U.S. Department of Labor

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

BRB No. 17-0633 BLA

KENNETH LAWSON, JR. Claimant-Respondent v. CONSOLIDATED OF KENTUCKY, INCORPORATED and CONSOLIDATED OF KENTUCKY, INCORPORATED c/o HEALTHSMART CCS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/15/2019 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Modification of William J. King, Administrative Law Judge, United States Department of Labor.

Phyllis L. Robinson, Manchester, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Modification (2015-BLA-05013) of Administrative Law Judge William J. King rendered on a claim 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 claimant's second request for modification of the denial of a claim filed on June 1, 2005.

Initially, in a Decision and Order dated October 1, 2007, Administrative Law Judge Kenneth A. Krantz found claimant established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish a totally disabling respiratory or pulmonary impairment and, therefore, denied benefits. 20 C.F.R. §§718.202(a), 718.203(b); 718.204(b)(2); Director's Exhibit 74.

On March 1, 2008, claimant requested modification. Director's Exhibit 82. In a Decision and Order dated December 18, 2012, Administrative Law Judge John P. Sellers III found claimant did not establish the existence of complicated pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Judge Sellers therefore found claimant did not establish a change in conditions or mistake of fact to support modification of the October 1, 2007 denial of benefits. The Board affirmed. *Lawson v. Consol. Of Kentucky, Inc.*, BRB No. 13-0158 BLA (Sept. 19, 2013) (unpub.).

On December 19, 2013, claimant requested modification and submitted additional evidence. Director's Exhibit 163. In a Decision and Order subject to this appeal, Administrative Law Judge William J. King (the administrative law judge) credited claimant with thirty years of underground coal mine employment and found he has a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2); Decision and Order at 5, 11-12. He therefore found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] He further found employer failed to rebut the presumption. Alternatively, the administrative law judge found claimant also invoked the irrebuttable presumption of total disability due

[1] Under Section 411(c)(4), claimant is presumed to be totally disabled due to pneumoconiosis if he has at least fifteen 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

to complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Thus, the administrative law judge found claimant established a change in conditions through two avenues.[2] 20 C.F.R. §725.310. Finally, he determined granting modification would render justice under the Act and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant totally disabled and in invoking the Section 411(c)(4) presumption. Employer also challenges the administrative law judge's finding of the existence of complicated pneumoconiosis. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[3]

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

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, "any mistake may be corrected, including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

[2] The administrative law judge found no mistake of fact in the prior findings that claimant did not establish either total disability or the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §725.310. Decision and Order at 19.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of thirty years of underground coal mine employment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Hearing Tr. at 6, 17-18; Decision and Order at 3, 11.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (en banc); Director's Exhibits 7, 8.

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

A miner is considered totally disabled if he has a respiratory or pulmonary impairment that, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, total disability is established by 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). If the administrative law judge finds total disability has been established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Employer argues the administrative law judge failed to consider all relevant evidence in finding claimant disabled. Employer's Brief at 14-15. We disagree. The administrative law judge considered the new evidence submitted on modification and found that while the October 16, 2014 pulmonary function study is non-qualifying, the qualifying October 16, 2014 blood gas study supports a finding of disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).[5] Decision and Order at 7, 11.

The administrative law judge next considered the medical opinions of Drs. Spencer, Koura, and Dahhan. He found that Dr. Spencer diagnosed at least a moderate respiratory impairment, but did not address whether claimant is able to perform his usual coal mine work,[6] and Dr. Koura opined that claimant has a totally disabling respiratory impairment but provided no documentation. Decision and Order at 11. In contrast, the administrative law judge found Dr. Dahhan's opinion that claimant is totally disabled based on the October 16, 2014 blood gas study establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

[5] We affirm the administrative law judge's determination that the sole new blood gas study is qualifying as unchallenged. *See Skrack*, 6 BLR at 1-711; Employer's Exhibit 1; Decision and Order at 7, 11.

[6] We note that the record contains a December 9, 2013 questionnaire completed by Dr. Spencer on which he responded "no" to the question of whether claimant is physically able from a pulmonary standpoint, to do his usual coal mine work. Employer's Exhibit 2 at 44. The administrative law judge's failure to consider this report is harmless, however, in light of the administrative law judge's ultimate conclusion that claimant established total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We reject employer's argument that Dr. Dahhan's opinion that claimant's disabling blood gas abnormalities could be due to obesity or severe arthritis renders his opinion insufficient to meet claimant's burden to establish total respiratory disability.[7] Employer's Brief at 16. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is present; the cause of the impairment is a distinct and separate issue. *See* 20 C.F.R. §§718.204(a),(c); 718.305(d); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81, 13 BLR 2-196, 2-212-13 (10th Cir. 1989). As Dr. Dahhan stated that "based on the finding on his arterial blood gases, [claimant] does not retain the physiological capacity to return to his previous coal mine work," the administrative law judge properly found his medical opinion supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 12; Employer's Exhibit 1.

We further reject employer's contention that the administrative law judge failed to adequately weigh all of the relevant evidence together. Employer's Brief at 15, 17. The administrative law judge acknowledged the non-qualifying nature of claimant's October 16, 2014 pulmonary function study but permissibly credited the opinion of Dr. Dahhan, who conducted both the October 14, 2016 pulmonary function and blood gas studies, that claimant's blood gas study demonstrated a disabling impairment. *See Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797, 1-798 (1984) (because blood gas studies and pulmonary function studies measure different types of impairment, the results of a qualifying pulmonary function study are not called into question by a contemporaneous normal blood gas study). Thus, the administrative law judge separately considered the pulmonary function and blood gas studies, pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and integrated the results into his consideration of the medical opinions.[8] Decision and

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[7] Dr. Dahhan concluded:

> Based on the findings on his arterial blood gases [claimant] does not retain the physiological capacity to return to his previous coal mining work or job of comparable demand. The diagnosis of sarcoidosis is still a high possibility as noted by various physicians in 2005 and 2006. Sarcoidosis is a progressive disease especially in the absence of treatment. Unfortunately, no adequate tissue sample has been obtained from [claimant's] lung to allow accurate evaluation of this possibility. In addition, [claimant] suffers from morbid obesity and severe degenerative disabling arthritis which can contribute to his severe hypoxemia.

Employer's Exhibit 1 at 5.

[8] Notably, while the administrative law judge found the opinions of Drs. Spencer and Koura insufficient to meet claimant's burden to establish total disability, their opinions

Order at 25-29. As the administrative law judge adequately considered all contrary probative evidence, we affirm his finding that the medical evidence established total disability overall.[9] 20 C.F.R. §718.204(b)(2); *see Shedlock*, 9 BLR at 1-198; Decision and Order at 12, 19.

Because employer has not raised any other allegation of error concerning the administrative law judge's finding under 20 C.F.R. §718.204, we affirm his finding that claimant established total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 12.

In light of our affirmance of the administrative law judge's findings of at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, we affirm his determination that claimant invoked the presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; Decision and Order at 12.

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

We affirm the administrative law judge's determination that employer failed to rebut the presumption as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15-17; *see* Employer's Brief at 17-18. We further

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are nonetheless supportive of that conclusion. Employer's Brief at 15. Nor is there merit to employer's contention that Dr. Dahhan's opinion should have been weighed as contrary probative evidence along with the non-qualifying pulmonary function studies because he acknowledged the possibility that claimant's blood gas abnormalities could be due to non-respiratory causes. Employer's Brief at 17. As set forth above, the issue is solely whether a totally disabling respiratory impairment exists, not whether it is due to an intrinsic disease process.

[9] We reject employer's argument that the administrative law judge improperly shifted the burden when he concluded employer failed to "rebut the presumption of total disability established by the new qualifying blood gas study." Decision and Order at 12; Employer's Brief at 16-17. As referenced by the administrative law judge, and as employer concedes, the regulations provide that a blood gas study is sufficient to establish a disabling impairment "[i]n the absence of contrary probative evidence." 20 C.F.R. §718.204(b)(2); 20 C.F.R. Part 718, Appendix C; Decision and Order at 11; Employer's Brief at 17. Because we have found that the administrative law judge properly weighed the medical opinion evidence, with the burden of proof on claimant, and permissibly concluded it supported the qualifying blood gas study, any error in implying employer did not meet its burden to rebut the presumption of total disability is harmless. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 12.

affirm, as unchallenged, the administrative law judge's finding claimant established modification based on that failure, and that granting modification renders justice under the Act. 20 C.F.R. §725.310; *see Mullins v. ANR Coal Co.*, 25 BLR 1-49, 1-52-53 (2012); *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70-71 (2008); *Skrack*, 6 BLR at 1-711; Decision and Order at 4. Thus, we affirm the administrative law judge's decision that claimant established entitlement under Section 411(c)(4) of the Act.[10]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[10] Because we have affirmed the administrative law judge's finding that claimant is entitled to benefits pursuant to Section 411(c)(4) of the Act, we need not address employer's contentions of error regarding the administrative law judge's alternative finding that claimant is also entitled to benefits pursuant to Section 411(c)(3). *See Larioni*, 6 BLR at 1-1278; Decision and Order at 17-19; Employer's Brief at 18-24.