BRB No. 00-0797 BLA

BILLY D. COMPTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PIKEVILLE COAL COMPANY D/B/A CHISHOLM MINE	)	DATE ISSUED:
	)	
and	)	
	)	
PIKEVILLE COAL COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Billy D. Compton, Thacker, West Virginia, *pro se*.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Barry H. Joyner (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, SMITH,

Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.
PER CURIAM:

Claimant appeals the Decision and Order (1998-BLA-1065) of Administrative Law Judge Robert L. Hillyard granting modification and denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] This case is before the Board for the second time. In the original Decision and Order, Administrative Law Judge Daniel L. Leland credited claimant with over thirty-two years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000). Judge Leland found that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b) and 718.204 (2000). Accordingly, benefits were awarded. Employer subsequently filed a motion for reconsideration, which the administrative law judge denied.

Employer appealed the award of benefits to the Board and in *Compton v. Chisholm Mine*, BRB No. 96-1092 BLA (Apr. 30, 1997)(unpub.), the Board affirmed the administrative law judge's findings regarding length of coal mine employment, date of entitlement and pursuant to Sections 718.202(a)(1), 718.203(b), 718.204(c)(1)-(4) and 718.204(b) (2000). Employer subsequently filed a motion for reconsideration, which the Board summarily denied. *Compton v. Chisholm Mine*, BRB No. 96-1092 BLA (July 23, 1997)(unpub. Order).

Within one year of the Board's affirmance of the award of benefits, employer requested modification and submitted new medical evidence. Judge Hillyard (the administrative law judge) found that the newly submitted evidence was sufficient to establish that a mistake in a determination of fact was made in the prior award of benefits which warranted modification of the award pursuant to 20 C.F.R. §725.310 (1999).[2] Accordingly, benefits were denied.

On appeal, claimant generally asserts that the administrative law judge erred

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

in granting modification and failing to award benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has indicated that she will not participate in this appeal unless requested to do so by the Board.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant and employer have not responded to the Board's Order.[3] Based on the brief submitted by the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, are supported by substantial evidence, and are in accordance with 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718 (2000), claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000). Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v.*

[3] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

Director, OWCP, 9 BLR 1-1 (1986).

Section 22 of the Longshore Act, 33 U.S.C. §922 (the statute underlying 20 C.F.R. §725.310) (1999), provides in part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim, review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation . . . .

33 U.S.C. §922.

The United States Court of Appeals for the Sixth Circuit has stated that "the purpose of this section is to permit a[n] [administrative law judge] to modify an award where there has been 'a mistake in a determination of fact [which] makes such a modification desirable in order to render justice under the act.'" *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-108 (6th Cir. 1982), quoting *Banks v. Chicago Grain Trimmers Association, Inc*., 390 U.S. 459, 464 (1968). The administrative law judge has the authority "to reconsider all the evidence for any mistake of fact or change in conditions," *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994), but the "exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw v. Stevens Shipping and Terminal Co*., 33 BRBS 68, 72 (1999), *aff'd sub nom. Stevens Shipping Co. v. Kinlaw*, 238 F.3d 414 (Table) (4th Cir. 2000)(unpub.). In reviewing the record as a whole on a request for modification, an 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); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 296 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 724, 18 BLR 2-26, 2-28 (4th Cir. 1993). "An administrative law judge must not lightly consider reopening a case at the behest of a party who, right or wrong, could have presented its side of the case at the first hearing." *Branham v. BethEnergy Mines, Inc*., 21 BLR 1-79, 1-82 (1998)(McGranery, J., dissenting). Nor is modification intended to protect litigants

from their counsel's litigation mistakes. *Kinlaw*, 33 BRBS at 74. Consequently, an administrative law judge should consider whether reopening will render justice by balancing the interest in obtaining a "correct" result against the need for finality in decision making. *Id*., at 73.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. In the previous decision awarding benefits, Judge Leland found that the evidence was sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis. Specifically, Judge Leland found that Dr. Baker's March 17, 1995, report was sufficient to establish total respiratory disability pursuant to Section 718.204(c)(4) (2000) because the physician checked the "no" box to indicate that claimant was unable to perform his usual coal mine employment from a respiratory standpoint. Director's Exhibit 36.

In considering employer's request for modification, the administrative law judge considered the newly submitted x-ray readings, pulmonary function studies, blood gas studies and medical opinions of record, along with the previously submitted medical evidence of record. In its petition for modification, employer provided a transcript of Dr. Baker's April 27, 1998, deposition wherein Dr. Baker was questioned about his prior examination of claimant and his opinion that claimant was totally disabled due to pneumoconiosis. The administrative law judge discussed Dr. Baker's answer at the deposition when asked whether claimant is disabled from doing comparable and gainful work in a dust free environment. Dr. Baker responded: "No, ma'am, he's not. He doesn't have a degree of disability from that standpoint." Decision and Order at 8; Director's Exhibit 69, Dep. p. 12. Dr . Baker went on to agree that claimant could perform comparable, gainful work in his coal mine employment so long as it was performed in a dust free environment. *Id*.

Based on his review of the deposition testimony, the administrative law judge found that Dr. Baker effectively recanted his disability assessment in the earlier medical report. Decision and Order at 8. The administrative law judge noted that in *Branham*, *supra*, "[w]here recanted medical opinions constituted newly submitted evidence, evidence which was not available in the prior determination, the Board found that the Administrative Law Judge properly exercised his discretion in finding that reopening the case would render justice under the Act." Decision and Order at 8. The administrative law judge, after indicating his discretionary authority in considering the appropriateness of modification, found that Dr. Baker's report was insufficient to establish total disability, and thus reasonably found that employer established that a mistake in a determination of fact had been made in the prior

award of benefits. Decision and Order at 8-9. The administrative law judge thus properly considered the newly submitted evidence of record and reasonably determined that it established a mistake in a determination of fact in the prior award pursuant to Section 725.310 (1999). The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Accordingly, we affirm the administrative law judge's finding that the previous determination that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c) (2000) constituted a mistake in a determination of fact and we affirm the administrative law judge's finding that the newly submitted medical opinion evidence fails to establish total respiratory disability thereunder as they are supported by substantial evidence. Claimant's failure to establish total respiratory disability pursuant to Section 718.204(c) (2000) or 65 Fed. Reg. 80,049, to be codified at 20 C.F.R. §718.204(b), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *Anderson, supra*; *Trent*, *supra*. Consequently, we affirm the administrative law judge's modification of the prior award of benefits to a denial of benefits.[4] *See King v. Jericol Mining, Inc.*, F.3d , BLR 2- , No. 99-4501 (6th Cir., Apr. 18, 2001); *Worrell*, *supra*.

[4] In addressing the other evidence of record, the administrative law judge permissibly concluded that the newly submitted evidence of record failed to establish total disability because none of the objective tests are qualifying, there is no evidence of cor pulmonale and Dr. Broudy and Younes both concluded that claimant was not totally disabled due to a respiratory or pulmonary impairment. Decision and Order at 8-9; *see Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986).

Accordingly, the administrative law judge's Decision and Order granting modification and denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge