U.S. Department of Labor

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

BRB Nos. 17-0273 BLA
and 17-0275 BLA

THELMA O. JASPER (o/b/o and Widow of FRANK V. JASPER) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/12/2018 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2010-BLA-5273) of Administrative Law Judge Drew A. Swank (the administrative law judge), rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves employer's request

for modification of a miner's claim filed on February 11, 2003[1] and is before the Board for the second time.[2]

In the last appeal, the Board held that the administrative law judge correctly determined that Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), is not available because the miner's claim was filed prior to January 1, 2005.[3] The Board also affirmed, as unchallenged on appeal, the administrative law judge's findings that the miner had more than fifteen years of underground coal mine employment, clinical pneumoconiosis arising

[1] Claimant is the widow of the miner, who died on January 14, 2009. Director's Exhibit 63. She is pursuing the miner's claim on behalf of his estate and she is also pursuing a survivor's claim, filed on February 17, 2009, on her own behalf. Survivor's Claim Director's Exhibit 2. On April 23, 2015, Administrative Law Judge Thomas M. Burke issued a Decision and Order Awarding Survivor's Benefits. Judge Burke found that claimant was automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*). Under Section 422(*l*), 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, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012). On February 1, 2017, Judge Burke issued a Decision and Order Awarding Survivor's Benefits. Noting that Administrative Law Judge Drew A. Swank (the administrative law judge) denied employer's request for modification of the award in miner's claim on January 31, 2017, Judge Burke stated that his April 23, 2015 award of survivor's benefits should stay in effect. On its own motion, the Board consolidated employer's appeals of the miner's and survivor's claims. *Jasper v. Consolidation Coal Co.*, BRB Nos. 17-0273 BLA and 17-0275 BLA (Apr. 3, 2017) (Order). Employer does not challenge the award of benefits in the survivor's claim in the present appeal.

[2] We incorporate the procedural history of the case as set forth in the Board's prior decision in *Jasper v. Consolidation Coal Co.*, BRB Nos. 15-0186 BLA and 15-0293 BLA (May 24, 2016) (unpub.) (Rolfe, J., concurring).

[3] Section 411(c)(4) of the Act applies to claims filed after January 1, 2005 that were pending on March 23, 2010. Section 411(c)(4) provides a rebuttable presumption that a miner's total disability or death was due to pneumoconiosis if he or she had at least fifteen years of underground coal mine employment, or 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); *see* 20 C.F.R. §718.305(b). Section 411(c)(4) is not available in the miner's claim, based on the filing date. 20 C.F.R. §718.305(a).

out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The Board vacated, however, the administrative law judge's finding that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and thus vacated his finding that employer established modification pursuant to 20 C.F.R. §725.310. The Board therefore remanded the case to the administrative law judge to reconsider the medical opinion evidence relevant to the issue of total disability causation. *Jasper v. Consolidation Coal Co.*, BRB Nos. 15-0186 BLA and 15-0293 BLA (May 24, 2016) (unpub.) (Rolfe, J., concurring).

The Board instructed the administrative law judge to reconsider the medical opinions, with the burden of proof on employer to establish a basis for modification under 20 C.F.R. §725.310 by showing a mistake in the prior determination that the miner's totally disabling respiratory impairment was due to pneumoconiosis.[4] Specifically, the Board instructed the administrative law judge to resolve the conflict between his decision to discredit Dr. Lenkey's opinion on the existence of a totally disabling respiratory impairment and his crediting of the same opinion on total disability causation.[5] The Board also instructed the administrative law judge to reconsider his finding that Dr. Lenkey's opinion is entitled to determinative weight based on the doctor's status as a treating physician, pursuant to 20 C.F.R. §718.104(d)(5). Further, the Board instructed the administrative law judge to address whether the opinions of Drs. Tomashefski and Tuteur

[4] The Board noted that employer was incorrect in stating that the miner retained the burden of proof on modification. *Jasper*, BRB Nos. 15-0186 BLA and 15-0293 BLA, slip op. at 4. Employer is the proponent of an order terminating the award of benefits in the miner's claim. *Id.* Thus, employer bears the burden of establishing a mistake in the determination of the ultimate fact of entitlement by applying the original burden of proof, albeit in reverse i.e., that a preponderance of the evidence does not show that the miner is entitled to benefits. *Id.*

[5] As an initial matter, the Board noted that the issues of pneumoconiosis, total respiratory or pulmonary disability, and disability causation must be considered separately, and a finding that a physician's opinion is not well-reasoned on one issue does not necessarily indicate that the opinion cannot be credited on a separate issue. *Jasper*, BRB Nos. 15-0186 BLA and 15-0293 BLA, slip op. at 6 n.9, *citing Luketich v. Director, OWCP*, 8 BLR 1-477, 1-480 n.3 (1986). The Board further noted, that the administrative law judge is required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), to explain his credibility determinations as they relate to each element of entitlement. *Jasper*, BRB Nos. 15-0186 BLA and 15-0293 BLA, slip op. at 6 n.9, *citing Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1985).

are adequately reasoned and documented on the issue of disability causation and, if so, to weigh them against Dr. Lenkey's opinion. Finally, the Board advised the administrative law judge that if he determined that employer met its burden to demonstrate a mistake of fact in the prior decision, he should then re-consider whether granting employer's modification request would render justice under the Act.[6] The administrative law judge was reminded to set forth all of his findings in detail, in compliance with the Administrative Procedure Act (APA).[7]

On remand, the administrative law judge initially found that justice under the Act would be served by consideration of employer's modification request. The administrative law judge next found that employer failed to meet its burden to establish that the miner's totally disabling respiratory impairment was not due to pneumoconiosis and thus establish a mistake of fact. Accordingly, the administrative law judge denied employer's request for modification pursuant to 20 C.F.R. §725.310, and he awarded benefits.

In the present appeal, employer contends that the administrative law judge erred in weighing the medical opinion evidence on the issue of disability causation at 20 C.F.R. §718.204(c). Employer contends that the administrative law judge applied an incorrect burden of proof and failed to adequately explain his findings. Claimant responds in support of the denial of employer's request for modification. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[8] 33 U.S.C. §921(b)(3), as incorporated by 30

[6] In a concurring opinion, Administrative Appeals Judge Jonathan Rolfe emphasized that, given the remedies available on modification in the miner's claim, the administrative law judge's conclusory statement that "the claimant is currently receiving benefits, and the survivor claim brought forth by [the miner's] widow has been held in abeyance until this case is resolved," could not be affirmed. *Jasper*, BRB Nos. 15-0186 BLA and 15-0293 BLA, slip op. at 10, *quoting* Decision and Order at 5. We note that, on remand, the administrative law judge repeated this rationale. Decision and Order on Remand at 6.

[7] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented." 5 U.S.C. §557(c)(3)(A).

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Ohio. *See Shupe v. Director,*

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a 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 of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see King v. Jericol Mining, Inc.*, 246 F.3d 822, 825, 22 BLR 2-305, 2-310 (6th Cir. 2001); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

The Miner's Claim - Disability Causation

Employer contends that the administrative law judge erred in his evaluation of the medical opinion evidence at 20 C.F.R. §718.204(c) in finding that employer failed to establish that the miner's total disability was not due to pneumoconiosis. The administrative law judge began his analysis by stating that, as the proponent of modifying the award of benefits in the miner's claim, the burden rested with employer "to disprove the causal link between pneumoconiosis and total disability" by establishing that "no part" of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. Decision and Order on Remand at 10, *citing Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013).

The administrative law judge then considered the medical opinions of Drs. Lenkey, Tomashefski, and Tuteur, relevant to disability causation. Decision and Order on Remand at 7-11; Director's Exhibits 16, 27, 48; Employer's Exhibits 1, 5, 6, 7, 8, 13. Dr. Lenkey, the miner's treating physician, opined that coal workers' pneumoconiosis in the form of silicosis, as found on the biopsy, was the cause of the miner's disabling respiratory impairment. Director's Exhibits 16, 27, 48. In contrast, Drs. Tomashefski and Tuteur opined that the miner's pneumoconiosis was too mild to contribute in any significant way to his respiratory impairment. Employer's Exhibits 6, 8, 13. The administrative law judge credited the opinion of Dr. Lenkey and discredited the opinions of Drs. Tomashefski and Tuteur to conclude that employer failed to meet its burden of proof on modification pursuant to 20 C.F.R. §725.310.

We agree with employer that the administrative law judge evaluated the medical opinion evidence under an incorrect burden of proof at 20 C.F.R. §718.204(c). Employer's Brief at 12-15. Contrary to the administrative law judge's findings, employer bears the

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OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order on Remand at 4 n.7; Director's Exhibits 2; 59 at 15.

burden of establishing a mistake in the determination of the ultimate fact of entitlement by applying the original burden of proof, albeit in reverse, i.e., that a preponderance of the evidence does not show that the miner is entitled to benefits.[9] *See* 20 C.F.R. §725.310(a); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *Nataloni*, 17 BLR at 1-84. Here, the Board affirmed the administrative law judge's findings with regard to every element of entitlement but disability causation. Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(i), (ii). Thus, to establish a basis for modification, employer must prove by a preponderance of the evidence that pneumoconiosis was not a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(c); *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599, 25 BLR 2-615, 2-624 (6th Cir. 2014).

We further conclude that the administrative law judge's recitation of an incorrect legal standard is not harmless under the facts of this case, as the administrative law judge specifically discredited Dr. Tomashefski's opinion under this incorrect standard. The administrative law judge noted that, based on a review of the slides from the miner's 2004 surgical lung biopsy and lymph node biopsies, Dr. Tomashefski opined that the miner's coal workers' pneumoconiosis was "too mild and of too limited extent to have caused him any *significant* respiratory dysfunction." Decision and Order on Remand at 10, *quoting* Employer's Exhibit 6. Because Dr. Tomashefski only opined that the miner's pneumoconiosis would not cause a "significant" impairment, the administrative law judge found that Dr. Tomashefski's opinion is not sufficient to meet employer's burden of proof to establish that "no part" of the miner's disabling impairment is due to pneumoconiosis. Decision and Order on Remand at 10-11.

In view of the foregoing, we vacate the administrative law judge's finding that employer failed to establish that the determination that the miner's totally disabling impairment was due to pneumoconiosis was mistaken and, therefore, vacate his finding that employer failed to establish a basis for modification at 20 C.F.R. §725.310. We further conclude that it is appropriate that the case be assigned to a different administrative law

[9] An employer must establish that "no part" of the miner's total disability was caused by pneumoconiosis in order to rebut the presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305(d)(1)(ii). As the Board previously determined, however, the Section 411(c)(4) presumption is not applicable in this case.

judge on remand for a fresh look at the evidence and a proper application of the law. 20 C.F.R. §§802.404(a), 802.405(a).

In considering employer's request for modification, the new administrative law judge must address the medical opinions of Drs. Tomashefski, Tuteur, and Lenkey in light of employer's arguments, and determine whether each opinion is adequately reasoned and documented on the issue of total disability causation and the weight it should be accorded. In so doing, the administrative law judge should address the physician's credentials, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions, taking into account other relevant evidence and the record as a whole.[10] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge must also set forth his or her "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record," in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1985). Finally, if the administrative law judge finds that employer has met its burden of demonstrating a mistake of fact, the new administrative law judge should then re-consider whether granting employer's modification request would render justice under the Act.[11] *See O'Keeffe*, 404 U.S. at 256; *Worrell*, 27 F.3d at 230, 18 BLR at 2-296.

[10] Because the case is being remanded to a new administrative law judge who will review it with fresh eyes, we do not address employer's arguments which relate to the credibility and weight accorded the physicians' opinions.

[11] We note that the administrative law judge 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 Remand at 5, *citing Sharpe v. Director, OWCP* [*Sharpe I*], 495 F.3d 125, 128, 24 BLR 2-56, 2-68 (4th Cir. 2007). This is not accurate. This is a Sixth Circuit case and that Circuit has not adopted *Sharpe*. Moreover, while *Sharpe I* held that an administrative law judge must consider the question before ultimately granting the relief requested in a modification petition, nothing in *Sharpe I* requires a threshold determination. While it might make sense to make a threshold determination in cases of obvious bad faith, for example, it does not follow that a threshold determination is appropriate in cases where there is no indication of an improper motive. In such a case, the administrative law judge should first consider the merits. If there is no basis to grant the relief requested in a modification petition, there is no reason to determine whether that relief would render justice under the Act. *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 broad discretion to correct mistakes of fact,

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is vacated, and the case is remanded for reassignment to a different administrative law judge for consideration in accordance with this opinion.[12]

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.").

[12] If the new administrative law judge denies employer's modification request on remand, the award of benefits in the survivor's claim need not be altered. However, should the new administrative law judge grant employer's modification request, and deny benefits in the miner's claim on remand, he or she must consider whether claimant can independently establish entitlement to survivor's benefits.