U.S. Department of Labor

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

BRB No. 17-0266 BLA

NORMA JEAN PARSONS (Widow of BILLY J. PARSONS)	)	
Claimant-Petitioner	)	
v.	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 02/28/2018
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

Norma Jean Parsons, Pennington Gap, Virginia.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2015-BLA-5043) of Administrative Law Judge Drew A. Swank,

[1] Claimant is the widow of the miner, who died on June 2, 1998. Director's Exhibit 10. Although the miner filed three claims for federal black lung benefits during his lifetime, they were all denied. Director's Exhibits 1-3. Therefore, Section 422(*l*) of the Act, which provides that a survivor of a miner who was determined to be eligible to

rendered on a request for modification of a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2]

An abbreviated procedural history[3] of this claim is as follows: Claimant filed her survivor's claim on May 3, 1999. On September 26, 2001, Administrative Law Judge Mollie Neal denied benefits, finding that the evidence did not establish that the miner's death was due to pneumoconiosis. The Board affirmed the denial. *Parsons v. Westmoreland Coal Co.*, BRB No. 02-0133 BLA (June 28, 2002) (unpub.). From June 2003 to August 2009, claimant filed three requests for modification, each denied because claimant failed to establish a mistake in a determination of fact in the prior denial of benefits by showing that the miner's death was due to pneumoconiosis. Claimant then filed her fourth timely request for modification on April 4, 2014, which is currently before the Board. The district director denied this modification request on the basis that the evidence was insufficient to establish death due to pneumoconiosis and, therefore, found that claimant had not demonstrated a mistake in a determination of fact.

Claimant requested a hearing and the case was forwarded to the Office of Administrative Law Judges. Administrative Law Judge Drew A. Swank (the administrative law judge) determined that, based upon full consideration of all the evidence and the specific facts of this case, granting the current request for modification would not render justice under the Act. Consequently, the administrative law judge denied claimant's request for modification.[4]

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receive benefits at the time of his death is automatically entitled to survivor's benefits, is not applicable in this case. 30 U.S.C. §932(*l*) (2012).

[2] Robin Napier, a lay representative with Stone Mountain Health Services of St. Charles, Virginia, filed a letter requesting that the Board review the administrative law judge's decision, but she is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] A complete procedural history is accurately set forth by the administrative law judge in his decision. *See* Decision and Order at 2-4.

[4] 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 at 5, *citing Sharpe v. Director, OWCP* [*Sharpe I*], 495 F.3d 125, 128, 24 BLR 2-56, 2-68 (4th Cir. 2007). 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* establishes that an administrative law judge must make the determination at

On appeal, claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are rational, 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and contains no reversible error. 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 of benefits, as there cannot be a change in the deceased miner's condition. 20 C.F.R. §725.310; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The administrative law judge can determine whether a mistake in fact in the prior decision occurred by reviewing wholly new evidence, cumulative evidence, or merely upon further reflection on the evidence initially submitted. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *see also Nataloni v.*

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the outset. Instead, the timing of the inquiry will be dictated by the individual facts of the case. 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 such as this where there is no indication of an improper motive. In such a case, the administrative law judge 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 broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."). Because the administrative law judge considered the relevant evidence and determined there was no mistake in fact, however, any error in his finding that claimant's modification request is not in the interest of justice is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[5] The miner's last coal mine employment was in Virginia. Director's Exhibit 5. Accordingly, the Board will apply the law 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).

Director, OWCP, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the instant case, the administrative law judge properly considered all of the evidence of record, including the newly submitted evidence[6] and the prior decisions,[7] and permissibly concluded that there was no mistake in the previous determinations that the miner's death was not due to pneumoconiosis. *Wojtowicz*, 12 BLR at 1-164; *see* Decision and Order at 9. We therefore hold that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310.

[6] The administrative law judge permissibly determined that Dr. Molony's newly submitted letter, dated April 22, 2014, was not "compelling" because the doctor did not identify any new medical evidence that he reviewed or explain how he determined that coal workers' pneumoconiosis contributed to the miner's death. Decision and Order at 6; s*ee Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012). The administrative law judge also accurately noted that some of the newly submitted medical records from Lee County Community Hospital had been previously submitted and considered in earlier decisions. Decision and Order at 6. The administrative law judge correctly determined that the only newly submitted evidence concerning the cause of the miner's death was an emergency room report, dated June 2, 1998, where a physician indicated that the miner died from "cardiorespiratory arrest due to cardiac arrhythmia due to coronary artery disease." *Id*., *quoting* Director's Exhibit 153.

[7] The administrative law judge stated:

> Considering the record as a whole, the undersigned finds that there is little reason, if any, to question the accuracy of the previous determinations. The facts of this case have now been reviewed [eleven] different times. The Board has reviewed the [administrative law judge's] factual findings on three separate occasions and, in every instance, found the decision to be supported by substantial evidence, rational, and in accordance with the applicable law. . . . All of these decisions have found that [c]laimant failed to establish that the miner's death was due to pneumoconiosis.

Decision and Order at 9.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge