U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0084 BLA

PHYLLIS STACY (Widow of LARRY STACY) Claimant-Respondent v. DIAMOND MAY COAL COMPANY and Self-Insured Through PROGRESS FUELS CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/22/2015 DECISION and ORDER

Appeal of the Award of Benefits in a Modification of a Survivor's Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizen's Law Center), Whitesburg, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Award of Benefits in a Modification of a Survivor's Claim[1] (2011-BLA-05860) of Administrative Law Judge Larry S. Merck, filed on April 5, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[2] Based on the parties' prior stipulation, the administrative law judge credited the miner with twenty years of surface coal mine employment[3] and found that all of this employment was in conditions substantially similar to those in underground mines. In addition, the administrative law judge determined that claimant established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(ii),

[1] Claimant is the widow of the miner, who died on March 19, 2006. Decision and Order at 2; Director's Exhibit 10. There is no evidence in the record that the miner received black lung benefits during his lifetime.

[2] Claimant filed a claim on April 5, 2006, and in a decision issued on February 25, 2008, Administrative Law Judge Ralph A. Romano awarded benefits. Director's Exhibit 43. Employer appealed to the Board, which reversed the award and held, as a matter of law, that claimant did not establish that the miner's death was due to pneumoconiosis under the standard set forth in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003) (holding that in order to establish that a miner's death was due to pneumoconiosis the physicians must explain the process by which pneumoconiosis hastened the miner's death). *P.S.* [*Stacy*] *v. Diamond May Coal Co*., BRB No. 08-0493 BLA, slip op. at 4 (Mar. 13, 2009) (unpub.). Claimant filed her request for modification on March 12, 2010. Director's Exhibit 46.

[3] The administrative law judge "incorporate[d] by reference, as if fully set forth herein, the findings of fact and conclusions of law contained in [Administrative Law Judge] Romano's Decision and Order issued on February 25, 2008, as modified by the Board's Decision and Order issued on March 13, 2009," and adopted these findings and conclusions "except to the extent that any . . . are inconsistent with those expressed in [his] Decision and Order." Decision and Order at 3.

(iv) and, therefore, invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4)(2012), as implemented by 20 C.F.R. §718.305. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that, by relying on the preamble to the 2001 revised regulations to find that the opinions of Drs. Oesterling and Rosenberg are insufficient to rebut the presumption, the administrative law judge denied employer due process and violated the Administrative Procedure Act (APA), 5 U.S.C. §556(e), as incorporated into the Act by 30 U.S.C. §932(a). In addition, employer asserts that these opinions prove that the miner's lung cancer was not related to his coal mine employment, thereby establishing rebuttal of the Section 411(c)(4) presumption. Further, employer contends that the administrative law judge erred in permitting modification of claimant's claim based on a change in law, and maintains that claimant had an improper motive in filing her request for modification. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge rationally found that the opinions of Drs. Rosenberg and Oesterling are insufficient to establish rebuttal. The Director also argues that the administrative law judge's granting of claimant's request for modification is appropriate and in the interest of justice.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated into the

[4] Under Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner 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 suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4)(2012), as implemented by 20 C.F.R. §718.305.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had twenty years of coal mine employment in conditions substantially similar to those in underground mines, and suffered from a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, therefore, the administrative law judge's finding that claimant was entitled to the rebuttable presumption at Section 411(c)(4).

[6] The record indicates that the miner's last coal mine employment was in

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law 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).

I. Request for Modification

Employer argues that the administrative law judge erred in granting claimant's request for modification of the denial of her claim, based on a change in law. Employer also contends that the administrative law judge failed to consider that granting claimant's request "would not render justice under the Act," because claimant's motive for requesting modification was improper. Employer's Brief at 17. In support of this argument, employer maintains that claimant "subverted the appellate process" by choosing to "have the claim considered under the [Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 260 (2010)] to shift the burden of proof and make it easier to get benefits," rather than appealing the Board's affirmance of the denial of her claim. *Id*. Employer's arguments are without merit.

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The administrative law judge, however, has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). Consequently, the Board has held that modification is available to permit re-examination of entitlement in circumstances similar to those in the case before us. *See Mullins v. ANR Coal Co., LLC*, 25 BLR 1-49, 1-53 (2012). Although *Mullins* involved application of Section 422(l), the Board has applied its holding to cases such as this involving Section 411(c)(4), and we do so here. *See, e.g.*, *Fields v. Clinchfield Coal Co.*, BRB No. 12-0188 BLA (Nov. 29, 2012) (unpub.); *Sweeney v. Jim Walters Resources, Inc.*, BRB No. 11-0346 BLA (Feb. 16. 2012) (unpub.).

We also reject employer's argument that claimant filed her modification request with an improper motive, i.e., to take advantage of the PPACA amendments. Employer's allegation is contradicted by the facts, since claimant filed her request on March 12, 2010, prior to enactment of the PPACA on March 23, 2010. Director's Exhibit 46. In addition, and more importantly, by filing a request for modification, claimant was exercising her right to pursue a claim for benefits under the Act. Thus, there was nothing improper about her motive in seeking modification of her denied claim. *See Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F. 3d 317, 327-29, 25 BLR 2-157, 2-173-176 (4th Cir. 2012), *cert. denied*, 570 U.S. (2013); *see also Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002). Accordingly, contrary to employer's contention, the administrative law judge's consideration of claimant's request for modification rendered justice under the Act. *See Sharpe v. Director, OWCP* (*Sharpe* I), 495 F.3d 125, 134 24 BLR 2-56, 2-70 (4th Cir. 2007).

II. Rebuttal of the Presumption

Employer does not contest the administrative law judge's determination that claimant properly invoked the Section 411 (c)(4) presumption. Under the Department of Labor's regulations, in order to rebut the Section 411(c)(4) presumption, employer must affirmatively establish that the miner did not have either legal pneumoconiosis[7] or clinical pneumoconiosis,[8] or that "no part of the miner's death was caused by pneumoconiosis, as defined in § 718.201." 20 C.F.R. §718.305(d)(2)(ii); *see Copley v. Buffalo Mining Co*., 25 BLR 1-81, 1-89 (2012).

Employer contends that the administrative law judge erred in relying on the preamble to discredit the opinions of Drs. Oesterling and Rosenberg, without identifying the part of the preamble he was applying. Employer also asserts that the scientific findings cited by the Department of Labor (DOL) in the preamble cannot provide the basis for a determination that the opinions of Drs. Oesterling and Rosenberg are "not scientifically credible[,]" because the cause of the miner's respiratory impairment must be evaluated on an individual basis. Employer's Brief at 15. Employer's allegations of error are without merit.

Contrary to employer's contention, when the administrative law judge discredited the opinions of Drs. Oesterling and Rosenberg on the existence of legal pneumoconiosis,

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[7] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[8] Clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

he explicitly indicated that their conclusions conflicted with the following evidence from scientific studies found credible by the DOL in the preamble to the revised regulations, and cited to their location in the Federal Register: coal dust exposure and cigarette smoking cause damage to the lungs by similar mechanisms; a finding of complicated pneumoconiosis is not required before a miner's disabling obstructive lung disease can be found to be attributable to coal dust exposure; and coal dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis, even in the absence of smoking. Decision and Order at 18, *citing* 65 Fed. Reg. 79,939-40, 79,951 (Dec. 20, 2000).

Employer also is incorrect in alleging that it was improper for the administrative law judge to consider the scientific evidence cited in the preamble when evaluating the credibility of medical opinions, and that it is a violation of the APA to do so without providing specific advance notice and an opportunity to respond. The United States Court of Appeals for the Sixth Circuit has held that it is appropriate for the administrative law judge to consider the extent to which a physician's opinion is consistent with the medical and scientific premises underlying the amended regulations, as expressed in the preamble, when assessing the credibility of that opinion. *A & E Coal Co. v. Adams*, 694 F.3d 798, 802, 25 BLR 2-203, 2-211 (6th Cir. 2012). Moreover, the Sixth Circuit has also found that the APA does not require the administrative law judge to separately enter into the record the scientific studies described in the preamble in order to consult them.[9] *Adams*, 694 F.3d at 802, 25 BLR at 2-211-12.

We decline to further address the administrative law judge's reliance on the preamble because, although employer has criticized his use of the preamble, it has not alleged any specific error in the findings that he made.[10] *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986). Further, the administrative law judge rationally determined that the opinions of Drs. Oesterling and Rosenberg were not well-reasoned on the issue of death causation because neither physician diagnosed the miner with legal pneumoconiosis, which was contrary to the

[9] We note that employer did not offer for the administrative law judge's consideration "the type and quality of medical evidence that would invalidate" the science cited by the Department of Labor in the preamble. *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014).

[10] The administrative law judge did not consider whether employer rebutted the presumed existence of clinical pneumoconiosis because he found that it was unable to rebut the presumed existence of legal pneumoconiosis and, thus, could not establish rebuttal pursuant to 20 C.F.R. §718.305(d)(2)(i). Decision and Order at 18 n.7.

administrative law judge's finding that employer did not rebut the presumed existence of legal pneumoconiosis, and, therefore, their opinions were permissibly discredited concerning death causation. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *see* Decision and Order at 19; Employer's Exhibits 1-3. We further affirm, therefore, the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption.

Accordingly, the administrative law judge's Award of Benefits in a Modification of a Survivor's Claim is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge