U.S. Department of Labor

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

BRB No. 17-0356 BLA

BETTY DEEL o/b/o MARCUS DEEL (deceased)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 06/29/2018
DOMINION COAL CORPORATION	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Appeals Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05310) of Administrative Law Judge Thomas M. Burke, rendered on a subsequent claim filed on August 27, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge considered this subsequent claim pursuant to 20 C.F.R. §725.310, based on multiple requests for modification filed by claimant before the district director.[1] The administrative law judge found that claimant established 25.36 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment and therefore invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] He further found that employer did not rebut the presumption and that granting modification would render justice under the Act. The administrative law judge therefore awarded benefits, commencing August 2010, the month in which the miner filed his subsequent claim.

On appeal, employer contends that the administrative law judge erred in finding that the miner was totally disabled and that claimant thereby invoked the Section 411(c)(4)

[1] The miner filed an initial claim on March 28, 1983, which was finally denied on January 19, 1995, for failure to establish any element of entitlement. Director's Exhibit 1. The miner filed two additional claims, each of which was also denied by the district director pursuant to 20 C.F.R. §725.309. *Id*. The miner filed the current subsequent claim on August 27, 2010, and it was denied by the district director for failure to establish any element of entitlement. Director's Exhibits 3, 31. The miner's first request for modification was denied by the district director on December 12, 2013, shortly after the miner's death on December 6, 2013. Director's Exhibits 21, 34. Claimant, the miner's widow, subsequently pursued the claim on his behalf and filed two additional timely requests for modification, each of which was denied. Director's Exhibits 43, 45. She thereafter timely requested a hearing on the miner's subsequent claim and the case was assigned to the administrative law judge. Director's Exhibit 49.

[2] Under Section 411(c)(4), the miner is presumed to have been totally disabled due to pneumoconiosis if he had least fifteen years of underground coal mine employment, or 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.

presumption.[3] Employer also contends that the administrative law judge erred in weighing the evidence relevant to rebuttal of the presumption. Additionally, employer contends that the administrative law judge erred in concluding that granting modification renders justice under the Act and in determining the commencement date for benefits. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief.[4]

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.[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).

Invocation of the Section 411(c)(4) Presumption - Total Disability

A miner is considered to have been totally disabled if he had a respiratory or pulmonary impairment which, standing alone, prevented him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). Total disability can be established by

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had 25.36 years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Employer's motion to hold this case in abeyance pending a decision in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *aff'd on reh'g*, 868 F.3d 1021 (Mem.) (2017), *cert. granted*, U.S. , 2018 WL 386565 (Jan. 12, 2018), has been rendered moot by the issuance of a decision by the United States Supreme Court on June 21, 2018. *Lucia v. SEC*, 585 U.S. , 2018 WL 3057893 (June 21, 2018). We further hold that employer has waived the issue of whether the manner in which the Department of Labor's administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II § 2, cl. 2, because employer raised this argument for the first time in its abeyance request, filed seven months after its brief in support of the petition for review, and five months after the briefing schedule closed. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

[5] The record indicates that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, and medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (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 concluded that claimant established total disability based on the medical opinion evidence, crediting Dr. Habre's opinion over the opinions of Drs. Castle and Tuteur. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18. For the reasons that follow, we reject employer's contention that the administrative law judge improperly assigned "little weight" to the opinions of Drs. Castle and Tuteur, but agree that he failed to adequately explain his crediting of Dr. Habre's opinion.[6]

Dr. Castle examined the miner and reviewed other evidence submitted in the record. Director's Exhibit 17. He stated that the miner's "physiologic studies have been essentially normal and there [was] no evidence of any significant obstruction or restriction." *Id.* He noted that the miner had reduced diffusion capacity on "several occasions" and that the blood gas studies were "significantly variable over time[.]" *Id.* He concluded that the miner had no respiratory impairment *attributable to coal dust exposure* and was totally disabled "as a whole man because of his advanced age and multiple other medical problems including musculoskeletal problems." *Id.*

In weighing Dr. Castle's opinion, the administrative law judge correctly observed:

> Dr. Castle finds [c]laimant to be suffering from a "whole man" disability from many medical ailments. But it is unclear whether he finds [c]laimant to suffer from a total pulmonary impairment. He reports finding no evidence of a restrictive or obstructive condition, but he refers to Claimant's

[6] The administrative law judge found that claimant failed to establish total disability based on the pulmonary function and blood gas studies. 20 C.F.R. §718.204(b)(2)(i)-(ii); Decision and Order at 17. There are three pulmonary function studies. A February 9, 2011 study by Dr. Habre was qualifying for total disability, but was invalidated by Dr. Michos. Director's Exhibit 14. Studies dated May 13, 2011 and November 14, 2012 were non-qualifying. Director's Exhibit 21. There are four resting blood gas studies. Two studies obtained by Dr. Habre on February 9, 2011 and Dr. Robinette on November 14, 2011 were qualifying, while two studies obtained by Dr. Castle on May 22, 2012 and Dr. Smriti on December 3, 2012 were non-qualifying. Director's Exhibits 17, 21.

> "pulmonary impairment" in the context of discussing its causation by cigarette smoking or cardiac condition.

Decision and Order at 18; Director's Exhibit 17.

Contrary to employer's contention, the administrative law judge did not err in rejecting Dr. Castle's opinion as equivocal. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Dr. Castle did not specifically address whether the miner had a totally disabling respiratory impairment, but rather couched his opinion in terms of whether the miner had a disabling respiratory or pulmonary impairment *due to coal dust exposure*. He further did not identify whether the miner's "whole man" disability included a disabling respiratory or pulmonary impairment. Director's Exhibit 17. The administrative law judge permissibly found that Dr. Castle did not adequately explain whether the miner had a disabling respiratory or pulmonary impairment – the relevant inquiry at 20 C.F.R. §718.204(b) – without regard to whether the cause of that impairment was coal dust exposure, smoking, or a cardiac condition.[7] *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). We therefore affirm the administrative law judge's discrediting of Dr. Castle's opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985).

Dr. Tuteur prepared a medical report on August 15, 2016, based on his review of his prior reports dated May 22, 1989 and February 28, 1992, along with evidence submitted in conjunction with the current claim. Employer's Exhibit 1. He described the miner's pulmonary symptoms as variable and opined that the miner was not totally disabled but had, at best, a mild obstructive impairment. *Id*. Contrary to employer's contention, the administrative law judge permissibly found Dr. Tuteur's opinion to be "conclusory" and not sufficiently reasoned. Decision and Order at 18. The administrative law judge noted correctly that while Dr. Tuteur indicated that a mild impairment would not prevent an individual from working in the mines, he "did not discuss [c]laimant's last coal mine employment or the exertional requirements of [that] position." Decision and Order at 9; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-104 (7th Cir. 2008) (administrative law judge may reject opinion based on generalities and not specifics of a miner's case). Furthermore, the administrative law judge found that

[7] Pursuant to 20 C.F.R. §718.204(b)(2), the relevant issue is the presence of a totally disabling respiratory or pulmonary impairment, while the cause of that impairment is considered at 20 C.F.R. §718.204(c) or in consideration of rebuttal of the Section 411(c)(4) presumption.

Dr. Tuteur's diagnosis of a mild impairment was undermined by his failure to discuss "the extensive abnormalities observed by the other reporting physicians and reflected in the treatment records."[8] Decision and Order at 18. Because the administrative law judge gave permissible reasons for assigning Dr. Tuteur's opinion less weight, we reject employer's assertions of error and affirm the administrative law judge's credibility determination.[9] *See Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Clark*, 12 BLR at 1-155.

Dr. Habre opined that the miner suffered from respiratory failure, severe hypoxemia at rest, and an obstructive and restrictive respiratory impairment. Director's Exhibit 14. He stated that the miner was "unable to perform strenuous activity or an intense labor requiring job." *Id*. After summarizing Dr. Habre's opinion in detail, the administrative law judge summarily concluded that it is "well-documented and well-reasoned, and is consistent with the objective medical evidence of record." Decision and Order at 17. Because the administrative law judge did not explain his basis for finding Dr. Habre's opinion to be well-documented and reasoned and consistent with the objective evidence of record,[10] we agree with employer that this finding cannot be affirmed. *See* 5 U.S.C. §557(c)(3)(A).[11] We therefore vacate the administrative law judge's finding that claimant

[8] The administrative law judge noted, for example, that while Dr. Castle reported "that [c]laimant had reduced diffusion capacity, and the treatment records also note [c]laimant had diffusion capacity problems on several occasions . . . Dr. Tuteur gave no explanation for this abnormality." Decision and Order at 18.

[9] Employer contends that the administrative law judge erred in not considering early reports by Dr. Tuteur obtained in conjunction with the miner's first claim for benefits. We consider the administrative law judge's error, if any, to be harmless, as Dr. Tuteur summarized his earlier findings in his recent report and stated that his current opinion was "unchanged" from his earlier reports. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[10] Employer correctly asserts that Dr. Habre relied on a qualifying pulmonary function study that was determined by the administrative law judge to be invalid, and did not update his report after the second, non-qualifying study was conducted. Director's Exhibit 14. We note that Dr. Habre also relied on a valid, qualifying blood gas study. *Id*.

[11] The Administrative Procedure Act, 5 U.S.C. §§500-591, 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. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

established that the miner was totally disabled and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

Justice Under the Act

Citing *Sharpe v. Director, OWCP* [*Sharpe I*], 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007), employer argues that the administrative law judge did not address all the factors relevant to whether granting modification under 20 C.F.R. §725.310[12] would render justice under the Act. Employer asserts that while the administrative law judge addressed futility, he did not explain his finding "in light of the complete history of this case," failed to consider the interest in finality, and failed to adequately consider whether claimant diligently pursued the miner's claim or sought to thwart employer's good-faith defense against this claim. Employer's Brief at 34-35. Employer's arguments are without merit.[13]

Pursuant to *Sharpe I*, the factors relevant to the justice under the Act inquiry include the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *See Sharpe I*, 495 F.3d at 128, 24 BLR at 2-68. The paramount concern in granting modification is whether the entitlement determination is accurate. *See Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547, 22 BLR 2-429, 2-453 (7th Cir. 2002); *see also Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 330, 25 BLR 2-157, 2-176 (4th Cir. 2012), *cert. denied*, 570 U.S. 917 (2013) ("the interest in finality rightly carries a great deal of weight" if the modification request is "belatedly made with an improper motive and without compelling new evidence"). Based on these principles, we see no error in the administrative law judge's finding that "claimant has met the threshold showing that [her] request for modification would render justice under the Act." Decision and Order at 15. Specifically, the administrative law judge noted that claimant acted diligently by "timely s[eeking] modification of the previous denial and

[12] 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 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. The 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, 256 (1971).

[13] Because this case arises with the jurisdiction of the Third Circuit, the *Sharpe* decision is not binding precedent but may be instructional in determining whether granting modification renders justice under the Act.

submitt[ing] new evidence in support of the request for modification." *Id*. He further concluded that her modification request was not futile or moot, as "relief is plainly available" because claimant established her entitlement to benefits. *Id*. Accordingly, if the administrative law judge finds on remand that claimant is entitled to benefits, he may reinstate his conclusion that granting modification renders justice under the Act.

Commencement Date for Benefits

The administrative law judge awarded benefits commencing August 2010, the month in which the miner filed his subsequent claim. Employer correctly asserts that the administrative law judge did not identify whether he was granting modification based on a change in conditions or a mistake in a determination of fact, which affects the date for commencement of benefits.

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." 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, claimant is entitled to benefits from the month the miner 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). Further, in a subsequent claim, no benefits may be paid for any time period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

Because the administrative law judge's finding as to the commence date for benefits is not properly explained in accordance with the applicable regulations, it is vacated.

Remand Instructions

On remand, the administrative law judge must reconsider whether Dr. Habre's opinion is sufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). If claimant establishes that the medical opinion evidence weighs in favor of total disability, the administrative law judge must make an overall finding on the issue, taking into consideration the contrary probative evidence. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. If claimant establishes total disability, she will have invoked the Section 411(c)(4) presumption and

established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Thereafter, the administrative law judge must address whether employer has established rebuttal of the presumption, based on all the relevant evidence of record.[14] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii). If total disability is not established, however, benefits are precluded. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

If the administrative law judge finds that claimant has established entitlement to benefits on remand, he must address whether he is granting modification based on a change in conditions or a mistake in a determination of fact, and thereafter determine the commencement date for benefits in accordance with 20 C.F.R. §725.503(b).

[14] Because we are remanding this case for further consideration of total disability and invocation of the Section 411(c)(4) presumption, we decline to address employer's arguments as they pertain to the administrative law judge's findings on rebuttal.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, and vacated in part, 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