U.S. Department of Labor

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

BRB No. 16-0101 BLA

CHERI HATFIELD (Widow of CECIL HATFIELD)	)	
Claimant-Respondent	)	
v.	)	
EASTERN COAL CORPORATION	)	DATE ISSUED: 08/25/2016
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 Granting the Claimant's Request for Modification, Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Lois A Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting the Claimant's Request for Modification, Awarding Benefits (2012-BLA-5692) of Administrative Law Judge Alice M. Craft, rendered on a survivor's claim filed on October 31, 2006, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). In a previous Decision and Order issued on November 27, 2009, Administrative Law Judge Daniel F. Solomon found that the evidence of record was insufficient to establish that the miner suffered from complicated pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, or that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205. Accordingly, benefits were denied.

In consideration of an appeal filed by the Director, Office of Workers' Compensation Programs (the Director), the Board held that Judge Solomon erred in not considering whether claimant was entitled to invoke the rebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).[1] *See Hatfield v. Eastern Coal Corp*., BRB No. 10-0252 BLA, slip op at 2-3 (Dec. 17, 2010) (unpub.). Therefore, the Board vacated the denial of benefits and remanded the case for further consideration. *Id*.

In a Decision and Order on Remand issued on September 30, 2011, Judge Solomon determined that, because the miner did not suffer from a totally disabling respiratory or pulmonary impairment prior to his death, claimant was not entitled to invoke the Section 411(c)(4) presumption, and he denied benefits. Claimant filed a timely request for modification of that denial on December 14, 2011.

In her Decision and Order on Modification issued on October 30, 2015, which is the subject of this appeal, Judge Craft (the administrative law judge) reweighed the evidence that was before Judge Solomon and found that it was sufficient to establish that the miner had complicated pneumoconiosis. Specifically, the administrative law judge determined that Dr. Perper's opinion that the miner had complicated pneumoconiosis was "the best documented and reasoned medical report" and outweighed the contrary evidence of record. Decision and Order on Modification at 35. Thus, the administrative

[1] Under Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if he or she had at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and also suffered from a totally disabling respiratory or pulmonary impairment at the time of his or her death. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

law judge found that claimant invoked the irrebuttable presumption that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.304. *Id*. at 35-36. Based on that finding, the administrative law judge concluded that claimant established a mistake in a determination of fact pursuant to 20 C.F.R §725.310. The administrative law judge further found that granting modification would render justice under the Act, and she awarded benefits.

On appeal, employer asserts that the administrative law judge abused her discretion in reweighing the evidence and in finding that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Employer also asserts that the administrative law judge did not properly consider first whether granting modification would render justice under the Act, prior to considering claimant's entitlement to benefits. Claimant responds, urging affirmance of the award of benefits. The Director has declined to file a brief, unless specifically requested to do so by the Board.

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.[2] 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).

Employer argues that the administrative law judge "abused her discretion in weighing the evidence by substituting her opinion" for that of Judge Solomon, rather than "reviewing the prior denial for a judicial mistake in a determination of fact[.]" Employer's Brief at 7. Employer notes that Judge Solomon previously rejected Dr. Perper's opinion because he found that it was "based on many assumptions and that it [was] logically flawed." *Id*., *quoting* Director's Exhibit 65. Employer asserts that the administrative law judge must specifically identify a "judicial mistake of fact" in Judge Solomon's credibility finding in order to credit Dr. Perper's opinion. Employer's Brief at 8. According to employer, the administrative law judge's decision on modification "circumvented the [prior] denial and awarded benefits on little more than her difference in opinion" with Judge Solomon on the probative value of the evidence. *Id*. Employer contends that it has been denied due process and that "the result here wreaks havoc upon notions of finality." *Id*. at 9-10.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

We reject employer's argument that the administrative law judge abused her discretion in considering whether claimant established a mistake in a determination of fact in Judge Solomon's denial of benefits. 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 administrative law judge 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, 18 BLR 2-290, 2-996 (6th Cir. 1994). The administrative law judge 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. 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 administrative law judge] 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.

Worrell, 27 F.3d at 230, 18 BLR at 2-296, *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

Based on the foregoing principles, we conclude that the administrative law judge properly reflected on the evidence initially submitted, and permissibly found that claimant established a mistake in a determination of fact, both as to whether the miner suffered from complicated pneumoconiosis and as to the ultimate issue of entitlement. *O'Keeffe*, 404 U.S. at 256; *Worrell*, 27 F.3d at 230, 18 BLR at 2-296. Because employer does not raise any specific errors with regard to the administrative law judge's crediting of Dr. Perper's opinion as reasoned and documented, or her finding that his opinion outweighed the contrary evidence on the issue of complicated pneumoconiosis, those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 35-36. Thus, we affirm, the administrative law judge's finding that claimant established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.[3]

[3] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed

Skrack, 6 BLR at 1-711. We further affirm, as unchallenged by employer, the administrative law judge's finding that the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Id.*

Employer also argues that the administrative law judge should have determined whether granting modification would render justice under the Act before determining whether claimant established a mistake in a determination of fact. Employer's Brief at 8-9. We disagree. Because the need for accuracy is a relevant factor in determining whether granting modification would render justice under the Act, the administrative law judge rationally considered first whether claimant was able to establish that the miner had complicated pneumoconiosis and prove a mistake in a determination of fact, prior to reaching the issue of whether granting modification would render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F. 3d 317, 327-28, 25 BLR 2-157, 2-173-174 (4th Cir. 2012), *cert. denied*, 133 S.Ct. 2852 (2013); *Sharpe v. Director, OWCP* (*Sharpe I*), 495 F.3d 125, 131-132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007); *Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 541, 22 BLR 2-429, 2-444 (7th Cir. 2002). As employer does not otherwise assert any specific error with respect to the administrative law judge's finding that granting modification in this case renders justice under the Act, that finding is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 36-37.

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by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 387, 21 BLR 2-616, 2-624 (6th Cir. 1999).

Accordingly, the administrative law judge's Decision and Order Granting the Claimant's Request for Modification, Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge