U.S. Department of Labor

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

BRB No. 19-0507 BLA

MERLE H. PAYNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TERRY EAGLE LIMITED PARTNERSHIP	)	
	)	
and	)	
	)	
AMVEST CORPORATION	)	DATE ISSUED: 09/28/2020
	)	
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 on Modification Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer/Carrier.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decision and Order on Modification Awarding Benefits (2018-BLA-06241) rendered on a subsequent claim[1] filed on June 30, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

On December 19, 2017, Administrative Law Judge Richard A. Morgan issued the initial decision on the subsequent claim. Director's Exhibit 68. He credited Claimant with 19.86 years of underground coal mine employment and found Claimant established the existence of pneumoconiosis, but failed to establish total disability. *Id.* Judge Morgan therefore denied benefits. *Id.* Claimant timely requested modification on January 22, 2018, and the case was assigned to Judge Swank (the administrative law judge). Director's Exhibit 69.

In his decision on modification that is the subject of this appeal, the administrative law judge found Claimant established 19 years of underground coal mine employment and a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2). He therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act[2] and Employer did not rebut it. Finding Claimant established modification based on a mistake in a determination of fact,[3] the

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[1] Claimant filed his first claim on September 3, 2009. Director's Exhibit 1. The district director denied the claim on May 10, 2010, finding Claimant established the existence of pneumoconiosis, but failed to establish pneumoconiosis arose out of coal mine employment or total disability. *Id.* Claimant took no further action until filing the current claim. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[3] In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, the administrative law judge may correct any

administrative law judge further found Claimant established a change in an applicable condition of entitlement in his subsequent claim.[4] 20 C.F.R. §§725.309, 725.310. He further determined granting modification would render justice under the Act and awarded benefits commencing June 2014, the month in which Claimant filed his subsequent claim.

On appeal, Employer challenges the administrative law judge's findings that Claimant established total pulmonary disability and therefore a mistake in a determination of fact, and granting modification would render justice under the Act. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the administrative law judge's finding that modification would render justice under the Act and asserting he engaged in the correct mistake in fact analysis.[5]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated

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mistake, "including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

[4] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he finds "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). The district director denied Claimant's prior claim because he did not establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, Claimant had to submit new evidence establishing pneumoconiosis arising out of coal mine employment or total disability. 20 C.F.R. §725.309(c).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established 19 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7-8.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant's coal mine employment occurred in West Virginia.

into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Modification – Legal Standard

Employer argues the administrative law judge did not perform the proper legal analysis in finding Claimant established a mistake in a determination of fact. It argues the administrative law judge erred because he engaged in a substantive review of the evidence, both old and new, to reach a conclusion contrary to Judge Morgan's earlier finding. Employer's Brief at 4-5. Employer asserts neither the administrative law judge nor Claimant raised a specific mistake made by Judge Morgan. *Id.* It therefore contends the administrative law judge abused his discretion by disregarding Judge Morgan's denial of benefits. *Id.* at 8. We reject Employer's arguments.

The administrative law judge correctly noted he has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence previously submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); Decision and Order at 4. As the Director asserts, "the modification procedure is flexible, potent, [and] easily invoked." Director's Response Letter at 2-3, *quoting Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497-98 (4th Cir. 1999). Contrary to Employer's assertion, Claimant need not specify the precise basis for modification or submit new evidence. *See O'Keeffe*, 404 U.S. at 256. Claimant "may simply allege the ultimate fact [the denial of benefits]…. was mistakenly decided." *Stanley*, 194 F.3d at 497; *see Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). The administrative law judge therefore acted within his discretion in reviewing all the evidence of record to find Claimant established a mistake in a determination of fact. 20 C.F.R. §725.310; *see O'Keeffe,* 404 U.S. at 256; Decision and Order at 4, 43.

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all relevant evidence and weigh the evidence

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See Shupe v. Director, OWCP, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 5; Hearing Transcript at 17.

supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The administrative law judge found Claimant established total disability based on the medical opinion evidence and the evidence as a whole.[7] Decision and Order at 26; *see* 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge considered the medical opinions of Drs. Rasmussen, Silman, Habre, Zaldivar, and Vuskovich. In finding Claimant established total pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge credited as the most well-reasoned and documented opinions those of Drs. Rasmussen, Silman, and Habre that Claimant is totally disabled from performing his usual coal mine employment due to his respiratory and pulmonary impairment.[8] Decision and Order at 24; Director's Exhibits 13, 63. He discredited the contrary opinions of Drs. Zaldivar and Vuskovich as not well-reasoned or documented. Decision and Order at 25-26.

Employer argues the administrative law judge erred in relying on Dr. Silman's opinion because the doctor "assumed" the non-qualifying resting blood gas study he administered "would have been qualifying if the Claimant had not been using oxygen." Employer's Brief at 12. We reject Employer's contention.

The administrative law judge found Dr. Silman based his opinion on Claimant's usual coal mine employment,[9] smoking history, medical history, symptoms, pulmonary

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[7] The administrative law judge found the pulmonary function study evidence to be in equipoise and all the blood gas studies non-qualifying. Decision and Order at 15; Director's Exhibits 13, 63, 64; Claimant's Exhibit 6; Employer's Exhibit 1; *see* 20 C.F.R. §718.204(b)(2)(i), (ii). He further found there is no evidence Claimant suffers from cor pulmonale with right-sided congestive heart failure and insufficient evidence to establish complicated pneumoconiosis. Decision and Order at 16, 28; *see* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.204(b)(1), (b)(2)(iii). Additionally, he found the treatment records do not contain a reasoned medical opinion addressing whether Claimant is totally disabled from a pulmonary standpoint. *Id.* at 26; Director's Exhibit 63.

[8] Because Employer does not challenge the administrative law judge's finding Claimant's usual coal mine work was as a miner operator and cutting machine operator, which required heavy labor, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17.

[9] Dr. Silman noted Claimant's last coal mine employment as a cutting machine operator and roof bolter required him to shovel belts, rock dust by hand and machine, hang

function testing, and a resting blood gas study. Decision and Order at 20-21; Director's Exhibit 63. Dr. Silman determined the pulmonary function study showed a moderately severe obstructive defect without significant bronchodilator response and the resting blood gas study showed severe arterial hypoxemia with some response to supplemental oxygen. Director's Exhibit 63. He noted Claimant stated "he could not be off his supplemental oxygen to get baseline room air arterial blood gas." *Id.* Dr. Silman indicated an exercise stress test was not performed "because of qualifying baseline arterial blood gas on supplemental oxygen." *Id.* The administrative law judge found Dr. Silman reasonably concluded the resting blood gas study showed hypoxemia, even though the values were non-qualifying,[10] as Claimant performed the study while using supplemental oxygen. Decision and Order at 27. Because Dr. Silman's opinion is not solely based on Claimant's blood gas study, the administrative law judge permissibly found his opinion reasoned and documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 26-27.

In addition, Employer does not challenge the administrative law judge's finding that the opinions of Drs. Rasmussen and Habre that Claimant is totally disabled are well-reasoned and documented or that the contrary opinions of Drs. Zaldivar and Vuskovich are poorly reasoned and documented. *See Clark*, 12 BLR at 1-155; *see also Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25-26. Rather, it merely contends the administrative law judge erred in relying on Dr. Silman's opinion. Employer's Brief at 12-13. Employer fails to explain how the results of the blood gas study Dr. Silman administered would change the administrative law judge's decision to credit the opinions of Drs. Rasmussen and Habre. We therefore affirm the administrative law judge's determination that the medical opinion evidence, including the opinions of Drs. Rasmussen and Habre, establishes total disability at 20 C.F.R. §718.204(b)(2)(iv). *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 26-27. Employer has not otherwise challenged the administrative law judge's total disability findings. Consequently, we further affirm the administrative law judge's overall determination based on the evidence as a whole that Claimant is totally disabled and therefore invoked the

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curtains for ventilation, set timbers, build brattices, conduct belt moves, and lift 50 to 100 pounds at any given time. Decision and Order at 20; Director's Exhibit 63.

[10] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

Section 411(c)(4) presumption.[11] 30 U.S.C. §921(c)(4); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

Modification – Justice under the Act

Finally, Employer argues the administrative law judge did not sufficiently examine Claimant's diligence and motive, the quality of the new evidence, and the need for finality in assessing whether granting modification would render justice under the Act. Employer's Brief at 9-11. We disagree.

In *Kinlaw v. Stevens Shipping & Terminal Co*., 33 BRBS 68 (1999), the Board held that "while [an] administrative law judge has the authority to reopen a case based on any mistake in fact, [an] administrative law judge's exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw*, 33 BRBS at 72 (citing *Wash. Soc'y for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991)). The Fourth Circuit and the Board have recognized that in considering whether to reopen a claim, an adjudicator must exercise the discretion granted under 20 C.F.R. §725.310 by assessing factors relevant to rendering justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007) (*Sharpe I*); *D.S*. [*Stiltner*] *v. Ramey Coal Co*., 24 BLR 1-33 (2008). These factors include the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. While improper motive will preclude modification, *Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F.3d 317, 330 (4th Cir. 2012), the preference for accuracy over finality is reflected in the broad discretion afforded administrative law judges when considering modification requests. *See Stanley*, 194 F.3d at 499 (factfinder is not "bound by the findings supporting the original denial"); *Jessee*, 5 F.3d at 725 (administrative law judge may correct any mistake, including the ultimate issue of benefits eligibility); *O'Keeffe*, 404 U.S. at 256 (district director has the authority "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted").

The administrative law judge's decision on modification reflects he properly considered the relevant factors. Decision and Order at 5. In finding that considering Claimant's modification request would serve justice under the Act,[12] the administrative law

[11] We also affirm, as unchallenged, the administrative law judge's finding Employer did not rebut the Section 411(c)(4) presumption. *See Skrack*, 6 BLR at 1-711.

[12] We note the administrative law judge conducted his "justice under the Act" analysis as a "threshold determination" before he addressed the merits of Claimant's modification request. Decision and Order at 5, *citing Sharpe v. Director, OWCP*, 495 F.3d

judge noted the request is Claimant's first and Claimant submitted relevant evidence.[13] *Id.* Moreover, as the Director points out, the administrative law judge's finding that Claimant established entitlement to benefits reflects the administrative law judge's recognition that his modification request was neither futile nor moot. Director's Response Letter at 4.

We also reject Employer's suggestion that Claimant was "ALJ shopping" and, therefore, the modification request is based upon an improper motive. Employer's Brief at 10. Employer has offered no evidence that Claimant's motivation to request modification was anything other than to obtain those benefits to which he is entitled. *See Sharpe II*, 692 F.3d at 330. Because the administrative law judge did not abuse his discretion, we affirm his determination that granting modification renders justice under the Act. *See O'Keeffe*, 404 U.S. at 256; *Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27, 1-34 (1996); Decision and Order at 5. Consequently, we further affirm the award of benefits.

125, 128 (4th Cir. 2007) (*Sharpe I*). While *Sharpe I* held that an administrative law judge must consider the question before ultimately granting the relief requested in a modification request, nothing in *Sharpe I* establishes that an administrative law judge must make the determination at the outset. Instead, the timing of the inquiry will be dictated by the individual facts of the case. While it might make sense to make a threshold determination in cases of bad faith, for example, it does not follow that a threshold determination is appropriate in cases such as this, where consideration of the evidence of record establishes a mistake in the ultimate fact of entitlement. This conclusion depends on a thorough consideration of the merits. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971). Given our affirmance of the award of benefits, however, any error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

[13] Employer alleges Claimant was not diligent because he did not submit Dr. Crum's 2019 re-reading of a 2016 x-ray until his modification request was before the administrative law judge in 2019. Employer's Brief at 9-10. Claimant sought modification and submitted additional evidence before the administrative law judge in accordance with the regulations. 20 C.F.R. §725.310; *Wooten v. Eastern Associated Coal Corp.*, 20 BLR 1-20, 25 (1996); Director's Exhibit 69. Moreover, Claimant was not required to submit new evidence as part of his modification request; indeed, the Fourth Circuit has held that the party seeking modification "may simply allege the ultimate fact . . . was mistakenly decided" and that "[t]here is no need for . . . startling new evidence." *Jessee*, 5 F.3d at 725.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge