BRB No. 12-0110 BLA

EDWARD E. IVY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROBERTS BROTHERS,	)	
c/o WARRIOR COAL COMPANY	)	DATE ISSUED: 11/19/2012
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting the Claimant's Request for Modification of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy and Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting the Claimant's Request for Modification (2009-BLA-05592) of Administrative Law Judge John P. Sellers, III, rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The pertinent procedural history of this case is as follows. Claimant's current subsequent claim was filed on March 27, 2005.[1] In a Decision and Order dated February 27, 2008, Administrative Law Judge Daniel F. Solomon denied benefits, finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b), and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Claimant filed a request for modification on March 28, 2008, which was denied by the district director. Claimant requested a hearing, which was held on October 20, 2010, before Judge Sellers (the administrative law judge). Director's Exhibit 87. In his Decision and Order dated October 31, 2011, the administrative law judge accepted the parties' stipulation of twenty-four years of coal mine employment, and also credited claimant's testimony that all of his coal mine work was underground. The administrative law judge determined that the new evidence on modification, considered in conjunction with the evidence submitted before Judge Solomon, established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Because claimant established total disability and fifteen years of qualifying coal mine employment, the administrative law judge found that claimant was entitled to the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer failed to rebut the

[1] Claimant filed an initial claim for benefits on December 4, 1990, which was denied by the district director on May 28, 1991, because claimant failed to establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed a subsequent claim on August 13, 2002. Director's Exhibit 2. The district director denied benefits on December 5, 2003, finding that, while claimant established the existence of pneumoconiosis, he failed to prove that he was totally disabled. *Id*.

[2] On March 23, 2010, Congress enacted amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). Relevant to this living miner's claim, amended Section 411(c)(4) provides that if a miner establishes at least fifteen years of underground coal mine employment or surface mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)).

presumption. The administrative law judge concluded that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and a basis for modification of the prior denial of his subsequent claim under 20 C.F.R. §725.310. Additionally, the administrative law judge determined that granting claimant's modification request would render justice under the Act. Accordingly, benefits were awarded.

On appeal, employer asserts that the administrative law judge abused his discretion in weighing the evidence and did not perform the proper legal analysis in granting modification.[3] Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a response, urging the Board to reject employer's arguments and affirm the award of benefits. Employer has also filed a reply brief, reiterating its arguments on appeal.

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.[4] 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).

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(d); *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(d)(2). Claimant's prior claim, filed on August 13, 2002, was denied for failure to establish total disability. Director's Exhibit 2. Consequently, in order to obtain review of the merits of his current subsequent claim, claimant had to submit new evidence establishing that element of entitlement. 20 C.F.R. §725.309(d)(2), (3).

[3] Employer's request to hold this case in abeyance pending resolution of the legal challenges to the PPACA and the severability of the amendments contained in Section 1556 is moot, as the United States Supreme Court has upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

[4] 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, 1-202 (1989) (en banc); Director's Exhibit 5.

Additionally, because claimant seeks modification of the denial of his subsequent claim for failing to satisfy the requirements of 20 C.F.R. §725.309, the administrative law judge was required to determine whether the new evidence submitted on modification, considered along with the evidence originally submitted in the current subsequent claim, established a change in the applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998). The administrative law judge was also required to determine whether there was a mistake in a determination of fact with regard to the prior denial of claimant's subsequent claim by Judge Solomon. The intended purpose of 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." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994).

Employer argues that insofar as claimant did not demonstrate a material worsening of his condition and did not establish a mistake in a determination of fact in the prior denial, he is not entitled to modification pursuant to 20 C.F.R. §725.310. Employer also argues that, because modification cannot be based on a change in the law, the administrative law judge erred in awarding benefits pursuant to amended Section 411(c)(4).

Employer's allegation that claimant must show a material worsening in his condition in order to obtain modification of his claim is without merit. As discussed *supra*, because claimant seeks modification of a denied subsequent claim for failure to satisfy the requirements of 20 C.F.R. §725.309, the administrative law judge was obligated to determine whether the new evidence submitted on modification, considered along with the evidence originally submitted in the current subsequent claim, satisfied claimant's burden of proof under 20 C.F.R. §725.309(d). *See Hess*, 21 BLR at 143. Although the prior version of 20 C.F.R. §725.309 (2000) required a miner who filed a subsequent claim to demonstrate a "material change in conditions," the revised version of 20 C.F.R. §725.309 provides that a claimant may demonstrate a "change in an applicable condition of entitlement" by submitting new evidence establishing at least one of the elements of entitlement that was previously adjudicated against claimant. *See White*, 23 BLR at 1-3; s*ee also* 65 Fed. Reg. 79,920, 79,968 (Dec. 20, 2000). Accordingly, we reject employer's argument that the administrative law judge applied the incorrect standard in assessing the miner's subsequent claim, as the administrative law judge properly considered whether the evidence on modification, in conjunction with the previously submitted evidence, established total disability, the element of entitlement previously adjudicated against claimant.

We also reject employer's contention that amended Section 411(c)(4) may not be applied to modification requests. Given the breadth of modification based on a mistake in fact, claimant is entitled to seek modification of the ultimate fact of entitlement. *See V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70-71 (2008). In this case, the administrative law judge properly considered whether claimant was entitled to modification of the prior denial of his subsequent claim in view of amended Section 411(c)(4).

As to the issue of whether claimant established a totally disabling respiratory or pulmonary impairment, sufficient to invoke the presumption at amended Section 411(c)(4), we reject employer's argument that the administrative law judge's findings do not satisfy the Administrative Procedure Act (APA),[5] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989). The administrative law judge noted that Judge Solomon weighed three medical opinions by Drs. Simpao, Rosenberg, and Broudy. Decision and Order at 18. Drs. Simpao and Rosenberg agreed that claimant had a totally disabling respiratory or pulmonary impairment, while Dr. Broudy opined that claimant was not totally disabled. Director's Exhibits 12, 40, 56, 66. The administrative law judge also noted that the new medical evidence on modification consisted of the opinions of Drs. Hauser and Jarboe, both of whom opined that claimant is totally disabled by a respiratory or pulmonary impairment. Decision and Order at 16, Claimant's Exhibit 3; Employer's Exhibits 3, 4, 7. The administrative law judge specifically explained the basis for his finding that claimant established total disability as follows:

> I note that the objective data and medical reports before Judge Solomon were generated several years ago, in 2003-2006, and therefore I find the recent evidence submitted on modification (i.e., the medical-opinion evidence of Dr. Hauser and Dr. Jarboe) to be more probative on the issue of the Claimant's respiratory or pulmonary capacity as it exists today. Furthermore, I note that even when the case was before Judge Solomon, two of the three physicians whose opinions were of record (Dr. Simpao and Dr. Rosenberg) found that the Claimant was then totally disabled. Dr. Broudy, the only dissenter, stated only that the Claimant's improvement

[5] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all 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 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

> after bronchodilation suggested that the Claimant would retain his capacity to [do] his former work, a statement which I consider to be equivocal in nature. I also note that Dr. Jarboe in his recent medical review considered the reports of Drs. Simpao, Broudy, and Rosenberg, as well as the recent medical reports, and did not find anything in the earlier reports to alter his conclusion that the Claimant was totally disabled.

Id. at 18. Because employer does not raise error with regard to the administrative law judge's credibility findings, and we see no error in the administrative law judge's reliance on the newly submitted evidence on modification, we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b). *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Furthermore, because claimant established a totally disabling respiratory impairment and fifteen years of qualifying coal mine employment, we affirm the administrative law judge's finding that claimant invoked the presumption at amended Section 411(c)(4), and that claimant has demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309.

The administrative law judge determined that employer failed to rebut the presumption at amended Section 411(c)(4) by establishing either that claimant does not have pneumoconiosis or that his respiratory disability did not arise out of, or in connection with, coal mine employment. *See Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011); Decision and Order at 19-28. Because employer raises no specific error with regard to the administrative law judge's finding that employer's evidence is not persuasive to rule out a causal relationship between claimant's coal dust exposure and his disabling respiratory impairment, we affirm the administrative law judge's rebuttal findings. *See Cox*, 791 F.2d at 445, 9 BLR at 2-46; *Sarf*, 10 BLR at 1-120-21.

Furthermore, we reject employer's assertion that granting modification does not render justice under the Act, as that issue is committed to the discretion of the administrative law judge. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-296. In this case, the administrative law judge noted employer's contentions that the purpose of modification is not served by allowing the claimant to retry the case and get a better result by a more favorably disposed administrative law judge. The administrative law judge rejected employer's contention and explained why he determined the interest of justice would be served by granting modification:

> [G]iven the recent unanimous evidence that the Claimant is totally disabled, and in light of the passage of [amended Section 411(c)(4)], I find that reopening the claim on modification serves the interests of justice under the

> Act. In this regard, I note that this is the Claimant's first motion for modification of his previously denied claim. The quality of the evidence he has offered is significant and goes to the heart of the previous denial, which was the determination that he was not totally disabled. In sum, I find that modification is appropriate in this case.

Decision and Order at 28. Because we discern no error or abuse of discretion in the administrative law judge's determination that granting modification would render justice under the Act, it is affirmed. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). Thus, we affirm the administrative law judge's finding that claimant established a basis for modification pursuant to 20 C.F.R. §725.310 and that he is entitled to benefits.

Accordingly, the administrative law judge's Decision and Order Granting the Claimant's Request for Modification 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