BRB No. 10-0291 BLA

BOBBY GENE SIMPSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TERCO, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	DATE ISSUED: 01/31/2011
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting the Claimant's Request for Modification and Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Frank K. Neuman (Cole, Cole, Anderson & Nagle, P.S.C.), Barbourville, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting the Claimant's Request for Modification and Awarding Benefits (2008-BLA-5367) of Administrative Law Judge Alice M. Craft, on a subsequent claim filed on September 26, 2002, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (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).[1] Considering claimant's request for modification, the administrative law judge found that the prior administrative law judge made a mistake in a determination of fact when he found that the evidence failed to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Considering all of the evidence of record, the administrative law judge found that fifteen years of coal mine employment were established, that the existence of clinical and legal pneumoconiosis arising out of coal mine employment was established at 20 C.F.R. §§718.202(a), 718.203(b), that total disability was established at 20 C.F.R. §718.204(b), and that disability causation was established at 20 C.F.R. §718.204(c).[2] Accordingly, claimant's request for modification was granted and benefits were awarded.

[1] Claimant's first claim for benefits, filed on September 27, 1990, was denied by the district director on March 11, 1991, because, although claimant established pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203(b), he failed to establish total disability. *See* 20 C.F.R. §718.204(b).

Claimant filed a second claim for benefits on November 4, 1994, which was denied by Administrative Law Judge Robert L. Hillyard, because claimant again failed to establish total disability. Judge Hillyard's denial was affirmed by the Board on June 24, 2000.

Claimant filed the current claim for benefits on September 26, 2002. Administrative Law Judge Jeffrey Tureck found that claimant established a change in an applicable condition at 20 C.F.R. §725.309, in this claim, by establishing total disability at Section 718.204(b). Nonetheless, Judge Tureck denied benefits because he found that the evidence of record failed to establish that claimant's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). The Board affirmed Judge Tureck's denial on October 26, 2006. On August 3, 2007, claimant filed a request for modification, which was denied by the district director on November 15, 2007. In response to the district director's denial of modification, claimant requested a hearing before an administrative law judge on the case.

[2] The administrative law judge's findings of fifteen years of coal mine employment, clinical pneumoconiosis, and total disability are affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

On appeal, employer contends that the administrative law judge erred in granting modification, without first considering the factors, set forth in *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007), which are pertinent to modification. Employer also contends that the administrative law judge erred in granting modification, without specifying the mistakes in fact made by the previous administrative law judge. Additionally, employer asserts that the administrative law judge erred in finding that a preponderance of the evidence established that claimant's disability was due to pneumoconiosis at Section 718.204(c). Finally, employer asserts that the administrative law judge erred in selecting the month in which claimant filed his claim, September 2000, as the date from which benefits commence. Claimant responds, urging affirmance of the administrative law judge's grant of modification and award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that because *Sharpe* is a Fourth Circuit case, and the instant case arises in the Sixth Circuit, *Sharpe* does not govern this case. The Director further contends that the facts in this case and those in *Sharpe* are distinguishable. The Director also argues that the administrative law judge's award on modification is supported by substantial evidence, and that the commencement date for benefits was properly determined. The Director asserts that the administrative law judge's decision awarding benefits should be affirmed.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law,[4] they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 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 the modification of an award or denial of benefits based upon a mistake in a determination of fact.[5] Mistakes of fact may be demonstrated by

[3] Section 1556 of Pub. L. No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims, is not applicable to this claim, which was filed prior to January 1, 2005.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in coal mining in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 4.

[5] Modification may also be established if a change in conditions is shown. 20 C.F.R. §725.310.

wholly new evidence, cumulative evidence, or merely upon further reflection of the evidence already submitted. *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); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Employer argues that the administrative law judge did not consider the factors set forth in *Sharpe*, in determining whether modification was appropriate in this case. Employer contends that in determining whether modification is appropriate, the administrative law judge must take into account several factors, in addition to whether a mistake in a determination of fact or a change in conditions was established. These factors include the importance of the finality of a prior decision, its accuracy, the motive of the party seeking modification, the diligence with which the party pursued the claim, and whether a grant of modification would be futile, given the facts of the case. *Sharpe*, 495 F.3d at 132-133, 24 BLR at 2-70.

At the outset, we note that, as the Director points out, *Sharpe* is a Fourth Circuit case. It is not, therefore, controlling in the instant case, which arises in the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Moreover, as the Director notes, *Sharp* would not preclude a grant of modification in this case, as employer has failed to point to any evidence that claimant failed to pursue his claim with due diligence. Director's Exhibit at 3. Further, as the Director notes, a grant of modification in this living miner's claim would not prove futile, as it would result in an award of benefits to claimant, in contrast to *Sharpe*, which involved a request for modification of the denial of a deceased miner's claim.

Next, employer contends that the administrative law judge erred in failing to point to any mistake made by the prior administrative law judge in finding that the evidence before him did not establish disability causation. The administrative law judge is not, however, required to identify a specific error made by the administrative law judge in the prior decision in order to find a basis for modification. Rather, the administrative law judge may, upon further reflection, determine that the ultimate finding in the case was wrongly decided. *Worrell*, 27 F.3d at 230, 18 BLR at 2-295-6.

Additionally, employer asserts that the administrative law judge erred in finding disability causation established at Section 718.204(c), based on Dr. West's opinion. Employer contends that the administrative law judge erred in relying on Dr. West's opinion, without fully considering claimant's lengthy smoking history or the contrary opinions of Drs. Dahhan and Broudy. Further employer contends that the administrative law judge erred in "automatically" crediting Dr. West's opinion, based on Dr. West's status as claimant's treating physician, without determining whether Dr. West provided a reasoned opinion. Employer also argues that the administrative law judge did not fully explain her reasoning in violation of the requirements of the Administrative Procedure

Act, 5 U.S.C. §557(c)(3)(A) as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), which requires the administrative law judge to provide an explanation for his or her findings of fact and conclusions of law.

In finding disability causation established at Section 718.204(c), the administrative law judge credited the opinion of Dr. West, who found, consistent with the administrative law judge's finding, that claimant had legal pneumoconiosis.[6] The administrative law judge rejected the opinions of Drs. Dahhan and Broudy because, contrary to the administrative law judge's finding, they found that claimant did not have legal pneumoconiosis.[7]

The administrative law judge properly rejected the opinions of Drs. Dahhan and Broudy on causation because they did not find the existence of legal pneumoconiosis established.[8] *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp*., 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

In considering Dr. West's opinion, the administrative law judge noted that he was Board-certified in Family Practice and that he had treated claimant since 2003. Acknowledging that Dr. West was not a pulmonologist, the administrative law judge, nonetheless, found his opinion credible because he had referred claimant to Dr. Mandviwala, a Board-certified pulmonologist, whose report was in the record, and who diagnosed legal pneumoconiosis.[9] Decision and Order at 34. In weighing the credibility of Dr. West's opinion, the administrative law judge found that Dr. Mandviwala reported the results of claimant's visits to Dr. West and that Dr. West's opinion was, therefore, "informed by Dr. Mandviwala's opinions." Decision and Order at 34. Further, the administrative law judge noted that Dr. Mandviwala's statement, that "[c]laimant was receiving maximal treatment under Dr. West's care," provided credibility to Dr. West's

[6] Dr. West opined that claimant's coal dust exposure contributed to his respiratory impairment. *See* 20 C.F.R. §718.201(a)(2).

[7] Drs. Dahhan and Broudy opined that claimant's respiratory impairment was due to smoking, not coal mine employment. *See* 20 C.F.R. §718.201(a)(2).

[8] Because the administrative law judge determined that disability causation was established on the basis of doctors' findings of legal pneumoconiosis, we only address whether the administrative law judge properly found that claimant's disability was due to legal pneumoconiosis. *See* Decision and Order at 39.

[9] Dr. Mandviwala opined that claimant's chronic obstructive lung disease was due to both smoking and coal mine employment. *See* 20 C.F.R. §718.201(a)(2).

opinion. Decision and Order at 34. The administrative law judge further concluded that, even though Dr. West attributed more years to claimant's coal mine employment and fewer to his history of smoking, than were found by the administrative law judge, "those differences [would] affect only the relative contribution of coal dust and smoking to the [c]laimant's impairment[,]…and…both would still be contributing factors…consistent with the premise underlying the regulations." Decision and Order at 36. However, the administrative law judge stated that Dr. West found that claimant had thirty-five years of coal mine employment, while she found that the record supported a fifteen year history of coal mine employment. Decision and Order at 6, 34. We conclude that the administrative law judge could reasonably find that Dr. West's opinion on causation was buttressed by the opinion of Dr. Mandviwala.

However, the administrative law judge's conclusory statement, that the discrepancy between Dr. West's finding of thirty-five years of coal mine employment and her own finding of fifteen years of coal mine employment, did not affect the credibility of Dr. West's opinion, without more explanation, is not reasonable. A physician's opinion that claimant's disability is due to the combined effects of smoking and coal mine employment need not apportion the relative contributions of each. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). The opinion must, however, be sufficient to establish that pneumoconiosis is a "substantially contributing cause" of claimant's disability. *See* 20 C.F.R. §718.204(c). In this case, the administrative law judge's statement, that an opinion need not apportion the disability caused by coal mine employment and smoking, is not, without additional explanation, sufficient to establish that legal pneumoconiosis "substantially contributed" to claimant's disability at Section 718.204(c). Consequently, we vacate the administrative law judge's finding that disability causation was caused by claimant's coal mine employment.

On remand, the administrative law judge must consider the totality of Dr. West's opinion, determine whether it is sufficient to establish that legal pneumoconiosis "substantially contributed" to claimant's disability and, if she so finds, explain the bases for her finding in compliance with the requirements of the APA. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). We, therefore, vacate the administrative law judge's finding that claimant established disability causation at Section 718.204(c) and remand the case for reconsideration of the Dr. West's opinion thereunder. Consequently, because we remand the case for further consideration under Section 718.204(c), we vacate the administrative law judge's grant of modification at Section 725.310.

Finally, employer argues that the administrative law judge erred in finding that the commencement date for benefits in this case was September 2002, the month in which claimant filed his claim. Rather, employer contends that the earliest date from which benefits could commence is August 2007, the month claimant requested modification.

The Director responds that the correction of a mistake in fact entitles claimant to benefits from the date he became totally disabled due to pneumoconiosis.

Contrary to employer's argument, the correction of a mistake in fact entitles claimant to benefits from the date claimant first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim for benefits, unless credited evidence establishes that he was not disabled at any subsequent time.[10] *See* 20 C.F.R. §725.503(d)(1); *Eifler v. Peabody Coal Co.*, 926 F.3d 663, 15 BLR 2-1 (7th Cir. 1991). In this case, the administrative law judge awarded benefits from the date claimant filed his claim for benefits because she found that the evidence did not establish the date from which claimant first became totally disabled due to pneumoconiosis. Because we vacate the administrative law judge's finding of disability causation at Section 718.204(c), however, we vacate her finding regarding the commencement date of benefits, and remand the case for further consideration of whether the evidence establishes the onset date of disability due to pneumoconiosis. If the administrative law judge determines, on remand, that disability causation is established, but that the evidence does not establish the date on which claimant first became disabled due to pneumoconiosis, the commencement date of benefits would be September 2002, the month in which claimant filed his claim for benefits.

[10] Had the administrative law judge found a change in conditions, claimant would be entitled to benefits only from the date of the change in his condition, or the date of his request for modification. 20 C.F.R. §725.503(d); *Eifler v. Peabody Coal Co.*, 13 F.3d 236, 18 BLR 2-86 (7th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order Granting the Claimant's Request for Modification and Awarding Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge