U.S. Department of Labor

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

BRB No. 23-0407 BLA

BEVERLY HOLT (o/b/o THOMAS D. HOLT, deceased) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	))))))))))))))))	 DATE ISSUED: 06/05/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

Kara L. Jones (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2017-BLA-05314) on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on August 4, 2014,[1] and is before the Benefits Review Board for a third time.[2]

The Board most recently affirmed the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption and the award of benefits. *Holt v. Consolidation Coal Co.*, BRB Nos. 21-0419 BLA and 21-0419 BLA-A, slip op. at 5-7 (Sept. 30, 2022) (unpub.). However, the Board vacated the ALJ's commencement date for benefits determination, instructing him to "reconsider all of the relevant evidence and determine if it establishes the onset date of the Miner's *total disability* for purposes of determining the date for the commencement of benefits in accordance with" the holdings in *Coleman v. Christen Coleman Trucking*, 784 F. App'x 431 (6th Cir. 2019) (unpub.) and *Dalton v. OWCP*, 738 F.3d 779 (7th Cir. 2013). *Id.* at 7-13 (emphasis added). Subsequently, the Board denied Employer's motion for reconsideration. *Holt v. Consolidation Coal Co.*, BRB Nos. 21-0419 BLA and 21-0419 BLA-A (Mar. 15, 2023) (Order on Recon.) (unpub.).

On remand, the ALJ determined the onset date of the Miner's total disability was August 2009, the month after the district director's denial of the Miner's prior claim became final, and thus benefits should commence at that time.

On appeal, Employer argues the ALJ erred in determining the commencement date for benefits. Claimant responds in support of the ALJ's commencement date finding. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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[1] Claimant is the widow of the Miner, who died on July 17, 2019, and she is pursuing the Miner's subsequent claim on his behalf. *Holt v. Consolidation Coal Co.*, BRB No. 18-0351 BLA, slip op. at 3 n.6 (Jan. 16, 2020) (unpub.).

[2] We incorporate the procedural history of this case as set forth in *Holt v. Consolidation Coal Co.*, BRB Nos. 21-0419 BLA and 21-0419 BLA-A (Sept. 30, 2022) (unpub.) and *Holt*, BRB No. 18-0351 BLA.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Ohio. *See*

Commencement Date of Benefits

The date for the commencement of benefits is the month in which the Miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless credible evidence establishes the Miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In a subsequent claim, benefits may not be paid for any period before the date on which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

In accordance with our instructions, the ALJ reconsidered all of the relevant evidence, including the evidence from the Miner's prior claim, to determine the onset date of the Miner's total disability.[4] Decision and Order on Remand at 4-5. Based on Drs. Zaldivar's and Fino's testimony that the Miner was totally disabled as early as 2008, submitted in the current claim by Employer, and the qualifying December 10, 2008 pulmonary function study from the Miner's prior claim, the ALJ concluded the Miner had been totally disabled "as far back as 2008" and therefore determined the onset of his total disability was August 2009. Decision and Order on Remand at 5; Employer's Exhibit 6 at 16, 22-23, 25; Employer's Exhibit 8 at 19-20; Director's Exhibit 1 at 312, 316. Considering the holdings in *Coleman* and *Dalton*, the ALJ determined that benefits should commence in August 2009, the month after the district director's denial of the Miner's prior claim became final.[5] Decision and Order on Remand at 5-6.

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 20.

[4] The Board previously affirmed, as unchallenged, the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. *Holt*, BRB No. 18-0351 BLA, slip op. at 3 n.5. Subsequently, the Board affirmed the ALJ's determination that Employer did not rebut the presumption of legal pneumoconiosis or disability causation based on Drs. Zaldivar's and Fino's opinions. *Holt*, BRB Nos. 21-0419 BLA and 21-0419 BLA-A, slip op. at 5-7. Because Employer failed to rebut the presumption, the Board explained that the remaining question on remand was the onset of the Miner's *total disability* for the purpose of determining the commencement date for benefits. *Id.* at 12 n.22.

[5] In *Coleman v. Christen Coleman Trucking*, 784 F. App'x 431, 436 (6th Cir. 2019) (unpub.), the miner's prior claim was denied because the evidence did not specifically establish that his totally disabling respiratory or pulmonary impairment was due to

Employer asserts the ALJ erred in his consideration of the commencement date for benefits. Employer's Brief at 5-20. Specifically, Employer contends that the ALJ improperly reexamined the evidence in the district director's final denial of benefits in the Miner's prior claim and that his determination is contrary to *Coleman* and the regulations, as well as deprives Employer of due process of law. *Id.* at 5-12, 17-20. It further contends the ALJ failed to consider whether the prior claim evidence was sufficient to rebut the presumption. *Id.* at 12-14. We are not persuaded by Employer's arguments.[6]

We reject Employer's attempt to distinguish *Coleman*.[7] Employer's Brief at 5-12. In *Coleman*, the Sixth Circuit identified two reasons why the ALJ's determination was

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pneumoconiosis. In the miner's subsequent claim filed after the 2010 reinstatement of the Section 411(c)(4) presumption, the Sixth Circuit affirmed the ALJ's determination that the miner was entitled to benefits beginning in November 2008, the month after the prior denial became final, because the miner had invoked the Section 411(c)(4) presumption based on evidence of total disability from the miner's prior claim. *See Coleman*, 784 F. App'x at 436-37. In *Dalton v. OWCP*, 738 F.3d 779, 780, 784-85 (7th Cir. 2013), the United States Court of Appeals for the Seventh Circuit affirmed the ALJ's finding of the onset date based on evidence of total disability due to pneumoconiosis dating back to August 1991, which predated the miner's 1999 application for benefits in that case.

[6] Employer argues the ALJ's finding of an onset date of the Miner's total disability based on application of the Section 411(c)(4) presumption in his prior claim violates principles of statutory construction. Employer's Brief at 14-17. Specifically, it notes 20 C.F.R. §718.305 applies only to claims filed after January 1, 2005, and pending on or after March 23, 2010. *Id.* at 15. Employer contends that because the Miner's prior claim was denied on June 12, 2009, that claim was not pending on or after March 23, 2010, as the regulations require, and therefore the presumption is not applicable to it. *Id.* at 16. The basis for Employer's "statutory construction" argument regarding 20 C.F.R. §718.305 is incorrect—in *Coleman*, like this case, the presumption was applied in the claimant's *current claim*, which included evidence from the claimant's prior claim, but was not applied in the claimant's prior claim as Employer seems to assert. *See Coleman*, 784 F. App'x at 435-36; *id.* at 14-17. The Sixth Circuit did not consider the *dates when the prior claim was filed* or when *the denial became final* in determining whether the presumption could be applied retroactively *to the evidence* from the prior claim. Rather, the Sixth Circuit determined the presumption applied to the subsequent claim, filed in 2012. *Coleman*, 784 F. App'x at 435-36.

[7] Employer points out that, unlike in *Coleman*, in this case there was no finding of total disability in the Miner's prior claim to support invoking the Section 411(c)(4) presumption and setting the onset date of the Miner's total disability due to

"consonant with the regulations[,]" and those reasons are equally applicable here. *See Coleman*, 784 F. App'x at 436. First, the Sixth Circuit stated "[a]ny evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." *Id.* (quoting 20 C.F.R. §725.309(c)(2)). Second, the Sixth Circuit explained that the ALJ did not disturb the district director's decision because she set the onset date for entitlement after the district director's prior decision became final. *Id.* (citing 20 C.F.R. §725.309(c)(6) ("In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.")). The Sixth Circuit further explained that all of the evidence, including the evidence from a prior claim, should be "seen through the new lens provided by the presumption."[8] *Id.*

As we explained in our prior decision, the district director denied the Miner's prior claim on June 12, 2009, because the evidence did not establish any element of entitlement, including, in relevant part, total disability. Director's Exhibit 1 at 273. However, the summary of the medical evidence upon which that denial was based lists only a July 14, 2008 pulmonary function study administered in conjunction with Dr. Lenkey's Department of Labor (DOL) sponsored complete pulmonary evaluation of the Miner and notes that it was *invalid*. *Id.* at 278. Although a subsequent qualifying pulmonary function study was administered on December 10, 2008, *id.* at 312, 316, the district director did not consider that pulmonary function study in finding total disability was not established. *Id.* at 278, 312, 316.

Thus, the denial of the Miner's prior claim was based, in relevant part, only on the *invalid pulmonary function study administered on July 14, 2008*, but not the qualifying December 10, 2008 pulmonary function study, apparently administered because the original July 14, 2008 study was invalid. Director's Exhibit 1 at 278, 289, 312, 316. Because the December 10, 2008 pulmonary function study was qualifying and *was not a basis for the prior denial*, it has never been considered to determine if the Miner was disabled at least since the date when the denial of the Miner's prior claim became final in

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pneumoconiosis. Employer's Brief at 5-12. For the reasons discussed herein, this is a distinction without a difference.

[8] We reject Employer's assertion that *Dalton* is "irrelevant" because it does not involve a subsequent claim. Employer's Brief at 8. In *Dalton*, the Seventh Circuit simply affirmed an ALJ's determination of an onset date that predated the filing date. *See Dalton*, 738 F.3d at 780, 784-85. Thus we see no error in the ALJ relying, in part, on *Dalton*. Decision and Order on Remand at 4-5.

July 2009.[9] Additionally, in depositions Employer submitted in the Miner's subsequent claim, Drs. Fino and Zaldivar opined that the Miner was totally disabled as of 2008 based on their review of *both* of the 2008 pulmonary function studies, as well as Dr. Lenkey's reports from 2008, 2009, 2014, and 2015. Employer's Exhibit 6 at 6-7, 16, 22-23, 25; Employer's Exhibit 8 at 7-8, 19-20.

Here, the ALJ relied on evidence of total disability dating back to 2008 that had not been considered in the prior claim and concluded that the onset date of the Miner's total disability was August 2009, the month after the district director's prior denial became final, for determining the commencement date of benefits. Decision and Order on Remand at 4-5; Employer's Exhibit 6 at 16, 22-23, 25; Employer's Exhibit 8 at 19-20; Director's Exhibit 1 at 312, 316. Thus, the ALJ did not reexamine the district director's findings or undermine the district director's conclusions in the Miner's prior claim.[10] Rather, consistent with *Coleman*, the ALJ considered all of the evidence in accordance with the current regulations,[11] while also respecting the finality of the district director's decision denying

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[9] Our dissenting colleague asserts that the ALJ could not "reuse" the qualifying December 10, 2008 pulmonary function study "that was before the district director." But again, the district director did not consider that pulmonary function study in finding total disability was not established to begin with, but only considered the invalid July 14, 2008 pulmonary function study, which does not "constitute evidence of the presence or absence of a respiratory or pulmonary impairment" and, therefore, did not support Claimant's burden to establish total disability. 20 C.F.R. §718.103(c). Thus, the December 10, 2008 pulmonary function study was not a basis for the prior denial.

[10] Contrary to our dissenting colleague's assertion, because the ALJ determined the onset date of the Miner's total disability as dating from the month after the district director's denial of the Miner's prior claim, the ALJ did treat the district director's prior denial as final and correct, and therefore Claimant was not permitted to merely relitigate the prior claim, consistent with 20 C.F.R. §725.309(c)(6) and the Sixth Circuit's holding in *Coleman*, *see* 784 F. App'x at 436.

[11] As we noted in the Board's previous decision, our dissenting colleague conflates the standard for establishing entitlement to benefits in a subsequent claim at 20 C.F.R. §725.309(c)(4) with the standard for determining when those benefits commence at 20 C.F.R. §725.309(c)(6). While our dissenting colleague correctly notes that Section 725.309(c)(4) does require a change in an applicable condition of entitlement based on new evidence as a threshold finding, once that change is established – as was the case here – Claimant was entitled to a review of her claim on the merits based on all relevant evidence, including the evidence submitted in the Miner's prior claim. *See* 20 C.F.R. §725.309(c)(2) (Any evidence submitted in connection with any prior claim must be made a part of the

the Miner's prior claim by setting the date for commencement of benefits after the date that the prior denial became final. *See Coleman*, 784 F. App'x at 436; Decision and Order on Remand at 4-5.

Employer also contends that Dr. Lenkey's October 16, 2014 DOL-sponsored complete pulmonary evaluation of the Miner submitted in conjunction with his subsequent claim establishes that he was not totally disabled as of that date. Employer's Brief at 11-12 (citing Director's Exhibits 12, 14; Employer's Exhibit 15 at 10-11). It further contends that Dr. Lenkey did not opine the Miner was totally disabled due to pneumoconiosis until February 19, 2015. *Id.* at 12. What Employer fails to recognize is that Dr. Lenkey's February 19, 2015 letter was sent to clarify his October 16, 2014 report and that he opined the Miner is "100% impaired" based on the October 16, 2014 pulmonary function study and "apologize[d] for any mix-ups which were on my part . . . ." Director's Exhibit 16 at 2; Employer's Exhibit 15 at 12-13. As Employer raises no other challenges to the ALJ's determination that the evidence establishes the onset date of the Miner's total disability was August 2009, we affirm it. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983); Decision and Order on Remand at 4-5.

We also reject Employer's arguments that the ALJ failed to consider whether the prior claim evidence is sufficient to rebut the presumption or that the ALJ erred by considering only whether the evidence established total disability, not *total disability due to pneumoconiosis*.[12] Employer's Brief at 11-14. As the Board previously explained,

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record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.); *Coleman*, 784 F. App'x at 436. Thus, the ALJ properly considered the evidence from the Miner's prior claim, which was made part of the record in the current claim, while also respecting the finality of the district director's denial of the Miner's prior claim by setting the date for commencement of benefits after the date that the denial became final, as the regulations expressly permit. 20 C.F.R. §725.309(c)(6) ("no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final").

[12] In this appeal, Employer reiterates its argument that was previously rejected by the Board that retroactive application of the Section 411(c)(4) presumption would deprive it of due process. Employer's Brief at 17-20; *see Holt*, BRB Nos. 21-0419 BLA and 21-0419 BLA-A, slip op. at 11 n.21. Because Employer has not shown the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

because Claimant already invoked the Section 411(c)(4) presumption and Employer failed to rebut the presumption, Claimant needed to establish only when the Miner *became totally disabled* to establish the onset date of the Miner's total disability due to pneumoconiosis. *Holt*, BRB Nos. 21-0419 BLA and 21-0419 BLA-A, slip op. at 12 n.22 (citing *Coleman*, 784 F. App'x at 436; *Dalton*, 738 F.3d at 785).

Therefore, based on the facts of this case, we affirm the ALJ's finding, as supported by substantial evidence, that Claimant established the Miner's totally disabling pneumoconiosis became compensable as of August 2009, the month after the district director's denial of the Miner's prior claim became final. *See* 20 C.F.R. §725.503(b); *see also Coleman*, 784 F. App'x at 436; Decision and Order on Remand at 5-6.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits on Remand.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the ALJ's award of benefits commencing in August 2009. The determinations of the district director in Claimant's prior claim must be treated as final and correct. By using evidence that was before the district director on the issue of total disability to reach a different conclusion on that issue, the ALJ and the majority violate the fundamental judicial principles of res judicata and issue preclusion. Consequently, unlike the majority, I would vacate the ALJ's determination as to the commencement date for entitlement and remand for him to consider the evidence properly before him as to the commencement date.

The specifics of the situation are as follows. Claimant first applied for benefits on June 5, 2008. Director's Exhibit 1 at 354. The record before the district director, who adjudicated that claim, included the December 10, 2008 pulmonary function study which had qualifying values. *Id.* at 312. On June 12, 2009, the district director issued a proposed decision determining that the Miner was not entitled to benefits because he had not established that he was totally disabled. *Id.* at 273-74. The Miner did not appeal or seek modification, so the district director's determination became unreviewable, and must be accepted as both "final and correct." *See Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483 (6th Cir. 2009) (quoting *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 616 (4th Cir. 2006)); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1361 (4th Cir. 1996) (en banc). Therefore, in this subsequent claim, "[C]laimant is required to submit newly developed evidence to ensure that [s]he is not merely relitigating the prior claim." *See Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 759-60 (6th Cir. 2013). Ergo, she cannot reuse the December 10, 2008 pulmonary function study to establish total disability and consequently entitlement. Further, medical opinions as to the date of onset of disability that rely on that study also cannot be used for that purpose. They are opinions as to the matter that has already been determined by the district director.[13] Since the ALJ improperly based his determination as to the onset of disability on the December 10, 2008 study and the medical opinions relying upon it, his determination must be vacated.

The majority erroneously affirms the ALJ's award of benefits commencing in August 2009 based on a misunderstanding of the facts and holding in *Coleman v. Christen Coleman Trucking*, 784 F. App'x 431 (6th Cir. 2019) (unpub.).[14] In *Coleman*, there was a *finding and determination of total disability* in the miner's prior claim to which the ALJ applied the reinstated 411(c)(4) presumption to support the onset date asserted by the

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[13] Because the 2008 pulmonary function study evidence from the Miner's prior claim was the explicit basis for Drs. Fino and Zaldivar opining the Miner had been totally disabled since 2008, consideration of this aspect of their opinions to "reexamin[e] the evidence" and re-adjudicate a resolved issue necessarily upsets the finality of the district director's decision. *See Coleman v. Christen Coleman Trucking*, 784 F. App'x 431, 436 (6th Cir. 2019) (unpub.); *Hatfield*, 556 F.3d at 483; *Williams*, 453 F.3d at 616; *Rutter*, 86 F.3d at 1361; Employer's Exhibits 6 at 16, 23; 8 at 19-20.

[14] *Coleman* is an unpublished case and therefore not precedential. It is unnecessary to consider whether it is persuasive, however, as its holding does not properly apply to this case. The majority also cites *Dalton v. OWCP*, 738 F.3d 779 (7th Cir. 2013); however, that case did not involve a subsequent claim and thus has no bearing on the issue of use of record evidence from a prior claim to establish the date of entitlement for a subsequent claim.

claimant. 784 F. App'x at 436. The court in *Coleman* explained "[the ALJ] was not reexamining the evidence as much as reevaluating its legal significance." *Id.* To the contrary here, the district director specifically found the Miner *did not establish he was totally disabled*. Director's Exhibit 1 at 273-74. That determination was a predicate to his ultimate conclusion that the Miner was not entitled to benefits—it was necessary to the district director's final denial—and thus his determination that the Miner was not totally disabled must be accepted as "final and correct." *Id.* at 273-74, 276; *see Hatfield*, 556 F.3d at 483; *Rutter*, 86 F.3d at 1361 (a prior final determination that a miner was not entitled to benefits, and "its necessary factual underpinning" at that time, must be accepted as legally correct). The majority states this is a "distinction without a difference." *See supra* at 4 n.7. They are mistaken. It is a crucial difference. In *Coleman* there was no disparity between the total disability findings and determinations in the earlier and later proceedings. 784 F. App'x at 436. The prior total disability determination in the earlier proceeding was utilized and respected. *Id.* In this case, the earlier findings and determination are being cast aside and the evidence is being reexamined as if the earlier proceeding had not taken place. It is fundamentally different from what occurred in *Coleman*, and it violates the judicial principles of res judicata and issue preclusion by not respecting as final the earlier total disability findings and determination.[15]

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[15] "[T]he res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong . . . ." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

Accordingly, I would vacate the ALJ's onset determination and remand this case for the ALJ to properly establish a commencement date for entitlement to benefits.

JUDITH S. BOGGS
Administrative Appeals Judge