BRB No. 14-0076 BLA

A.W. GARRETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KARST ROBBINS COAL COMPANY	)	DATE ISSUED: 11/24/2014
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5991) of Administrative Law Judge Linda S. Chapman, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of a subsequent claim filed on October 24, 2005.[1] On March 12, 2009, the administrative law judge issued a Decision

[1] Claimant filed his first claim for benefits on July 16, 1990, which was denied by Administrative Law Judge Clement J. Kichuk on August 5, 1993, because claimant did not establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant filed his second claim on May 19, 1997. *Id*. On October 15, 1998, Judge Chapman issued a Decision and Order denying benefits. *Id*. Judge Chapman's denial of benefits was based on claimant's failure to establish total disability due to pneumoconiosis and, thus,

and Order denying benefits because claimant failed to establish that his total disability was due to pneumoconiosis. Claimant filed a request for modification on March 10, 2010, which the district director denied. Claimant requested a hearing, which was held by the administrative law judge on February 24, 2010.

In the Decision and Order that is the subject of the current appeal, the administrative law judge credited claimant with at least 17.83 years of underground coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that the evidence was sufficient to establish that claimant is totally disabled. *See* 20 C.F.R §718.204(b)(2)(i), (ii) and (iv).[2] Based on her findings that claimant had more than fifteen years of qualifying coal mine employment, and suffers from a totally disabling respiratory impairment, the administrative law judge determined that claimant invoked the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis.[3] The administrative law judge further found that employer did not rebut the presumption.

Consequently, the administrative law judge found that claimant established a mistake in a determination of fact in the prior denial of benefits, pursuant to 20 C.F.R. §725.310. Furthermore, the administrative law judge found that claimant established a

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claimant's failure to establish a material change in conditions at 20 C.F.R. §725.309 (2000). *Id.* Claimant filed a request for modification on July 21, 1999, which was denied by the district director on October 6, 1999. *Id*. Claimant filed a second request for modification on September 26, 2000, which was denied by the district director on October 13, 2000. *Id*. Claimant filed his third request for modification on December 17, 2001. *Id*. On June 17, 2004, Administrative Law Judge Stephen L. Purcell issued a Decision and Order denying benefits. *Id*. Judge Purcell concluded that, although claimant established the existence of pneumoconiosis, and employer conceded that claimant has a totally disabling respiratory impairment, claimant failed to establish that his total disability was due to pneumoconiosis. *Id*. Claimant did not further pursue his 1997 claim.

[2] The administrative law judge found that the evidence was insufficient to establish the presence of complicated pneumoconiosis and, thus, that claimant did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

[3] Amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[4] Based on these findings, the administrative law judge concluded that claimant was entitled to modification and that granting modification would render justice under the Act. The administrative law judge also determined that, because the medical evidence did not establish the onset date of claimant's total disability due to pneumoconiosis, claimant is entitled to benefits commencing as of the month in which he filed his most recent claim. Accordingly, the administrative law judge granted modification and awarded benefits to commence as of October 2005.

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by proving that claimant does not have legal pneumoconiosis and is not totally disabled by pneumoconiosis. Employer also challenges the administrative law judge's determination that October 2005 was the proper date for the commencement of benefits. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter in which he urges the Board to reject employer's argument that the administrative law judge required employer to establish rebuttal beyond a reasonable doubt. The Director maintains that the administrative law judge merely found that employer's experts did not provide credible opinions.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[4] The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has at least 17.83 years of underground coal mine employment and has a totally disabling respiratory impairment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 24-26. Accordingly, we further affirm the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption. Decision and Order at 19-20.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

I. Change in an Applicable Condition of Entitlement/Availability of Modification

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). In this case, claimant's prior claim was denied because he failed to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. Claimant, therefore, had to submit new establishing this element of entitlement in order to have a review of his current claim on the merits. 20 C.F.R. §725.309(c).

Additionally, because claimant filed a request for modification of the March 12, 2009 denial of benefits in the subsequent claim, the issue before the administrative law judge was whether the medical evidence developed since the denial of benefits in the prior claim (*i.e.*, the evidence developed since Judge Purcell's June 17, 2004 denial of benefits) established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, thereby, establishing a basis for modification at 20 C.F.R. §725.310. *See Hess v. Director, OWCP*, 21 BLR 1-141 (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. 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).

Consequently, we reject employer's contention that amended Section 411(c)(4) does not apply to modification requests, as modification is not available based on a change in law. Employer's Brief at 29. Because modification, based on a mistake in a determination of fact, encompasses the ultimate fact of entitlement, 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). *See V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70-71 (2008).

II. Rebuttal of the Section 411(c)(4) Presumption

A. Existence of Pneumoconiosis

As an initial matter, we affirm, as unchallenged on appeal, the administrative law judge's finding that employer cannot rebut the amended Section 411(c)(4) presumption

by establishing the absence of clinical pneumoconiosis.[7] *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711; Decision and Order at 21. Because employer has failed to establish the absence of clinical pneumoconiosis, it cannot rebut the amended Section 411(c)(4) presumption by showing the absence of legal pneumoconiosis.[8] 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). Thus, the only method of rebuttal available to employer is to disprove the presumed causal relationship between claimant's pneumoconiosis and his totally disabling respiratory impairment.

B. Total Disability Causation

The administrative law judge found that employer failed to rule out a causal relationship between claimant's total disability and pneumoconiosis. Employer contends that, in weighing the medical opinions relevant to the existence of legal pneumoconiosis, and the cause of claimant's totally disabling respiratory impairment, the administrative law judge erroneously required employer "to rule out the possibility that coal dust caused, contributed to or aggravated" claimant's impairment. Employer's Brief at 19.

The administrative law judge stated that, in order to disprove the presumed fact that claimant is totally disabled due to pneumoconiosis, employer "must affirmatively rule out a causal relationship between [claimant's] disabling respiratory impairment and his coal mine employment." Decision and Order at 18. This is consistent with the recent holding of the United States Court of Appeals for the Sixth Circuit that, pursuant to 20 C.F.R. §718.305(d)(1)(ii), the party opposing entitlement must "rule out" coal mine

[7] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[8] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

employment as a cause of the miner's disability.[9] *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071, 25 BLR 2-431, 2-446-47 (6th Cir. 2013) (holding that there is no meaningful difference between the "play[ed] no part" standard set forth in the regulation and the "rule-out" standard previously applied by a number of United States Circuit Courts of Appeals). Therefore, we conclude that the administrative law judge applied the correct standard with respect to rebuttal of the presumption that claimant is totally disabled due to pneumoconiosis.

In evaluating whether employer established rebuttal under this method, the administrative law judge considered the opinions of Drs. Rosenberg and Fino, who opined that claimant's disabling chronic obstructive pulmonary disease (COPD) is due to cigarette smoking, and is unrelated to coal mine dust exposure. Decision and Order at 21-24; Director's Exhibit 73; Employer's Exhibits 1, 2. The administrative law judge found that, because Drs. Rosenberg and Fino did not credibly explain why claimant does not have a coal dust-related lung disease, their opinions were insufficient to establish that claimant's disability was unrelated to his coal mine employment. Decision and Order at 24.

Employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Fino. Employer further contends that the administrative law judge erred in her analysis of the preamble to the 2001 revisions to the regulations, and in relying on the Board's unpublished decisions in *M.A.* [*Amburgey*] v. *Jones Fork Operation*, BRB No. 08-0308 BLA (Jan. 16, 2009) (unpub.), and *Y.D.* [*Dyke*] *v. Diamond May Coal Co.*, BRB No. 08-0176 BLA (Nov. 26, 2008) (unpub.). These allegations of error are without merit.

The administrative law judge observed correctly that Dr. Rosenberg eliminated coal mine dust exposure as a source of claimant's disabling obstructive pulmonary impairment, in part, because claimant's pulmonary function study revealed a markedly reduced FEV1/FVC ratio, which Dr. Rosenberg opined was uncharacteristic of a coal

[9] The Department of Labor (DOL) has explained that the "no part" standard set forth in 20 C.F.R. §718.305(d)(1)(ii) recognizes that the United States Circuit Courts of Appeals have interpreted amended Section 411(c)(4) "as requiring the party opposing entitlement to 'rule out' coal mine employment as a cause of the miner's disabling respiratory or pulmonary impairment." 78 Fed. Reg. 59,105 (Sept. 25, 2013). The DOL also explicitly chose not to use the "contributing cause" standard set forth in 20 C.F.R. §718.204(c), and stated that the application of a different standard on rebuttal "is warranted by the statutory section's underlying intent and purpose," which "effectively singled out" totally disabled miners who had fifteen years of qualifying coal mine employment "for special treatment." 78 Fed. Reg. 59,106-07 (Sept. 25, 2013).

mine dust-induced lung disease, but was classic for a smoking-related disease.[10] Decision and Order at 11, 13-14, 21-22; Director's Exhibit 73; Employer's Exhibit 1. The administrative law judge acted within her discretion in according less weight to Dr. Rosenberg's opinion because the assumption that he relied on, that a significant decrement in the FEV1/FVC ratio rules out a diagnosis of pneumoconiosis, is contrary to the medical science credited by the Department of Labor (DOL). *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012). The administrative law judge also rationally found that Dr. Rosenberg's reliance on the partial reversibility of claimant's respiratory impairment to rule out coal dust exposure as a causative factor, detracted from the probative value of his opinion, as "after [the] use of a bronchodilator, [claimant] continued to demonstrate a residual, irreversible, and totally disabling respiratory impairment." Decision and Order at 22; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Because the administrative law judge provided valid reasons for discrediting Dr. Rosenberg's opinion, we affirm her finding that Dr. Rosenberg's opinion is insufficient to rebut the presumed fact that claimant's totally disabling respiratory impairment is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26.

Employer further argues that the administrative law judge did not properly consider Dr. Fino's opinion. Contrary to employer's assertion, the administrative law judge's acted within her discretion as fact-finder in discounting of Dr. Fino's opinions. The administrative law judge reasonably determined that, even if one accepted Dr. Fino's premises that "smokers have a greater loss of FEV1", or "a reduced diffusion capacity is 'classic' for bullous emphysema," or claimant's "oxygen transfer impairment was due to his bullous emphysema," he failed to explain how claimant's "extensive history of exposure to coal dust played no part in that impairment." Decision and Order at 23-24, *quoting* Employer's Exhibit 2; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *Gross v. Dominion Coal Corp.*, 23 BLR 1-18 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Moreover, the administrative law judge acted within her discretion in according diminished weight to Dr. Fino's opinion, as he did not explain the change in his opinion from 2006, when he could not rule out some obstruction due to coal mine dust, and his conclusion, with "absolute certainty," in 2013 that claimant's pulmonary impairment was unrelated to coal mine dust exposure. Decision and Order at 23-24, *quoting* Employer's Exhibit 2; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Thus, the administrative law judge rationally determined that Dr. Fino's

[10] The administrative law judge noted that "[a]lthough Dr. Rosenberg asserted that this characterization was based on 'epidemiologic studies accepted by the [DOL]' he failed to identify these studies." Decision and Order at 11 n.11.

opinion failed to effectively rule out coal mine employment as a cause of claimant's total respiratory disability. *See Ogle*, 737 F.3d at 1069-70, 25 BLR at 2-442-45.

Because the administrative law judge permissibly exercised her discretion in determining the weight to accord the opinions of Drs. Rosenberg and Fino, we affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant is not totally disabled due to pneumoconiosis. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Ogle*, 737 F.3d at 1074, 25 BLR at 2-451-52; *Morrison*, 644 F.3d at 479, 25 BLR at 2-8. Furthermore, because we affirm the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption by establishing either that claimant does not have pneumoconiosis or that claimant's total disability was not due to pneumoconiosis, we affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Consequently, we affirm the administrative law judge's finding that claimant established a mistake in a determination of fact at 20 C.F.R. §725.310.

III. Commencement of Benefits

Finally, employer challenges the administrative law judge's finding that October 2005 is the date from which benefits commence. Specifically, employer argues that benefits should commence from March 2010, the date that claimant requested modification. Employer's Brief at 30. We disagree.

Whether modification is granted based on mistake in fact or change in conditions affects the date from which benefits commence. 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, or if that date is not ascertainable, as of the date he requested modification. 20 C.F.R. §725.503(d)(2). If modification is based on the correction of a mistake in fact, claimant is entitled to benefits from the date he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim, unless credited evidence establishes that he was not disabled at any subsequent time. 20 C.F.R. §725.503(d)(1); *see Eifler v. Peabody Coal Co.*, 926 F.3d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

In this case, the administrative law judge found that claimant established a mistake in a determination of fact. Decision and Order at 28. The medical evidence that the administrative law judge relied on to render her finding establishes only that claimant became totally disabled due to pneumoconiosis at some time prior to the date of that evidence. *See Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). Further, the administrative law judge did not credit any evidence that claimant was not

totally disabled due to pneumoconiosis at any time subsequent to the filing date of his subsequent claim. Thus, the administrative law judge properly awarded benefits commencing as of October 2005, the month in which this claim was filed. *See Eifler*, 926 F.3d at 666, 15 BLR at 2-4.

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

SO ORDERED.

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BETTY JEAN HALL, Acting
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge