U.S. Department of Labor

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

BRB No. 16-0208 BLA

JOE O. OSBORNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 02/23/2017
	)	
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 Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

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

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Rebecca J. Fiebig (Nicholas C. Geale, Acting Solicitor of Labor, Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Modification Awarding Benefits (2013-BLA-05094) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed on March 11, 2002,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). In a previous Decision and Order issued on April 15, 2009, Administrative Law Judge Thomas M. Burke denied benefits because he found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 104. Claimant timely requested modification, and in a Decision and Order issued on June 13, 2011, Administrative Law Judge Linda S. Chapman found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Director's Exhibit 151. Therefore, Judge Chapman denied benefits.

Claimant then filed a second request for modification. In a Decision and Order issued on January 12, 2016, which is the subject of this appeal, Administrative Law Judge Paul C. Johnson, Jr. (the administrative law judge), found that the second request for modification was timely filed, and credited claimant with twenty-seven years of underground coal mine employment.[2] The administrative law judge found that the evidence established that claimant suffers from both clinical pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(1), (4), and legal pneumoconiosis[4] pursuant to 20 C.F.R.

[1] The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim, based on its filing date. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(a).

[2] The record indicates that claimant's coal mine employment was in Virginia. Decision and Order at 3; Director's Exhibit 99; Hearing Transcript at 19. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] "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).

§718.202(a)(4). The administrative law judge therefore found that claimant demonstrated a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. In addition, the administrative law judge found that claimant established that he is totally disabled by a respiratory or pulmonary impairment that is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). The administrative law judge further found that granting modification would render justice under the Act. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that claimant's total respiratory or pulmonary disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[5] Employer also asserts that the administrative law judge erred in finding that granting modification would render justice under the Act. Claimant responds, urging affirmance of the award of benefits.[6]

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. 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 (1965).

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[4] "'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).

[5] In its brief filed on May 16, 2016, employer initially challenged the administrative law judge's determination that claimant's modification request was timely filed. The Director, Office of Workers' Compensation Programs, filed a limited response to employer's brief, urging the Board to affirm the administrative law judge's determination that the modification request was timely. Thereafter, by letter dated October 26, 2016, employer withdrew the issue of the timeliness of claimant's modification request, and requested that the Board address the remaining arguments in its brief.

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant's modification request was timely filed, and that claimant established twenty-seven years of underground coal mine employment, and total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 6-9, 57-58; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 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 an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Section 22 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits in a miner's claim based on a change in conditions[7] or a mistake in a determination of fact. The administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge 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).

I. LEGAL PNEUMOCONIOSIS

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis. The administrative law judge noted that Drs. Baker, Forehand, Rasmussen, Klayton, and Robinette diagnosed claimant with legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and hypoxemia arising out of coal mine employment. Decision and Order at 52-55; Director's Exhibits 17, 72, 84, 105-106, 138; Claimant's Exhibits 1, 9. Conversely, Drs. Basheda, Castle, and Hippensteel opined that claimant does not suffer from legal pneumoconiosis, but suffers from obstructive lung disease due to cigarette smoking and asthma, along with idiopathic pulmonary fibrosis and cardiac disease. Decision and Order at 5, 53-55; *see* Director's Exhibits 66, 82, 83, 138; Employer's Exhibits 1-3, 7-9. Of the opinions diagnosing legal pneumoconiosis, the administrative law judge found that only Dr. Baker's opinion was well-reasoned and

[7] The administrative law judge found that claimant failed to establish a change in conditions. Decision and Order at 45-53.

well-documented and, therefore, assigned his opinion significant weight.[8] Decision and Order at 52-55. The administrative law judge discounted the contrary opinions of Drs. Basheda, Castle, and Hippensteel because he was not persuaded by their reasoning for opining that claimant does not suffer from legal pneumoconiosis.[9] *Id.* at 52-55. The administrative law judge, therefore, found that a preponderance of the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

We reject employer's contention that the administrative law judge erred in according less weight to the opinions of Drs. Basheda, Castle, and Hippensteel. The administrative law judge correctly noted that Dr. Basheda "attributed [c]laimant's obstructive lung disease to tobacco use or asthma" based on "bronchoreversibility" evidenced by pulmonary function testing. Decision and Order at 52; *see* Employer's Exhibits 2, 8. However, the administrative law judge further noted that "the only pulmonary function study [identified] by Dr. Basheda that showed bronchoreversibility was dated 2002" and that the "other studies all demonstrated no acute bronchoreversibility."[10] *Id.* The administrative law judge rationally found that Dr. Basheda's opinion was not persuasive because he "relied on the oldest diagnostic testing in evidence to support his conclusion . . . ." Decision and Order at 52; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 1167, 21 BLR 2-73, 2-82 (6th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

In weighing Dr. Castle's opinion, the administrative law judge noted that Dr. Castle opined that claimant's "reduction in diffusing capacity was related to interstitial

[8] The administrative law judge found that the medical opinions of Drs. Forehand, Rasmussen, and Robinette, which were part of the original evidence submitted in the claim, were not credible on the issue of legal pneumoconiosis because they were based on older testing. Decision and Order at 55. The administrative law judge also found that Dr. Klayton did not adequately explain his diagnosis of legal pneumoconiosis. *Id.* at 51.

[9] The administrative law judge also found that the opinions of Drs. Castle and Hippensteel submitted in the original proceedings in the claim were not credible because they were based on older testing. Decision and Order at 55.

[10] Specifically, Dr. Basheda indicated that the pulmonary function studies taken on July 9, 2003, August 4, 2003, October 20, 2009, October 14, 2010, and June 15, 2012 showed "no acute bronchodilator response." Employer's Exhibit 2.

idiopathic pulmonary fibrosis, because if it were caused by pneumoconiosis, there would be a high profusion of p or r type opacities"[11] on claimant's chest x-ray. Decision and Order at 52-53; Director's Exhibit 82; Employer's Exhibit 1 at 11. The administrative law judge permissibly discounted Dr. Castle's opinion on the issue of legal pneumoconiosis because Dr. Castle required the "absence of radiographic evidence of clinical pneumoconiosis." Decision and Order at 52-53; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000). Moreover, the administrative law judge rationally found that Dr. Castle's discussion of whether coal mine dust exposure causes a mixed obstructive and restrictive ventilatory impairment, or a purely obstructive ventilatory impairment,[12] was equivocal and inconsistent. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 52-53.

Finally, the administrative law judge noted Dr. Hippensteel's opinion that claimant "does not suffer from legal pneumoconiosis because, although pneumoconiosis is latent and progressive, 'it is usually associated with ongoing coal dust exposure and much less likely to be progressive after leaving work in the mines.'" Decision and Order at 54, *quoting* Employer's Exhibit 3 at 23. The administrative law judge permissibly found Dr. Hippensteel's rationale unpersuasive because the "[r]egulations and findings of the Department of Labor make clear that pneumoconiosis may only first become detectable after leaving the mines, and a claimant is not required to prove that the disease is progressive."[13] Decision and Order at 54; *see* 20 C.F.R. §718.201(c) (recognizing

[11] Dr. Castle explained that claimant developed resting hypoxemia evidenced by arterial blood gas testing as a result of his idiopathic pulmonary fibrosis and associated reduced diffusion capacity. Employer's Exhibit 1 at 12.

[12] In his October 11, 2013 report, Dr. Castle opined that coal mine dust exposure causes a mixed obstructive and restrictive ventilatory impairment. Employer's Exhibit 1. During his July 9, 2015 deposition, Dr. Castle stated that coal mine dust exposure can cause "obstructive or restrictive [impairments] or a combination of both." Employer's Exhibit 4 at 26. On cross-examination, however, Dr. Castle testified that he "would expect [claimant] to present with just pure obstruction alone more commonly than you would see with restriction" if claimant suffered from pneumoconiosis. *Id*. at 39.

[13] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Basheda, Castle, and Hippensteel on the issue of legal pneumoconiosis, any error he may have made in according less weight to their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6

pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure"); *see also Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

Employer also argues that the administrative law judge erred in crediting Dr. Baker's opinion. Employer maintains that Dr. Baker's opinion is insufficiently reasoned and is based exclusively on claimant's history of exposure to coal mine dust. Employer's argument lacks merit.

As summarized by the administrative law judge, Dr. Baker opined that claimant suffers from an obstructive respiratory impairment and an oxygen-gas exchange impairment, with both impairments caused by coal mine dust exposure and smoking. Decision and Order at 54; Director's Exhibit 138. Claimant also reported wheezing for four to five years before Dr. Baker's examination, and Dr. Baker opined that the wheezing was related to claimant's coal mine employment. *Id.* The administrative law judge recognized that Dr. Baker based his legal pneumoconiosis diagnosis on chest x-ray evidence which revealed "'heavy dust load in [claimant's] work environment,' the abnormal pulmonary function studies, and arterial blood gas values." Decision and Order at 35, *quoting* Director's Exhibit 138.

Contrary to employer's argument, the administrative law judge permissibly found that Dr. Baker's opinion was "well-documented and well-reasoned, as Dr. Baker relied on a physical examination, occupational history, diagnostic testing, and medical literature in forming his opinions, and provided a thorough explanation as to why the underlying data supported his conclusions." Decision and Order at 54; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Specifically, the administrative law judge found that Dr. Baker "thoroughly explained how coal mine dust would affect [c]laimant after his exposure ceased in 1987,"[14] and how both "[c]laimant's

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BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to these physicians' opinions.

[14] The administrative law judge noted that "Dr. Baker could not recall why [c]laimant stopped working in 1987 or what his pulmonary capacity was at the time, but stated that it was not necessarily important in determining the causation of any pulmonary impairment." Decision and Order at 35; *see* Director's Exhibit 138 at 8-9. The administrative law judge also noted that Dr. Baker "explained that generally any pulmonary irritant injury will worsen with time. Further, there is a lot of individual

occupational exposure and cigarette smoking had an additive effect"[15] on claimant's pulmonary impairments. *Id*. Moreover, the administrative law judge noted Dr. Baker's explanation that claimant's weight did not cause his hypoxemia, as Dr. Baker opined that "for obesity to affect the results of an arterial blood gas study, an individual would need to be morbidly obese to achieve pO2 levels as low as [c]laimant's levels." *Id*. Therefore we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) through Dr. Baker's reasoned medical opinion. We also affirm the administrative law judge's finding that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *See Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

II. TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

Employer next argues that the administrative law judge erred in finding that the evidence established that claimant's total respiratory or pulmonary disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We disagree. The administrative law judge rationally discounted the opinions of Drs. Basheda, Castle, and Hippensteel because they did not diagnose legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-21 (4th Cir. 2015); *Scott v. Mason Coal Co.*,

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variation as to whether an individual will leave coal mine employment and develop a significant impairment, and the period of time over which the impairment develops." *Id*.

[15] Specifically, the administrative law judge summarized the studies relied upon by Dr. Baker as follows:

> Dr. Baker cited to a 2009 article in the American Journal of Respiratory and Critical Care Medicine, written by Dr. Nemery and not in evidence, which stated exposure to coal dust is an accepted cause of [chronic obstructive pulmonary disease (COPD)], "even if it remains difficult to apportion the respective contributions of smoking, occupational exposures and other factors." The article also reported the incidence of emphysema was much higher in coal miners than non-miners, for both smokers and non-smokers. Dr. Baker stated that [c]laimant has COPD, which is a combination of emphysema, bronchitis, and bronchospasm. Based on this literature, Dr. Baker opined that part of [c]laimant's COPD is due to coal dust exposure.

Decision and Order at 36-37, *quoting* Director's Exhibit 138 at 28.

289 F.3d 263, 269-70, 22 BLR 2-372, 2-382-84 (4th Cir. 2002); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 58-59. Moreover, the administrative law judge permissibly found Dr. Baker's opinion, that legal pneumoconiosis was a substantially contributing cause of claimant's total disability, to be "well-documented and well-reasoned" because "Dr. Baker examined the [c]laimant in 2009, reviewed [c]laimant's occupational, medical, and social histories, and administered diagnostic testing" and because Dr. Baker explained how claimant's years of coal mine dust exposure was a "significant factor" in causing claimant's total disability. Decision and Order at 60-61; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to legal pneumoconiosis[16] pursuant to 20 C.F.R. §718.204(c).

III. WHETHER GRANTING MODIFICATION WOULD RENDER JUSTICE UNDER THE ACT

The modification of a claim does not automatically flow from a finding that a mistake was made in an earlier determination. Rather, modification should be made only where doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F. 3d 317, 327-28, 25 BLR 2-157, 2-173-174 (4th Cir. 2012), *cert. denied*, 133 S.Ct. 2852 (2013); *Sharpe v. Director, OWCP* (*Sharpe I*), 495 F.3d 125, 131-132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007). The factors relevant to this inquiry include whether the modification request is futile, the requesting party's diligence and motive, and the result of weighing the Act's preference for accuracy against the interest in finality in decision making. *Sharpe II*, 692 F.3d at 327-28, 25 BLR at 2-173-174 (explaining that a request for modification is futile when it is meritorious but no relief is available); *Sharpe I*, 495 F.3d at 128, 24 BLR at 2-68.

[16] Employer argues that the administrative law judge did not properly weigh the x-ray, CT scan, and medical opinion evidence on the issue of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Employer also argues that the administrative law judge failed to weigh treatment record evidence on the issue of clinical pneumoconiosis. Because we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, and that his total disability was due to legal pneumoconiosis, we need not address employer's arguments on the issue of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); *Kozele*, 6 BLR at 1-382 n.4.

We reject employer's contention that the administrative law judge erred in finding that granting modification would render justice under the Act. Citing the relevant factors, the administrative law judge permissibly found that "[c]laimant acted diligently and in good faith in pursuit of his modification request" as it was timely filed, and permissibly found that "the need for accuracy and the lack of futility or mootness of a favorable ruling weigh in favor of granting [c]laimant's request . . . ." Decision and Order at 42-43; *see Sharpe II*, 692 F. 3d at 327-28, 25 BLR at 2-173-174. Specifically, the administrative law judge explained that "a cumulative review of the evidence revealed a mistake of fact . . . and [c]laimant is now entitled to benefits." *Id*. Because we discern no abuse of discretion in the administrative law judge's determination that granting modification would render justice under the Act, it is affirmed. *See Sharpe II*, 692 F. 3d at 327-28, 25 BLR at 2-173-174.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge