabled due to pneumoconiosis. Thus, he awarded benefits beginning April 2009, the month in which the miner filed his claim. Employer contends the evidence establishes the miner was not disabled until "February 5, 2010, as all of the pulmonary function studies beginning on and following that date are qualifying." Employer's Brief at 25. We disagree.

The pulmonary function study and medical opinion evidence the administrative law judge credited establishes only that the miner became totally disabled due to pneumoconiosis at some time prior to the date of that evidence. *See Merashoff v. Consolidation Coal Co*, 8 BLR 1-105, 1-109 (1985). Further, the administrative law judge did not credit any evidence that the miner was not totally disabled due to pneumoconiosis at any time after the filing date of his claim. Substantial evidence supports the

[16] In light of our affirmance of the administrative law judge's finding that employer failed to establish that the miner did not have legal pneumoconiosis, we need not address its challenges to his determination that it also failed to establish that the miner did not have clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

administrative law judge's finding that the medical evidence does not reflect when the miner became totally disabled due to pneumoconiosis. Therefore, we affirm the administrative law judge's determination that benefits are payable from the month in which the miner filed his claim, April 2009. 20 C.F.R. §725.503(b),(d)(1).

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and employer raises no specific challenge to the survivor's claim, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2012); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits to the Miner with a Resulting Automatic Award of Benefits in a Survivor's Claim both On Modification is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge