BRB No. 02-0861 BLA

ROY R. HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED:
	)	08/07/2003
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 on Remand Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Roy R. Hall, Big Rock, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (1999-BLA-01340) of Administrative Law Judge Daniel F. Sutton rendered 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 third time.

Claimant=s application for benefits filed on August 28, 1995 was denied by Administrative Law Judge Frederick D. Neusner, who found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1), but did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. '718.204(c)(2000). Director's Exhibits 1, 42. Although claimant had submitted an October 24, 1995 exercise blood gas study conducted by Dr. Forehand that was both qualifying

[2] and valid, Director's Exhibits 13, 14, the administrative law judge chose to credit a May 15, 1996 non-qualifying exercise blood gas study and Dr. Sargent=s opinion that the 1995 study likely reflected a transient condition, to find that claimant was not totally disabled. Upon review of claimant=s appeal, the Board affirmed the administrative law judge=s decision denying benefits. *Hall v. Dominion Coal Corp.*, BRB No. 97-0766 BLA (Jan. 28, 1998)(unpub.); Director's Exhibits 52, 55.

Thereafter, claimant timely requested modification. Director's Exhibit 56; *see* 33 U.S.C. '922, implemented by 20 C.F.R. '725.310(2000). In support of his modification request, claimant submitted a report of a February 4, 1998 blood gas study in which Dr. Forehand measured claimant=s arterial blood oxygen at rest, during exercise, and after exercise. Director's Exhibit 70. The test yielded non-qualifying values at rest, qualifying values during exercise, and non-qualifying values two minutes after exercise. *Id*. Dr. Forehand compared these results with those of the blood gas study he previously conducted on October 24, 1995, which had been non-qualifying at rest and qualifying during exercise. Finding the results of the two tests Aessentially identical,@ Dr. Forehand concluded that AMr. Hall has a totally and permanently disabling respiratory impairment of a gas exchange nature . . . .@ Director's Exhibit 70 at 2. Dr. Forehand criticized the May 15, 1996 non-qualifying exercise blood gas study previously cited by Dr. Sargent and Judge Neusner as proof of non-disability. Dr. Forehand pointed out that A[b]lood samples for arterial blood gas analysis must be drawn during exercise,@ not after exercise as was done on May 15, 1996. Director's Exhibit 70 at 2. Dr. Forehand noted that on February 4, 1998, he took a sample of claimant=s arterial blood two minutes after exercise Ato demonstrate that the pO2 will

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[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] A Aqualifying@ objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. *See* 20 C.F.R. '718.204(b)(2)(i),(ii). A Anon-qualifying@ study exceeds those values.

rapidly return to the normal range after falling abnormally low during exercise.@ Director's Exhibit 70 at 1-2. Dr. Forehand thus rejected the previous opinions of Drs. Castle and Sargent questioning the October 1995 qualifying exercise blood gas study based on the May 1996 exercise blood gas study, and concluded that A[i]f properly evaluated, . . . Mr. Hall=s respiratory impairment is still present and is irreversible . . . , as I have shown on two occasions separate[d] by an interval of greater than two years.@ Director's Exhibit 70 at 2. Dr. Forehand opined that claimant=s total disability is due to pneumoconiosis. *Id*.

Employer responded to claimant=s modification request with the September 8, 1999 medical examination report of Dr. Castle, and the January 3, 2000 consultation report of Dr. Fino. Employer's Exhibits 1, 9. Both physicians opined that claimant was not totally disabled, based on pulmonary function studies, diffusion capacity tests, and prior blood gas studies.[3] Review of the record discloses no evidence from employer in response to Dr. Forehand=s criticism of Dr. Sargent=s May 1996 exercise blood gas study previously credited by Judge Neusner.

Administrative Law Judge Daniel F. Sutton considered claimant=s request for modification on the record because the parties waived their right to a hearing. *See* 20 C.F.R. '725.461(a); *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 429, 21 BLR 2-495, 2-504 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 390, 21 BLR 2-384, 2-388-89 (6th Cir. 1998); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000). The administrative law judge first found that no mistake in a determination of fact was established because Judge Neusner Aproperly evaluated and weighed the evidence of record as it existed before him@ in finding that claimant was not totally disabled. [2000] Decision and Order Awarding Benefits at 4. The administrative law judge determined that the weight of the new blood gas study and medical opinion evidence submitted on modification established a change in conditions by demonstrating that claimant was totally disabled pursuant to 20 C.F.R. '718.204(c)(2),(c)(4)(2000). The administrative law judge additionally accorded greater weight to Dr. Forehand=s new medical opinion and found that claimant=s total disability was due to pneumoconiosis pursuant to 20 C.F.R. '718.204(b)(2000). Accordingly, the administrative law judge awarded benefits. Because claimant did not establish a mistake in a determination of fact but rather a change in conditions pursuant to 20 C.F.R. '725.310(2000), the administrative law judge awarded benefits as of April 1998, the month in which claimant filed his modification request.

Upon review of employer=s appeal, the Board rejected all of employer=s allegations of error in the administrative law judge=s weighing of the medical evidence and held that substantial evidence supported the administrative law judge=s findings regarding claimant=s entitlement. *Hall v. Dominion Coal Corp*., BRB No. 00-1083 BLA (Oct. 10, 2001)(unpub.).

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[3] The record reflects that claimant declined to undergo a blood gas study during Dr. Castle=s examination because he had experienced discomfort following the February 1999 blood gas study. Employer's Exhibit 1 at 3.

The Board thus affirmed the award of benefits. However, the Board held that the administrative law judge failed to consider whether the ultimate fact of entitlement was correctly decided previously by Judge Neusner. *Hall*, slip op. at 13. The Board therefore vacated the administrative law judge=s mistake of fact and change in conditions findings, and remanded the case for him to reconsider the basis for granting modification and to then set the onset date accordingly. In this context, the Board directed the administrative law judge=s attention to Dr. Forehand=s critical analysis of the exercise blood gas study evidence previously relied upon by Judge Neusner in denying benefits, and to Dr. Forehand=s opinion that claimant has been totally disabled all along.

On remand, the administrative law judge found that Athere was a mistake in Judge Neusner=s determination that total respiratory disability was not established by either arterial blood gas study evidence pursuant to 20 C.F.R. '718.204(c)(2) or medical opinion evidence pursuant to 20 C.F.R. '718.204(c)(4).@ Decision and Order on Remand at 7. Taking into account 20 C.F.R. '718.105(b)(2000), which provides that A[i]f an exercise blood-gas test is administered, blood shall be drawn during exercise,@ the administrative law judge found that Dr. Forehand=s October 1995 and February 1998 exercise blood gas studies were properly conducted, whereas Dr. Sargent=s May 1996 after exercise blood gas study incorrectly measured claimant=s blood oxygen after exercise. The administrative law judge also considered Dr. Forehand=s demonstration that claimant=s arterial blood oxygen level rapidly returned to normal when it was sampled after exercise, even though it had dropped to a qualifying level during exercise. The administrative law judge found that A[g]iven this significant difference in test methodology, I conclude that the evidence does not show that the Claimant=s condition improved after the 1995 study as found by Judge Neusner.@ Decision and Order on Remand at 7. The administrative law judge found the occurrence of a mistake in the prior determination Areinforced@ by the new evidence submitted on modification, because Dr. Forehand=s February 1998 blood gas testing Aagain produced qualifying results during exercise,@ and because Dr. Forehand Aprovided the well-reasoned and documented opinion . . . that the Claimant is permanently and totally disabled due to pneumoconiosis.@ *Id*. For the reasons set forth in his prior decision and affirmed by the Board, the administrative law judge found that Dr. Forehand=s opinion outweighed those of Drs. Fino and Castle, and concluded that Athe ultimate fact of total disability due to pneumoconiosis was wrongly determined.@ Decision and Order on Remand at 8. Upon review of the record, the administrative law judge found that the evidence did not establish the onset date, but merely demonstrated that claimant became totally disabled due to pneumoconiosis at some time prior to Dr. Forehand=s October 25, 1995 examination and testing. Since there was no credited evidence that claimant was not totally disabled due to pneumoconiosis at any point subsequent to the filing date of his claim, the administrative law judge set the onset date as August 1, 1995, the month in which claimant filed his application for benefits.

On appeal, employer contends that the administrative law judge erred in finding that a mistake in a determination of fact was established and in setting the claim filing date as the

onset date of total disability due to pneumoconiosis. Claimant responds, urging affirmance, and the Director, Office of Workers= Compensation Programs (the Director), responds, urging the Board to reject employer=s argument that the administrative law judge=s decision to grant modification based on a mistake of fact violates the law of the case doctrine.

The Board=s scope of review is defined by statute. The administrative law judge=s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. '901; 20 C.F.R. ''718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 22 of the Longshore Act, 33 U.S.C. '922 (the statute underlying 20 C.F.R. '725.310), 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, within whose jurisdiction this case arises, has recognized that Aby its plain language, 33 U.S.C. '922 is a broad reopening provision that is available to employers and employees alike.@ *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825, 22 BLR 2-305, 2-310 (6th Cir. 2001). When a request for modification is filed, A[t]he fact-finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence for any mistake in fact,@ *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 743, 21 BLR 2-203, 2-210 (6th Cir. 1997), including whether Athe ultimate fact (disability due to pneumoconiosis) was wrongly decided . . . .@ *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Employer contends that the administrative law judge=s decision to reweigh the evidence and grant modification based on a mistake of fact violates the law of the case

doctrine because the Board previously affirmed Judge Neusner=s credibility determinations. Employer's Brief at 13-16. Employer=s contention lacks merit, because claimant timely requested modification under Section 22, a broad reopening provision that displaces finality rules. *See Banks v. Chicago Grain Trimmers Ass=n*, 390 U.S. 459, 461-65 (1968)(Section 22 displaces *res judicata*); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 293 F.3d 533, 541, 22 BLR 2-429, 2-444 (7th Cir. 2002)(Wood, J., dissenting)(Section 22 articulates Aa preference for accuracy over finality . . . .@); *King*, 246 F.3d at 824-25, 22 BLR at 2-309-10 (An employer can pursue modification even though the Board has affirmed the administrative law judge=s decision awarding benefits.); *Betty B Coal Company v. Director, OWCP* [*Stanley*], 194 F.3d 491, 499, 22 BLR 2-1, 2-13 (4th Cir. 1999)(A[T]he factfinder is in no way bound by the findings supporting the original denial.@).

Employer notes correctly that in *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999), the Sixth Circuit court suggested that the law of the case doctrine might foreclose modification by an administrative law judge of an issue previously decided by a superior tribunal. *Milliken*, 200 F.3d at 950, 22 BLR at 2-58 (Observing that Aagencies and ALJ=s, of course, are not free to ignore this court=s mandates,@ and describing the mandate rule as Apart of the . . . >law of the case doctrine.=@). But in *Milliken*, the court specified that if an appellate court has not actually decided a particular issue, nothing forecloses a subsequent administrative law judge from modifying a compensation order based on that issue. *Milliken*, 200 F.3d at 950-51, 22 BLR at 2-59-60. Here, the Board never addressed the issue of the validity of the exercise blood gas studies in its prior decision affirming the denial of benefits. Thus, contrary to employer=s contention, nothing in the Board=s prior decision foreclosed the administrative law judge from considering modification based on an alleged mistake in the prior analysis of the blood gas study evidence. *See Milliken*, 200 F.3d at 951, 22 BLR at 2-60; *Stanley*, 194 F.3d at 499, 22 BLR at 2-13. Therefore, we reject employer=s contention that the administrative law judge erred by reconsidering the blood gas study evidence on modification.

Employer next argues that since claimant did not raise the technical validity of Dr. Sargent=s May 1996 exercise blood gas study in the initial litigation of his claim, he waived that issue and the administrative law judge erred in considering it on modification. Employer's Brief at 24. In *Milliken*, the court rejected the argument that the claimant had waived the issue upon which she premised her modification petition. The court held that although the claimant failed to pursue the widow=s presumption argument before the Board and the Sixth Circuit court in the initial litigation of her claim, she could properly raise the argument on modification. *Milliken*, 200 F.3d at 955, 22 BLR at 2-67-68 (Describing the waiver rule as Aprudential and not jurisdictional.@). Moreover, reliance on waiver is misplaced where a timely request for modification is filed. *See Hilliard*, 292 F.3d at 547, 22 BLR at 2-454 (A[A] modification request cannot be denied solely because it contains argument . . . that could have been presented at an earlier stage in the proceedings . . . .@); *Worrell*, 27 F.3d at 230, 18 BLR at 2-296 (Once a modification request is filed, the administrative law judge Ahas the authority, if not the duty, to reconsider all the evidence for

any mistake of fact . . . .@); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-29 (4th Cir. 1993)(Finality principles do not apply where modification is timely sought.). Thus, we reject employer=s waiver argument.

Employer alleges that even if the administrative law judge could reach the exercise blood gas study issue, he improperly acted as a medical expert in questioning the technical validity of Dr. Sargent=s May 1996 exercise blood gas study. Employer's Brief at 21-22. Contrary to employer=s contention, the administrative law judge properly relied on Dr. Forehand=s medical opinion to assess the reliability of the exercise blood gas studies. Decision and Order on Remand at 6-8; Director's Exhibit 70; *see Lane v. Union Carbide Corp*., 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997)(Upholding the administrative law judge=s reliance on a physician=s opinion that another physicians= exercise blood gas study was technically inaccurate). Therefore, we reject employer=s allegation of error.

Employer argues that the administrative law judge=s findings regarding the validity of the exercise blood gas studies are entirely speculative. Employer's Brief at 22-23. As noted by the administrative law judge, the applicable quality standard provides that A[i]f an exercise blood-gas test is administered, blood shall be drawn during exercise.@ 20 C.F.R. '718.105(b)(2000). The record reflects that Dr. Forehand drew claimant=s blood during exercise in both the October 1995 and February 1998 exercise blood gas studies. Director's Exhibits 13, 70. The record also reflects that Dr. Sargent described his May 1996 blood gas study as an Aafter exercise@ test. Director's Exhibit 38 at 10. The administrative law judge had before him Dr. Forehand=s criticism of Dr. Sargent=s methodology, and Dr. Forehand=s non-qualifying post-exercise sample taken for the purpose of demonstrating the need to measure arterial blood oxygen during exercise. Director's Exhibit 70. Therefore, contrary to employer=s contention, the record contains evidence potentially to support a determination that Dr. Forehand=s exercise blood gas testing conformed with 20 C.F.R. '718.105(b)(2000) whereas Dr. Sargent=s testing did not. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997)(The administrative law judge evaluates the evidence and draws conclusions.); *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 201 n.3, 12 BLR 2-376, 2-380 n.3 (6th Cir. 1989)(A non-qualifying blood gas study taken after exercise did not conform with Section 718.105(b) because it was not taken during exercise.); *Lane*, 105 F.3d at 172, 21 BLR at 2-44.

Nevertheless, we are constrained to vacate the administrative law judge=s finding that a mistake in a determination of fact was established because he did not consider all relevant evidence in drawing that conclusion. Employer notes, correctly, that the administrative law judge neglected to discuss Dr. Castle=s 1996 testimony that the May 1996 exercise blood gas study was an adequate test, Director's Exhibit 37 at 20, 29, and did not consider Dr. Castle=s or Dr. Sargent=s 1996 opinions that claimant is not totally disabled. Employer's Brief at 21-26; Director's Exhibits 27, 35-38. Where the administrative law judge fails to discuss relevant evidence and make findings, Athe proper course for the Board is to remand the case to the ALJ pursuant to 33 U.S.C. '921(b)(4) rather than attempting to fill the gaps in the

ALJ=s opinion.@ *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Consequently, we must vacate the administrative law judge=s finding pursuant to 20 C.F.R. ' 725.310(2000) and instruct him to include the 1996 opinions of Drs. Castle and Sargent in his consideration of whether the ultimate fact of entitlement was correctly decided. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-296.

Employer contends that the administrative law judge=s mistake in fact finding was erroneous and that therefore the date of onset finding cannot stand. Employer's Brief at 27. Because we have vacated the finding that a mistake in a determination of fact was established, we also vacate the administrative law judge=s onset date finding and instruct him to reconsider the onset issue after he has reassessed the basis for modification, as the administrative law judge=s finding on remand will be determinative of the onset date. *See* 20 C.F.R. ' 725.503(d)(Setting forth guidelines for determining the onset date for benefits awarded based on a modification request.).

Accordingly, the administrative law judge=s Decision and Order on Remand Awarding Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge