U.S. Department of Labor

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

BRB No. 16-0408 BLA

GERALD SMITH Claimant-Petitioner v. PITTSBURG & MIDWAY COAL MINING COMPANY and PACIFIC EMPLOYER'S INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/26/2017 DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits on Modification of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law, LLC), Henderson, Kentucky for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Modification (2011-BLA-5805) of Administrative Law Judge Joseph E. Kane (the administrative law judge), rendered on a subsequent claim[1] filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant filed this subsequent claim on March 9, 2001. Director's Exhibit 4. In a Decision and Order issued on January 28, 2004, the administrative law judge denied benefits, finding that claimant failed to prove that an applicable condition of entitlement had changed pursuant to 20 C.F.R. §725.309.[2] Director's Exhibit 42. That denial was affirmed by the Board on appeal. *Smith v. Pittsburg & Midway Coal Mining*, BRB No. 04-0428 BLA (Nov. 30, 2004) (unpub.); Director's Exhibit 48.

On February 28, 2005, claimant filed a timely request for modification. Director's Exhibit 49. The case was assigned to Administrative Law Judge Daniel F. Solomon, who issued a Decision and Order denying benefits on October 13, 2009. Director's Exhibit 125. Judge Solomon found that claimant established both the existence of pneumoconiosis and total disability, and thereby satisfied the requirements of 20 C.F.R. §725.309. *Id*. However, because Judge Solomon determined that claimant failed to prove that his disability was caused by pneumoconiosis, benefits were denied. *Id*.

Claimant filed a second modification request on October 8, 2010, and the case was assigned to the administrative law judge. Director's Exhibits 129, 143. In his April 20, 2016 Decision and Order - Denying Benefits on Modification, which is the subject of this appeal, the administrative law judge accepted the parties' stipulation that claimant has thirty-three years of coal mine employment. The administrative law judge determined that the evidence developed since the prior denial by Judge Solomon demonstrated a change in conditions, as it established that claimant no longer suffers from total respiratory or pulmonary disability. Having found that claimant is no longer totally disabled, the administrative law judge determined that claimant was unable to establish

[1] Claimant filed three prior claims, of which two were denied and one was withdrawn. Director's Exhibits 1, 2. The last prior claim, filed in 1997, was denied because claimant failed to establish any element of entitlement. Director's Exhibit 2.

[2] When 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 that "one of the applicable conditions of entitlement . . . has changed since the 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).

disability causation and, thus, failed to establish a basis for modification pursuant to 20 C.F.R. §718.310. Accordingly, the administrative law judge denied benefits.

Claimant contends that the administrative law judge erred in finding a change in conditions as to whether he is totally disabled, and also erred in failing to properly consider whether the evidence on modification is sufficient to establish disability causation. Claimant further contends that the administrative law judge erred in finding that he is not eligible to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). Employer responds, urging affirmance of the denial 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.

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.[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).

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, 1-2 (1986) (en banc).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, incorporated into the Act by 30 U.S.C. §932(a), authorizes modification of an award or denial of benefits in a miner's claim based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement that defeated an award in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994). In reviewing the record

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-201 (1989) (en banc); Director's Exhibit 5.

as a whole on modification, an 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, 257 (1971); *see King v. Jericol Mining, Inc.*, 246 F.3d 822, 825, 22 BLR 2-305, 2-310 (6th Cir. 2001); *Consolidation Coal Corp. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994).

In this case, the administrative law judge summarized the evidence submitted with the current modification request and found that the pulmonary function tests administered by Dr. Vincent on November 10, 2010, and Dr. Houser on April 24, 2012, were qualifying[4] for total disability, while a pulmonary function test administered by Dr. Baker on March 3, 2015,[5] was non-qualifying for total disability.[6] Decision and Order at 7; Director's Exhibit 134; Claimant's Exhibit 1; Employer's Exhibit 4. The administrative law judge noted that the parties did not submit any new blood-gas study evidence on modification, but that the record consists of three newly-submitted medical opinions.[7] Drs. Vincent and Houser opined that claimant suffers from a totally disabling respiratory or pulmonary impairment that is significantly related to pneumoconiosis, while Dr. Repsher opined that claimant has no respiratory or pulmonary disability. Claimant's Exhibits 1, 3; Employer's Exhibit 1.

After setting forth the standard for establishing modification pursuant to 20 C.F.R. §725.310, the administrative law judge noted that claimant previously established all of the elements of entitlement except disability causation at 20 C.F.R. §718.204(c). Decision and Order at 10. The administrative law judge observed that pneumoconiosis is

[4] A "qualifying" pulmonary function test yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" test exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[5] The administrative law judge mistakenly identified the most recent pulmonary function test as being dated March 3, "2014," when it is dated March 3, "2015." Employer's Exhibit 4.

[6] The administrative law judge noted that the pulmonary function tests "from the prior modification and claim" included two qualifying tests by Dr. Simpao, each dated June 27, 2001, and a qualifying test by Dr. O'Brian on August 18, 2006. The administrative law judge did not identify a qualifying pulmonary function test obtained on May 10, 2001 by Dr. Simpao. Director's Exhibit 12.

[7] The administrative law judge did not identify the prior medical opinions of Drs. Baker, Simpao, O'Brian, Buchanan, and Fino. Director's Exhibits 12, 40, 91, 98, 100, 101, 104.

a progressive and irreversible disease and therefore, as a general rule, "more weight is given to the most recent evidence." *Id*. at 11. The administrative law judge then stated the following:

> I have reviewed the newly submitted evidence and I find that it establishes a change in condition[s] from the prior decision. In the prior Decision and Order the [pulmonary function tests] and medical reports supported a finding of total disability. The newly submitted evidence does not. The newly submitted [pulmonary function test] evidence shows that Claimant's pulmonary condition actually improved. The March 3, 201[5] [pulmonary function test], the most recent one in the record, is non[-]qualifying and does not support a finding of total disability. All of the other newly submitted evidence in the record is more than two years older, and the evidence from the prior modification and claims is almost ten years older. I give more weight to the newly submitted evidence.
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> Although the two newly submitted medical reports by the Claimant find that the miner is totally disabled due to pneumoconiosis, both reports are based on the [pulmonary function] testing from 2012 and before. Neither physician reviewed the 201[5] [pulmonary function test] that yielded normal results. Therefore, when examining the evidence as a whole, I give the 201[5] [pulmonary function test] more weight than the reports of Drs. Vincent and Houser on the issue of total disability. Since I have found that the Claimant is no longer totally disabled, he cannot establish that he is totally disabled due to pneumoconiosis.

Id. Based on these determinations, the administrative law judge denied benefits.

Claimant maintains that he is entitled to the rebuttable presumption at Section 411(c)(4) and that the administrative law judge erred in finding a change in conditions as to whether he is totally disabled. Claimant asserts that the administrative law judge's finding on total disability is irrational and contrary to "the intent of the law." Claimant's Brief at 8. Claimant also contends that the administrative law judge did not properly weigh together all of the evidence on the issue of total disability. Claimant's arguments have merit, in part.

As an initial matter, we reject claimant's contention that the administrative law judge erred in finding that he is not eligible for the Section 411(c)(4) presumption. Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis, *in claims filed after January 1, 2005*, if the miner establishes fifteen or more years of underground coal mine employment, or 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). Contrary to claimant's assertion, based on the statutory language, the date of the filing of a claim, and not the date of the filing of a request for modification, controls whether the 411(c)(4) presumption is applicable. *Id.*; *see* 20 C.F.R. §725.310. The presumption is not applicable in this case because claimant filed his current claim before January 1, 2005. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

We also reject claimant's assertion that the administrative law judge did not have the authority to consider whether the evidence on modification showed a change in conditions with respect to total disability, because claimant requested modification only on the separate issue of disability causation. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-996. The applicable regulation states that "[i]n any case forwarded for hearing, the administrative law judge assigned to hear such case shall consider whether any additional evidence submitted by the parties demonstrates a change in conditions . . . ." 20 C.F.R. §725.310(c). Furthermore, in *Worrell*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that "[o]nce a request for modification is filed, no matter the grounds stated, if any, [the administrative law judge] has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions." *Worrell*, 27 F.3d at 230, 18 BLR at 2-296, *citing Eifler v. Peabody Coal Co.*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991). Thus, the administrative law judge had the authority on modification to reconsider the issue of whether claimant suffers from a totally disabling respiratory or pulmonary impairment. *Id.*; *see Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 541, 22 BLR 2-429, 2-444 (7th Cir. 2002).

However, with respect to claimant's challenge to the administrative law judge's total disability findings, we conclude that the administrative law judge failed to provide an adequate rationale for his determination that claimant is no longer totally disabled. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). The administrative law judge assigned greatest weight to the most recent pulmonary function test solely on the basis of its recency in light of the progressive nature of pneumoconiosis. The Sixth Circuit has held that it is rational to credit more recent evidence, solely on the basis of recency, only if the more recent evidence shows that the miner's condition has progressed or worsened. *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52, 16 BLR 2-61, 2-64-65 (4th Cir. 1992) (a case involving x-rays); *see Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719, 18 BLR 2-16, 2-24 (4th Cir. 1993) (applying the holding in *Adkins* to medical opinions). The Sixth Circuit reasoned that, because pneumoconiosis is a progressive disease and a miner with pneumoconiosis cannot get better, it is impossible to reconcile conflicting evidence based on its chronological order if the evidence shows that a miner's condition has improved. *Woodward*, 991 F.2d at 319, 17 BLR at 2-84; *citing Adkins* 958 F.2d at 51-52, 16 BLR at 2-64-65 ("[e]ither the earlier or the later result must be wrong,

and it is just as likely that the later evidence is faulty as the earlier");[8] *see also Worley v. Blue Diamond Coal*, 82 F.3d 419 (6th Cir. Apr. 15, 1996) (unpub.) (applying *Woodward* to pulmonary function tests). In this case, because the most recent pulmonary function test shows improvement in claimant's respiratory condition, the administrative law judge's analysis is inconsistent with *Woodward*, and cannot be affirmed. *Woodward*, 991 F.2d at 319, 17 BLR at 2-84.

Furthermore, the Sixth Circuit has explained that an administrative law judge must undertake a qualitative analysis of the evidence in rendering his findings of fact. *See Woodward*, 991 F.2d at 321, 17 BLR at 2-86; *see also Thorn*, 3 F.3d at 718, 18 BLR at 2-23 (4th Cir. 1993) ("A bare appeal to 'recency' is an abdication of rational decisionmaking."). Because the administrative law judge did not provide any rationale, other than recency, for assigning controlling weight to the March 3, 2015 non-qualifying pulmonary function test,[9] we vacate the administrative law judge's determination that claimant is no longer totally disabled, and we further vacate the denial of benefits.[10] *Woodward*, 991 F.2d at 319-20, 17 BLR at 2-84-85.

On remand, we instruct the administrative law judge to conduct a qualitative analysis of the newly-submitted evidence, in conjunction with the previously-submitted evidence, in determining whether to modify the prior determination that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). *See Fields v. Island Creek*

[8] Higher results are not necessarily more credible than lower results among valid pulmonary function tests. *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719, 18 BLR 2-16, 2-24 (4th Cir. 1993); *see Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991) (recognizing that, because pneumoconiosis is a chronic condition, a miner's functional ability on a pulmonary function study may vary, and thus could measure higher on any given day than its typical level); *cf. Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22, 1994) (unpub.).

[9] Additionally, claimant mentions in his brief that the height recorded for claimant on the March 3, 2015 test is 65 inches, which is at least two inches shorter than earlier pulmonary function tests. Employer's Exhibit 4. Although claimant is correct that the height recorded is shorter, the March 3, 2015 test is non-qualifying for total disability, applying Appendix B, the maximum age of 71 years, and each of the varying heights reported for claimant ranging from 65 to 68 inches.

[10] Because we vacate the administrative law judge's crediting of the non-qualifying March 3, 2015 pulmonary function test, we also vacate his determination that the opinions of Drs. Vincent and Houser are less credible on the issue of total disability because they did not review that test.

Coal Co., 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). The administrative law judge must also consider, as necessary, whether claimant has established a basis for modification by establishing either a mistake in a determination of fact or a change in conditions on the issue of disability causation pursuant to 20 C.F.R. §§718.204(c); 725.310. Finally, if the administrative law judge finds a basis for modification of any of the prior findings, we instruct the administrative law judge to additionally consider whether modification of those findings would 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); *Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 541, 22 BLR 2-429, 2-444 (7th Cir. 2002). In rendering his findings on remand, the administrative law judge must comply with the Administrative Procedure Act.[11] *See Wojtowicz*, 12 BLR at 1-165.

[11] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Modification is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge