U.S. Department of Labor

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

BRB No. 22-0064 BLA

LEXIE LYNN MADON (Widow of JERMA MADON) Claimant-Respondent v. HARLAN CUMBERLAND COAL COMPANY and SECURITY INSURANCE COMPANY OF HARTFORD Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/14/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Claimant's Claim on Modification of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Claimant's Claim on Modification (Decision and Order on Modification) (2019-BLA-06114) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case involves a request for modification of a survivor's claim filed on August 28, 2015.

In her January 31, 2018 Decision and Order Denying Benefits, ALJ Theresa C. Timlin found Claimant established the Miner had at least twenty-four years of underground coal mine employment based on the parties' stipulation and a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). She also found Employer rebutted the presumption and denied benefits. On January 14, 2019, Claimant timely requested modification of that denial. Director's Exhibits 60, 62.

In his October 22, 2021 Decision and Order on Modification, the subject of the current appeal, ALJ Morris (the ALJ) found Claimant established at least twenty-four years of underground coal mine employment and total disability. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. He further determined Employer did not rebut the presumption; Claimant

[1] Claimant is the widow of the Miner, who died on July 19, 2015. Director's Exhibits 1 at 145 (internally Director's Exhibit 8), 21. The Miner previously filed a claim he later withdrew; that claim is therefore considered not to have been filed. *See* 20 C.F.R. §725.306; Director's Exhibit 8 at 205-07 (June 14, 2017 Hearing Tr. at 7-9). Because the Miner never successfully established entitlement to benefits during his lifetime, Claimant is not entitled to derivative benefits under Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death 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 or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

established modification based on a mistake in a determination of fact, 20 C.F.R. §725.310; and granting modification would render justice under the Act.[3] Thus he awarded benefits.

On appeal, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response.

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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[3] Notably, ALJ Morris (the ALJ) held that he was required to make a "threshold" determination of whether granting modification would render justice under the Act prior to considering the modification petition on the merits. Decision and Order on Modification at 5, *citing Sharpe v. Director, OWCP* [*Sharpe I*], 495 F.3d 125, 128 (4th Cir. 2007). While *Sharpe I* held that an ALJ must consider the question before ultimately granting *the relief* requested in a modification petition, nothing in it establishes that an ALJ may make the determination at the outset, before *considering the merits* of the petition, even in cases with no new evidence. While it might make sense to make a threshold determination in cases of obvious bad faith, it does not follow that a threshold determination is appropriate in cases such as this where there is no indication of an improper motive. In such a case, the ALJ must first consider the merits, which will generally resolve the *Sharpe I* inquiry. *See O'Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254, 255 (1971) (the plain purpose of modification is to vest an adjudicator with "discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."). Given the ALJ considered the merits of Employer's petition, however, any error in finding he had the discretion to refuse to consider the petition is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-four years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment and therefore invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 8, 14.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits

Modification

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *See* 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 need not submit new evidence 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).

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

Because Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[6] or that "no part 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 did not establish rebuttal by either method.[7]

The ALJ 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). He considered the opinions of Drs. Fino and Swedarsky that the

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1 at 81 (internally Director's Exhibit 16), 154-183, 188-89 (internally Director's Exhibits 3, 5), 8 at 223-24 (June 14, 2017 Hearing Tr. at 25-26).

[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). 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 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] We affirm, as unchallenged, the ALJ's finding that Employer failed to disprove clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i); *Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 20.

Miner's death was due to lung cancer.[8] Decision and Order on Modification at 21-23; Director's Exhibit 8 at 405-432, 442-447; Employer's Exhibit 1. He found their opinions inadequately explained and thus insufficient to rebut the presumption of death due to pneumoconiosis. Decision and Order on Modification at 21-23.

Employer argues the ALJ erred in discrediting Drs. Fino's and Swedarsky's opinions. Employer's Brief at 8-11. We disagree.

Dr. Fino cited several medical studies to support his conclusion that there is no causal relationship between coal mine dust exposure and lung cancer. Director's Exhibit 8 at 405-432, 442-447; Employer's Exhibit 1. He stated he saw no evidence that the Miner had clinical pneumoconiosis or that coal mine dust contributed to his death. Director's Exhibit 8 at 163-64. Dr. Swedarsky acknowledged that a 2011 x-ray classification of 1/1 is consistent with "simple coal workers' pneumoconiosis" and biopsy results of the Miner's right lung sections "reveal[ed] honeycomb type fibrosis." Director's Exhibit 8 at 430. However, he did not render an opinion on whether the Miner had clinical pneumoconiosis. He opined the Miner had small cell neuroendocrine carcinoma of the lung, honeycomb fibrosis of the lung secondary to obstructive pneumonitis and radiation therapy, black pigment deposits consistent with coal mine dust exposure, emphysema related to cigarette smoking, and congestive heart failure due to atherosclerotic cardiovascular disease. *Id.* at 425-26. Further, he opined the Miner died due to complications of chemotherapy and radiation therapy for small cell carcinoma of the lung, and that "coal worker's pneumonitis" did not contribute to or hasten his death. *Id.* at 432.

The ALJ rationally discredited Drs. Fino's and Swedarsky's death causation opinions because they did not diagnose clinical pneumoconiosis, contrary to his finding that Employer failed to disprove the disease.[9] *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (physician who fails to diagnose pneumoconiosis, contrary to the

[8] The ALJ also considered Dr. Dye's opinion that pneumoconiosis caused, in part, the Miner's death. Decision and Order on Modification at 22-23; Claimant's Exhibit 1. Because Dr. Dye's opinion does not aid Employer in rebutting the Section 411(c)(4) presumption, we decline to address Employer's arguments regarding the ALJ's weighing of Dr. Dye's opinion. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 11-13.

[9] Because the ALJ provided a valid reason to discredit the opinions of Drs. Fino and Swedarsky, we need not address the remainder of Employer's arguments regarding the additional reasons he gave for rejecting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 8-11.

ALJ's finding, cannot be credited on rebuttal of disability causation "absent specific and persuasive reasons"); Decision and Order on Modification at 21-22. Moreover, the ALJ permissibly discredited Dr. Fino's opinion because the doctor did not explain how the medical literature he cited to show coal mine dust exposure does not cause lung cancer establishes pneumoconiosis played no role in the Miner's death. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order on Modification at 21. As it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

Thus we affirm the ALJ's findings that Employer did not rebut the Section 411(c)(4) presumption,[10] 20 C.F.R. §718.305(d)(2), and that Claimant therefore established a mistake in a determination of fact. 20 C.F.R. §725.310; Decision and Order at 23. We further affirm, as unchallenged, the ALJ's determination that granting modification would render justice under the Act. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5. Therefore, we affirm the award of benefits.[11]

[10] Because we have affirmed the ALJ's finding that Employer failed to disprove clinical pneumoconiosis, we need not address Employer's argument that he erred in finding it failed to disprove legal pneumoconiosis. S*ee Larioni*, 6 BLR at 1-1278; Employer's Brief at 7-8, 13.

[11] Employer argues the ALJ erred in failing to "reconcile" Claimant's conflicting testimony about her eligibility to receive benefits as a dependent. Employer's Brief at 13. In her Decision and Order Denying Benefits dated January 31, 2018, ALJ Timlin considered Claimant's testimony at the June 14, 2017 hearing and stated Claimant "remarried [on March 27, 2017] and therefore seeks benefits for the period from the date of [the Miner's death] to the date of her remarriage." Decision and Order at 3; Director's Exhibit 8 at 207, 213. In his Decision and Order on Modification dated October 22, 2021, the ALJ noted Claimant testified at the September 10, 2020 hearing that she had not remarried since the Miner died. Decision and Order on Modification at 4; September 10, 2020 Hearing Tr. at 19. He determined this testimony "contradicts [Claimant's] testimony at the original hearing" in which she stated "she had re-married on March 27, 2017." Decision and Order on Modification at 4. He concluded Claimant "was married to the Miner for 42 years and is now remarried." *Id*. at 3 (citing Claimant's testimony from the June 14, 2017 hearing; Director's Exhibit 8 at 213-214). Further, he specifically acknowledged that a remarried claimant is not entitled to benefits while she is remarried. Decision and Order on Modification at 4 n.6. Thus, in light of these findings, Employer has not alleged any error that requires remand. *See Shinseki v. Sanders*, 556 U.S. 396, 413

Accordingly, the ALJ's Decision and Order Awarding Claimant's Claim on Modification is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

(2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni,* 6 BLR at 1-1278.