



BRB No. 16-0397 BLA

DONALD HELTON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
COASTAL COAL COMPANY, LLC)	
)	DATE ISSUED: 03/21/2017
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 Modification of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Modification (2012-BLA-5975) of Administrative Law Judge Christopher Larsen rendered on a

request for modification of a subsequent claim¹ 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 November 21, 2005, and is before the Board for the second time.

On February 22, 2008, Administrative Law Judge Ralph A. Romano issued the initial decision on the subsequent claim. Judge Romano credited claimant with thirty-two years of coal mine employment, as stipulated by the parties, and found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Judge Romano therefore found that claimant demonstrated a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309.² Reviewing the entire record, Judge Romano found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, Judge Romano awarded benefits.

Following employer's appeal, the Board vacated Judge Romano's findings that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The Board also vacated Judge Romano's findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and that his disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The Board, therefore, vacated Judge Romano's award of benefits. *D.H. [Helton] v. Coastal Coal Co.*, BRB No. 08-0426 BLA (Feb. 12, 2009)(unpub.); Director's Exhibit 107.

In a Decision and Order on Remand dated December 8, 2011, Judge Romano noted that subsequent to the Board's decision, Congress reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which affects claims, like this one,

¹ Claimant's initial claim for benefits, filed on May 22, 1991, was denied by the district director on October 31, 1991, because claimant failed to establish any element of entitlement. Director's Exhibit 1.

² 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).

filed after January 1, 2005.³ Judge Romano found that while claimant was able to establish more than fifteen years of qualifying coal mine employment, he was unable to establish total pulmonary or respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, could not invoke the rebuttable presumption under Section 411(c)(4), or establish entitlement to benefits under 20 C.F.R. Part 718 without the aid of the Section 411(c)(4) presumption.⁴ Accordingly, Judge Romano denied benefits.

Claimant timely filed a request for modification on January 25, 2012, Director's Exhibit 128, and the case was subsequently assigned to Administrative Law Judge Christopher Larsen (the administrative law judge), who held a hearing on September 2, 2015.

In the Decision and Order that is the subject of the current appeal, the administrative law judge credited claimant with thirty-two years of underground coal mine employment, based on the parties' stipulation, and determined that employer did not contest its designation as the responsible operator. Hearing Transcript at 5, 11; 2011 Decision and Order on Modification at 4. Considering all the evidence submitted in the subsequent claim, including new evidence submitted in support of modification, the administrative law judge found that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing "a change in a[n applicable] condition of entitlement that defeated his claim before Judge Romano." *Id.* at 10. Based on his findings that claimant had more than fifteen years of qualifying coal mine employment and suffers from a totally disabling respiratory impairment, the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and further found that employer did not rebut the presumption. Accordingly, the administrative law judge granted modification pursuant to 20 C.F.R. §718.310, and awarded benefits commencing November 2005, the month in which claimant filed his subsequent claim.

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes fifteen or more years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

⁴ In order to establish entitlement to benefits under 20 C.F.R. Part 718, unassisted by the Section 411(c)(4) presumption, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

On appeal, employer challenges the administrative law judge's commencement date of November 2005, and requests that the Board modify the award of benefits to reflect a commencement date of January 2012, the month in which claimant requested modification. Claimant responds in support of the administrative law judge's finding that benefits commence as of November 2005. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this case.⁵

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.⁶ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Date for the Commencement of Benefits

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, established a change in conditions or a mistake in a determination of fact with regard to the prior denial. *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, claimant 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 "from the month in which the claimant requested modification." *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 month he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the month he filed his claim, unless credited evidence establishes that he was not disabled

⁵ Because employer does not challenge the administrative law judge's findings on the merits of entitlement, we affirm the administrative law judge's award of benefits in this claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁶ 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, 1-202 (1989) (en banc); Director's Exhibit 4.

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 argues that the administrative law judge erred in awarding benefits as of November 2005, the month in which the subsequent claim was filed, given that the finding of total disability was based on the most recent pulmonary function study and medical opinion dated January 21, 2012.

In addressing claimant's modification request, the administrative law judge specifically found "no mistake of fact in Judge Romano's [2011] decision to accord greater credit to Dr. Jarboe's opinion" over that of Dr. Rasmussen regarding claimant's condition at that time.⁷ Decision and Order on Modification at 13; 2011 Decision and Order at 6-8. The administrative law judge determined that the most recent medical evidence submitted on modification "reflect[s] that [claimant's] obstructive disease has progressed, to the point that it is now disabling."⁸ Decision and Order on Modification at 14, 20. Thus, relying on Dr. Gallai's most recent pulmonary function study and medical opinion dated January 21, 2012, the administrative law judge found that claimant established total disability and invocation of the Section 411(c)(4) presumption, and that employer failed to establish rebuttal. *Id.* at 14, 19-20. The administrative law judge then concluded that claimant was entitled to benefits as of November 2005, the month in which he filed his subsequent claim. *Id.* at 20.

Employer argues that the administrative law judge's determination is erroneous because he granted modification and awarded benefits based on a change in conditions established by the most recent evidence of record. Employer maintains that, as a matter of law, the administrative law judge's finding supports January 2012 as the onset date pursuant to 20 C.F.R. §725.503(d)(2), as that is the month in which claimant requested modification. Employer's Brief at 6-9.

⁷ In his 2011 decision, Judge Romano credited Dr. Jarboe's 2006 and 2007 opinions, that claimant had the respiratory capacity to perform his usual coal mine employment, over Dr. Rasmussen's 2006 opinion that claimant was totally disabled. 2011 Decision and Order at 8; Director's Exhibits 15, 18, 20, 88.

⁸ The administrative law judge credited Dr. Gallai's January 21, 2012 pulmonary function study because it was performed "almost five years after the most recent study considered by Judge Romano." Decision and Order on Modification at 11; Claimant's Exhibit 1. Similarly, the administrative law judge credited Dr. Gallai's January 21, 2012 medical opinion that claimant is totally disabled from performing his last coal mine employment, finding that it was "supported by the most recent objective medical evidence. . .". *Id.* at 14.

There is merit to employer's argument that the administrative law judge erred in finding that claimant is entitled to benefits commencing in November 2005, a date that pre-dates Judge Romano's 2011 denial of benefits. In a modification proceeding, an administrative law judge may award benefits that pre-date the prior denial of benefits only if modification is based on a mistake in a determination of fact. *See* 20 C.F.R. §725.503(d)(1). If the award of benefits is based on a change in conditions, benefits are payable "beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, 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," and if the month of onset is not ascertainable, "benefits shall be payable to such miner from the month in which the claimant requested modification." 20 C.F.R. §725.503(d)(2).

As set forth *supra*, the administrative law judge explicitly stated that he found claimant's condition had progressed to the point that it is *now* disabling and that the evidence submitted on modification reflected "a change in a condition of entitlement that defeated [claimant's] claim before Judge Romano." Decision and Order on Modification at 10. The administrative law judge relied on Dr. Gallai's January 21, 2012 pulmonary function study and medical opinion, which post-dated Judge Romano's denial of benefits, to find that claimant established total respiratory disability and invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *Id.* at 11-14. The administrative law judge further expressed his agreement with Judge Romano's prior determination that the 2006 and 2007 pulmonary function and medical opinion evidence weighed against a finding of total disability. *Id.* at 11-14. Thus, based on the administrative law judge's findings, we conclude that his decision to award benefits was based on a change in conditions following Judge Romano's 2011 denial of benefits. Consequently, we modify the administrative law judge's decision to reflect that the date for the commencement of benefits is January 2012, the month in which claimant filed for modification.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Modification is affirmed as modified to reflect that benefits commence as of January 2012.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge