



BRB No. 15-0187 BLA

In the Matter of DOMINIC LASALA	)	
(Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BISHOP COAL COMPANY	)	DATE ISSUED: 03/03/2016
	)	
Employer-Petitioner	)	
	)	
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5037) of Administrative Law Judge Linda S. Chapman rendered on a request for modification of a subsequent claim<sup>1</sup> 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 a miner's claim filed on August 2, 2002.<sup>2</sup>

In the initial decision on this subsequent claim, dated April 22, 2004, Judge Chapman credited the miner with twenty-one years of coal mine employment based upon the stipulation of the parties, and found that the newly submitted evidence failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment and, thus, failed to establish a change in an applicable condition of entitlement since the denial of the miner's prior claim. 20 C.F.R. §725.309. Accordingly, benefits were denied.

The miner appealed, but while his appeal was pending before the Board, he timely requested modification. *See* 20 C.F.R. §725.310. At his request, the Board dismissed the appeal and the case was remanded for modification proceedings. *LaSala v. Bishop Coal Co.*, BRB No. 04-0669 BLA (Jan. 14, 2005)(Order)(unpub.).

On October 19, 2007, Administrative Law Judge Richard T. Stansell-Gamm denied benefits, finding that although the miner established total respiratory disability and, therefore, a change in an applicable condition of entitlement, and established clinical pneumoconiosis, the miner failed to establish that he was totally disabled due to pneumoconiosis. The miner appealed and employer cross-appealed. The miner again requested modification, and the case was remanded for modification proceedings. *LaSala v. Bishop Coal Co.*, BRB Nos. 08-0232 BLA and 08-0232 BLA-A (May 22, 2008)(Order)(unpub.).

On July 23, 2009, the district director issued a Proposed Order Denying Modification. The miner died on August 24, 2009,<sup>3</sup> and the miner's daughter, Sharon A.

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<sup>1</sup> The miner's initial claim for benefits, filed on July 15, 1983, was denied after the miner's second request for modification because Administrative Law Judge Michael P. Lesniak found the evidence insufficient to establish pneumoconiosis or total respiratory disability. The Board affirmed the denial of benefits. *LaSala v. Bishop Coal Co.*, BRB No. 98-0705 BLA (Feb. 18, 1999)(unpub.); Director's Exhibit 1.

<sup>2</sup> The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the present claim, as it was filed prior to January 1, 2005. Director's Exhibit 3.

<sup>3</sup> Sharon A. Garver and Alice J. Harman, the miner's daughters, were appointed as executors of the miner's estate, and Sharon A. Garver is pursuing this claim on behalf of the estate. Director's Exhibit 126.

Garver, mailed a copy of the autopsy, *inter alia*, to the district director on January 26, 2010, which the district director determined was a request for modification. Director's Exhibits 123, 124, 126, 133, 142.

In the Decision and Order that is the subject of the current appeal, Judge Chapman (the administrative law judge) determined that the claim was timely filed, and credited the miner with at least twenty-one years of coal mine employment, based upon the stipulation of the parties. Considering all evidence submitted in the subsequent claim, the administrative law judge agreed with Judge Stansell-Gamm that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), thereby establishing "a change in a condition of entitlement that defeated his claim before Judge Lesniak." Decision and Order at 18. The administrative law judge further determined that, while the evidence was insufficient to establish the existence of complicated pneumoconiosis, the evidence established the existence of both simple clinical pneumoconiosis and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded, commencing August 2002, the month in which this claim was filed.

On appeal, employer challenges the administrative law judge's commencement date of August 2002, as unsupported by her findings on modification. Employer requests that the Board modify the award of benefits to reflect the commencement date of August 2009 or, alternatively, remand the case for further findings on modification at 20 C.F.R. §725.310 and disability causation at 20 C.F.R. §718.204(c). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.<sup>4</sup>

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.<sup>5</sup> 33 U.S.C. §921(b)(3), as incorporated by 30

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<sup>4</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had at least twenty-one years of coal mine employment and established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, total respiratory disability pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>5</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4.

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that “one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final.” 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(c)(3). The miner’s prior claim was denied because he failed to establish the existence of pneumoconiosis and total respiratory disability. Consequently, new evidence had to be submitted establishing the existence of pneumoconiosis or total respiratory disability in order to obtain review on the merits of the claim. *See* 20 C.F.R. §725.309(c).

Additionally, because this case involves a request for modification of the denial of a subsequent claim, the administrative law judge was required to consider whether the evidence developed in the subsequent claim, in conjunction with the evidence submitted with the request for modification, establishes a change in conditions or a mistake in a determination of fact with regard to the prior denial of claimant’s subsequent claim. *See* 20 C.F.R. §725.310; *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62-3 (3d Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-5, 18 BLR 2-26, 2-28 (4th Cir. 1993). If modification is based on a change in conditions, the miner is entitled to benefits as of the month of onset of total disability due to pneumoconiosis, “provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge.” *See* 20 C.F.R. §725.503(d)(2). If the date of onset of total disability due to pneumoconiosis is not ascertainable, benefits are payable as of the date the request for modification was made. *Id.* If modification is based on the correction of a mistake in a determination of fact, including the ultimate fact of entitlement, the miner 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(b), (d)(1); *see Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

Employer challenges the administrative law judge’s finding that the appropriate date for the commencement of benefits is August 2002, arguing that the basis for modification was a change in conditions. Thus, employer maintains that the correct date for the commencement of benefits is August 2009, the month in which the most recent denial of the claim by the district director became final. Alternatively, employer asserts that the administrative law judge failed to make a finding regarding the grounds for modification at 20 C.F.R. §725.310, and failed to determine whether reopening the case

would render justice under the Act. Lastly, employer argues that, if this case is remanded, the administrative law judge must reconsider her finding that disability causation was established at 20 C.F.R. §718.204(c). Employer’s Brief at 10-19.

Turning first to the issue of disability causation, employer contends that the reasons cited by the administrative law judge “for according more weight to Dr. Rasmussen and less weight to Dr. Castle are not supported by substantial evidence or consistent with law.” Employer’s Brief at 17 n.6. Specifically, employer asserts that the administrative law judge erroneously credited the opinion of Dr. Rasmussen, that the miner’s totally disabling impairment was primarily due to pneumoconiosis, solely because Dr. Rasmussen examined the miner, and that she improperly discredited the contrary opinion of Dr. Castle as hostile to the Act, when it cannot be characterized as such. *Id.* Employer’s arguments are not supported by the record.

The administrative law judge determined that, in his 2007 Decision and Order, Judge Stansell-Gamm accorded equal weight to the opinions of Drs. Rasmussen and Castle in rendering his finding that the miner failed to establish legal pneumoconiosis by a preponderance of the evidence. Decision and Order at 26. However, the administrative law judge acted within her discretion in according more weight to the opinion of Dr. Rasmussen and less weight to the opinion of Dr. Castle than did Judge Stansell-Gamm. The administrative law judge determined that Dr. Rasmussen “examined [the miner] four times over the course of thirty years, and concluded that his pattern of impairment – a significant oxygen transfer impairment during exercise, and a corresponding absence of a ventilatory impairment – was ‘quite consistent’ with lung disease induced by coal mine dust exposure.” *Id.*; Director’s Exhibits 68, 82. By contrast, the administrative law judge determined that Dr. Castle attributed the miner’s disabling impairment solely to smoking, indicating that when coal workers’ pneumoconiosis causes an impairment, it “generally” causes a mixed, irreversible obstructive and restrictive defect, which was not present in the miner. *Id.*; Director’s Exhibit 94. Dr. Castle additionally stated that if coal workers’ pneumoconiosis causes a reduction in diffusing capacity, it is associated with a high profusion of p or r opacities, contrary to the findings on the miner’s x-rays. *Id.* Contrary to employer’s assertion, the administrative law judge did not discount Dr. Castle’s opinion as “hostile to the Act” but, rather, determined that he relied on views that were contrary to the prevailing medical science as expressed in the regulations defining legal pneumoconiosis.<sup>6</sup> Decision and Order at 26; *see* 20 C.F.R. §§718.201(a)(2) (The definition of legal pneumoconiosis includes “any chronic restrictive *or* obstructive

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<sup>6</sup> The administrative law judge noted that coal dust exposure can result in a purely obstructive impairment, and that the miner need not have x-ray findings of rounded opacities for his disabling impairment to be caused by legal pneumoconiosis. Decision and Order at 26.

pulmonary disease arising out of coal mine employment”); 718.202(a)(4) (A diagnosis of pneumoconiosis may be made “notwithstanding a negative X-ray . . .”); *see also Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012). The administrative law judge further found that Dr. Rasmussen’s opinion was buttressed by the opinion of Dr. Forehand, which the administrative law judge determined was well-reasoned, supported by the objective medical evidence, and entitled to determinative weight. Decision and Order at 25-26; *see Looney*, 678 F.3d at 316, 25 BLR at 2-133; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). As the administrative law judge’s credibility determinations are supported by substantial evidence, and employer asserts no other error regarding the administrative law judge’s weighing of the evidence, we affirm her finding that disability causation is established at 20 C.F.R. §718.204(c). *See Etzweiler v. Cleveland Bros. Equip. Co.*, 16 BLR 1-38 (1992)(en banc).

Next, we agree with employer that the administrative law judge’s finding of August 2002 as the appropriate date for the commencement of benefits cannot be affirmed. In addressing this modification request, the administrative law judge initially noted that a subsequent claim must be denied pursuant to 20 C.F.R. §725.309 “unless at least one of the conditions of entitlement upon which the previous claim was denied has changed and is now present,” and further noted that she would conduct a complete review of the record pursuant to 20 C.F.R. §725.310 “to determine whether there has been a change in conditions or mistake in a determination of fact.” Decision and Order at 2-3. The administrative law judge reviewed the medical evidence submitted since the denial of the prior claim and found that it established total respiratory disability and “a change in a condition of entitlement that defeated the miner’s claim before Judge Lesniak.” Decision and Order at 18. After finding the pathology evidence sufficient to establish clinical pneumoconiosis, and that the miner’s total disability was due to pneumoconiosis based on the 2008 opinion of Dr. Forehand and the 2004 opinion of Dr. Rasmussen, the administrative law judge concluded that:

[The miner has] established a change in a condition of entitlement that defeated [his] previous claim. [The miner has] established that [he] was totally disabled due to pneumoconiosis. Accordingly, [the miner is] entitled to benefits under the Act. . .

Based on the foregoing, it is hereby ordered that the claim of [the miner] for benefits under the Act is granted.

Decision and Order at 27. The administrative law judge then awarded benefits as of August 2002, the month in which the miner filed this claim.

While the administrative law judge permissibly determined that there was sufficient evidence to establish a change in an applicable condition of entitlement, which

is the standard applied to subsequent claims pursuant to Section 725.309, she failed to explain whether she granted modification based on a change in conditions or a mistake in a determination of fact. *See* 20 C.F.R. §725.310. In awarding benefits as of the month in which this claim was filed, the administrative law judge appears to have applied the regulations establishing the commencement date of benefits based on a mistake in fact, but she made no such finding, and she failed to make the requisite determination as to when the miner first became totally disabled due to pneumoconiosis. *See* 20 C.F.R. §725.503(b), (d)(1). Because the basis for granting modification is unclear from the administrative law judge's decision, we must vacate her determination as to the date of entitlement, and remand this case for further consideration.

On remand, the administrative law judge must explain her specific basis for granting modification (i.e., a change in conditions or a mistake in fact), and then apply the pertinent provisions at 20 C.F.R. §725.503 to determine the date for the commencement of benefits. In so doing, the administrative law judge must address whether the record establishes the onset date of the miner's disability due to pneumoconiosis, and explain her findings. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). The administrative law judge must also address whether granting modification of the previous denial of the miner's claim will render justice under the Act. *See Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317, 25 BLR 2-157 (4th Cir. 2012), *cert. denied*, 570 U.S. (2013); *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007).

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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GREG J. BUZZARD  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge