U.S. Department of Labor

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

BRB No. 18-0534 BLA

JIMMIE BELCHER Claimant-Respondent v. COAL ENERGY, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/30/2020 DECISION and ORDER

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

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

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

BEFORE: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Modification (2017-BLA-05661) of Administrative Law Judge Drew A. Swank pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of a subsequent claim filed on March 24, 2010.[1]

On June 10, 2016, Administrative Law Judge Theresa C. Timlin issued the initial decision on the subsequent claim. She credited claimant with 17.4 years of underground coal mine employment and found the medical evidence developed since the prior denial of benefits established total respiratory disability. She therefore determined claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c), and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found employer rebutted the presumption and denied benefits. Director's Exhibit 88.

Claimant timely requested modification on September 15, 2016 and the case was assigned to Administrative Law Judge Drew A. Swank (the administrative law judge). Director's Exhibit 89.

In the Decision and Order Awarding Benefits on Modification subject to the current appeal, the administrative law judge found claimant established 17.4 years of underground coal mine employment and a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2).[3] He therefore determined claimant invoked the presumption of

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[1] Claimant filed four previous claims which were all finally denied. Director's Exhibits 1-4. On October 7, 2008, the district director denied his most recent prior claim, filed on November 2, 2007, because he did not establish any element of entitlement. Director's Exhibit 4. Claimant took no further action until filing the current claim on March 24, 2010. Director's Exhibit 6.

[2] Section 411(c)(4) of the Black Lung Benefits Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds "one of the applicable conditions of entitlement . . . has changed since the

total disability due to pneumoconiosis at Section 411(c)(4) of the Act. The administrative law judge further found employer did not rebut the presumption and determined claimant established modification based on a mistake in a determination of fact and a change in condition.[4] 20 C.F.R. §725.310. He further determined granting modification would render justice under the Act and awarded benefits commencing March 2010, the month claimant filed his subsequent claim.

On appeal, employer challenges the administrative law judge's findings it did not rebut the Section 411(c)(4) presumption and that granting modification would render justice under the Act. It also argues the administrative law judge applied the incorrect standard in determining the date for commencement of benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

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date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 4. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing any of the elements of entitlement. 20 C.F.R. §725.309(c). While the administrative law judge did not make a specific finding on the issue, claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c) by establishing total respiratory disability at 20 C.F.R. §718.204(b)(2).

[4] In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 17.4 years of underground coal mine employment, a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 22-23.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits on Modification 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 Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish claimant has neither clinical nor legal pneumoconiosis,[7] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found employer failed to establish rebuttal by either method.[8]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered

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[6] Because claimant's coal mine employment occurred in West Virginia, 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); Director's Exhibit 78 at 24.

[7] Clinical pneumoconiosis is defined as "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. 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). "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).

[8] Pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge determined that employer rebutted the presumption of clinical pneumoconiosis, but did not rebut the presumption of legal pneumoconiosis. Decision and Order at 32.

the opinions of Drs. Spagnolo, Zaldivar, and Castle that claimant does not have legal pneumoconiosis but suffers from a restrictive impairment due to causes other than coal mine dust exposure.[9] Decision and Order at 32-39, 42-43; Director's Exhibits 40, 76; Employer's Exhibits 1, 5. Finding their opinions not well-reasoned, the administrative law judge determined employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 42.

We reject employer's contention that the administrative law judge erred in his consideration of Dr. Spagnolo's opinion. Employer's Brief at 24-26. Dr. Spagnolo conducted a records review and concluded that claimant's "respiratory complaints . . . are most likely explained by his nearly [fifty] years of cigarette smoking and underlying very severe cardiac disease." Director's Exhibit 76. At his deposition, Dr. Spagnolo testified coal dust can cause a restrictive impairment but it could not have caused the significant change that occurred in claimant in a few months. *Id*. (Spagnolo's Deposition) at 14-15. The administrative law judge found that although Dr. Spagnolo cited medical literature showing generally that cardiac disease can cause respiratory symptoms, he failed to adequately explain how it did in claimant's case, or what role claimant's exposure histories played in his impairment. Decision and Order at 36, 53. Contrary to employer's assertion, the administrative law judge thus permissibly found Dr. Spagnolo did not adequately explain why claimant's more than 17 years of coal mine dust exposure did not significantly contribute, along with those other conditions, to his respiratory impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322-24 (4th Cir. 2013); *Minich*, 25 BLR at 1-150; Decision and Order at 18, 36, 53.

Nor is there merit to employer's assertion the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Castle. Employer's Brief at 36-37. The administrative law judge conducted a thorough review of their opinions, summarizing the reasons they provided for attributing claimant's restrictive impairment to causes other than

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[9] The administrative law judge also considered the opinions of Drs. Habre, Wolfe, Littner, and Raj. Decision and Order at 39-43. Dr. Habre diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to smoking and coal dust exposure. Director's Exhibits 12, 76. Drs. Wolfe, Littner, and Raj diagnosed legal pneumoconiosis in the form of a restrictive respiratory impairment due to coal dust exposure and smoking. Director's Exhibit 77; Claimant's Exhibit 2. The administrative law judge determined that while their medical opinions are "not perfect," they did include "more reasoned and documented explanations" than the medical opinions of Drs. Zaldivar, Spagnolo, and Castle. Decision and Order at 39-43.

coal mine dust. *See* Decision and Order at 33-39. He accurately observed that both physicians relied on the absence of positive x-ray evidence to exclude a diagnosis of legal pneumoconiosis. *Id*. at 35, 38; Director's Exhibits 40, 76; Employer's Exhibits 1, 5. Dr. Zaldivar testified at his deposition that he was able to exclude coal dust as a cause of claimant's impairment because:

> From the legal standpoint, since in my opinion he doesn't have pneumoconiosis radiographically, the legal definition encompasses the judgement of the examiner and the physician.
>
> The totality of this case allows me to conclude that his pulmonary [sic], which is not a respiratory condition but a ventilatory condition, is so because of the surgery, the obesity and the activity unrelated to any coal mining pulmonary disease because there is no intrinsic pulmonary disease at all.

Director's Exhibit 76 (Zaldivar's Deposition) at 37. Dr. Zaldivar stated that "for coal workers' pneumoconiosis to produce a restrictive impairment, one must be dealing with extensive radiographic findings, not just simple pneumoconiosis but complicated pneumoconiosis . . . ." *Id*. at 47. Similarly, Dr. Castle opined claimant's restrictive impairment is not due to "legal coal workers' pneumoconiosis" in part because "if restriction was present due to coal workers' pneumoconiosis, it would be associated with a significant amount of fibrotic changes on the chest x-ray. That was not the finding in this case at any time." Employer's Exhibit 1 at 33, 35. In addition, at his deposition, Dr. Castle acknowledged a contribution from pneumoconiosis could cause claimant's impairment but indicated that he would expect to see some x-ray changes, or perhaps see an obstructive impairment or some changes in the blood gas values, which were not present in this case. Employer's Exhibit 5 at 54, 58.

Clinical pneumoconiosis and legal pneumoconiosis are distinct diseases and, as the administrative law judge observed, the absence of clinical pneumoconiosis does not preclude the existence of legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(1), (2); 718.202(a)(4); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821 (4th Cir. 1995); *Barber v. U.S. Steel Mining Co.*, 43 F.3d 899, 901 (4th Cir. 1995); Decision and Order at 35-38. Consequently, he permissibly concluded that Dr. Zaldivar's and Dr. Castle's reliance on the absence of positive radiographic evidence to exclude coal mine dust as a cause of claimant's impairment undermines their opinions. *See* 20 C.F.R. §§718.201(a)(1), (2); 718.202(a)(4); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12, (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 35-38.

Substantial evidence supports the administrative law judge's credibility determinations and the Board is not empowered to reweigh the evidence. *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As the administrative law judge permissibly discredited the only opinions supportive of a finding claimant does not have legal pneumoconiosis,[10] we affirm his finding employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.[11] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether employer established that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). He permissibly discredited the opinions of Drs. Spagnolo, Zaldivar, and Castle that claimant's disability is not due to pneumoconiosis because they did not diagnose legal pneumoconiosis, contrary to his finding that employer failed to disprove the disease.[12] *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 144 (4th Cir. 2015); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (where physician failed to properly diagnose

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[10] Employer asserts the administrative law judge erred in "applying only minimal scrutiny" in crediting the opinions of Drs. Habre, Wolfe, Littner, and Raj that claimant has legal pneumoconiosis. Employer's Brief at 38-47. We decline to address this argument as their opinions do not assist employer in rebutting the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, the administrative law judge explained that regardless of his consideration of their opinions, the medical evidence employer submitted is insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 43.

[11] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Spagnolo, Zaldivar, and Castle on the issue of legal pneumoconiosis, we need not address employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[12] Because the administrative law judge provided a valid reason for discrediting the opinions of Drs. Spagnolo, Zaldivar, and Castle on the issue of disability causation, we need not address employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele*, 6 BLR at 1-382 n.4.

pneumoconiosis, administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons"); Decision and Order at 45-51. We therefore affirm the administrative law judge's determination employer failed to rebut total disability causation at 20 C.F.R. §718.305(d)(1)(ii).

Modification – Justice under the Act

We also reject employer's assertion the administrative law judge erred in finding that granting modification would render justice under the Act. The administrative law judge properly identified the factors to be considered.[13] Decision and Order at 6-7; *see Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F.3d 317, 330 (4th Cir. 2012); *Sharpe v. Director, OWCP* (*Sharpe I*), 495 F.3d 125, 131-132 (4th Cir. 2007). He then permissibly found granting modification would render justice under the Act because claimant timely sought modification, submitted additional evidence before the administrative law judge to support his position, and established a mistake in fact and change in conditions. *Sharpe II*, 692 F.3d at 330; *Sharpe I*, 495 F.3d at 131-132; *see also Banks v. Chi. Grain Trimmers Ass'n*, 380 U.S. 459, 464 (1968); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 546-47 (7th Cir. 2002); Decision and Order at 6-7. Because we discern no abuse of discretion in the administrative law judge's determination, it is affirmed. *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68, 72 (1999).

Commencement Date for Benefits

Finally, employer challenges the administrative law judge's determination the date for commencement of benefits is March 2010, asserting that he erred in not making a specific finding concerning whether modification was being granted based on a mistake in fact or a change in condition. Employer's Brief at 50-52. Employer argues the administrative law judge erred in "only considering whether the evidence established a specific onset date of total disability." *Id.* at 51. We disagree.

Because this case involves a request for modification of the denial of a subsequent claim, the administrative law judge was required to consider whether the evidence developed in the subsequent claim, in conjunction with the evidence submitted with the request for modification, established a change in conditions or a mistake in a determination of fact with regard to the prior denial. *See* 20 C.F.R. §725.310; *Keating v. Director,*

[13] The factors relevant to whether modification would render justice under the Act include the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *Sharpe v. Director, OWCP* (*Sharpe I*), 495 F.3d 125, 133 (4th Cir. 2007).

OWCP, 71 F.3d 1118, 1123 (3d Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-5 (4th Cir. 1993). If modification is based on a change in conditions, claimant is entitled to benefits as of the month of onset of total disability due to pneumoconiosis, "provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge." *See* 20 C.F.R. §725.503(d)(2). If the date of onset of total disability due to pneumoconiosis is not ascertainable, benefits are payable "from the month in which the claimant requested modification." *Id*. If modification is based on the correction of a mistake in a determination of fact, including the ultimate fact of entitlement, the miner is entitled to benefits from the month he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the month he filed his claim, unless credited evidence establishes that he was not disabled at any subsequent time. 20 C.F.R. §725.503(b), (d)(1); *see Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

Here, the administrative law judge found claimant established both a change in conditions and a mistake of fact. Decision and Order at 7. With respect to a mistake in fact, the administrative law judge specifically disagreed with Judge Timlin's prior determination that the opinions of Drs. Spagnolo and Zaldivar are credible and sufficient to rebut the Section 411(c)(4) presumption.[14] *See Looney*, 678 F.3d at 316 (explaining that if a reviewing court can discern what the administrative law judge did and why he did it, the duty of explanation is satisfied); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999); Decision and Order at 7, 18, 30, 33-36, 42-43, 53. He then considered the relevant evidence and found the record does not establish the onset date of claimant's disability due to pneumoconiosis, a finding employer does not challenge. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 54. Based on that finding and his determination claimant established a mistake in fact, we see no error in the administrative law judge's application of 20 C.F.R. §725.503(d)(1) to award benefits beginning in the month in which claimant filed his current subsequent claim and not the month in which he requested modification. 20 C.F.R. §725.503(d)(1), (2).

[14] Administrative Law Judge Theresa C. Timlin found the presumption rebutted based on the medical opinions of Drs. Spagnolo and Zaldivar. Administrative Law Judge Drew A. Swank (the administrative law judge) found those same opinions insufficient to rebut the presumption. Thus there is no merit to employer's contention the administrative law judge "relied heavily on newly submitted evidence" to find a mistake in a prior determination of fact. Employer's Brief at 52.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge