BRB No. 97-1341 BLA

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| PAUL E. OSBORNE | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| ISLAND CREEK COAL COMPANY | ) | DATE ISSUED: |
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| 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 of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Daniel Sachs (United Mine Workers of America, Legal Department), Castlewood, Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-0956 and 96-BLA-1454) of Administrative Law Judge Paul H. Teitler 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). Claimant filed a claim on September 11, 1992. In the initial Decision and Order, the administrative law judge, after accepting the parties' stipulations of at least eighteen years of coal mine employment and total disability, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The

administrative law judge also found the evidence insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. By Decision and Order dated March 30, 1995, the Board affirmed the administrative law judge's finding that claimant failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Osborne v. Island Creek Coal* Co., BRB No. 94-3988 BLA (Mar. 30, 1995) (unpublished). The Board, therefore, affirmed the administrative law judge's denial of benefits. *Id.* Claimant subsequently requested modification of his denied claim. Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, the administrative law judge denied claimant's request for modification. On appeal, claimant contends that the administrative law judge erred in failing to find a change in conditions. Claimant also argues that the administrative law judge failed to properly consider whether there was a mistake in a determination of fact. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant argues that the administrative law judge erred in failing to find a change in conditions pursuant to 20 C.F.R. §725.310. The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered 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). In the prior decision, the Board affirmed the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Osborne*, *supra*. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).

In the instant case, the administrative law judge found that the newly

submitted medical evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Decision and Order at 5-9. The administrative law judge, therefore, found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. *Id.* at 9.

We note that claimant has not cited any newly submitted evidence which would support a finding of pneumoconiosis or a finding of total disability due to pneumoconiosis. Claimant's sole contention regarding the issue of a change in conditions is that the opinions of Drs. Fino, Sargent, Jarboe and Morgan should have been given little weight because their opinions are inconsistent with the holding of the United States Court of Appeals for the Fourth Circuit in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). However, inasmuch as these opinions do not support a finding of pneumoconiosis or total disability due to pneumoconiosis, the administrative law judge's error, if any, in his consideration of these opinions constitutes harmless error. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We, therefore, affirm the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310.

Claimant also contends that the administrative law judge failed to properly consider whether there was a mistake in a determination of fact. The United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction in the instant case arises, has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Claimant, in his closing argument,[1] contended that the administrative law judge had committed a mistake in a determination of fact inasmuch he failed to "use the legal definition of [pneumoconiosis]." Claimant's Closing Argument at 2. In his most recent decision, the administrative law judge set out the legal definition of pneumoconiosis under 20 C.F.R. §718.201 and acknowledged that a diagnosis of emphysema could constitute a finding of legal pneumoconiosis if it was found to be related to coal dust exposure. Decision and Order at 10. The administrative law judge, however, after reviewing his prior Decision and Order and the medical evidence of record, found that there was not a mistake in a determination of fact and that the medical evidence of record did not support a finding of legal pneumoconiosis. *Id.* at 11.

[1]The parties did not object to the case being decided on the record. Claimant and employer each submitted closing arguments.

Claimant contends that the administrative law judge did not properly review the medical evidence to determine whether claimant's emphysema was caused or aggravated by coal dust exposure. In support of his contention that the previously submitted evidence is sufficient to establish the existence of pneumoconiosis, claimant references the evidence admitted as Director's Exhibits 20, 24 and 37. Claimant's Brief at 3. This evidence consists of the results of a December 3, 1992 pulmonary function study conducted by Dr. Sargent (Director's Exhibit 20); Dr. Forehand's October 13, 1992 report (Director's Exhibit 24); and Dr. Forehand's January 15, 1993 report (Director's Exhibit 37).

Claimant's December 3, 1992 pulmonary function study does not support a finding of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 20. Moreover, the Board previously held that the administrative law judge acted within his discretion in finding that the opinions of Drs. Forehand and Rasmussen, who opined that claimant was totally disabled due to pneumoconiosis, were not well-reasoned inasmuch as their smoking histories were not supported by the record and Dr. Forehand's opinion was equivocal. *Osborne*, slip op. at 2. In light of the Board's previous affirmance of the administrative law judge's rejection of the opinions of Drs. Forehand and Rasmussen, we affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge