**U.S. Department of Labor**

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

BRB No. 17-0292 BLA

| | | |
|---|---|---|
| DENZEL P. RICHARDSON | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| PARAMONT COAL CORPORATION SELF-INSURED THROUGH PYXIS RESOURCES COMPANY, c/o HEALTH SMART CASUALTY CLAIM | ) | |
| | ) | |
| Employer-Petitioner | ) | DATE ISSUED: 03/15/2018 |
| | ) | |
| 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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2014-BLA-5135) of Administrative Law Judge Larry S. Merck rendered on a claim filed on May 21, 2001 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, involving claimant's request for modification of a subsequent claim filed on May 21, 2000, has a protracted procedural history.[1]

In a decision and order dated May 11, 2004, Administrative Law Judge Linda S. Chapman credited claimant with at least twenty-two years of coal mine employment and found that the new evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge therefore found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the old and new evidence together, Judge Chapman again found that claimant established the existence of complicated pneumoconiosis and awarded benefits. Director's Exhibit 42. Pursuant to employer's appeal, the Board vacated the award of benefits, and remanded the case for further consideration. *Richardson v. Paramont Coal Corp.*, BRB No. 04-0696 BLA (Apr. 28, 2005) (unpub.).

On remand, in a decision and order dated December 5, 2005, Judge Chapman again found complicated pneumoconiosis established and awarded benefits. Director's Exhibit 49. Pursuant to employer's second appeal, the Board vacated the award of benefits and remanded the case for reassignment to another administrative law judge. *Richardson v. Paramont Coal Corp.*, BRB No. 06-0324 BLA (Oct. 31, 2006) (unpub.). On remand, the case was assigned to Administrative Law Judge Daniel F. Solomon.

In a decision and order dated June 15, 2007, Judge Solomon initially found that Judge Chapman had mistakenly considered claimant's affirmative case x-ray evidence to include readings by Drs. DePonte and Patel. Judge Solomon found that while these x-rays were listed on claimant's evidence summary form, claimant substituted x-ray readings by Drs. Capiello and Ahmed at the October 22, 2003 hearing before Judge Chapman. Considering these readings, together with the other evidence of record, Judge Solomon found that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, or otherwise establish total disability pursuant to 20 C.F.R.

[1] This is claimant's second claim. Director's Exhibit 3. Claimant's first claim, filed on June 22, 1992, was denied on September 30, 1994, because he did not establish total respiratory disability. The Board affirmed the denial, and claimant took no further action; thus, the denial became final. Director's Exhibit 1; *see* Decision and Order at 2.

§718.204(b)(2). Thus, Judge Solomon found that claimant failed to establish a change in the applicable condition of entitlement and denied benefits. Director's Exhibit 57.

On September 14, 2007, claimant submitted new evidence and requested modification of Judge Solomon's denial of benefits pursuant to 20 C.F.R. §725.310. The case was assigned to Administrative Law Judge Larry S. Merck (the administrative law judge), who conducted a hearing on June 16, 2016. At the hearing, employer conceded that claimant established the existence of complicated pneumoconiosis, and entitlement to benefits, but contested the date for the commencement of benefits. Decision and Order at 3; Hearing Tr. at 15.

In a decision and order dated February 13, 2017, which is the subject of the current appeal, the administrative law judge initially found that the evidentiary record established by Judge Chapman had been correct, and thus considered the x-ray readings by Drs. Patel and DePonte, instead of the readings by Drs. Capiello and Ahmed. The administrative law judge further found that the new x-ray evidence submitted on modification clarified the prior evidence and demonstrated a mistake in a determination of fact with regard to Judge Solomon's denial of claimant's subsequent claim. *See* 20 C.F.R. §725.310. Accordingly, the administrative law judge awarded benefits pursuant to 20 C.F.R. §725.503(b) from May 2001, the month in which claimant filed his subsequent claim.

On appeal, employer argues that the administrative law judge erred in granting modification based on a mistake in a determination of fact, rather than on a change in conditions and, therefore, erred in determining the date for the commencement of benefits. Claimant responds, urging affirmance of the administrative law judge's decision and order. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[2]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable

[2] Because employer does not challenge the administrative law judge's findings on the merits of entitlement, we affirm the administrative law judge's award of benefits in this claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

**Date for the Commencement of Benefits**

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, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62-3 (3d Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-5, 18 BLR 2-26, 2-28 (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 granted modification based on a mistake of fact. Decision and Order at 11. As a preliminary matter, the administrative law judge found that Judge Solomon erred in considering the x-ray readings by Drs. Capiello and Ahmed in rendering his decision on claimant's subsequent claim.[4] Decision and Order at 6-7. The

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 9.

[4] The administrative law judge noted that prior to the 2003 hearing, claimant's counsel designated x-ray readings by Drs. Patel and DePonte as affirmative case evidence in support of his subsequent claim. Decision and Order at 5. At the 2003 hearing, held before Judge Administrative Law Judge Linda S. Chapman, claimant's counsel attempted to submit two additional x-ray readings, one by Dr. Capiello and one by Dr. Ahmed, as affirmative case evidence. Decision and Order at 6, referencing 2003 Hearing Tr. at 7-9. After Judge Chapman advised claimant's counsel that these additional x-ray readings exceeded the limitations on evidence set forth at 20 C.F.R. §725.414, claimant's counsel

administrative law judge determined that the decision in claimant's subsequent claim should have been based on the x-ray readings by Drs. DePonte and Patel. *Id.* Thus, in addressing claimant's modification request, the administrative considered the x-ray readings by Drs. DePonte and Patel (rather than the readings by Drs. Capiello and Ahmed) and employer's rebuttal evidence, in conjunction with the new x-ray interpretations by Drs. DePonte and Fino submitted on modification. Decision and Order at 7-9.

The administrative law judge correctly noted that the previously submitted x-ray interpretations all identified large lesions in claimant's lungs, but that the readers disagreed as to the cause of these lesions.[5] Decision and Order at 9. Claimant's physicians attributed the lesions to complicated pneumoconiosis, while employer's physicians attributed the lesions to other causes, including cancer and tuberculosis. *Id.* The administrative law judge noted that, in contrast, all three x-ray interpretations submitted on modification, including employer's x-ray interpretation, diagnose complicated coal workers' pneumoconiosis, Category B. *Id.* Thus, the administrative law judge found that "the more recent evidence persuasively clarifies the x-ray evidence overall" and establishes a mistake in a determination of fact in Judge Solomon's finding that the x-ray evidence did not demonstrate the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Decision and Order at 9-10. The administrative law judge further found that the record did not reflect when claimant's simple pneumoconiosis became complicated pneumoconiosis. Decision and Order at 11. Consequently, the administrative law judge

---

sought to submit the readings by Drs. Capiello and Ahmed under the good cause exception to the limitations on evidence at 20 C.F.R. §725.456. Decision and Order at 6; Hearing Tr. at 10, 12. As the administrative law judge noted, Judge Chapman denied counsel's request, and explicitly stated that she would not consider the readings by Drs. Capiello and Ahmed. Decision and Order at 6-7, *referencing* 2003 Hearing Tr. at 11-12. Instead, she stated that she would place them in a separate envelope solely for the purpose of preserving them in the event the parties challenged the issue of the evidentiary limitations on appeal. *Id.* Based on this exchange, the administrative law judge found that the parties "understood" from Judge Chapman's rulings that the x-ray readings of Drs. Ahmed and Capiello would not be considered in rendering a decision on the subsequent claim. Decision and Order at 7.

[5] Both the x-ray interpretations by Drs. Capiello and Ahmed, considered by Judge Solomon, and the interpretations by Drs. DePonte and Patel, were read as positive for large opacities of complicated pneumoconiosis. *Compare* Claimant's Exhibits 2, 3 *with* Director's Exhibits 12, 27; Claimant's Exhibit 1.

concluded that claimant was entitled to benefits as of May 2001, the month in which he filed his subsequent claim. *Id.*

Employer does not challenge the administrative law judge's finding that Judge Solomon's consideration of the x-ray interpretations by Drs. Capiello and Ahmed constituted procedural error. Nor does employer challenge the administrative law judge's findings that claimant established the existence of complicated pneumoconiosis.[6] Rather, employer asserts that the administrative law judge erred in granting modification based on a mistake in fact rather than a change in conditions, resulting in an error in the commencement date. Employer's Brief at 3-4. Specifically, employer argues that: "Judge Merck found Judge Solomon committed a mistake of fact in considering the x-ray readings of Drs. Ahmed and Capiello, instead of the x-ray readings of Drs. DePonte and Patel. Based on that alleged mistake of fact, Judge Merck found claimant had established the condition described in §718.304(a) . . . ." Employer's Brief at 2. Employer asserts that Judge Solomon's identification of the x-ray evidence to be considered was a discretionary procedural ruling, not a factual error, and thus was not within the scope of issues that are subject to modification. Employer's Brief at 4, *citing Bowman v. Director, OWCP*, BRB No. 03-0720 BLA (Sept. 10, 2004) (unpub.).

Employer misconstrues the administrative law judge's analysis by conflating his clarification of the evidentiary record with his determination that the previously-submitted x-rays, together with the new evidence, establish the existence of complicated pneumoconiosis. The administrative law judge did not find that Dr. Solomon's consideration of the x-ray readings of Drs. Capiello and Ahmed was a mistake in a determination of fact. Rather, the administrative law judge found that the new x-ray evidence established "that the cause of the large opacities identified on earlier x-rays, which previously had differing origins proposed by different physicians, were large opacities of coal workers' pneumoconiosis."[7] Decision and Order at 10.

---

[6] As employer points out, there is little difference in the x-ray interpretations considered by Judge Solomon and those considered by the administrative law judge, as all identified large opacities of complicated pneumoconiosis. Employer's Brief at 3; *compare* Claimant's Exhibits 2, 3 *with* Director's Exhibits 12, 27; Claimant's Exhibit 1. Further, in each instance the rebuttal x-ray readings submitted by employer identified large lesions, but attributed the lesions to causes other than pneumoconiosis. *Compare* Director's Exhibit 34 *with* Director's Exhibits 26, 34.

[7] We note that employer does not demonstrate that the procedural substitution of one set of readings for the other made any difference whatsoever. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the alleged "error

The scope of modification based on correcting a mistake of fact is broad, encompassing the ultimate fact of entitlement. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *see Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999). As it is supported by substantial evidence, we affirm the administrative law judge's finding that the new x-ray evidence submitted on modification establishes "a mistake in determination of fact in Judge Solomon's finding that the x-ray evidence did not demonstrate the existence of complicated pneumoconiosis pursuant to [20 C.F.R. §]718.304(a)." Decision and Order at 10.

The commencement date for benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Where a miner suffers from complicated pneumoconiosis, the fact-finder must consider whether the evidence establishes the onset of the disease. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). If the evidence does not establish that date, the commencement date is the month in which the claim was filed. *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b). In a subsequent claim, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

The administrative law judge found that the evidence is not sufficient to allow a specific determination as to when claimant's simple pneumoconiosis became complicated pneumoconiosis. As employer raises no challenge to that determination, it is affirmed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 120-21 (1987). We therefore affirm the administrative law judge's determination that claimant is entitled to benefits commencing May 2001, the month and year in which claimant filed this subsequent claim. Decision and Order at 11.

---

to which [it] points could have made any difference"). The administrative law judge based his findings as to the previously-submitted evidence on all of the previous readers having found a large opacity—which was true of both the Patel/DePonte set of readings and of the Capiello/Ahmed set of readings. Decision and Order at 10.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge