BRB No. 98-1397 BLA

| | | |
|---|---|---|
| FRANK DAVID BUBBLO | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | DATE ISSUED: |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits Upon Modification of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Frank David Bubblo, West Wyoming, Pennsylvania, *pro se*.

Rodger Pitcairn (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits Upon Modification (98-BLA-0143) of Administrative Law Judge Ainsworth H. Brown 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 in February 1994. Director's Exhibit 1. The administrative law judge, in a Decision and Order issued in March 1996, found that claimant established 7.3 years of coal mine employment and found that claimant did not establish the existence of pneumoconiosis. Director's Exhibit 38; *see* 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. Claimant appealed, and the Board, in a Decision and Order issued in February 1997, affirmed the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). Accordingly, the Board affirmed the administrative law judge's denial of benefits. *Bubblo v. Director, OWCP*, BRB No. 96-0983 BLA (Feb. 21, 1997)(unpublished); Director's

Exhibit 43.

Claimant then filed a motion for modification on March 18, 1997 with the district director, alleging that Dr. Talati relied on an inaccurate smoking history. Director's Exhibits 44-46; *see* 20 C.F.R. §725.310. The administrative law judge found that claimant did not establish a mistake of fact with respect to the existence of pneumoconiosis. Accordingly, the administrative law judge denied the petition for modification. Claimant appeals, without the assistance of counsel, contending generally that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs, has submitted a response advocating affirmance of the administrative law judge's denial of benefits.

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

Claimant may establish modification by establishing either a change in conditions since the issuance of a previous decision or a mistake in a determination of fact in the previous decision. 20 C.F.R. §725.310(a). In considering whether a change in conditions has been established pursuant to Section 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 claim. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The United States Court of Appeals for the Third Circuit, under whose jurisdiction the instant case arises, has held that Section 725.310 requires the administrative law judge to review all of the evidence of record in determining whether any mistake of fact was made in the previous adjudication of the case. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

In denying claimant's request for modification, the administrative law judge initially noted that claimant argued that Dr. Talati's previously submitted report was flawed and contrary to recent medical literature. The administrative law judge further noted that the Director had submitted a new letter from Dr. Talati dated March 24, 1998 in which the physician stated that claimant suffered from emphysema due to smoking. The administrative law judge found that even if claimant was correct in arguing that Dr. Talati's finding was flawed, it was claimant's burden to produce evidence that he had a lung condition that was "more likely than not" due to his coal dust exposure. Decision and

Order at 2. The administrative law judge concluded that the record contained no credible medical opinion that contradicted Dr. Talati's opinion.

The record contains medical opinions by Drs. Talati and Aquilina. In a 1994 report, Dr. Talati diagnosed chronic obstructive lung disease and coronary artery bypass surgery. Under "etiology," Dr. Talati listed smoking related chronic obstructive pulmonary disease, and coal dust exposure but noted that claimant's x-ray was not consistent with pneumoconiosis. Director's Exhibit 12. In a 1995 report, Dr. Talati diagnosed chronic obstructive lung disease secondary to smoking. Dr. Talati also diagnosed severe pulmonary impairment and indicated that it was secondary to chronic obstructive pulmonary disease from smoking. Director's Exhibit 31. In his most recent report, dated 1998, Dr. Talati stated, "In view of history [sic] of smoking for many years and exposure to the coal dust only for six or seven years, and as there is no history of asthma, as well as x-ray of the chest did not reveal any pneumoconiosis changes, I would consider it likely his emphysema or COPD is from smoking related [sic]."[1] Unnumbered Exhibit. In a deposition dated December 13, 1995, Dr. Aquilina diagnosed coal workers' pneumoconiosis. Director's Exhibit 36, Deposition at 19. In a separate report dated February 28, 1995, Dr. Aquilina diagnosed coal workers' pneumoconiosis and stated that claimant's respiratory impairment in and of itself would prevent him from engaging in his coal mine work.[2] Director's Exhibit 20.

We hold that, on modification, the administrative law judge reasonably discounted medical articles submitted by claimant that did not specifically involve the examination of claimant or the review of documents pertaining to claimant's health status, and reasonably found that they did not undermine the credibility of Dr. Talati's reports. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136, 1-139 (1989). The administrative law judge also discredited the February 1995 opinion of Dr. Aquilina on the basis that Dr. Aquilina failed to address claimant's positive smoking habit. Director's Exhibit 20; Director's Exhibit 37, Hearing Transcript at 15-17. The administrative law judge's failure to address the testimony of Dr. Aquilina acknowledging that claimant smoked for a period of about twenty years, Director's Exhibit 36, Deposition at 7, is harmless error, inasmuch as the administrative law judge provided, in his previous Decision and Order, a valid alternative basis for discrediting of Dr. Aquilina's opinion.[3] Specifically, the administrative law judge

[1] The letterhead for this report states that Dr. Talati has a Diplomate in the American Board of Internal Medicine and in the Subspecialty Board of Pulmonary Diseases. Unnumbered Exhibit. The record also contains a resume for Dr. Talati that states that he is Board-certified in internal medicine and the subspecialty Board of Pulmonary Disease. Director's Exhibits 13, 26.

[2] Dr. Aquilina indicated that he is Board-certified in anesthesia, but that he is neither Board-certified in internal medicine, pulmonary medicine, nor radiology. Director's Exhibit 36.

[3] As noted *infra*, the administrative law judge incorporated his previous 1996 Decision and Order. Decision and Order Upon Modification at 1.

credited the opinion of Dr. Talati over the opinion of Dr. Aquilina because of Dr. Talati's superior qualifications. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *see generally Oggero v. Director, OWCP*, 7 BLR 1-860, 1-864 (1985).

Moreover, the administrative law judge did not recite all the medical evidence of record in determining that claimant failed to establish a mistake in fact; rather, the administrative law judge stated that he incorporated his earlier 1996 Decision and Order and the Board's 1997 Decision and Order into his decision on modification. Decision and Order Upon Modification at 1. As he implicitly weighed all the evidence and permissibly found that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a), we affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact in the prior decision denying benefits.[4] *See Keating*,

[4] In his prior Decision and Order, the administrative law judge weighed all of the x-ray evidence of record and properly gave greater weight to the x-ray interpretations of the readers with superior qualifications. *See* 20 C.F.R. §718.202(a)(1); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge also properly found that claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) as the record does not contain any biopsy of autopsy evidence. In addition, the presumptions enumerated at 20 C.F.R. §718.202(a)(3) are inapplicable to this claim as the record contains no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304; claimant filed his claim after January 1, 1982, *see* 20 C.F.R. §718.305(e); and this is not a survivor's claim, *see* 20 C.F.R. §718.306. In weighing the medical opinions of record, the administrative law judge also rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to 20 C.F.R..§718.202(a)(4). *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986). The administrative law judge acted within his discretion as fact-finder in concluding that the opinion of Dr. Aquilina, that

*supra*.

Finally, inasmuch as no new evidence was submitted by claimant on modification that was supportive of claimant's entitlement or dealt specifically with claimant's condition, the administrative law judge did not err in declining to consider whether the evidence was sufficient to establish a change in conditions under Section 725.310. *See Nataloni*, *supra*.

---

claimant suffered from pneumoconiosis and was totally disabled due to pneumoconiosis, was outweighed by the medical opinion of Dr. Talati, that claimant's respiratory impairment was unrelated to claimant's coal mine employment, based on his superior qualifications. *See Clark*, *supra*.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits Upon Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge