

BRB No. 13-0284 BLA

DARRELL MAY)
)
 Claimant-Respondent)
)
 v.)
)
 LEECO, INCORPORATED) DATE ISSUED: 03/26/2014
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 and)
)
 JAMES RIVER COAL COMPANY)
)
 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 Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

H. Brett Stonecipher and Tighe A. Estes (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2007-BLA-5602) of Administrative Law Judge Alice M. Craft, rendered with respect to a duplicate claim, filed on August 11, 1995, pursuant to the provisions of the Black Lung

Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).¹ The relevant procedural history of this case is as follows. Claimant filed a duplicate claim on August 11, 1995.² Director's Exhibit 2. In a Decision and Order issued on April 28, 1998, Administrative Law Judge Robert L. Hillyard denied benefits, finding that while claimant established a material change in conditions, the existence of pneumoconiosis and a totally disabling respiratory or pulmonary impairment, the evidence was insufficient to establish the requisite element of disability causation. *Id.* Upon consideration of claimant's appeal, the denial was affirmed by the Board. *See May v. Leeco, Inc.*, BRB No. 98-1109 BLA (May 10, 1999) (unpub).

Claimant subsequently filed a request for modification on July 30, 1999, which was denied by Administrative Law Judge Daniel L. Roketenetz on July 11, 2001. Director's Exhibit 2. Within one year of that denial, claimant filed another application for benefits on September 7, 2001, but there is no indication in the record that the district director processed the application. *Id.*

Claimant later filed an application for benefits on June 2, 2006, which was processed by the district director as a subsequent claim. Director's Exhibit 3. In a Decision and Order dated July 14, 2009, Judge Mosser awarded benefits pursuant to the 2001 revised regulations at 20 C.F.R. Part 718. In response to employer's appeal, the Director, Office of Worker's Compensation Programs (the Director) filed a Motion to Remand, asserting that the award of benefits should be vacated because claimant's September 7, 2001 application constituted an unadjudicated second request for modification of the denied August 11, 1995 duplicate claim. The Board agreed with the Director that the June 2, 2006 application was erroneously processed as a subsequent claim, as the September 2, 2001 modification request was still viable, along with the underlying duplicate claim filed on August 11, 1995. *See May v. Leeco, Inc.*, BRB No. 09-0767 BLA, slip op. at 4-5 (Aug. 25, 2010) (unpub.). Thus, the Board vacated the award of benefits and remanded the case to Judge Mosser for consideration as to whether claimant was entitled to modification of the denial of his August 11, 1995 duplicate

¹ The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the duplicate claim at issue in this case, as it was filed prior to January 1, 2005. *See* Pub. L. No. 111-148, §1556(c); Director's Exhibit 2.

² Claimant first filed a claim on March 5, 1990. Director's Exhibit 1. In a Decision and Order issued on February 25, 1993, Administrative Law Judge Donald W. Mosser denied benefits because he found that while claimant established the existence of pneumoconiosis arising out of coal mine employment, the evidence was insufficient to establish total disability. *Id.*

claim, pursuant to 20 C.F.R. §725.310 (2000).³ *Id.* at 5. The Board instructed Judge Mosser on remand to give the parties the opportunity to develop and submit evidence without regard to the evidentiary limitations at 20 C.F.R. §725.414. The Board also instructed Judge Mosser to address on remand the joint argument raised by claimant and employer that liability for benefits in this case must transfer to the Black Lung Disability Trust Fund.

On remand, because Judge Mosser was no longer available, the case was assigned to Judge Craft (the administrative law judge).⁴ On February 22, 2013, the administrative law judge issued her Decision and Order Awarding Benefits on Remand, which is the subject of this appeal. Based on employer's concession that claimant is totally disabled, the administrative law judge found that claimant satisfied his burden to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The administrative law judge observed that claimant's August 11, 1995 duplicate claim was denied by Judges Hillyard and Roketenetz, based on claimant's failure to prove that pneumoconiosis was a substantially contributing cause of his respiratory disability. However, based on her consideration of all of the evidence submitted with regard to the duplicate claim, along with the evidence submitted on modification, the administrative law judge found that claimant established total disability due to legal pneumoconiosis.⁵ The administrative law judge concluded that claimant established a basis for modification pursuant to 20 C.F.R. §725.310 (2000), and that granting modification would render justice under the Act.⁶ Accordingly benefits were awarded, beginning in August 1995, the month in which claimant filed his duplicate claim.⁷

³ Relevant to this claim, the Department of Labor revised the regulations, effective on January 19, 2001, *see* 65 Fed. Reg. 80,045-80,107 (2000). The substantive revisions in 2000, pertaining to 20 C.F.R. §§725.309, 725.310, apply only to claims filed after January 19, 2001. Where the former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

⁴ On March 18, 2011, the administrative law judge issued an Order setting a schedule for the parties to submit additional evidence as directed by the Board. Claimant submitted a May 5, 2011 report by Dr. Baker. Claimant's Exhibit 7. Employer submitted an April 2, 2011 report by Dr. Dahhan. Employer's Exhibit 5.

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).

⁶ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is totally disabled and that he established a material change in conditions

On appeal, employer asserts that the administrative law judge erred in discrediting Dr. Broudy's opinion regarding the cause of claimant's disabling respiratory impairment. Employer argues that the administrative law judge failed to explain whether she was granting modification based on a mistake in a determination of fact in the prior denial or a change in conditions. To the extent the administrative law judge determined that there was a mistake in a determination of fact, employer contends that the administrative law judge erred in considering the newly submitted evidence. Employer also challenges the administrative law judge's findings with regard to the commencement date for benefits. Claimant responds, urging affirmance of the award of benefits. The Director has not 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.⁸ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Because this case involves a request for modification by claimant of the denial of his August 11, 1995 claim, for failure to establish the element of disability causation, the administrative law judge was required to

pursuant to 20 C.F.R. §725.309 (2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order Awarding Benefits on Second Remand at 32.

⁷ In accordance with the Board's remand instruction, the administrative law judge determined that neither claimant nor employer was unduly prejudiced or denied a full and fair hearing on the issues in this case, as a result of the district director's failure to timely process claimant's modification request. Decision and Order Awarding Benefits on Second Remand at 8. Thus, the administrative law judge denied their joint request to transfer liability for benefits to the Black Lung Disability Trust Fund. *Id.* Because the administrative law judge's ruling is unchallenged by employer on appeal, it is affirmed. *See Skrack*, 6 BLR at 1-711.

⁸ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); December 16, 2008 Hearing Transcript at 17.

consider whether the evidence originally submitted with that claim, in conjunction with the evidence submitted by the parties on modification, established a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *See Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). The administrative law judge was also required to consider whether there was any mistake in a determination of fact with regard to the prior denial of claimant's August 11, 1995 claim. *See* 20 C.F.R. §725.310; *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

The administrative law judge determined that claimant suffers from legal pneumoconiosis and is totally disabled due to legal pneumoconiosis, based on the opinions of Drs. Baker, Vaezy, and Westerfield, who attribute claimant's disabling chronic obstructive pulmonary disease (COPD) to a combination of smoking and coal dust exposure. Decision and Order Awarding Benefits on Remand at 45. The administrative law judge specifically rejected the contrary opinions of employer's experts, Drs. Jarboe, Harrison, Rosenberg, Broudy and Dahhan, that claimant's COPD is due to smoking alone, because she found that none of the physicians "adequately explained why [twenty-one years] of underground coal dust exposure was not a factor" in claimant's respiratory condition. *Id.*

Employer asserts that the administrative law judge misinterpreted the preamble, mischaracterized Dr. Broudy's opinion and erred in giving it less weight.⁹ We disagree. Dr. Broudy examined claimant on four separate occasions and also reviewed medical evidence provided to him by employer. Director's Exhibit 2; Employer's Exhibits 1, 4 Dr. Broudy opined that claimant has moderately severe COPD due entirely to smoking, based on the type of impairment claimant exhibited during pulmonary function and arterial blood gas testing. *Id.* Based on our review, we conclude that administrative law judge acted within her discretion in discounting Dr. Broudy's opinion. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-551 (6th Cir. 2002).

⁹ Contrary to employer's assertion, the administrative law judge did not reject Dr. Broudy's opinion on the grounds that it is "hostile to the Act." Employer's Brief in Support of Petition for Review at 10. Rather, the administrative law judge permissibly evaluated Dr. Broudy's opinion in light of the preamble and determined that he expressed views that were "contrary to the premises underlying the regulations." Decision and Order Awarding Benefits on Second Remand at 44; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001).

Contrary to employer's contention, the administrative law judge did not misinterpret the preamble in evaluating Dr. Broudy's opinion.¹⁰ The administrative law judge rationally found that "Dr. Broudy's contention that cigarette smoking damage can be distinguished from coal dust damage is contrary to the premise underlying the regulations that coal dust and smoking cause damage to the lungs by similar mechanisms." Decision and Order Awarding Benefits on Remand at 44, citing 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Furthermore, as noted by the administrative law judge, Dr. Broudy believes that, "when exposure to coal dust causes significant impairment, it is usually a restrictive type of impairment or at least a mixed defect." Employer's Exhibit 1. However, the administrative law judge observed correctly that Dr. Broudy's views are inconsistent with the regulation at 20 C.F.R. 718.201, which recognizes that coal dust exposure may cause either a "chronic restrictive *or obstructive pulmonary disease*."¹¹ Decision and Order Awarding Benefits on Remand at 26, quoting 20 C.F.R. 718.201; *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

The credibility of the medical experts is a matter within the discretion of the administrative law judge in her role as fact-finder. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-122. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when the findings are supported by substantial evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's decision to assign "little weight" to Dr. Broudy's opinion relevant to whether claimant has legal pneumoconiosis. Decision and Order Awarding

¹⁰ We reject employer's assertion that the administrative law judge's credibility findings are based on her mischaracterization of Dr. Broudy's opinion. A review of the record reflects that the administrative law judge summarized correctly Dr. Broudy's written opinion and deposition testimony. *See* Decision and Order Awarding Benefits on Second Remand at 23-27; Director's Exhibit 2; Employer's Exhibits 1, 4.

¹¹ Because the administrative law judge provided valid bases for according Dr. Broudy's opinion less weight, we need not address employer's argument with regard to Dr. Broudy's discussion of focal emphysema. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief in Support of Petition for Review at 14-15.

Benefits on Remand at 44. As employer raises no specific allegations of error regarding the administrative law judge's credibility determinations with regard to Drs. Baker, Vaezy, Westerfield, Jarboe, Harrison, Rosenberg, and Dahhan, they are affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Thus, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

With respect to 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding that Dr. Broudy's opinion was entitled to less weight on the issue of disability causation because Dr. Broudy did not diagnose pneumoconiosis, contrary to the administrative law judge's finding that claimant suffers from legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994) *rev'd on other grounds, Skukan v. Consolidation Coal Co.*, 46 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Therefore, we affirm the administrative law judge's finding that claimant established total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

As an additional matter, we reject employer's contention that the administrative law judge failed to state the basis upon which she granted modification. The administrative law judge explained that claimant established a mistake in a determination of fact because she reached different conclusions with regard to the evidence previously before Judges Hillyard and Roketenetz. Decision and Order Awarding Benefits on Remand at 47. She specifically noted that while Dr. Broudy's opinion was previously credited by Judges Hillyard and Roketenetz, she did not find his explanations to be credible. *Id.* The administrative law judge concluded that "Judges Hillyard and Roketenetz made a mistake in fact when they concluded that claimant's disability was not due to pneumoconiosis." *Id.*

Moreover, contrary to employer's argument, the administrative law judge permissibly weighed the newly submitted evidence in reaching her decision to grant modification, based on a mistake in a determination of fact.¹² In determining whether claimant is entitled to modification of the denial of his claim, the administrative law judge was 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); *see King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001); *Consolidation*

¹² Employer asserts that the administrative law judge erred in considering multiple reports submitted subsequent to the denial of claimant's August 11, 2005 duplicate claim. Employer's Brief in Support of Petition for Review at 16.

Coal Corp. v. Worrell, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established a basis for modification of the denial of his duplicate claim pursuant to 20 C.F.R. §725.310 (2000).

Lastly, employer challenges the administrative law judge's determination of the date for the commencement of benefits. Where, as here, modification is granted based on a mistake of fact, the date for the commencement of those benefits is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b),(d); see *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182-83 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that claimant was not totally disabled due to pneumoconiosis at any subsequent time. See 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4, 9 BLR 2-32, 2-36 n.4 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

In determining the commencement date for benefits, the administrative law judge observed correctly that claimant filed his claim for benefits in August 1995, and was diagnosed as totally disabled in September and November 1995, by Dr. Veazy, the physician who conducted the examination on behalf of the Department of Labor. The administrative law judge found that, "the record does not establish when the Claimant first became disabled. But there is no evidence that he was not disabled at any time after Dr. Vaezy examined him in connection with his second claim." Decision and Order Awarding Benefits on Remand at 50. Because it is supported by substantial evidence, we affirm the administrative law judge's determination that benefits should commence as of August 1995, the month in which the claim was filed. See *Owens*, 14 BLR at 1-50.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge