BRB No. 10-0426 BLA

ROBERT E. HILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 04/29/2011
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denial of Benefits on Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Robert E. Hill, Marion, Kentucky, pro se.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denial of Benefits on Modification of Administrative Law Judge Daniel F. Solomon, issued on March 11, 2010, on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). Claimant filed his claim for benefits on July 6, 2006, and benefits were denied by Administrative Law Judge Jeffrey Tureck on December 7, 2007, on the ground that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Claimant filed a timely request for modification on January 2, 2008 and submitted additional evidence. The district director denied modification and, at claimant's request, the case

was forwarded to the Office of Administrative Law Judges (OALJ) for a hearing, which was held on August 25, 2009, before Judge Solomon (the administrative law judge). In his March 11, 2010 Decision and Order, which is the subject of this appeal, the administrative law judge accepted the parties' stipulation of at least fourteen years of coal mine employment and adjudicated the claim under the regulations at 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and denied benefits.

On appeal, claimant asserts that the administrative law judge erred in failing to consider all of the relevant evidence as to his entitlement to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response to claimant's appeal unless specifically requested to do so by the Board. The Director, however, notes that the recent amendments to the Act are not applicable to this case, based on the filing date of the claim.[1]

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). Because claimant filed his claim on July 6, 2004, we agree with the Director, Office of Workers' Compensation Programs, that the amendments are not applicable to this case.

[2] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 6.

I. Evidentiary Limitations

Claimant contends in this appeal that the administrative law judge erred in failing to consider the opinion of Dr. Gary James, his treating physician. Based on our review, we conclude that claimant's contention has merit, in part. The relevant procedural history is as follows.

While the case was before Judge Tureck, claimant submitted a medical report by Dr. James, dated July 18, 2004. In conjunction with his modification request, but subsequent to the district director's Proposed Decision and Order denying benefits on modification, claimant filed a second report by Dr. James, dated August 25, 2008. By letter dated September 10, 2008, the district director advised claimant that this evidence could not be included in the Director's Exhibits, but further informed him that the report would be forwarded to OALJ and a copy provided to the other parties of record.

At the August 25, 2009 hearing before the administrative law judge, claimant stated that he wished to submit, post-hearing, as Claimant's Exhibit 2, a report being prepared by Dr. Houser, based on Dr. Houser's examination of claimant on July 29, 2009. August 25, 2009 Hearing Transcript at 6. Claimant also submitted as Claimant's Exhibit 6, a report by Dr. Rasmussen, dated August 12, 2009.[3] *Id.* at 7. Employer objected to the admission of the reports by Drs. Houser and Rasmussen, asserting that there were limits to the amount of evidence claimant could submit on modification, and that claimant was not entitled to submit three medical reports, by Drs. James, Houser and Rasmussen.[4] *Id.* at 10. Employer also noted that until claimant designated his evidence, employer would be unable to determine what evidence it should designate in rebuttal. *Id.* at 8. The administrative law judge ruled on employer's objection as follows:

> JUDGE SOLOMON: All right, here's what we're going to do. You've given me seven exhibits. I'm going to leave the record open. . . . So at this point, I'm not going to make a determination one way or the other on what is the designated evidence until we have all of the evidence. Then we will make a determination. So, we can do this through by [sic] leaving the

[3] Prior to the hearing, claimant submitted a black lung evidence summary, on August 5, 2009, designating as initial evidence, the reports of Drs. Houser and Rasmussen.

[4] Employer also objected to the admission of Dr. Houser's report because it was not exchanged with employer in accordance with the twenty-day rule at 20 C.F.R. §725.456(b). August 25, 2009 Hearing Transcript at 11.

> record open[,] and we can do a telephone conference after the fact and come back and address each one of these issues.

Id.

After the hearing, on September 21, 2009, claimant submitted Dr. Houser's report. By letter dated October 6, 2009, claimant informed the administrative law judge and employer that he would be relying on Dr. Houser's report for his claim. During a telephone conference conducted on November 16, 2009, the administrative law judge asked claimant to clarify the evidence he was relying on to support his case. The following discussion transpired:

> JUDGE SOLOMON: So, how many reports are there in number?
>
> . . .
>
> MR. YONTS [Claimant's Counsel]: It's going to be, medical reports, we're relying on Dr. Hauser [sic] and not Dr. Rasmussen. This is a modification, right?
>
> JUDGE SOLOMON: You get one each.
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> MR. YONTS: Right. So, I'm relying on Hauser [sic], for the medical reports and not Rasmussen.
>
> JUDGE SOLOMON: Here is my ruling. My ruling is you get one each and you get one rebuttal each.

Transcript of Telephone Conference at 7-8. Based on claimant's designation of Dr. Houser's report, employer submitted, in rebuttal, a medical report by Dr. Repsher, based on Dr. Repsher's post-hearing examination of claimant on October 29, 2009.[5] *Id*. at 9. Subsequently, the parties submitted evidence summary forms designating their evidence and the record was closed.

The regulations at 20 C.F.R. §§725.414 and 725.310(b) establish combined evidentiary limitations. *See* 20 C.F.R. §§725.2(c), 725.414, 725.310(b). The applicable provisions permit claimant and employer to submit two medical reports in support of their affirmative case, pursuant to 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), and one medical report on modification, pursuant to 20 C.F.R. §725.310(b). In *Rose v. Buffalo Mining*

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[5] Employer noted that it had previously submitted Dr. Hippensteel's consultation report as rebuttal evidence, but was withdrawing that submission and substituting Dr. Repsher's report. Transcript of Telephone Conference at 9.

Co., 23 BLR 1-221, 1-227 (2007), the Board held that, if a party did not submit the full complement of evidence allowed by 20 C.F.R. §725.414, in support of its affirmative case in the underlying claim, that party would be permitted on modification to submit any additional evidence allowed under 20 C.F.R. §725.414, as well as the additional medical evidence allowed by 20 C.F.R §725.310(b). *Rose*, 23 BLR at 1-227.

Based on the facts of this case, we conclude that it is necessary to vacate the administrative law judge's Decision and Order and remand this case for further consideration by the administrative law judge as to whether the parties have been given the opportunity to properly designate their evidence in accordance with 20 C.F.R. §§725.414, 725.310 and the holding in *Rose*. Although the administrative law judge correctly observed during the telephone conference that the parties are entitled to submit one medical report on modification, he did not also consider whether the parties were entitled to submit, under *Rose*, any additional evidence to complete their complement of evidence permitted at 20 C.F.R. §725.414. We note that it is unclear whether claimant's attempt to submit both Dr. James's August 25, 2008 report and Dr. Rasmussen's August 12, 2009 report was in compliance with 20 C.F.R. §725.414. Therefore, we vacate the administrative law judge's Decision and Order and instruct the administrative law judge, on remand, to reconsider the content of the evidentiary record in this case, and to give the parties the opportunity to designate their evidence in accordance with both 20 C.F.R. §§725.414 and 725.310(b).

II. Modification

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement, which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely upon further reflection on the evidence of record. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001); *Consolidation Coal Corp. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994).

In this case, the administrative law judge failed to consider the threshold issue of whether the new evidence submitted on modification was sufficient to establish a change

in conditions regarding the existence of pneumoconiosis at 20 C.F.R. §718.202(a), or whether there was a mistake in a determination of fact with regard Judge Tureck's denial of benefits. Therefore, we instruct the administrative law judge on remand to reconsider the newly submitted evidence to determine whether claimant established the existence of pneumoconiosis and, if so, to then consider all the evidence of record on each of the elements of entitlement. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni,* 17 BLR at 1-83. Moreover, the administrative law judge must determine whether claimant has demonstrated a mistake in a determination of fact with regard to Judge Tureck's denial of benefits, as demonstrated by wholly new evidence, cumulative evidence, or merely upon further reflection on the evidence already submitted. *See King,* 246 F.3d at 825, 22 BLR at 2-310; *Worrell*, 27 F.3d at 230, 18 BLR at 2-996.

III. Instructions on Remand

To summarize, we instruct the administrative law judge on remand to consider the evidentiary record in light of *Rose* and, as necessary, reopen the record to give the parties the opportunity to designate their evidence, as appropriate. The administrative law judge should also allow for the submission of any additional rebuttal evidence, depending on the parties' designation of their affirmative evidence. Once the evidentiary record is closed, the administrative must determine whether claimant has established a basis for modification of the denial of benefits by Judge Tureck pursuant to 20 C.F.R. §725.310. In evaluating whether claimant has established modification, based on a change in conditions, the administrative law judge must determine whether the new evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 575, 22 BLR 2-107, 2-119 (6th Cir. 2000). If a change in conditions is established, the administrative law judge must then consider all of the evidence of record, as to claimant's entitlement to benefits. In addition, the administrative law judge has the authority to consider all the evidence of record regarding whether there has been a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.

As to the issue of total disability, if reached, the administrative law judge must consider all of the record evidence and render findings under each of the subsections of

20 C.F.R. §718.204(b)(2)(i)-(iv).[6] Thereafter, he must weigh all of the contrary probative evidence together in determining whether claimant has satisfied his burden to prove total disability. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991) (*en banc*); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). As necessary, the administrative law judge must also determine whether claimant has established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). In rendering his decision on remand, the administrative law judge must explain the bases for all of his credibility determinations in accordance with the Administrative Procedure Act.[7] *See Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989).

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[6] Because the administrative law judge did not weigh a qualifying pulmonary function test, dated June 15, 2008, contained in claimant's treatment records at Employer's Exhibit 4, we instruct the administrative law judge, on remand, to consider this evidence in determining whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

[7] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order Denial of Benefits on Modification is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge