U.S. Department of Labor

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

BRB No. 16-0042 BLA

ROY J. MCKINNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 10/28/2016
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits Upon Request for Modification of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Roy J. McKinney, Coal City, West Virginia, *pro se*.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for employer.

Rebecca J. Fiebig (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits Upon Request for Modification (2012-BLA-05030) of Administrative Law Judge Theresa C. Timlin, rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] In her Decision and Order, Judge Timlin (the administrative law judge) credited claimant with 21.25 years of underground coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Parts 718 and 725. The administrative law judge reviewed the evidence of record, and the denial of claimant's subsequent claim, and found that claimant failed to establish a mistake in a determination of fact, a change in conditions, or a change in an applicable condition of entitlement under 20 C.F.R. §§725.309 and 725.310. Accordingly, the administrative law judge denied claimant's request for modification and denied benefits.[3]

[1] Lois McGlothlin, a lay representative with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. McGlothlin is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant's filed his initial claim on October 12, 2004, which was denied by the district director on June 8, 2005, for failure to establish total disability. Director's Exhibit 1. Claimant took no further action until filing a subsequent claim on August 1, 2006. In a Decision and Order issued on March 18, 2009, Administrative Law Judge Linda S. Chapman found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b) and, therefore, failed to establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. 2009 Decision and Order at 11. She denied benefits accordingly. *Id*. The Board affirmed the denial of benefits in a Decision and Order issued on April 23, 2010. *McKinney v. Westmoreland Coal Co.*, BRB No. 09-0498 BLA (Apr. 23, 2010) (unpub.). The Director, Office of Workers' Compensation Programs, submitted a letter to the Board addressing the potential application of the presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4), 30 U.S.C. §923(c)(4) (2012). The Board treated the letter as a request for reconsideration and denied it. *McKinney v. Westmoreland Coal Co.*, BRB No. 09-0498 BLA (Oct. 23, 2010) (unpub. Order). Claimant filed a request for modification of his denied subsequent claim on February 3, 2011. Director's Exhibit 88.

[3] Based on the administrative law judge's finding that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment, she did not address

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging the Board to affirm the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge erred in finding that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2). Therefore, the Director asks the Board to vacate the denial of benefits and remand the case for further consideration. Employer has filed a reply to the Director's letter brief, reiterating its argument that the denial of benefits should be affirmed.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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.[5] 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).

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 mistake in a determination of fact or a change in conditions. The administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). The administrative law judge is authorized "to correct mistakes

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the applicability of the presumption set forth in Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the record establishes 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.

[4] We affirm the administrative law judge's finding that claimant established 21.25 years of underground coal mine employment, as it is unchallenged on appeal and is not adverse to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-610, 1-611 (1983).

[5] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 4, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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). In considering whether a change in conditions has been established, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement that defeated an award in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

Additionally, because claimant requested modification of the denial of his subsequent claim for failure to satisfy the requirements of 20 C.F.R. §725.309, the administrative law judge is required to determine whether the new evidence submitted on modification, considered with the evidence originally submitted in the subsequent claim, is sufficient to establish a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(c); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). Because claimant's prior claim was denied for failure to establish total respiratory or pulmonary disability, claimant had to establish this element of entitlement in order to obtain review of his claim on the merits. 20 C.F.R. §725.309(c)(2), (3); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Director's Exhibit 1.

The administrative law judge initially considered whether claimant established that the denial of his subsequent claim by Administrative Law Judge Linda S. Chapman, based on her finding that claimant did not establish total respiratory or pulmonary disability, contained a mistake in a determination of fact under 20 C.F.R. §725.310. Judge Chapman found that claimant did not prove that he is totally disabled at 20 C.F.R. §718.204(b)(2)(i) or (iii), as claimant's pulmonary function studies produced nonqualifying[6] values, and there is no evidence that claimant suffered from cor pulmonale with right-sided congestive heart failure. 2009 Decision and Order at 9; Director's Exhibits 11, 34. Regarding 20 C.F.R. §718.204(b)(2)(ii), Judge Chapman stated, "[b]ecause the preponderance of the exercise blood gas studies produced qualifying results, I find that, in the absence of probative evidence to the contrary, [claimant] is entitled to the regulatory presumption of total disability."[7] 2009 Decision

[6] A "non-qualifying" pulmonary function study or blood gas study yields values that are in excess of the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "qualifying" study yields values that are equal to or less than the applicable table values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The record contains blood gas studies dated February 7, 2007, October 30, 2006, and October 20, 2008. Director's Exhibits 11, 34, 59. The February 7, 2007 blood gas

and Order at 10; Director's Exhibits 11, 34, 59. Judge Chapman then addressed the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). She accorded greatest weight to the opinions of Drs. Zaldivar and Hippensteel that claimant's blood gas study results do not establish the presence of a respiratory or pulmonary impairment, stating:

> As Dr. Zaldivar and Dr. Hippensteel explained, [claimant's] cardiac condition, as reflected by the results of the physiologic studies, played a significant role in his arterial hypoxemia on exercise. They concluded that while [claimant] may be disabled as a whole man, from a respiratory standpoint, he has the capability to perform his previous coal mining work; he does not have a fixed, permanent, and disabling respiratory impairment.

2009 Decision and Order at 11; Employer's Exhibits 1, 3, 5, 7. Judge Chapman then concluded, "I rely on the[se] opinions to find that [claimant] has not established that he has a totally disabling respiratory impairment" pursuant to 20 C.F.R. §718.204(b)(2). 2009 Decision and Order at 11.

The administrative law judge determined that Judge Chapman properly found that claimant could not establish total disability under 20 C.F.R. §718.204(b)(2)(i) or (iii).[8] 2015 Decision and Order at 9. The administrative law judge summarized Judge Chapman's findings with respect to the blood gas studies and medical opinions and noted that the Board affirmed Judge Chapman's determination that the opinions of Drs. Zaldivar and Hippensteel precluded a finding of total respiratory or pulmonary disability under 20 C.F.R. §718.204(b)(2). 2015 Decision and Order at 9, *citing McKinney v. Westmoreland Coal Co.*, BRB No. 09-0498 BLA (Apr. 23, 2010) (unpub.). The administrative law judge concluded that there was no mistake in a determination of fact in the prior denial in light of "Judge Chapman's careful review of the record and the Board's equally careful review of Judge Chapman's Decision and Order." 2015 Decision and Order at 9.

Upon considering the Director's arguments, and further reflecting upon Judge Chapman's denial of claimant's subsequent claim, we agree with the Director that the

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study yielded non-qualifying values on the resting and exercise portions of the test. Director's Exhibit 34. Both the October 30, 2006 and October 20, 2008 blood gas studies yielded non-qualifying values on the resting portions of the tests, but qualifying values on the exercise portions of the tests. Director's Exhibits 11, 59.

[8] We affirm this finding, as it is supported by substantial evidence. *See Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986).

administrative law judge's finding of no mistake in a determination of fact cannot be affirmed. Drs. Zaldivar and Hippensteel acknowledged that claimant's exercise blood gas studies reflected a disabling impairment, but opined that the impairment is not respiratory or pulmonary in nature because it is entirely caused by claimant's heart disease. By according greatest weight to these opinions, and finding that they outweighed the qualifying exercise blood gas studies, Judge Chapman combined her analyses of the existence of a totally disabling impairment and the cause of the impairment.

The regulation at 20 C.F.R. §718.204 treats these as distinct issues, however, with the inquiry into the presence of a totally disabling impairment governed by 20 C.F.R. §718.204(b), and the etiology of the impairment governed by 20 C.F.R. §718.204(c). The regulation at 20 C.F.R. §718.204(b) sets forth the medical criteria relevant to the existence of a totally disabling impairment, and total disability is established if, in the absence of contrary probative evidence, the medical criteria in any one of the subsections at 20 C.F.R. §718.204(b)(2) is satisfied. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The regulatory definition of "total disability due to pneumoconiosis," and the types of proof that are required to satisfy its terms, appear separately at 20 C.F.R. §718.204(c).

Accordingly, Judge Chapman's conflation of the issues of whether there is a totally disabling impairment and the cause of that impairment constitutes error. We must vacate, therefore, the administrative law judge's finding that Judge Chapman properly determined that claimant failed to establish total disability pursuant to both 20 C.F.R. §718.204(b)(2), and her finding that Judge Chapman's denial of benefits did not contain a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. We must also vacate the administrative law judge's conclusion that claimant failed to establish a change in an applicable condition of entitlement and a change in conditions at 20 C.F.R. §§725.309 and 725.310, as the administrative law judge also relied on a combined analysis of total disability and total disability causation therein.[9] 2015 Decision and Order at 17-18.

[9] As a matter of law, a change in conditions cannot be established under 20 C.F.R. §718.204(b)(2)(i) or (ii), because neither party proffered new pulmonary function studies or blood gas studies in conjunction with claimant's request for modification. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Relevant to 20 C.F.R. §718.204(b)(2)(iv), claimant submitted two statements from Dr. Golden that post-date the prior denial, while employer submitted the transcript of a new deposition of Dr. Zaldivar. Director's Exhibit 87; Claimant's Exhibit 2; Employer's Exhibit 7.

This case is remanded to the administrative law judge for reconsideration of whether claimant established a basis for modification of his denied duplicate claim. On remand, the administrative law judge must reconsider whether claimant has established a mistake in a determination of fact or a change in conditions with respect to total disability under 20 C.F.R. §725.310. *See Jessee*, 5 F.3d at 725, 18 BLR at 2-28; *Hess*, 21 BLR at 1-143. When weighing the relevant evidence, the administrative law judge must address the issue of whether claimant has a totally disabling impairment at 20 C.F.R. §718.204(b)(2). If the administrative law judge finds that claimant is unable to prove that he has such an impairment, which is a requisite element of entitlement, an award of benefits is precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

If the administrative law judge finds that claimant has established a mistake in a determination of fact, or a change in conditions, regarding whether he has a totally disabling respiratory or pulmonary impairment, claimant will have established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and a basis for modification under 20 C.F.R. §725.310. Before granting claimant's request for modification, however, the administrative law judge must determine whether doing so would render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F. 3d 317, 327-28, 25 BLR 2-157, 2-173-174 (4th Cir. 2012), *cert. denied*, 133 S.Ct. 2852 (2013). If the administrative law judge finds that modifying the denial will render justice, claimant will have invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), based on the administrative law judge's crediting of claimant with 21.25 years of coal mine employment and her finding of total disability on remand. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b). Under these circumstances, the administrative law judge must address total disability causation in the context of rebuttal, where the burden shifts to employer to establish that claimant has neither legal nor clinical pneumoconiosis, or that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

Accordingly, the administrative law judge's Decision and Order Denying Benefits Upon Request for Modification is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge