BRB No. 99-1180 BLA

DENVER T. SIZEMORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
TRANSCO ENERGY, INCORPORATED	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denial of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Timothy J. Walker, London, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand - Denial (96-BLA-0194) of Administrative Law Judge Gerald M. Tierney 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). The case is before the Board for the third time. In the initial Decision

[1] Claimant is Denver T. Sizemore, the miner, who filed his application for benefits on August 21, 1992. Director's Exhibit 1.

and Order, Administrative Law Judge Bernard J. Gilday, Jr. adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited the miner with twenty-four and three-quarter years of qualifying coal mine employment. Next, Administrative Law Judge Gilday found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability due, at least in part, to pneumoconiosis. Accordingly, benefits were denied. Director's Exhibit 39. Claimant timely appealed and the Board affirmed Administrative Law Judge Gilday's determinations under 20 C.F.R. §718.202(a)(1)-(4), and therefore, affirmed the denial of benefits. *Sizemore v. Leeco, Inc.*, BRB No. 94-0785 BLA (Nov. 4, 1994)(unpub.); Director's Exhibit 50. Subsequently, claimant filed a petition for modification.

On modification, Administrative Law Judge Gerald M. Tierney (administrative law judge) noted the parties' stipulation that claimant worked in qualifying coal mine employment for twenty-five years. Next, the administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) or (a)(4), and that claimant, therefore, failed to establish modification pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

Claimant appealed and the Board affirmed the administrative law judge's finding that the newly submitted evidence did not establish total disability inasmuch as this determination was unchallenged on appeal, but vacated his determinations that claimant failed to establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(1), (a)(4), and a change in conditions pursuant to Section 725.310. The Board remanded the case for further consideration and, in addition, instructed the administrative law judge to review all relevant evidence of record to determine whether a mistake in a determination of fact was demonstrated. *Sizemore v. Leeco, Inc.*, BRB No. 97-0548 BLA (Jan. 28, 1998) (unpub.).

On remand, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and, therefore, a change in conditions under Section 725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erroneously evaluated the x-ray evidence under Section 718.202(a)(1) and impermissibly failed to render determinations regarding the existence of pneumoconiosis under Section 718.202(a)(4) or a mistake in a determination of fact under Section 725.310. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's

findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 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).

Relevant to Section 718.202(a)(1), claimant argues that the administrative law judge erred by failing to find that the newly submitted x-ray evidence established the existence of pneumoconiosis. Claimant's argument lacks merit. After considering the radiological qualifications of the readers, the administrative law judge, within a permissible exercise of his discretion, found that the newly submitted x-ray readings when considered with all of the x-ray evidence failed to establish the existence of pneumoconiosis, and therefore, a change in the previous determination. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order on Remand at 2; Director's Exhibits 53-58. Inasmuch as this determination is rational and supported by substantial evidence, we affirm the administrative law judge's Section 718.202(a)(1) finding. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order on Remand at 2; Director's Exhibits 20-24, 32, 54-58.[2]

[2] Claimant mistakenly cites to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), which articulates the duplicate claims standard set forth at Section 725.309. This standard is inapplicable to the instant case inasmuch as this case involves a petition for modification pursuant to Section 725.310, not a duplicate claim. *See* 20 C.F.R. §§725.309, 725.310.

Claimant argues that the administrative law judge failed to determine whether the medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) in accordance with the Board's remand instructions. We agree. In its previous Decision and Order, the Board vacated the administrative law judge's discrediting of Dr. Bushey's medical opinion pursuant to Section 718.202(a)(4) inasmuch as it was based on x-ray evidence[3] and specifically instructed the administrative law judge to reconsider the newly submitted medical opinion evidence to determine whether claimant established the existence of pneumoconiosis. [1998] *Sizemore*, *slip op*. at 3. After noting that this case involved a petition for modification on remand from the Board, the administrative law judge analyzed only whether the newly submitted x-ray evidence established the presence of pneumoconiosis, and not whether the newly submitted medical opinion evidence established the existence of pneumoconiosis, as ordered by the Board. Decision and Order on Remand at 1-2. Hence, we remand the case for the administrative law judge to reconsider whether the newly submitted medical opinion evidence demonstrates the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See* 20 C.F.R. §718.202(a)(4); *see generally Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997).

[3] Dr. Bushey's report consists of a description of physical findings based on an April 28, 1995 examination of claimant, a description of symptoms, a work history, the results of a pulmonary function study and an x-ray. Dr. Bushey diagnosed chronic lung disease with pulmonary emphysema and fibrosis, compatible with coal workers' pneumoconiosis 2/2, q/p, em. Director's Exhibit 53.

Claimant similarly contends that the administrative law judge failed to render a mistake in a determination of fact finding under Section 725.310. The Board specifically instructed the administrative law judge "to review all relevant evidence and determine whether the evidence demonstrates a mistake in a determination of fact." *See* [1998] *Sizemore*, *slip op*. at 3. Further, we note that the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that "the trier of fact has the authority simply to rethink a prior finding of fact" and that "[i]f a claimant merely alleges that the ultimate fact... was wrongly decided, the [trier of fact] may, if he chooses, accept this contention and modify the final order accordingly." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-295-296 (6th Cir. 1994); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-14-15 (1994)(*en banc*). The court held further that, "once a request for modification is filed, no matter the grounds stated, if any, the trier of fact has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions." *Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Kingery*, 19 BLR at 1-15. Although, the administrative law judge referred to the findings regarding the x-ray and medical opinion evidence made by Administrative Law Judge Gilday in his earlier Decision and Order, and found that "when considered together all the x-ray evidence failed to prove pneumoconiosis," the administrative law judge did not consider the new medical opinion in determining whether a mistake in a determination of fact had been made. Decision and Order on Remand at 2. We therefore remand the case for the administrative law judge to render such a determination.[4] *See Worrell*, *supra*; *Kingery*, *supra*.

If the administrative law judge determines that either a mistake in a determination of fact or change in conditions has been demonstrated, he must then review the entire record and render a decision on the merits of entitlement under 20 C.F.R. Part 718.

Accordingly, the Decision and Order on Remand - Denial of the administrative law judge is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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[4] The administrative law judge erroneously stated that the Board's decision affirming Administrative Law Judge Gilday's denial was dated May 10, 1995, when this decision was dated November 4, 1994. This error, however, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order on Remand at 1.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge