

BRB No. 14-0223 BLA

LEO DEPSKY (deceased))
)
 Claimant-Respondent)
)
 v.)
)
 WINNE LAND COMPANY)
)
 and)
)
 TRAVELERS INDEMNITY COMPANY) DATE ISSUED: 10/15/2014
)
 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 William S. Colwell, Administrative Law Judge, United States Department of Labor.

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman and Goggin), Bethlehem, Pennsylvania, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (12-BLA-5100) of Administrative Law Judge William S. Colwell awarding benefits 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 subsequent claim filed on May 18, 2006.¹

In the initial decision, Administrative Law Judge Ralph A. Romano credited claimant with 12.25 years of coal mine employment,² and noted that employer stipulated that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). However, Judge Romano found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Judge Romano, therefore, found that claimant failed to establish that the applicable condition of entitlement had changed since the date upon which the denial of his prior claim became final. *See* 20 C.F.R. §725.309. Accordingly, Judge Romano denied benefits.

Claimant appealed, but while his appeal was pending before the Board, he filed a motion to remand to the district director, informing the Board that he was pursuing a request for modification. *See* 20 C.F.R. §725.310. In response, the Board dismissed claimant's appeal and remanded the case for modification proceedings.

In a Decision and Order dated September 15, 2010, Administrative Law Judge Janice K. Bullard found that the new medical opinion evidence established the existence

¹ Claimant's initial claim, filed on April 2, 1985, was denied based upon claimant's failure to establish any of the elements of entitlement. Director's Exhibit 1. Although claimant filed a second claim in 1998, that claim was subsequently withdrawn, and is, therefore, considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibit 2. Claimant filed a third claim on January 18, 2003. Director's Exhibit 3. In a Decision and Order dated September 8, 2004, Administrative Law Ralph A. Romano found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). *Id.* Judge Romano, therefore, found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. However, Judge Romano found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* Accordingly, Judge Romano denied benefits. *Id.* Claimant filed an appeal with the Board. However, by Order dated January 25, 2005, the Board dismissed claimant's appeal as abandoned. *Depsky v. Winnie Land Co.*, BRB No. 04-0955 BLA (Jan. 25, 2005) (Order) (unpub.). The Board subsequently denied claimant's motion for reconsideration. *Depsky v. Winnie Land Co.*, BRB No. 04-0955 BLA (Mar. 11, 2005) (Order) (unpub.).

² The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Judge Bullard, therefore, found that claimant demonstrated a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. However, Judge Bullard determined that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Bullard denied benefits.

Claimant timely filed a request for modification on December 3, 2010. Director's Exhibit 73. In a Decision and Order dated March 28, 2014, Administrative Law Judge Williams S. Colwell (the administrative law judge) credited claimant³ with 12.25 years of coal mine employment, and noted that employer stipulated that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). After noting that employer did not contest the issue of whether claimant suffered from clinical pneumoconiosis,⁴ the administrative law judge found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis,⁵ in the form of obstructive lung disease due to coal mine dust exposure. 20 C.F.R. §718.202(a)(4). The administrative law judge, therefore, found that claimant established that the applicable condition of entitlement had changed since the date upon which the denial of his prior 2003 claim became final. *See* 20 C.F.R. §725.309. The administrative law judge also found that the new medical opinion evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, determined that Judge Bullard made a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 when she found that claimant did not establish that his total disability was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to pneumoconiosis

³ The administrative law judge noted that claimant died on February 6, 2012, and that claimant's widow is pursuing his claim. Decision and Order at 1 n.1.

⁴ "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).

⁵ "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).

pursuant to 20 C.F.R. §718.204(c). Employer also argues that the administrative law judge erred in determining that benefits should commence as of May 2006, the month in which claimant filed his claim. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

In order to establish a basis for modification of the denial of benefits, claimant has the burden to establish either a change in conditions since the issuance of the previous decision or a mistake in a determination of fact in the previous decision. 20 C.F.R. §725.310(a); see *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The administrative law judge has the authority to reconsider all the evidence for any mistake in fact, including whether the ultimate fact of entitlement was wrongly decided. See *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-63 (3d Cir. 1995).

Employer initially argues that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In considering whether claimant's total disability was due to pneumoconiosis, the administrative law judge accorded the most weight to Dr. Simelaro's opinion, that claimant's disabling pulmonary impairment was attributable in part to his legal pneumoconiosis (in the form of obstructive lung disease due to coal mine dust exposure).⁶ Decision and Order at 20-21, 23; Director's Exhibit 73. The

⁶ In finding that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge credited Dr. Simelaro's opinion that claimant suffered from obstructive lung disease arising out of his coal mine dust exposure. Decision and Order at 20-21; Director's Exhibit 73. Because employer does not challenge the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge also found that Dr. Simelaro's opinion was supported by that of Dr. Tavarria. Decision and Order at 23; Director's Exhibit 76. The administrative law judge accorded less weight to Dr. Hertz's opinion, that claimant's disabling pulmonary impairment was not due to pneumoconiosis, because the doctor did not diagnose the existence of legal pneumoconiosis. Decision and Order at 22-23; Employer's Exhibits 3, 5. The administrative law judge, therefore, found that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Employer argues that the administrative law judge erred in finding that Dr. Simelaro's opinion was sufficient to establish that claimant's total disability was due to pneumoconiosis. Employer's Brief at 11-12. We disagree. In crediting Dr. Simelaro's opinion that claimant's total disability was due to legal pneumoconiosis (in the form of obstructive lung disease due to his coal mine dust exposure), the administrative law judge found that the doctor's opinion was supported by claimant's work history, symptomatology, findings on physical examination, and objective test results. Decision and Order at 20-21, 23. Moreover, contrary to employer's contention, Dr. Simelaro did not fail to address claimant's other medical issues and their impact upon his respiratory condition. As the administrative law judge accurately noted, Dr. Simelaro, in addressing the cause of claimant's pulmonary disability, considered claimant's "history of sleep apnea, obesity, and heart disease in addition to [his] coal dust-induced lung disease." *Id.* at 23; Director's Exhibit 73. Because it is based on substantial evidence, we affirm the administrative law judge's finding that Dr. Simelaro's disability causation opinion was sufficiently documented and reasoned. See *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

Further, the administrative law judge permissibly accorded less weight to Dr. Hertz's opinion because it was based on a faulty premise, that claimant did not suffer from legal pneumoconiosis. See *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Clites v. J & L Steel Co.*, 663 F.3d 14, 3 BLR 2-86 (3d Cir. 1981); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); see also *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 22-23. Because the administrative law judge's credibility determinations are rational and supported by substantial evidence,⁷ we affirm the administrative law judge's finding that the evidence

⁷ Employer contends that the administrative law judge erred in his consideration of Dr. Tavarria's opinion. Employer's Brief at 11-12. We need not address employer's contention. Because the administrative law judge permissibly accorded the greatest weight to Dr. Simelaro's opinion in finding that claimant's total disability was due to pneumoconiosis, any error in regard to his consideration of Dr. Tavarria's opinion is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Employer next asserts that the administrative law judge failed to identify the basis for his determination that claimant demonstrated a mistake determination in fact. Employer's Exhibit at 8. We disagree. The administrative law judge explained that he determined that Judge Bullard made a mistake in a determination of fact, in her 2010 Decision and Order, in finding that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). 20 C.F.R. §725.310; *Keating*, 71 F.3d at 1123, 20 BLR at 2-63; Decision and Order at 6.

Employer also contends that the administrative law judge's award of benefits must have been based upon a change in conditions, as opposed to a mistake in a determination of fact, because the administrative law judge relied upon evidence that was developed after the previous denial of benefits, namely, Dr. Simelaro's November 16, 2010 medical report. We disagree. In reviewing the record as a whole on modification, an 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). In this case, the administrative law judge permissibly found that there was a mistake in a determination of fact regarding Judge Bullard's finding that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). See 20 C.F.R. §725.310; *Keating*, 71 F.3d at 1123, 20 BLR at 2-63.

Employer next argues that the administrative law judge erred in determining that benefits should commence as of May 2006, the month in which claimant filed his claim. When modification is based on the correction of a mistake in a determination of fact, a claimant is entitled to benefits from the date he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim, unless credited evidence establishes that he was not disabled at any subsequent time. 20 C.F.R. §725.503(d)(1); see *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

As noted above, the administrative law judge relied upon Dr. Simelaro's November 16, 2010 medical report in finding that the evidence established that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 73. However, the medical evidence credited by the administrative law judge establishes only that claimant became totally disabled due to pneumoconiosis at some time prior to the date of that evidence. See *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). The administrative law judge found that the medical evidence did not establish the date on which claimant became totally disabled due to pneumoconiosis. Decision and Order at 24. The administrative law judge also did not credit any evidence that claimant was not

totally disabled due to pneumoconiosis at any time subsequent to the filing date of his 2006 claim. Since the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis, benefits are payable from the month in which he filed this claim. 20 C.F.R. §725.503(b). Therefore, we affirm the administrative law judge's determination that benefits commence from May 2006, the month and year in which claimant filed his claim. 20 C.F.R. §725.503(b); *Owens*, 14 BLR at 1-49.

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge