BRB No. 05-0901 BLA

KESTER J. MEADE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFILED COAL COMPANY	)	DATE ISSUED: 08/30/2006
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Kester J. Meade, Coeburn, Virginia, *pro se*.

Anne Musgrove (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (04-BLA-0122) of Administrative Law Judge Linda S. Chapman (the administrative law judge) denying benefits on a miner's 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*

[1]Although claimant is not represented by counsel on appeal, claimant filed a brief arguing that the newly submitted evidence is sufficient to establish total disability and, thus, a change in conditions. Claimant's Pro Se Statement at 6.

seq. (the Act).[2] This case involves a request for modification. The pertinent procedural history of this case is as follows: Claimant filed a claim on May 26, 1987. Director's Exhibit 1. On November 10, 1989, Administrative Law Judge John J. Forbes, Jr. issued a Decision and Order awarding benefits. Director's Exhibit 44. Judge Forbes credited claimant with thirty-four years of coal mine employment. *Id*. Although he found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000), Judge Forbes found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). *Id*. Judge Forbes also found that the evidence established that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). *Id*. Further, although he found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000), Judge Forbes found that the evidence established total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). *Id.*

On December 27, 1991, the Board issued a Decision and Order, which affirmed in part, and vacated in part, Judge Forbes's November 10, 1989 Decision and Order, and remanded the case for further consideration of the evidence. *Meade v. Clinchfield Coal Co.*, BRB No. 89-4083 BLA (Dec. 27, 1991)(unpub.). In disposing of employer's appeal, the Board affirmed Judge Forbes's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a)(1)-(4) and 718.204(c)(1)-(3) (2000). *Id*. However, the Board vacated Judge Forbes's finding that the evidence established total disability at 20 C.F.R. §718.204(c)(4) (2000), and remanded the case for further consideration of the evidence. *Id*. The Board also instructed Judge Forbes to weigh all of the contrary probative evidence together at 20 C.F.R. §718.204(c) (2000), if he found that the evidence established total disability at 20 C.F.R. §718.204(c)(4) (2000). *Id*. In addition, the Board instructed Judge Forbes to determine whether claimant met his burden to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000), if reached. *Id*.

By Order dated May 1, 1992, Administrative Law Judge James Guill advised the parties that the case would be reassigned to another administrative law judge on remand because Judge Forbes was no longer with the Office of Administrative Law Judges (OALJs). Director's Exhibit 53.

[2]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.

On January 25, 1993, Administrative Law Judge Stuart A. Levin issued a Decision and Order on Remand denying benefits. Director's Exhibit 56. Judge Levin's denial was based on his finding that the evidence did not establish total disability at Section 718.204(c)(4) (2000). *Id*. On March 29, 1994, the Board issued a Decision and Order, which affirmed Judge Levin's denial of benefits. *Meade v. Clinchfield Coal Co.*, BRB No. 93-1003 BLA (Mar. 29, 1994)(unpub.).

In a Statement of Claimant or Other Person dated April 5, 1994, claimant requested modification of the denial of benefits. Director's Exhibit 64. However, on April 15, 1994, claimant filed an appeal of the Board's March 29, 1994 Decision and Order with the United States Court of Appeals for the Fourth Circuit,[3] within whose jurisdiction this case arises.[4] Director's Exhibit 63. On January 10, 1995, the Fourth Circuit issued a decision, which remanded the case to Judge Levin for further consideration of the evidence at Section 718.204(c)(4) (2000). *Meade v. Clinchfield Coal Co.*, No. 94-1483 (4th Cir., Jan. 10, 1995)(unpub.). The court instructed Judge Levin to conduct a hearing to determine the basis for Dr. Garcia's unexplained findings about claimant's exertional limits. *Meade*, No. 94-1483, slip op. at 3.

In its March 17, 1995 Order, the Board vacated its March 29, 1994 Decision and Order, and remanded the case to the OALJs for further proceedings consistent with the Fourth Circuit's opinion. *Meade v. Clinchfield Coal Co.*, BRB No. 93-1003 BLA (Mar. 17, 1995)(unpub. order).

By Order dated November 7, 1995, Judge Levin ordered the parties to file, within fifteen days, a statement with respect to whether they wished to obtain Dr. Garcia's explanations for his findings about claimant's exertional limitations by deposition or by testimony at a formal hearing. Director's Exhibit 71. In a letter dated November 17, 1995, claimant noted that he did not desire to obtain any evidence from Dr. Garcia, but intended to obtain additional evidence in the form of an examination by Dr. Robinette. Director's Exhibit 72. Claimant also noted that he did not object to employer submitting additional evidence into the record in accordance with the regulations. *Id*. In a letter dated November 20, 1995, employer stated that it did not object to an examination of claimant by Dr. Robinette, provided that it was able to respond to the proposed evidence. Director's Exhibit 73. Employer also noted that it believed that the proper procedure was

[3]Since claimant's most recent coal mine work occurred in Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4]In a letter dated April 19, 1994, claimant requested that the district director hold his modification request in abeyance until the United States Court of Appeals for the Fourth Circuit issued a decision in his case. Director's Exhibit 65.

to treat the matter as a request for modification and remand the case to the district director. *Id*.

By Order dated February 1, 1996, Judge Levin agreed with employer that claimant was, in effect, pursuing modification. Director's Exhibit 74. Consequently, since neither party indicated a desire to proceed in the limited manner prescribed by the Fourth Circuit and in light of claimant's right to seek modification, Judge Levin remanded the case to the district director for appropriate action. *Id*. In a letter dated February 6, 1996, claimant requested that Judge Levin reconsider his February 1, 1996 Order because he neither wished to institute modification proceedings nor requested the case to be remanded for modification proceedings. Director's Exhibit 75. Claimant additionally stated that he did not wish to reopen the record beyond the scope allowed by the Fourth Circuit. *Id*. However, in a letter dated February 20, 1996, employer objected to claimant's request for reconsideration of Judge Levin's February 1, 1996 Order. Director's Exhibit 76.

By Order dated May 29, 1996, Judge Levin granted claimant's request for reconsideration, and ordered the parties to file, within fifteen days, briefs that discussed the procedures that they believed should have been employed to address the limited issue on remand from the Fourth Circuit. Director's Exhibit 78. Judge Levin noted that claimant's wish to proceed in accordance with the limited remand prescribed by the Fourth Circuit brought the case full circle to the administrative law judge's November 7, 1995 Order, which requested statements from the parties about the manner in which they wished to develop evidence on the basis of Dr. Garcia's unexplained findings about claimant's exertional requirements. *Id*.

By Order dated June 19, 1996, Judge Levin granted employer thirty days to locate Dr. Garcia and schedule his deposition. Director's Exhibit 81. Alternatively, if employer was unable to locate Dr. Garcia within thirty days, Judge Levin granted employer sixty days to take claimant's deposition about the history he gave to Dr. Garcia with respect to the exertional requirements of claimant's last coal mine job. *Id*.

On February 20, 1997, Judge Levin issued a Decision and Order, which remanded the case to the district director so that the parties could develop evidence responsive to the Fourth Circuit's remand order, or claimant could initiate modification proceedings. Director's Exhibit 82. The district director denied the claim on May 9, 1997 because the evidence did not establish total disability. Director's Exhibit 84.

On September 2, 1998, Administrative Law Judge Richard T. Stansell-Gamm issued a Decision and Order denying benefits. Director's Exhibit 99. Judge Stansell-Gamm found that the evidence did not establish total disability at Section 718.204(c)(1)-(4) (2000). *Id*. In its October 18, 1999 Decision and Order, the Board affirmed Judge

Stansell-Gamm's denial of benefits. *Meade v. Clinchfield Coal Co.*, BRB No. 98-1618 BLA (Oct. 18, 1999)(unpub.). Further, on May 16, 2000, the Fourth Circuit affirmed the Board's October 18, 1999 Decision and Order. *Meade v. Clinchfield Coal Co.*, No. 99-2594 (4th Cir., May 16, 2000) (unpub.).

In a letter dated January 5, 2001, claimant requested modification of the denial of his claim. Director's Exhibit 111. The district director denied claimant's request for modification on February 16, 2001. Director's Exhibit 113. On June 5, 2002, Judge Levin issued a Decision and Order denying benefits on the basis that claimant failed to establish modification at 20 C.F.R. §725.310 (2000).[5] Director's Exhibit 133. Judge Levin found that the newly submitted evidence failed to establish total disability at 20 C.F.R. §718.204(b)(2). *Id*. Consequently, Judge Levin found that the evidence was insufficient to establish either a change in conditions or a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). *Id*. In its Decision and Order dated April 14, 2003, the Board affirmed Judge Levin's denial of benefits. *Meade v. Clinchfield Coal Co.*, BRB No. 02-0678 BLA (Apr. 14, 2003)(unpub.). Subsequently, on October 15, 2003, the Board issued an Order denying claimant's request for reconsideration. *Meade v. Clinchfield Coal Co.*, BRB No. 02-0678 BLA (Oct. 15, 2003)(unpub. Order on Recon.)(*en banc*).

In a letter dated November 7, 2003, claimant requested modification of Judge Levin's denial of benefits. Director's Exhibit 145.

On July 12, 2005, the administrative law judge issued a Decision and Order Denying Modification and Benefits. The administrative law judge found the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found the evidence insufficient to establish a change in conditions at 20 C.F.R. §725.310 (2000). Further, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is

[5]The revisions to the regulation at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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, supported by substantial evidence, and 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).

The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310 (2000), 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. *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, Judge Levin denied benefits because he found that the newly submitted evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2), Director's Exhibit 133, a finding subsequently affirmed by the Board. *Meade*, BRB No. 02-0678 BLA, slip op. at 3-4. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish total disability at Section 718.204(b) (*i.e.*, the evidence submitted since Judge Levin's denial of benefits).

In finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered two pulmonary function studies dated November 16, 2004 and March 23, 2005. The November 16, 2004 pulmonary function study, administered by Dr. Agarwal,[6] produced pre-bronchodilator values of 1.88 on FEV1, 2.56 on FVC, and 62 on MVV. Claimant's Exhibit 1. This study produced post-bronchodilator values of 1.85 on FEV1, 2.30 on FVC, and 66 on MVV. *Id*. Dr. Agarwal noted that claimant was 71 inches tall and 75 years of age. *Id*. The March 23, 2005 pulmonary function study, administered by Dr. Castle,[7] produced pre-bronchodilator values of 1.88 on FEV1, 2.63 on FVC, and 58 on

[6]Dr. Agarwal noted that claimant's effort, cooperation and understanding were good. Claimant's Exhibit 1.

[7]Dr. Castle noted that claimant was unable to produce acceptable and reproducible spirometry and MVV data. Claimant's Exhibit 1. Nonetheless, Dr. Castle stated that the pre-bronchodilator spirometry is probably valid. *Id*. Further, in an April 19, 2005 report, Dr. Castle stated that the pre-bronchodilator spirometry of the March 23, 2005 pulmonary function study was probably valid. *Id*. However, Dr. Castle stated that the post-bronchodilator spirometry showed less than maximal effort. *Id*.

MVV. Employer's Exhibit 8. This study produced post-bronchodilator values of 1.55 on FEV1, and 2.05 on FVC. *Id*. Dr. Castle noted that claimant was 70 inches tall and 75 years of age.[8] *Id*. The administrative law judge stated that "[t]he pulmonary function…studies performed by Dr. Agarwal and Dr. Castle did not produce qualifying results under the regulations, even though the [c]laimant did not put forth good effort during the post bronchodilator studies performed by Dr. Castle." Decision and Order at 8.

In order to be qualifying,[9] a pulmonary function study must initially produce FEV1 values that are equal to, or less than, the applicable table values in Appendix B of 20 C.F.R. Part 718. 20 C.F.R. §718.204(b)(2)(i). Then, if applicable, a pulmonary function study must produce FVC or MVV values that are equal to, or less than, the applicable table values in Appendix B of 20 C.F.R. Part 718, or a percentage of 55% or less when the results of the FEV1 test are divided by the results of the FVC test. *Id*. Based on a height of 70.1 inches and an age of 71 years, the values of a pulmonary function study must be 1.88 or less on FEV1, 2.43 or less on FVC, and 75.0 or less on MVV, to be qualifying. 20 C.F.R. Part 718, Appendix B. Similarly, based on a height of 71.3 inches and an age of 71 years, the values of a pulmonary function study must be 1.98 or less on FEV1, 2.55 or less on FVC, and 79.0 or less on MVV to be qualifying. *Id*. Consequently, the results of the November 16, 2004 and March 23, 2005 pulmonary function studies would be qualifying for a miner who was 71 years of age, regardless of whether he was 70 inches tall or 71 inches tall. Claimant, however, was 75 years of age at the time these studies were administered.

Although the regulations only provide table values for miners up to 71 years of age, the regulations do not prohibit an administrative law judge from finding, by extrapolation, the appropriate qualifying table values for miners older than 71 years of age. However, the administrative law judge must explain her process for finding that a pulmonary function study is qualifying or non-qualifying under the regulations. The Administrative Procedure Act, 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), requires that an administrative law judge independently evaluate the evidence and provide an explanation

[8]Dr. Agarwal noted claimant's height as 71 inches, Claimant's Exhibit 1, while Dr. Castle noted claimant's height as 70 inches, Employer's Exhibit 8. The administrative law judge did not resolve the conflicting heights that were recorded on the pulmonary function studies. *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983).

[9]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii).

for her findings of fact and conclusions of law. In the instant case, the administrative law judge did not explain how she came to the conclusion that the November 16, 2004 and March 23, 2005 pulmonary function studies did not produce qualifying results. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, we vacate the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at Section 718.204(b)(2)(i), and remand the case for further consideration of the newly submitted evidence. On remand, the administrative law judge must explain her process for finding that the newly submitted pulmonary function studies are qualifying or non-qualifying under the regulations. *Wojtowicz*, 12 BLR at 1-165. Furthermore, because there are differences in the heights recorded in the pulmonary function studies, the administrative law judge should make a factual finding of the miner's height and use that height in determining whether the studies are qualifying under the regulations. *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983).

Since no newly submitted arterial blood gas study of record yielded qualifying values, Employer's Exhibit 8, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Further, since there is no medical evidence of cor pulmonale with right-sided congestive heart failure, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

With regard to Section 718.204(b)(2)(iv), the administrative law judge found the newly submitted medical opinion evidence insufficient to establish total disability. In so finding, the administrative law judge considered the reports of Drs. Nida, Agarwal, and Castle. Dr. Nida noted, in a report dated April 4, 2005, that claimant has an obstructive pattern on pulmonary function test. Claimant's Exhibit 1. In a report dated November 9, 2004, Dr. Agarwal opined that claimant has dyspnea on exertion that is probably secondary to chronic obstructive airway disease. *Id*. Further, in a subsequent report dated November 30, 2004, Dr. Agarwal opined that claimant has shortness of breath which may be secondary to a mild restrictive lung disease that is related to his history of coal workers' pneumoconiosis. *Id*. In a report dated April 19, 2005, Dr. Castle opined that claimant is disabled as a whole man because of his age and other general medical problems. Employer's Exhibit 8. In addition, Dr. Castle opined that claimant is not totally disabled as a result of coal workers' pneumoconiosis. *Id*. In considering the pulmonary function study that he administered, Dr. Castle explained that the mild reduction in both the FVC and FEV1, without an actual true restriction based upon the total lung capacity, was totally related to claimant's previous thoracity surgery for thymoma and possible myasthenia gravis. *Id*. Dr. Castle also noted that claimant did not demonstrate a disabling abnormality of blood gas transfer mechanisms. *Id*.

The administrative law judge correctly stated that "[Dr. Nida] did not indicate the extent of [c]laimant's pulmonary condition, or offer any opinion as to whether he retained the ability to perform his previous coal mining work." Decision and Order at 8. Further, the administrative law judge correctly stated that "[Dr. Agarwal] did not offer any opinion on the extent of the [c]laimant's respiratory impairment, or whether it was sufficient to prevent him from returning to his previous coal mining job." *Id*. In addition, based on her consideration of the underlying pulmonary function and arterial blood gas studies in Dr. Castle's report, the administrative law judge reasonably found that Dr. Castle's opinion did not support a conclusion that claimant is totally disabled from a respiratory or pulmonary impairment. *Id*. Thus, since none of the physicians opined that claimant suffers from a disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

On remand, if the administrative law judge finds that the newly submitted pulmonary function study evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i), then she must weigh together all of the contrary probative evidence of disability, like and unlike, to determine whether the evidence is sufficient to establish total disability at Section 718.204(b)(2). *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), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

In view of our decision to vacate and remand the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i), we further vacate the administrative law judge's finding that the evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310 (2000), and remand the case for further consideration of the evidence thereunder. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni*, 17 BLR at 1-84.

Finally, we address the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). The Fourth Circuit 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. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In considering whether there was a mistake in a determination of fact, the administrative law judge stated, "[u]pon review of the entire evidentiary record, I find [that c]laimant has not established that Judge Levin made a mistake in any determination of fact." Decision and Order at 9. In so finding, the administrative law judge noted that Judge Levin's Decision and Order was thorough, well reasoned, and amply supported by

the record at the time of his decision. *Id*. In addition, the administrative law judge noted that, like Judge Levin, she reviewed the entire record to determine if there was a mistake of fact in any of the previous decisions in this case. *Id*. The administrative law judge therefore concluded, "[o]n review of the entire record, I find no mistake of fact in a previous decision that resulted in a mistaken conclusion that the [c]laimant did not establish that he had a totally disabling respiratory or pulmonary impairment." *Id*. We detect no error in the administrative law judge's determination that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). Consequently, we affirm it.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge