BRB No. 11-0724 BLA

CUBERT SPENCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEST VIRGINIA SOLID ENERGY, INCORPORATED	)	DATE ISSUED: 07/24/2012
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Third Decision and Order on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C. for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Third Decision and Order on Remand Awarding Benefits (2005-BLA-00018) of Administrative Law Judge Linda S. Chapman (the administrative law judge), rendered on claimant's February 19, 2004 petition to modify the denial of his duplicate claim, filed on October 29, 1999,[1] pursuant to the provisions of the Black Lung

[1] This case has a lengthy procedural history, as set forth in *Spence v. W. Va. Solid Energy, Inc.*, BRB No. 01-0724 BLA (Apr. 25, 2002) (unpub.), *Spence v. W. Va. Solid*

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). Most recently, the Board affirmed an award of benefits in this case, based on the administrative law judge's determination that claimant has complicated pneumoconiosis and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304. *Spence v. W. Va. Solid Energy, Inc.*, BRB No. 10-0230 BLA, slip op. at 7-8. (Dec. 23, 2010) (unpub.). The Board, however, vacated the administrative law judge's finding that benefits should commence as of October 1999, the month in which claimant filed his duplicate claim, because the administrative law judge failed to properly explain the basis for granting modification, a determination which affects the date for commencement of benefits. *Id*. at 8. The Board instructed the administrative law judge on remand to apply the pertinent regulation at 20 C.F.R. §725.503(d)(2), in determining the date for commencement of benefits, and to specify whether modification is based on a mistake in a determination of fact or a change in conditions at 20 C.F.R. §725.310 (2000), and also to consider whether the record established the onset date of claimant's complicated pneumoconiosis. *Id*. at 9.

In her Third Decision and Order on Remand, dated July 13, 2011, the administrative law judge clarified that modification was granted on the ground of a mistake in a determination of fact in the denial of claimant's duplicate claim by Administrative Law Judge Daniel J. Roketenetz in 2002. The administrative law judge also found that the record did not establish the date on which claimant's simple pneumoconiosis became complicated pneumoconiosis. Applying 20 C.F.R. §725.503(d), the administrative law judge awarded benefits commencing October 1999, the month in which claimant filed his duplicate claim.

On appeal, employer asserts that, despite her statements to the contrary, because the administrative law judge specifically relied on the newly submitted evidence on modification to find that claimant established the existence of complicated pneumoconiosis, the administrative law judge has found a change in condition under 20 C.F.R. §725.310 (2000).[2] Employer maintains that benefits may not commence before

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Energy, Inc., BRB No. 03-0236 BLA (Oct. 20, 2003) (unpub.), *Spence v. W. Va. Solid Energy, Inc.*, BRB Nos. 06-0402 BLA and 06-0402 BLA-A (Feb. 28, 2007) (unpub.), *C.S.* [*Spence*] *v. W. Va. Solid Energy, Inc.*, BRB No. 08-0159 BLA (Nov. 25, 2008) (unpub.), *Spence v. W. Va. Solid Energy, Inc.*, BRB No. 10-0230 BLA (Dec. 23, 2010) (unpub.).

[2] For purposes of future proceedings in this case, employer preserves its challenge to the administrative law judge's finding that claimant established the existence of

January 1, 2004, the date of the first x-ray evidence for complicated pneumoconiosis submitted with the modification request. Claimant responds, urging affirmance of the administrative law judge's finding with respect to the date for commencement of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board. Employer has also filed a reply brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 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).

The applicable regulation provides that, if a claim is awarded pursuant to a request for modification based on a mistake in fact, benefits are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, or, where there is a finding of complicated pneumoconiosis, when simple pneumoconiosis became complicated pneumoconiosis.[4] *See* 20 C.F.R. §725.503(d)(1); *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Truitt v. North American Coal Corp.,* 2 BLR 1-199 (1979). However, if the evidence does not establish the month of onset, benefits should commence from the month in which claimant filed his claim. *Id*. In cases where a claim is also pursuant to a request for modification based on a change in conditions, there is an additional provision that, if the evidence establishes the onset date

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complicated pneumoconiosis. Employer's Brief in Support of Petition for Review at 8 n.2.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

[4] In a case where a miner is found entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the fact-finder must consider whether the evidence of record establishes an onset date of the miner's complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989). If the evidence does not reflect the onset date for complicated pneumoconiosis, then the date for commencement of benefits is the month during which the claim was filed, unless the evidence affirmatively establishes that the miner had only simple pneumoconiosis for any period subsequent to the date of filing, in which case benefits must commence "following the period of simple pneumoconiosis." *Id*. at 1-30.

of total disability due to pneumoconiosis, "no benefits shall be payable for any month prior to the effective date of the most recent denial." 20 C.F.R. §725.503(d)(2); *Spence v. W. Va. Solid Energy, Inc.*, BRB No. 03-0236 BLA (Oct. 20, 2003)(unpub.). However, if the evidence does not establish the month of onset, benefits are payable from the month in which the modification request was filed. Director's Exhibit 77.

In accordance with the Board's remand instruction, the administrative law judge addressed the basis for modification under 20 C.F.R. §725.310 (2000). She noted that when Judge Roketenetz initially reviewed the claim, there was some evidence of complicated pneumoconiosis but it was not sufficient to invoke the presumption. Third Decision and Order on Remand at 6. She specifically noted her agreement with Judge Roketenetz's finding that there was no evidence of record to establish that a 1.5 centimeter mass identified on claimant's biopsy would appear as greater than one centimeter on x-ray. *Id*. The administrative law judge, however, also stated:

> I find that, considering all of the medical evidence, including the newer medical evidence submitted in connection with [claimant's] modification request, there was a mistake of fact in Judge Roketenetz's ultimate determination of entitlement. In other words, while the medical evidence before Judge Roketenetz may not have been sufficient to support a finding of complicated pneumoconiosis, considering it in conjunction with the newer medical evidence, Judge Roketenetz's conclusion that the evidence was not sufficient to invoke the presumption under Section 718.304 was incorrect. . . . Thus, I find that [claimant] established a mistake of fact in Judge Roketenetz's previous determination on the ultimate issue of entitlement[.] [T]hat is, whether the evidence was sufficient to invoke the irrebuttable presumption of complicated pneumoconiosis under Section 718.304.

Id. at 5-6. The administrative law judge concluded that because the evidence did not establish the exact time when claimant's simple pneumoconiosis became complicated pneumoconiosis, claimant was entitled to benefits as of October 1999, the month in which he filed his duplicate claim.

Employer asserts that the administrative law judge's finding of modification, based on a mistake in a determination of fact, is inconsistent with "how she actually credited the evidence," relying on the evidence submitted on modification to find the existence of complicated pneumoconiosis. Employer maintains that since the administrative law judge specifically agreed with Judge Roketenetz's denial of benefits, based on the evidence before him, the only basis for granting modification in this case is because of a change in conditions. We disagree.

The administrative law judge has acted within her discretion in finding that claimant established modification based on a mistake in a determination of fact. *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-151 (1989) (en banc). The purpose of allowing modification, based on a mistake in a determination of fact, is to vest the fact-finder "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.*" *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993), *quoting O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) (emphasis added); *see King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001). Contrary to employer's assertion, when a request for modification is filed, the administrative law judge may "reconsider all the evidence for any mistake of fact," including whether "the ultimate fact" of entitlement was wrongly decided. *Jessee*, 5.3d at 725, 18 BLR at 2-28.

In this case, the administrative law judge determined that the ultimate fact of entitlement was wrongly decided. We reject employer's assertion that the administrative law judge's modification finding was limited to her review of the newly submitted evidence, as she noted on remand specific evidence before Judge Roketenetz indicating that claimant had complicated pneumoconiosis (three positive x-ray readings for complicated pneumoconiosis, Category A, and biopsy evidence). Third Decision and Order on Remand Awarding Benefits at 4. Furthermore, contrary to employer's argument, the administrative law judge has followed the Board's remand instruction and properly explained why her finding of complicated pneumoconiosis is supported by substantial evidence in the record as a whole. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Clark*, 12 BLR at 1-151. We, therefore, affirm the administrative law judge's finding that claimant established modification based on a mistake in a determination of fact at 20 C.F.R. §725.310. We also affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that "there is no evidence to establish the date on which [claimant's] simple pneumoconiosis became complicated pneumoconiosis." Third Decision and Order on Remand Awarding Benefits at 6; *see Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983). Thus, we affirm the administrative law judge's finding, pursuant to 20 C.F.R. §725.503(d)(1), that benefits in this case commence in October 1999, the month in which claimant filed his duplicate claim. *See* 20 C.F.R. §725.503(d)(1); *Williams*, 13 BLR at 1-28; *Truitt,* 2 BLR at 1-199.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge