U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0246 BLA

NICKY J. WEAVER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	
	)	DATE ISSUED: 03/24/2016
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 on Second Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

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

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Second Remand (2010-BLA-5089) of Administrative Law Judge Thomas M. Burke, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, which is before the Board for the third time, involves an April 8, 2009 request for modification of a claim filed on October 6, 2005.[1]

In the last appeal, the Board affirmed Administrative Law Judge Michael P. Lesniak's findings that claimant worked for at least fifteen years in qualifying coal mine employment,[2] that he is totally disabled under 20 C.F.R. §718.204(b)(2), and that he, therefore, invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). *Weaver v. S.*

[1] In the initial decision, Administrative Law Judge Janice K. Bullard found that the evidence established the existence of clinical pneumoconiosis, due to coal mine dust exposure, and that claimant suffers from a totally disabling pulmonary impairment. However, Judge Bullard found that the evidence did not establish that claimant is totally disabled due to pneumoconiosis. Accordingly, Judge Bullard denied benefits. Following claimant's timely request for modification on April 8, 2009, Director's Exhibit 75, the case was reassigned to Administrative Law Judge Michael P. Lesniak, who awarded benefits in a Decision and Order dated May 25, 2011. Pursuant to employer's appeal, the Board vacated the award of benefits and remanded the case for further consideration of the evidence. On remand, Judge Lesniak again awarded benefits. Pursuant to employer's appeal, the Board again vacated the award. On remand, the case was reassigned to Administrative Law Judge Thomas M. Burke, whose March 11, 2015 Decision and Order Awarding Benefits on Second Remand is the subject of the current appeal. The complete procedural history of this case is set forth in the Board's prior decisions. *Weaver v. S. Ohio Coal Co.*, BRB No. 13-0120 BLA (Nov. 27, 2013) (unpub.); *Weaver v. S. Ohio Coal Co.*, BRB No. 11-0608 BLA (May 30, 2012) (unpub.).

[2] The record reflects that claimant's coal mine employment was in West Virginia. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Director's Exhibit 4. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1980) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment is established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Ohio Coal Co., BRB No. 13-0120 BLA (Nov. 27, 2013) (unpub.). The Board vacated, however, the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. The Board therefore remanded the case to the administrative law judge to reconsider the evidence relevant to rebuttal.

On remand, because Judge Lesniak was unavailable, the case was reassigned, without objection, to Administrative Law Judge Thomas M. Burke (the administrative law judge). The administrative law judge found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the award of benefits.

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

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant does not have legal and clinical pneumoconiosis,[4] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In evaluating whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Mavi, Zaldivar, and Altmeyer, which were originally submitted in the claim, together with the supplemental opinion of Dr. Zaldivar and the opinion of Dr. Basheda, submitted by employer on modification. Dr. Mavi diagnosed legal pneumoconiosis, in the form of

[4] "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).

disabling chronic obstructive pulmonary disease (COPD) that is due to both coal mine dust exposure and cigarette smoking. Decision and Order on Second Remand at 4; Director's Exhibits 35, 49. Drs. Zaldivar, Altmeyer, and Basheda opined that claimant does not have legal pneumoconiosis, but suffers from severe airway obstruction caused by bullous emphysema due to smoking. Drs. Zaldivar and Basheda also opined that claimant suffers from asthma that is unrelated to coal mine dust exposure. Director's Exhibits 50, 55, 58, 64; Employer's Exhibits 2, 5, 6.

The administrative law judge credited Dr. Mavi's opinion, attributing claimant's obstructive impairment to both coal mine dust exposure and cigarette smoking, as well-reasoned, well-documented, and more consistent with the scientific studies set forth in the preamble to the 2001 regulatory revisions. In contrast, the administrative law judge found the opinions of Drs. Zaldivar, Altmeyer, and Basheda to be inadequately explained and less consistent with the science underlying the regulations and set forth in the preamble. Therefore, the administrative law judge stated that he gave "less credit" to the opinions of Drs. Zaldivar, Altmeyer, and Basheda than to the opinion of Dr. Mavi, and he concluded that employer "has not ruled out legal pneumoconiosis . . . ." Decision and Order on Second Remand at 6, 8.

Employer contends that a remand is required because the administrative law judge applied an improper standard by stating that employer did not rule out the existence of legal pneumoconiosis. Employer's Brief at 8-10. A review of the administrative law judge's Decision and Order as a whole reflects that, before beginning his analysis of the medical evidence, the administrative law judge correctly stated that employer bore the "burden to demonstrate by a preponderance of the evidence that . . . Claimant does not suffer from pneumoconiosis . . . ." Decision and Order on Second Remand at 2; *see* 20 C.F.R. §718.305(d)(1)(i). Moreover, as the Director asserts, the administrative law judge did not reject the opinions of Drs. Zaldivar, Altmeyer, and Basheda as insufficient to meet a "rule out" standard. Rather, he found that their opinions on the existence of legal pneumoconiosis were entitled to less weight than those of Dr. Mavi, for the reasons he gave after considering the physicians' explanations. Decision and Order on Second Remand at 7-8; Director's Brief at 4 n.4. Because the administrative law judge correctly stated employer's burden to establish that claimant does not have pneumoconiosis and found that employer's physicians' opinions were entitled to less weight than the contrary opinion of another physician, we reject employer's argument that he applied an improper standard. For the same reasons, even if, as employer contends, the administrative law judge's statement that employer did not "rule out" legal pneumoconiosis was error, it is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

Employer contends that the administrative law judge erred in discounting the opinions of Drs. Zaldivar, Altmeyer, and Basheda because he found that their opinions

that bullous emphysema is not caused by coal mine dust exposure were "hostile to the Act." Employer's Brief at 10-15. Employer's contention lacks merit.

The administrative law judge noted that, in opining that claimant's obstructive impairment is due to both coal mine dust exposure and cigarette smoking, Dr. Mavi explained that there was "no way to differentiate [between the contributions by coal mine dust exposure and cigarette smoking] because bullae happen when the bronchial tubes are constricted. If coal dust can cause narrowing of the bronchial tubes, it can cause bullous disease." Director's Exhibit 49 at 19. Dr. Mavi further explained that both cigarette smoking and coal mine dust exposure cause airflow obstruction, and that bullous emphysema is a sequella [sic] of airflow obstruction."[5] Director's Exhibit 49 at 20.

The administrative law judge noted that, in contrast, Drs. Zaldivar, Altmeyer, and Basheda each opined that there is no reason to implicate coal mine dust exposure as a cause of claimant's COPD, because his obstructive impairment is due to bullous emphysema, which is not a type of emphysema that is caused by coal mine dust exposure. Decision and Order on Second Remand at 7; Director's Exhibits 50, 55, 58, 64; Employer's Exhibits 2, 5, 6.

Contrary to employer's contention, the administrative law judge did not find the opinions of Drs. Zaldivar, Altmeyer, and Basheda to be hostile to the Act. Rather, in evaluating the conflicting opinions, the administrative law judge noted that the preamble states that emphysema "may be legal pneumoconiosis if it arises from coal-mine employment," without any specification that this causal effect only exists with respect to certain types of emphysema. Decision and Order on Second Remand at 7; *referencing* 65 Fed. Reg. 79920, 79939 (Dec. 20, 2000). Further, the administrative law judge noted, the preamble cites studies supporting the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, as well as studies finding that the risks of cigarette smoking and coal mine dust exposure are additive. 65 Fed. Reg. at

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[5] Dr. Mavi explained:

> To take a breath is [active] - - our muscles have to contract to take a breath in. The deflation, or deflating the lungs, is a passive process. As the bronchial tubes get narrow, the lungs do not have enough time to completely deflate. Over time these air blebs stay inflated and they, over time, can form these, what is called, bullous [sic]. So, any mechanism that will narrow the bronchial tubes can, technically speaking, lead to the bullous disease.

Director's Exhibit 49 at 20.

79940, 79943; Decision and Order on Second Remand at 7. Permissibly keeping this information in mind, the administrative law judge accorded greater weight to the opinion of Dr. Mavi, than to the opinions of Drs. Zaldivar, Altmeyer, and Basheda, because he found Dr. Mavi's opinion to be well-documented, well-reasoned, and more in accord with the statement of medical studies found valid, and relied upon, by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264-65 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); Decision and Order on Second Remand at 7. As employer does not challenge the administrative law judge's determination that Dr. Mavi's opinion is both credible and more in accord with the science in the preamble than the opinions of employer's experts, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge found that Dr. Altmeyer relied, in part, on the reversibility of claimant's impairment as a reason for eliminating coal mine dust exposure as a cause. Decision and Order on Second Remand at 7-8. The administrative law judge noted that all of the physicians agree that there is a significant non-reversible component to claimant's impairment. Decision and Order on Second Remand at 8. In light of this factor, the administrative law judge concluded that Dr. Altmeyer did not adequately explain why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of his remaining obstructive impairment, and the administrative law judge accorded Dr. Altmeyer's opinion less weight on that basis. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Second Remand at 7-8. As the Director points out, employer does not challenge this finding. Director's Brief at 3 n.2. Consequently the administrative law judge's discounting of Dr. Altmeyer's opinion on this basis is affirmed. *See Skrack*, 6 BLR at 1-711.

The administrative law judge found that Dr. Basheda excluded coal mine dust exposure as a cause of claimant's pulmonary impairment, in part, because his impairment developed after he left coal mining. The administrative law judge discounted Dr. Basheda's explanation because he found that it was inconsistent with the Department of Labor's recognition of 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 Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, 24 BLR 2-199, 2-216 (6th Cir. 2009); Decision and Order on Second Remand at 8; Director's Brief at 3 n.2. As the Director points out, employer does not challenge this determination.

Director's Brief at 3 n.2. Consequently the administrative law judge's discounting of Dr. Basheda's opinion is affirmed. *See Skrack*, 6 BLR at 1-711.

The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As the administrative law judge accorded greater weight to the opinion of Dr. Mavi, that claimant suffers from legal pneumoconiosis, than to the contrary opinions of Drs. Zaldivar, Altmeyer, and Basheda, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis. Decision and Order on Second Remand at 8. The failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Employer next contends that the administrative law judge did not adequately address whether employer rebutted the presumed fact of total disability causation, by establishing that no part of claimant's total pulmonary or respiratory disability was caused by pneumoconiosis, as defined in 20 C.F.R. §718.201. *See* 20 C.F.R. §718.305(d)(ii); Employer's Brief at 18. We disagree.

As previously discussed, in addressing the issue of legal pneumoconiosis, the administrative law judge accorded greater weight to the opinion of Dr. Mavi, that claimant suffers from legal pneumoconiosis, in the form of a severe obstructive impairment due, in part, to coal mine dust exposure, than to the opinions of Drs. Zaldivar, Altmeyer, and Basheda, that claimant's emphysema is due solely to smoking. Given this finding, a conclusion that the presumption was not rebutted was the only rational one that the administrative law judge could reach. Drs. Zaldivar, Altmeyer, and Basheda agreed that claimant's totally disabling pulmonary impairment is due to his emphysema. Director's Exhibits 50 at 37; 58 at 33-36; Employer's Exhibits 2, 5. Therefore, their opinions regarding the cause of claimant's disability reiterated their opinions regarding the presence of legal pneumoconiosis. Thus, the administrative law judge's determination that the medical opinions of Drs. Zaldivar, Altmeyer, and Basheda were outweighed and consequently did not establish that claimant does not have legal pneumoconiosis necessarily rendered their opinions inadequate to disprove disability causation. Under the facts of this case, there was no need for the administrative law judge to analyze their opinions a second time. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013).

We, therefore, affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption, and affirm the award of benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(i), (ii); *see Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66; *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000).

Benefits Commencement Date

The administrative law judge found that the evidence does not establish when claimant became totally disabled due to pneumoconiosis, and therefore awarded benefits as of October 2005, the month in which claimant filed his claim. Decision and Order on Second Remand at 8. Employer asserts that while the administrative law judge did not specify whether the award of benefits on modification was based on a mistake of fact or a change in conditions, because the administrative law judge awarded benefits through invocation of the new, Section 411(c)(4) presumption, it follows that claimant established a change in conditions. Employer's Brief at 16. Thus, employer asserts, in the event the award of benefits is affirmed, the earliest date for the commencement of benefits would be April 2006, the month in which claimant requested modification. Employer's Brief at 17.

Employer's contention lacks merit. Once entitlement to benefits is demonstrated, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603, 12 BLR 2-178, 2-184 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (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 the miner was not totally disabled due to pneumoconiosis at any subsequent time. 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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). In addition, where, as here, benefits are awarded pursuant to 20 C.F.R. §725.310, the basis for granting modification affects the determination of the date from which benefits commence. *Eifler v. Peabody Coal Co.*, 926 F.2d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991). If modification is based on a change in conditions, claimant is entitled to benefits as of the month he became totally disabled due to pneumoconiosis, or if that date is not ascertainable, as of the month in which he requested modification. 20 C.F.R. §725.503(d)(2). If modification is based on the correction of a mistake of fact, the date for the commencement of benefits is determined pursuant to 20 C.F.R. §725.503(b). That is, claimant is entitled to benefits as of the month in which he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the month in which 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 Eifler*, 926 F.3d at 666, 15 BLR at 2-4; *Edmiston*, 14 BLR at 1-69. The scope of modification based on correcting a mistake of fact is broad, encompassing "the ultimate fact (disability due to pneumoconiosis) . . . ." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *see Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999).

The administrative law judge did not specify the grounds upon which he granted modification. However, viewing the administrative law judge's findings in light of his Decision and Order as a whole, it is apparent that the administrative law judge granted modification based on a mistake of fact. A change in conditions must be based on new evidence. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994). Here, the administrative law judge did not identify new evidence that established a change in conditions. Rather, after noting that the prior finding that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis was affirmed by the Board, the administrative law judge accorded greater weight to Dr. Mavi's originally submitted opinion, that claimant is totally disabled due to legal pneumoconiosis, than to all of the contrary evidence of record, both new and old. Therefore, contrary to employer's contention, it follows that on this record, as weighed by the administrative law judge, claimant established a mistake in a determination of fact. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Stanley*, 194 F.3d at 497, 22 BLR at 2-11.

Because the administrative law judge granted modification based upon a mistake in a determination of fact, namely, the ultimate fact of claimant's eligibility for benefits, *see Stanley*, 194 F.3d at 497, 22 BLR at 2-11, claimant is entitled to benefits from the date he 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 Eifler*, 926 F.3d at 666, 15 BLR at 2-4; *Owens*, 14 BLR at 1-50.

Here, the administrative law judge determined that benefits should commence as of October 2005, the month in which claimant filed his claim. Decision and Order on Second Remand at 8. Because employer failed to rebut the Section 411(c)(4) presumption, claimant established all of the elements of entitlement. *See* 20 C.F.R. §§718.305(c), 718.202(a)(3), 718.204(c)(2). The administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim. Since substantial evidence supports the administrative law judge's finding that the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis, we affirm the administrative law judge's determination that benefits are payable from October 2005, the month in which claimant filed his claim. 20 C.F.R. §725.503(b).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge