U.S. Department of Labor

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

BRB No. 24-0110 BLA

WILLIAM E. WILDERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	**NOT-PUBLISHED**
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	DATE ISSUED: 02/28/2025
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 Awarding Benefits on Modification of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Christopher L. Wildfire (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Eirik Cheverud (Emily Su, Deputy Solicitor for National Operations; Jennifer Feldman Jones, Acting Associate Solicitor; Andrea J. Appel,

Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Modification (2022-BLA-05687) rendered 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 request for modification of a claim filed on October 3, 2018.

In a September 29, 2020 Decision and Order Denying Benefits, the ALJ credited Claimant with twenty-six years of coal mine employment based on the parties' stipulation and determined at least fifteen years were qualifying employment. He also found Claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202. However, he found Claimant failed to establish a totally disabling respiratory or pulmonary impairment and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018), or establish entitlement under 20 C.F.R. Part 718. 20 C.F.R. §718.204(b)(2).

Claimant timely requested modification on August 26, 2021. Director's Exhibit 37. In his November 29, 2023 Decision and Awarding Benefits on Modification, the subject of this appeal, the ALJ again found Claimant established twenty-six years of underground coal mine employment and determined he also established a totally disabling respiratory or pulmonary impairment, thereby invoking the Section 411(c)(4) presumption. 20 C.F.R. §718.204(b)(2). He also found Employer did not rebut the presumption. Finally, he determined that granting modification would render justice under the Act and awarded benefits. 20 C.F.R. §725.310.

On appeal, Employer contends the ALJ misconstrued the parties' stipulation regarding the nature of Claimant's coal mine employment as being entirely underground and therefore erred in finding Claimant invoked the Section 411(c)(4) presumption. It also

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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.

argues the ALJ erred in finding it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds in support of the award.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 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, 362 (1965).

In a miner's claim, the ALJ 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 [by the ALJ], including the ultimate issue of benefits eligibility." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Invocation of the Section 411(c)(4) Presumption – Nature of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ accepted the parties' stipulation of twenty-six years of coal mine employment and further stated he accepted their "stipulation that Claimant had the equivalent of more than fifteen years of qualifying underground coal mine employment from his combined [twenty-six] years of aboveground and underground coal mine dust exposure." Decision and Order on Modification at 6, 9; *see* 2020 Hearing Transcript at 5-6.[3] Employer does not challenge the ALJ's total length of coal mine employment finding

[2] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[3] All references to the formal hearing transcript refer to the July 21, 2020 hearing.

of twenty-six years, and we therefore affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Rather, Employer asserts the ALJ erroneously found it stipulated to Claimant specifically having spent fifteen of those years in underground coal mine employment. It contends he instead should have rendered findings as to whether the conditions of Claimant's aboveground coal mine employment were substantially similar to those in an underground mine. Employer's Brief at 16, 25. The Director responds that Employer forfeited this argument by failing to raise this issue before the ALJ in the initial proceedings or on modification. Director's Brief at 1. In reply, Employer argues it raised and preserved this issue for appeal. Employer's Reply Brief at 2.

At the July 21, 2020 hearing, Claimant testified that all of his twenty-six years of coal mine employment was either underground or aboveground *at an underground mine*, which is consistent with the information he reported on his Employment History Form CM-911a. 2020 Hearing Transcript at 14-15; Director's Exhibit 3. Employer offered no contrary evidence before the ALJ to contradict Claimant's testimony concerning the nature of his coal mine employment nor does it argue before the Board that contradictory evidence exists. Instead, Employer contends the ALJ failed to evaluate whether the conditions of Claimant's aboveground coal mine employment were substantially similar to those in an underground mine. Employer's Brief at 16. However, a miner who works aboveground at an underground mine need not establish that the working conditions were substantially similar to those in an underground mine. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1057-59 (6th Cir. 2013); *Muncy*, 25 BLR at 1-29; Employer's Brief at 16-17. Consequently, we need not address Employer's argument that the ALJ erred in finding Employer stipulated to over fifteen years of qualifying coal mine employment, as all of Claimant's twenty-six years constituted qualifying coal mine employment. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 16, 20-26; Employer's Reply Brief at 1-2. We therefore affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption.[4] Decision and Order on Modification at 8-9.

[4] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant established a totally disabling respiratory or pulmonary impairment based on the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii) and his weighing of the evidence as a whole at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 24-25, 30.

Rebuttal of Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[5] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer disproved clinical pneumoconiosis but did not rebut legal pneumoconiosis or establish that no part of Claimant's total disability is caused by legal pneumoconiosis. Decision and Order on Modification at 19-21.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the medical opinions of Drs. Basheda and Rosenberg.[6] Decision and Order on Modification at 16-21. In his opinion submitted on modification, Dr. Basheda opined that Claimant has chronic obstructive pulmonary disease (COPD) due to smoking and exercise-induced hypoxemia related to "underlying cardiovascular disease." Modification Employer's Exhibit 2 at 8-9. In his deposition, conducted in conjunction with Claimant's original claim, he explained that Claimant does not have legal pneumoconiosis because Claimant's obstruction improved over time, whereas coal dust

[5] "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). "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] The ALJ also considered the medical opinions of Drs. Pickerill and Saludes that Claimant has legal pneumoconiosis. Decision and Order on Modification at 16-18. As their opinions do not aid Employer in rebutting the Section 411(c)(4) presumption, we need not address them. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order on Modification 19-20.

obstruction is irreversible. Employer's Exhibit 6 at 21; *see also* Employer's Exhibit 4 at 12. Dr. Rosenberg prepared a report and was deposed in conjunction with Claimant's original claim and opined Claimant has asthma and possibly tobacco-induced COPD. Employer's Exhibit 7 at 20; *see also* Employer's Exhibit 3. He further opined Claimant's impairment is not legal pneumoconiosis, basing his opinion on the fact that Claimant's pulmonary function tests have become "essentially normal or near normal." Employer's Exhibit 7 at 22.

The ALJ found Drs. Basheda's and Rosenberg's opinions not well-reasoned and contrary to the regulations and, therefore, insufficient to satisfy Employer's burden of proof. Decision and Order on Modification at 19-20.

Employer generally contends the ALJ erred in relying on "certain language" in the preamble to reject Drs. Basheda's and Rosenberg's opinions. Employer's Brief at 27-28. Employer does not specifically identify what portions or aspects of the ALJ's analysis of the preamble are in error; instead, Employer generally contends the preamble is not valid evidence, the Department of Labor misinterprets science in it, and the science is outdated. *Id*.

Contrary to Employer's assertion, the ALJ permissibly consulted the preamble as a statement of credible medical research findings the Department of Labor accepted when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830-31 (10th Cir. 2017); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); Decision and Order on Modification at 20-21. Because Employer neither alleges any specific error with regard to the ALJ's interpretation of the preamble in rejecting the opinions of its medical experts nor raises any other specific error by the ALJ in weighing the evidence, we affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983).

Thus, we affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis. Decision and Order on Modification at 19-21.

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii). The ALJ discredited Drs. Basheda's and Rosenberg's opinions regarding the cause of Claimant's disability, as they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that he has the disease. 20 C.F.R. §718.305(d)(1)(ii); *see Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505-06 (4th Cir. 2015); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); Decision and Order on Modification at 34. As Employer raises no specific argument with regard to the ALJ's findings on disability causation, other than the argument it raised on legal pneumoconiosis that we rejected, we affirm the ALJ's finding that Employer did not establish that no part of Claimant's respiratory impairment was caused by legal pneumoconiosis. *Skrack*, 6 BLR at 1-711. Thus, we affirm the ALJ's conclusion that Employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Modification at 34. Consequently, we further affirm the ALJ's findings that Claimant established a change in conditions at 20 C.F.R. §725.310 and that granting modification would render justice under the Act. Decision and Order on Modification at 5, 35-36.

Accordingly, the ALJ's Decision and Order Awarding Benefits on Modification is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge