U.S. Department of Labor

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

BRB No. 21-0340 BLA

BARBARA A. KIDD (Widow of RUSSELL R. KIDD) Claimant-Respondent v. SHINER RIDGE, INCORPORATED and AMERICAN INTERNATIONAL SOUTH/CHARTIS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 3/24/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Timothy J. Walker (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits (2019-BLA-05871) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a second request for modification of a survivor's claim[1] filed on December 10, 2008.

In a March 13, 2013 Decision and Order Denying Benefits, ALJ Lystra A. Harris credited the Miner with 14.02 years of coal mine employment and thus found Claimant could not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, she denied benefits because Claimant failed to establish the Miner had pneumoconiosis or his death was due to pneumoconiosis. 20 C.F.R. §§718.202, 718.205; Director's Exhibit 57. Claimant timely requested modification of that denial. Director's Exhibit 58. In an August 29, 2017 Decision and Order Denying Survivor's Benefits on Modification, ALJ Joseph E. Kane concluded Claimant failed to establish a mistake in a determination of fact and thus denied modification. 20 C.F.R. §725.310; Director's Exhibit 99. Claimant thereafter submitted her second modification request. Director's Exhibit 100.

In his February 19, 2021 Decision and Order, the subject of the current appeal, ALJ Peter B. Silvain, Jr. (the ALJ) found Claimant established the Miner had 15.54 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. He

[1] Claimant is the widow of the Miner, Russell R. Kidd, who died on October 7, 2008. Director's Exhibit 16. The Miner never established entitlement to benefits during his lifetime. Director's Exhibit 1. Thus, Claimant is not entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

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

also found Employer did not rebut the presumption. Thus, he found Claimant established modification based on a mistake in a determination of fact, 20 C.F.R. §725.310, found granting modification would render justice under the Act, and awarded benefits.

On appeal, Employer asserts the ALJ erred in finding a mistake in a determination of fact in the prior denial of benefits. It argues the ALJ erred in finding the Miner had at least fifteen years of coal mine employment and therefore Claimant invoked the Section 411(c)(4) presumption. It also argues he erred in finding it did not rebut the presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless requested to do so.

The Benefit 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.[4] 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 (1965).

Modification – Mistake of Fact

Employer argues the ALJ erred in finding a mistake in a determination of fact in the prior denial by concluding the evidence establishes the Miner was totally disabled at the time of his death. Employer's Brief at 9 (unpaginated). It asserts that, because ALJs Harris and Kane did not address the issue of total disability in their denials, the ALJ was precluded from finding a mistake of fact on this basis. *Id.* Thus it maintains the Board should remand this case for further consideration of this issue. *Id.* We disagree.

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, (6th Cir. 1994). The ALJ 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.

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[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability 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 at 15.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 21.

254, 256 (1971) (emphasis added). Moreover, in *Worrell*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, explained that:

> If a claimant merely alleges that the ultimate fact (disability due to pneumoconiosis [or death due to pneumoconiosis]) was wrongly decided, the deputy commissioner [or ALJ] may, if he chooses, accept this contention and modify the final order accordingly. "There is no need for a smoking-gun factual error, changed conditions, or startling new evidence."

27 F.3d at 230 (quoting *Jessee v. Director, OWCP*, 5 F.3d 723, 725, (4th Cir. 1993)). As Claimant has established entitlement to survivor's benefits, as discussed below, and thus established the ultimate fact of entitlement, she has established a mistake in a determination of fact and a basis for modifying the denial of her survivor's claim. *See O'Keeffe*, 404 U.S. at 256; *Worrell*, 27 F.3d at 230; *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825 (6th Cir. 2001); 20 C.F.R. §725.310; Decision and Order at 15.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *See 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. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ considered the Miner's testimony, employment history forms, paystubs, and Social Security Administration (SSA) earnings records. Decision and Order at 4-8; Director's Exhibits 4, 6-7, 10; Hearing Transcript at 14, 20. For his pre-1978 employment, the ALJ credited the Miner with a full quarter of coal mine employment for each quarter in which the evidence reflects he earned at least $50.00 from coal mine operators. Decision and Order at 6-7, *citing Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984); *see also Shepherd v. Incoal, Inc*., 915 F.3d 392, 405-06 (6th Cir. 2019) (ALJ may apply the *Tackett* method unless "the miner was not employed by a coal mining company for a full calendar quarter"). Using this method, he found the Miner worked for 0.75 of a year in 1976 and 1977. *Id.*

For coal mine employment from 1978 to 1999, the ALJ gave effect to all the provisions and options the Sixth Circuit sets forth in *Shepherd*, 915 F.3d at 401-05. Decision and Order at 4-8. He credited the Miner with a full year of coal mine employment

for every year in which he worked at least 125 days, or a fraction of a 125-day work-year where the Miner worked fewer than 125 days. *Id.* Where the evidence established the Miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, the ALJ presumed that, in the absence of contrary evidence, the Miner worked for at least 125 days in such employment. *Id.* If he could not ascertain the specific beginning and ending dates of the Miner's employment with various operators, the ALJ applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine the number of days the Miner worked in coal mine employment for a given year.[5] *Id.* Utilizing this framework, the ALJ found the Miner worked 14.79 years from 1978 to 1999. *Id.* Adding that to the Miner's 0.75 of a year of work in 1976 and 1977, the ALJ credited the Miner with a total of 15.54 years of coal mine employment.

Employer contends the ALJ erred in calculating the Miner's employment for the years 1996 to 1998 with two entities: E&B Mining and Starlight Coal. Employer's Brief at 11-12 (unpaginated). This argument has no merit.

The ALJ noted the record contains the Miner's paystubs with E&B Mining and Starlight Coal, reflecting his weekly earnings. Decision and Order at 6 n.13; *see* Director's Exhibit 6. Utilizing these weekly earnings in conjunction with the total yearly earnings set forth in the Miner's SSA earnings records, the ALJ assessed the number of days that the Miner worked with these entities for each year from 1996 to 1998. *Id.* He then divided the number of days that the Miner worked by a 125-day work-year to find the Miner worked 0.40 of a year with E&B Mining in 1996 and 0.43 of a year for Starlight from 1997 to 1998. *Id.*

Employer contends the ALJ should have utilized the formula at 20 C.F.R. §725.101(a)(32)(iii) and divided the Miner's yearly earnings by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, to determine the number of days the Miner worked each year from 1996 to 1998. Employer's Brief at 11-12 (unpaginated). It asserts this formula results in crediting the Miner with 0.24 of a year with E&B Mining and 0.31 of a year with Starlight Coal for the relevant years. *Id.*

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[5] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may apply this formula, dividing the miner's annual earnings by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual.* 20 C.F.R. §725.101(a)(32)(iii).

Although Employer contends the ALJ overestimated the Miner's employment by 0.28 of a year for the years 1996 to 1998 (the 0.83 of a year that the ALJ found compared to 0.55 of a year that Employer advocates), reducing the ALJ's length of coal mine employment determination by this amount does not affect his conclusion that the Miner had at least fifteen years of coal mine employment. Decision and Order at 4-8. Thus Employer has failed to explain how the error it alleges could have made any difference. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

Nevertheless, we also conclude Employer's argument lacks merit. Utilizing the formula at 20 C.F.R. §725.101(a)(32)(iii) and the "daily" wage table at Exhibit 610 to determine the length of a miner's coal mine employment is discretionary. The ALJ permissibly relied on the Miner's paystubs with E&B Mining and Starlight Coal to assess his coal mine employment for the years 1996 to 1998. *See Shepherd*, 915 F.3d at 398; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); 20 C.F.R. §725.101(a)(32)(ii) ("[t]he dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony"). As Employer raises no other arguments on this issue, we affirm the ALJ's finding that Claimant established at least fifteen years of coal mine employment. *Muncy*, 25 BLR at 1-27; Decision and Order at 8.

Nor does Employer challenge the ALJ's finding that all of the Miner's coal mine employment took place in underground mines; thus we affirm it. Decision and Order at 9; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(b)(1)(i). As the Miner had greater than fifteen years of underground coal mine employment and was totally disabled by a respiratory or pulmonary impairment, we affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

Because Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[6] or that "no part of [his] death was caused by pneumoconiosis

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

as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.[7]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did 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)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit holds this standard requires Employer to show the Miner's coal mine dust exposure "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

The ALJ considered Drs. Broudy's opinion that the Miner did not have legal pneumoconiosis. Director's Exhibits 1 at 64-66; 47 at 29-30, 67-72. Dr. Broudy diagnosed the Miner with a restrictive ventilatory defect due to obesity and unrelated to coal mine dust exposure. *Id.* He also diagnosed bronchitis due to cigarette smoking and unrelated to coal mine dust exposure. *Id.*

Dr. Broudy excluded a diagnosis of legal pneumoconiosis because the Miner's restrictive lung defect was "characteristic of obesity." Director's Exhibit 47 at 69. The ALJ found the doctor failed to adequately explain why the Miner's thirteen years of coal mine dust exposure "did not also contribute to or aggravate" the obesity-related lung defect. Decision and Order at 20-21; *see Young*, 947 F.3d at 405; 20 C.F.R. §§718.201(a)(2), (b). In addition, the ALJ noted Dr. Broudy excluded coal mine dust exposure as a cause of the Miner's bronchitis "because it was diagnosed six years after he stopped working in the mines." Decision and Order at 20 (citing Director's Exhibit 47 at 35). The ALJ found this explanation unpersuasive because it is contrary to the regulations recognizing pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); Decision and Order at 20. Finally, the ALJ found Dr. Broudy diagnosed the Miner with "respiratory symptoms,

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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).

[7] The ALJ found Employer disproved clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i)(B); Decision and Order at 19.

including dyspnea, wheezing, chronic cough, and sputum," but "failed to explain how these symptoms were unrelated to the thirteen-year occupational exposure to coal dust he considered." Decision and Order at 20-21; *see Young*, 947 F.3d at 405; 20 C.F.R. §718.201(a)(2), (b).

Employer generally argues Dr. Broudy's opinion is credible because he considered the Miner's coal mine employment history and a large body of medical evidence. Employer's Brief at 14-15 (unpaginated).

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255. We consider Employer's argument on legal pneumoconiosis to be a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited Dr. Broudy's opinion, the only opinion supportive of Employer's burden on rebuttal, we affirm his finding that Employer did not disprove legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Death Causation

The ALJ found Employer did not rebut the Section 411(c)(4) presumption by establishing "no part of the Miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(ii); *see* Decision and Order at 21-22. Because Employer does not challenge this finding, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 21-22.

Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4). Thus, we also affirm his finding that Claimant established a mistake in a determination of fact at 20 C.F.R. §725.310 and the award of benefits.[8]

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[8] We further affirm, as unchallenged, the ALJ's finding that granting modification would render justice under the Act. *See Skrack*, 6 BLR at 1-711; Decision and Order at 22-23.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge