BRB No. 11-0255 BLA

CLARENCE E. BROWN	)	
Claimant-Respondent	)	
v.	)	
DOMINION COAL CORPORATION	)	DATE ISSUED: 12/23/2011
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Clarence E. Brown, Raven, Virginia, *pro se*.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Modification Awarding Benefits (2010-BLA-05182) of Administrative Law Judge Linda S. Chapman on a duplicate claim,[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-

[1] This is claimant's third claim for benefits. Director's Exhibit 1. Claimant's two prior claims were denied for failure to establish total disability pursuant to 20 C.F.R. §718.204, as set forth in the prior history in *C.E.B.* [*Brown*] *v. Dominion Coal Corp.*, BRB No. 07-0263 BLA (Dec. 17, 2007) (unpub.).

944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case is before the Board for the fourth time and concerns a duplicate claim filed by claimant on October 15, 1998, which is still pending as the result of two modification requests. Director's Exhibit 1. Claimant filed a second request for modification on May 4, 2009. The administrative law judge credited claimant with twenty-eight years of coal mine employment and found that the evidence submitted on modification established that claimant has complicated pneumoconiosis and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Thus, the administrative law judge found that claimant established a material change in conditions at 20 C.F.R. §725.309 (2000),[2] and a basis for modification of the denial of his prior claim pursuant to 20 C.F.R. §725.310 (2000). She further determined that granting claimant's modification request would render justice under the Act. Accordingly, benefits were awarded, commencing October 1998, the month in which claimant filed his duplicate claim.

On appeal, employer challenges the administrative law judge's credibility determinations and her findings that claimant established the existence of complicated pneumoconiosis and a material change in conditions at 20 C.F.R. §725.309 (2000). Additionally, employer asserts that the administrative law judge failed to properly consider whether granting claimant's modification request would render justice under the Act, and that she erred in determining the date for commencement of benefits. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate 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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[2] The regulations, which were revised and became effective on January 19, 2001, are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). The substantive revisions made to 20 C.F.R. §§725.309 and 725.310 apply only to claims filed after January 19, 2001. All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of the regulations remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations. The miner's current claim is a "duplicate claim" under 20 C.F.R. §725.309(d) (2000).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 2.

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

As this case involves a duplicate claim, claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), by proving, based on the evidence developed subsequent to the denial of his prior claim, one of the elements of entitlement previously adjudicated against him.[4] *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*) *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Furthermore, as this case involves a request for modification of the denial of a duplicate claim, for failure to establish a material change in conditions, the administrative law judge was required to consider whether all of the evidence developed in conjunction with the current duplicate claim, including any new evidence submitted with the two modifications requests, established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). *See Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). The administrative law judge was also required to determine whether there has been a mistake in a determination of fact with regard to the prior denial of claimant's duplicate claim. *See* 20 C.F.R. §725.310 (2000). The United States Court of Appeals for the Fourth Circuit, wherein jurisdiction for this case arises, has stated that the intended purpose of modification, based on a mistake in a determination of fact, is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001). Because claimant's prior claim was denied for failure to establish total disability, the issue presented in this case is whether claimant has established a material change in conditions by means of the irrebuttable presumption at 20 C.F.R. §718.304.[5] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a)

[4] To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[5] Claimant has not submitted evidence to establish total disability pursuant to 20 C.F.R. §718.204(b)(i)-(iv).

when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

Employer contends that the administrative law judge's erred in finding that claimant established complicated pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.304(a).[6] We disagree. Contrary to employer's contention, the administrative law judge properly considered the x-ray evidence submitted by claimant in support of his 2009 modification request, in conjunction with the x-ray evidence developed since the denial of his prior claim in 1996. Decision and Order on Modification at 4-5, 19. The administrative law judge determined that this evidence "overwhelmingly" established that claimant "has a disease process in his lungs that has resulted in the development of a large mass exceeding one centimeter in his right lung that appears on his x-rays, and more recently, in his left lung as well."[7] *Id*. at 20. The administrative law judge indicated that "the dispute centers on the etiology of these masses." *Id*. The administrative law judge noted that the only physicians in the record, who read claimant's x-rays as negative for complicated pneumoconiosis, are Drs. Wheeler and Scott. *See* Decision and Order on Modification at 19; Employer's Exhibits 1, 2. As noted by the administrative law judge, they opined the masses identified on claimant's x-rays and CT scans are "probably due to a form of granulomatous disease, either tuberculosis or histoplasmosis." Decision and Order on Modification at 19.

Employer argues that the administrative law judge erred in discounting the opinions of Drs. Wheeler and Scott as "speculative" and "equivocal," and that she has improperly acted as a medical expert in this case. Employer's Brief in Support of Petition for Review at 27-32. There is no merit to this argument. The Fourth Circuit, within whose jurisdiction this claim arises, specifically held in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285, 24 BLR 2-269, 2-284 (4th Cir. 2010), under factual circumstances similar to this case, that an administrative law judge may reject, as

[6] Employer resurrects its argument that the administrative law judge is bound by factual findings, rendered by different administrative law judges, as to whether the evidence in this duplicate claim is sufficient to establish complicated pneumoconiosis. We reject this argument for the reasons set forth in *Brown*, BRB No., 07-0263 BLA, slip op. at 7 n.7.

[7] The administrative law judge noted that Dr. Wheeler reported an increase in the size of the mass in claimant's right lung from 4.5 centimeters in 1996 to 6.0 centimeters in 2009. Decision and Order on Modification at 20 n.9.

speculative and equivocal, the opinions of employer's experts who exclude coal dust exposure as the cause for large opacities or masses identified by x-ray, and attribute the radiological findings to conditions, such as tuberculosis, histoplasmosis, granulomatous disease or sarcoidosis, if they fail to point to evidence in the record indicating that the miner suffers or suffered from any of the alternative diseases. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284. In this case, the administrative law judge rationally explained why the opinions of Drs. Wheeler and Scott were not credible:

> Dr. Wheeler and Dr. Scott relied on the asymmetrical and apical presentation of the disease in the x-rays and CT scans they viewed, which made pneumoconiosis an "unlikely" explanation for the changes. They did not cite to any medical literature in support of their conclusions. Both Dr. Wheeler and Dr. Scott felt that the changes they observed were probably due to tuberculosis or granulomatous disease. Not only were these conclusions equivocal, neither physician discussed the possibility of pneumoconiosis as a co-existent disease process.

Decision and Order on Modification at 24. The administrative law judge also noted that there was no evidence in the record to support the conclusions of Drs. Wheeler and Scott that claimant has granulomatous disease in the form of either tuberculosis or histoplasmosis.[8] *Id*. at 22. Thus, because the administrative law judge permissibly exercised her discretion in rendering credibility determinations, and she followed applicable law, we affirm her decision to give the opinions of Drs. Wheeler and Scott little probative weight on the issue of whether claimant has complicated pneumoconiosis. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Since it is supported by substantial evidence, we affirm the administrative law judge's finding, pursuant to 20 C.F.R. §718.304(a), that claimant has established that he has complicated pneumoconiosis, based "on more than fifteen ILO readings" finding that he has large masses in his lungs that exceed one centimeter, and which have been designated as Category A or B opacities. Decision and Order on Modification at 21. We specifically affirm the administrative law judge's reliance on claimant's modification evidence, which included a positive reading for complicated pneumoconiosis, Category

[8] The administrative law judge referenced treatment notes from Dr. Smiddy indicating that claimant underwent a bronchoscopy in 1996, which showed no evidence of tuberculosis or cancer. Decision and Order at 22; Claimant's Exhibit 1. Dr. Smiddy has diagnosed complicated pneumoconiosis, based on his treatment of claimant and his review of multiple x-rays. Claimant's Exhibit 1.

B, by Dr. Alexander, a Board-certified radiologist and B reader, of the most recent x-ray dated June 10, 2009. Claimant's Exhibit 2; s*ee Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Perry v. Mynu Coals, Inc*., 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006); *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000)

Because the administrative law judge permissibly found that the evidence submitted in conjunction with the current duplicate claim, along with the evidence submitted by claimant in conjunction with his modification requests, establishes that claimant has complicated pneumoconiosis, we affirm her finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis, and also established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *See Cox*, 602 F.3d at 288, 24 BLR at 2-287-88; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Furthermore, because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 25. We, therefore, affirm the administrative law judge's conclusion that claimant has established a basis for modification of the denial of his duplicate claim pursuant to 20 C.F.R. §725.310 (2000).

Additionally, we reject employer's contention that the administrative law judge erred in her consideration of whether granting claimant's modification request would "render justice under the Act." *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Sharpe v. Director, OWCP*, 495 F.3d 125, 131-132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007). As the Fourth Circuit recognized in *Sharpe*, the decision of whether to grant or deny a request for modification is committed to the discretion of the administrative law judge. *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69; *see also Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976). The court directed an administrative law judge to weigh any factors that are pertinent in the circumstances, as well as the accuracy of the prior decision. *Sharpe*, 495 F.3d at 128, 24 BLR at 2-68. Specifically, the court stated, "[t]hese include not only accuracy, but also the requesting party's diligence and motive, and whether a favorable ruling would nonetheless be futile." *Id*. With regard to the diligence factor, the court noted that the United States Court of Appeals for the Seventh Circuit, in *Hilliard*, has recognized that the diligence of the party seeking modification should be considered in a modification determination. *Id*. Further, with regard to the motive factor, the court noted that "[t]he requesting party's motive may be an appropriate consideration in adjudicating a modification request, in that 'if the party's purpose in filing a modification is to thwart a claimant's good faith claim or an employer's good faith defense, the remedial purpose of the statute is no longer served.'" *Sharpe*, 495 F.3d at 133, 24 BLR at 2-68-69, *quoting Hilliard*, 292 F.3d at 546, 22 BLR at 2-452.

In this case, the administrative law judge followed the directives of *Sharp*e and explained:

> In determining whether it is appropriate to grant [claimant's] request for modification, I have taken into consideration [claimant's] diligence, indeed his dogged pursuit of his claim over more than ten years, and his status as an unrepresented [c]laimant with a limited education, as well as the quality of the new evidence he has submitted. I have weighed all of these factors under the "justice under the Act" standard, which requires that I keep in mind the "basic determination of Congress that accuracy of determination is to be given great weight in all determinations under the Act." I find that granting [claimant's] request for modification would render justice under the Act.

Decision and Order at 25, *quoting Hilliard*, 292 F.3d at 547, 22 BLR at 2-453. Because the administrative law judge considered each of the factors identified in *Sharpe* and rendered findings that are rational and supported by substantial evidence, we affirm her conclusion that granting claimant's modification request would render justice under the Act. *See Sharpe*, 495 F.3d at 133, 24 BLR at 2-69; Decision and Order at 25.

As a final matter, we reject employer's contention that the administrative law judge erred in awarding benefits as of October 1998, the month in which claimant filed his claim. In a case where a miner is found entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the fact-finder must consider whether the evidence of record establishes an onset date of the miner's complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989). If the evidence does not reflect the onset date for complicated pneumoconiosis, then the date for commencement of benefits is the month during which the claim was filed, unless the evidence affirmatively establishes that the miner had only simple pneumoconiosis for any period subsequent to the date of filing, in which case benefits must commence "following the period of simple pneumoconiosis." *Williams*, 13 BLR at 1-30.

In this case, the administrative law judge reviewed the record, and found that because there was "numerous findings of complicated pneumoconiosis dating back to 1991," which predated claimant's October 15, 1998 application for benefits, the "date of filing of [claimant's duplicate] claim is the earliest date from which benefits are payable." Decision and Order at 26 n.11. Because it is rational, we affirm her decision to award benefits, commencing in October 1998, the month in which claimant filed his claim for benefits. *See* 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge