BRB No. 06-0300 BLA

HARLIS I. MUSICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 08/31/2006
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Harlis I. Musick, Rosedale, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-0094) of Administrative Law Judge Thomas M. Burke 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).[1] This case involves claimant's request for modification of a

[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.

duplicate claim filed on May 6, 1991.[2] In the initial Decision and Order, Administrative Law Judge Joel R. Williams, after crediting claimant with at least twenty years of coal mine employment, found that equally qualified physicians had reached "conflicting opinions" regarding whether the x-ray evidence was positive for pneumoconiosis. Applying the "true doubt" rule, Judge Williams found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(1) (2000). Director's Exhibit 54. Judge Williams also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b) (2000). *Id.* However, Judge Williams found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Accordingly, Judge Williams denied benefits. *Id.* By Decision and Order dated February 23, 1995, the Board affirmed Judge Williams's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Musick v. Clinchfield Coal Co.*, BRB No. 94-0430 BLA (Feb. 23, 1995) (unpublished). The Board, therefore, affirmed Judge Williams's denial of benefits.[3] *Id.*

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[2]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on July 25, 1978. Director's Exhibit 62. In a Decision and Order dated March 14, 1985, Administrative Law Judge Robert J. Shea found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2). *Id.* However, Judge Shea also found that the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2). *Id.* Judge Shea further found that the evidence was insufficient to establish entitlement under 20 C.F.R. Part 410, Subpart D. *Id.* Accordingly, Judge Shea denied benefits. *Id.* By Decision and Order dated October 21, 1987, the Board affirmed Judge Shea's finding that the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2). *Musick v. Clinchfield Coal Co.*, BRB No. 85-0792 BLA (Oct. 21, 1987) (unpublished). The Board noted that subsequent to the issuance of Judge Shea's decision, the United States Court of Appeals for the Fourth Circuit held that where entitlement is precluded under 20 C.F.R. Part 727, entitlement must be considered under 20 C.F.R. §410.490. *Id.* The Board, therefore, considered this issue *sua sponte*. *Id.* In light of its affirmance of Judge Shea's finding of subsection (b)(2) rebuttal, the Board held that entitlement under 20 C.F.R. §410.490 was precluded. *Id.* The Board, therefore, affirmed Judge Shea's denial of benefits. *Id.* There is no indication that claimant took any further action in regard to his 1978 claim.

Claimant filed a second claim on May 6, 1991. Director's Exhibit 1.

[3]In its Decision and Order dated February 23, 1995, the Board noted that:

> Claimant's 1991 claim is a duplicate claim. Section 725.309 provides

Claimant filed a request for modification on February 20, 1996. Director's Exhibit 56. In a Decision and Order dated August 7, 1998, Administrative Law Judge Joan Huddy Rosenzweig noted that Judge Williams, in his decision, had found the x-ray evidence sufficient to establish the existence of pneumoconiosis based upon his application of the "true doubt" rule. Director's Exhibit 78. In light of the United States Supreme Court's invalidation of the "true doubt" rule, Judge Rosenzweig noted that claimant had failed to satisfy his burden of establishing the existence of pneumoconiosis based upon a preponderance of the evidence. *Id.* However, Judge Rosenzweig, in her consideration of the x-ray evidence, found that a preponderance of the x-ray evidence was, in fact, positive for pneumoconiosis. *Id.* Consequently, she found the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Id.* Judge Rosenzweig, therefore, found that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Judge Rosenzweig

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> that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). The Board has defined a material change in conditions as that "evidence which is relevant and probative so that there is a reasonable possibility that it would change the prior administrative result." *See Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *see also Rice v. Sahara Coal Co.*, 15 BLR 1-19 (1990) (*en banc*). Claimant's prior 1978 claim was denied because Administrative Law Judge Robert J. Shea found the evidence sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2). Director's Exhibit 51. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, claimant was required to submit new evidence, which if credited on the merits, could support a finding that he was totally disabled. *See Shupink*, *supra*.
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> Although the administrative law judge did not address whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, we note that the newly submitted medical evidence includes Dr. King's February 14, 1991 report indicating that claimant would be unable to perform his usual coal mine work and Dr. Smiddy's February 5, 1992 report indicating that claimant "by age and state of health is one hundred percent totally disabled." Director's Exhibit 11; Claimant's Exhibit 1. Because there is a reasonable possibility that this evidence, if credited, could change the prior administrative result, the newly submitted evidence is sufficient as a matter of law to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Shupink, supra*.

Musick, BRB No. 94-0430 BLA, slip op. at 3 n.4.

further found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b) (2000). *Id.* Although Judge Rosenzweig found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) (2000), she found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) and (c)(4) (2000). *Id.* Weighing all of the relevant evidence together, Judge Rosenzweig found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Judge Rosenzweig further found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Id.* Accordingly, Judge Rosenzweig awarded benefits. *Id.*

By Decision and Order dated March 29, 2000, the Board affirmed Judge Rosenzweig's findings pursuant to 20 C.F.R. §§725.310 (2000), 718.202(a)(1) (2000), 718.203(b) (2000) and 718.204(c)(1) (2000) as unchallenged on appeal.[4] *Musick v. Clinchfield Coal Co.*, BRB No. 98-1581 BLA (Mar. 29, 2000) (unpublished). The Board, however, vacated Judge Rosenzweig's findings pursuant to 20 C.F.R. §718.204(c)(2) and (c)(4) (2000) and remanded the case for further consideration. *Id.* The Board also vacated Judge Rosenzweig's finding pursuant to 20 C.F.R. §718.204(b) (2000). *Id.*

Due to Judge Rosenzweig's unavailability, the case was reassigned to Administrative Law Judge Clement J. Kichuk. In a Decision and Order on Remand dated March 12, 2002, Judge Kichuk found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Director's Exhibit 103. Accordingly, Judge Kichuk denied benefits. *Id.* By Decision and Order dated March 31, 2003, the Board affirmed Judge Kichuk's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Musick v. Clinchfield Coal Co.*, BRB No. 02-0444 BLA (Mar. 31, 2003) (unpublished). The Board, therefore, affirmed Judge Kichuk's denial of benefits. *Id.* Claimant, representing himself, filed an appeal with the United States Court of Appeals for the Fourth Circuit. Director's Exhibit 115. In a Decision dated July 15, 2003, the Fourth Circuit held that the Board's decision was based upon substantial evidence and was without reversible error. *Musick v. Clinchfield Coal Co.*, No. 03-1485 (4th Cir. July 15, 2003) (unpublished). The Fourth Circuit, therefore, affirmed the Board's Decision and Order denying benefits. *Id.*

[4]Because the record did not contain any evidence of cor pulmonale with right-sided congestive heart failure, the Board noted that a finding of total disability pursuant to 20 C.F.R. §718.204(c)(3) (2000) was precluded. *Musick v. Clinchfield Coal Co.*, BRB No. 98-1581 BLA (Mar. 29, 2000) (unpublished).

Claimant subsequently filed a request for modification on September 12, 2003. Director's Exhibit 121. Administrative Law Judge Thomas M. Burke (the administrative law judge) found that the newly submitted evidence (*i.e.*, the evidence submitted since the denial of claimant's first request for modification) was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)[5] and was, therefore, insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge also found that there was no mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. 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.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000),[6] 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 Kichuk denied benefits because he found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Director's Exhibit 103. Judge Kichuk's Decision and Order denying benefits was subsequently affirmed by the Board and the Fourth Circuit. Consequently, the issue properly before the administrative law judge was whether the

[5]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[6]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

newly submitted evidence, namely the evidence submitted since Judge Kichuk's denial of benefits, was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b).

The administrative law judge properly found that the only newly submitted pulmonary function study, a study conducted on March 31, 2004, is non-qualifying. Decision and Order at 9; Employer's Exhibit 1. Consequently, we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge accurately noted that the record contains seven newly submitted arterial blood gas studies conducted on July 28, 2000, July 29, 2000, December 7, 2001, December 9, 2001, December 10, 2001, December 11, 2001 and March 31, 2004. Decision and Order at 9; Director's Exhibit 121; Employer's Exhibit 1. Of the seven newly submitted arterial blood gas studies, three of the studies, those conducted on July 28, 2000, December 7, 2001 and December 9, 2001, produced qualifying values. Director's Exhibit 121. The administrative law judge, however, noted that claimant's three qualifying arterial blood gas studies were conducted while claimant was hospitalized for treatment of pneumonia and, therefore, were "more reflective of his condition at the time he was suffering from an acute illness rather than his chronic pulmonary or respiratory condition."[7] Decision and Order at 9-10. The administrative law judge acted within his discretion in determining that claimant's July 28, 2000, December 7, 2001 and December 9, 2001 qualifying arterial blood gas studies were unreliable as an indicator of claimant's respiratory function. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984). The administrative law judge also noted that claimant's most recent arterial blood gas study, a study conducted on March 31, 2004, is non-qualifying. Decision and Order at 10; Employer's Exhibit 1. Because it is based upon substantial evidence, we affirm the

[7]Dr. Castle reviewed the newly submitted arterial blood gas studies of record. During an August 30, 2004 deposition, Dr. Castle stated:

> [The arterial blood gas studies] showed basically that he had, at times, very – during periods of wellness, he had normal blood gases. He had abnormal blood gases during periods of acute illness, including pneumonia, pleural effusion, and so forth, and the last prior blood gas – and when he had exercise studies, there was a normal response, so even though there was some variability, the variability occurred in periods of illness where one would expect to have an abnormal blood gas.

Employer's Exhibit 4 at 13.

administrative law judge's finding that the newly submitted arterial blood gas study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Because there is no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii) is precluded. Decision and Order at 9.

The administrative law judge finally considered the newly submitted medical opinion evidence. The newly submitted medical opinion evidence consists of the opinions rendered by Drs. Fino and Castle. The administrative law judge properly found that the newly submitted opinions of Drs. Fino and Castle are insufficient to support a finding of a totally disabling pulmonary or respiratory impairment.[8] Decision and Order at 11. We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

Modification may also be based upon a finding of a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[9] In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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[8]Dr. Fino reviewed the medical evidence. In a report dated November 7, 2003, Dr. Fino opined that claimant did not suffer from any "primary pulmonary impairment or disability, regardless of cause." Director's Exhibit 124.

Dr. Castle examined claimant on March 31, 2004. Dr. Castle also reviewed the medical evidence. In a report dated April 21, 2004, Dr. Castle opined that, from a pulmonary standpoint, claimant was not permanently and totally disabled. Employer's Exhibit 1. During an August 30, 2004 deposition, Dr. Castle opined that claimant has no respiratory impairment. Employer's Exhibit 4 at 15.

[9]The United States Court of Appeals for the Fourth Circuit has held that a party 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).

In this case, the administrative law judge stated:

> [A] thorough review of the entire record in this case does not reveal a mistake in Judge Kichuk's determination that Claimant was not totally disabled from pneumoconiosis which was upheld on appeal by the Benefits Review Board and the Fourth Circuit Court of Appeals. I find he was correct in crediting the opinions of Dr. Sargent and Dr. Fino over the less qualified physicians in the record. The determination that claimant is not totally disabled is supported by the preponderance of the pulmonary function study evidence, and the blood gas studies, as well as the opinions of the most highly qualified physicians. It is also supported by the most recent pulmonary evaluation conducted by Dr. Castle.

Decision and Order at 13.

Because it is based upon substantial evidence, the administrative law judge's finding that there was no mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) is affirmed.

In light of our affirmance of the administrative law judge's findings that claimant failed to establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), we affirm the administrative law judge's denial of claimant's request for modification.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge