U.S. Department of Labor

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

BRB No. 17-0105 BLA
and 17-0107 BLA

CASSANDRA M. TERRY (o/b/o and Widow of LUTHER TERRY)	)	
Claimant-Respondent	)	
v.	)	
U.S. STEEL MINING COMPANY, ALABAMA, LLC	)	
and	)	
U.S. STEEL CORPORATION	)	DATE ISSUED: 10/30/2017
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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and J. Thomas Walker (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

Kary B. Wolfe (Jones Walker LLP), Birmingham, Alabama, for employer/carrier.

Sarah M. Hurley (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2015-BLA-05252, 2015-BLA-05747) of Administrative Law Judge Lystra A. Harris awarding benefits on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on January 11, 2013,[1] and a survivor's claim filed on September 24, 2013.[2]

In a Proposed Decision and Order dated December 4, 2013, the district director denied benefits in the miner's 2013 subsequent claim.[3] Claimant thereafter requested modification. Director's Exhibit 30. In a Proposed Decision and Order dated September 30, 2014, the district director granted claimant's request for modification, and awarded benefits. Director's Exhibit 33. On November 12, 2014, the district director issued a second Proposed Decision and Order, wherein he again granted modification, and awarded benefits.[4] Director's Exhibit 35. Pursuant to employer's request, the case was

[1] The miner filed two previous claims, both of which were finally denied. Director's Exhibits 1, 2. The miner's most recent prior claim, filed on September 13, 2010, was denied by the district director on September 2, 2011 because the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 2.

[2] Employer's appeal in the miner's claim was assigned BRB No. 17-0105 BLA, and its appeal in the survivor's claim was assigned BRB No. 17-0107 BLA. By Order dated December 20, 2016, the Board consolidated these appeals for purposes of decision only.

[3] While his claim was pending before the district director, the miner died on August 18, 2013. Director's Exhibit 13. Claimant, the miner's surviving spouse, is pursuing the miner's claim.

[4] In the second Proposed Decision and Order, the district director found that the basis for modification was a mistake in a determination of fact, rather than a change in conditions, the basis for modification set forth in the prior Proposed Decision and Order. Director's Exhibit 35.

forwarded to the Office of Administrative Law Judges (OALJ) for a formal hearing. Director's Exhibit 36.

Claimant filed a survivor's claim on September 24, 2013. Director's Exhibit 39. In a Proposed Decision and Order dated December 17, 2014, the district director awarded benefits in the survivor's claim. Director's Exhibit 53. Pursuant to employer's request, the case was forwarded to the OALJ for a formal hearing. Director's Exhibit 54. On January 28, 2016, the administrative law judge held a hearing regarding both the miner's claim and the survivor's claim.

In a Decision and Order dated October 11, 2016, the administrative law judge credited the miner with at least twenty-nine years of underground coal mine employment,[5] and found that the evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that the miner invoked the Section 411(c)(4) presumption[6] and established a change in the applicable condition of entitlement. The administrative law judge further determined that employer failed to rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim.

The administrative law judge also considered claimant's survivor's claim. The administrative law judge noted that Section 422(*l*), 30 U.S.C. §932(*l*), provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. The administrative law judge determined that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 932(*l*). Accordingly, the administrative law judge awarded survivor's benefits.

[5] The record reflects that the miner's last coal mine employment was in Alabama. Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

On appeal, employer contends that the administrative law judge erred in finding that the miner was entitled to modification of the district director's initial December 4, 2013 denial of his claim. Employer also contends that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in awarding derivative survivor's benefits pursuant to Section 932(*l*). Claimant responds in support of the administrative law judge's award of benefits in both claims. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge was not required to address the district director's modification determination before adjudicating the miner's claim. The Director also responds in support of the administrative law judge's award of derivative survivor's benefits.

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. 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).

The Miner's Claim

Modification

Employer initially argues that the administrative law judge improperly granted claimant's request for modification based upon a change in the law, rather than a change in conditions or a mistake in a determination of fact. We disagree. Employer's argument fails to recognize the broad scope of the modification inquiry.

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 has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See USX Corp. v. Director, OWCP* [*Bridges*], 978 F.2d 656, 658, 17 BLR 2-29, 2-31 (11th Cir. 1992); *see also Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002). 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).

As the administrative law judge recognized, the district director, upon reviewing claimant's motion for modification, reconsidered the evidence and determined that it cast doubt on the correctness of his previous decision that entitlement to benefits was not

established. Decision and Order at 10; Director's Exhibit 35. Thus, contrary to employer's contention, the district director and the administrative law judge permissibly used the modification process to correct a mistake of fact, i.e., the ultimate fact of entitlement[7]. *O'Keeffe*, 404 U.S. at 256; *Bridges*, 978 F.2d at 658, 17 BLR at 2-31.

Invocation of the Section 411(c)(4) Presumption

Because employer does not challenge the administrative law judge's finding the miner invoked the Section 411(c)(4) presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Moreover, because the administrative law judge found that the miner invoked the Section 411(c)(4) presumption that he was totally disabled due to pneumoconiosis, the miner satisfied his initial burden to demonstrate a change in the applicable condition of entitlement at 20 C.F.R. §725.309. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-12, 25 BLR 2-743, 2-754-55 (4th Cir. 2015) (holding that the fifteen-year presumption may be used to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, including the existence of pneumoconiosis); *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794, 795, 25 BLR 2-285, 2-292 (7th Cir. 2013).

Rebuttal of the Section 411(c)(4) Invocation

Because the miner invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[8] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of

[7] Even if one were to view the question as a mixed question of law and fact, it would be susceptible to modification. *See Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992). We further note, as the Director, Office of Workers' Compensation Programs, points out, that the district director's rationale for granting modification has no bearing because the administrative law judge reviews a claimant's modification request de novo. *See* 20 C.F.R. §725.455(a).

[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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Goldstein and Postma.[9] Director's Exhibit 13; Employer's Exhibits 1, 4, 5. Drs. Goldstein and Postma diagnosed chronic obstructive pulmonary disease (COPD). In a report dated October 10, 2013, Dr. Goldstein opined that the miner's COPD was due to cigarette smoking. Director's Exhibit 20. Dr. Goldstein noted that the most common cause of COPD is smoking. *Id.* Dr. Goldstein also noted that he disagreed with Dr. Barney that twenty percent of the miner's symptoms were due to "his coal mining experience." *Id.* During a January 18, 2016 deposition Dr. Postma also diagnosed COPD due to cigarette smoking. Employer's Exhibit 3. During the deposition, Dr. Postma testified as follows:

> Q. Do you feel that [the miner's] exposure to coal dust could have contributed to or caused his COPD??
>
> A. It's potential.
>
> ***
>
> Q. You said that you believe that there was potential that coal dust exposure could have contributed to or caused his COPD. I want to know

[9] Although Dr. Barney also diagnosed chronic obstructive pulmonary disease (COPD), the administrative law judge found that Dr. Barney's opinion provided support for a diagnosis of legal pneumoconiosis in that, "while he acknowledged that [the] [m]iner's pulmonary impairment [was] predominantly related to tobacco abuse, he considered that there was some, or a high likelihood that [the] [m]iner's extensive years of coal dust exposure exacerbated his pulmonary problems." Decision and Order at 32; Director's Exhibit 16. The administrative law judge noted that the doctor stated that there "is a substantial body of evidence that patients with extensive smoking related COPD and work exposures to coal dust can have synergistic effects on their respiratory disease." *Id.* The administrative law judge further noted that Dr. Barney partitioned the miner's respiratory impairment as "80% related to smoking and 20% related to coal dust exposure." *Id.* The administrative law judge, therefore, found that Dr. Barney's opinion did not assist employer in proving that the miner did not suffer from legal pneumoconiosis. *Id.* Because this finding is unchallenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

your reasoned opinion, do you think that coal dust contributed to cause his COPD or was it cigarette smoking?

A. I think it was cigarette smoking.

Employer's Exhibit 3 at 72, 74.

The administrative law judge discredited the opinions of Drs. Goldstein and Postma, because she found that the doctors failed to adequately explain how they eliminated the miner's twenty-nine years of coal mine dust exposure as a contributor to the miner's COPD. Decision and Order at 26-30.

We reject employer's contention that the administrative law judge erred in her consideration of the opinions of Drs. Goldstein and Postma. The administrative law judge permissibly discredited the opinions of Drs. Goldstein and Postma, because she found that they failed to adequately explain how they eliminated the miner's coal mine dust exposure as a source of his COPD. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 31. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish that the miner did not have legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Upon finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge permissibly discounted the opinions of Drs. Goldstein and Postma, that the miner's pulmonary impairment was not caused by pneumoconiosis,

[10] Therefore, we need not address employer's contentions of error regarding the administrative law judge's findings with respect to the existence of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

because the physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease.[11] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 32-33. We, therefore, affirm the administrative law judge's determination that employer failed to establish that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because the miner established invocation of the Section 411(c)(4) presumption that he was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits in the miner's claim is affirmed.

The Survivor's Claim

The administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(*l*) of the Act: that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on or after March 23, 2010; and that the miner had been determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Decision and Order at 35-36.

Employer asserts that Section 932(*l*) requires a miner to have been receiving benefits at the time of his death for a survivor to be awarded automatic benefits. Employer also argues that the revised regulation at 20 C.F.R. §725.212(a)(3) is contrary to the Act, because it is inconsistent with prior regulations implementing the original version of Section 932*(l*). Finally, employer contends that the administrative law judge's application of Section 932(*l*) to this case is contrary to the binding precedent of the United States Court of Appeals for the Eleventh Circuit in *U.S. Steel Mining Co., LLC v.*

[11] There is no indication that the opinions of Drs. Goldstein and Postma as to causation were independent of their mistaken belief that claimant did not have legal pneumoconiosis. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995) (recognizing that a doctor's judgment as to whether pneumoconiosis is a cause of a miner's disability is necessarily influenced by the accuracy of his underlying diagnosis).

Director, OWCP [*Starks*], 719 F.3d 1275, 25 BLR 2-297 (11th Cir. 2013). Employer's arguments are substantially similar to those rejected by the Board in *Ferguson v. Oak Grove Resources, LLC,* BLR , BRB No. 16-0570 BLA (Aug. 7, 2017), and we reject them here for the reasons set forth in that decision. Because employer raises no other allegation of error, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(*l*). 30 U.S.C. §932(*l*); *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order awarding benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge