BRB No. 07-0263 BLA

C.E.B.	)	
Claimant-Respondent	)	
v.	)	
DOMINION COAL CORPORATION	)	DATE ISSUED: 12/17/2007
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 Granting Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

C.E.B., Raven, Virginia, *pro se*.

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

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

PER CURIAM:

Employer appeals the Decision and Order Granting Modification (06-BLA-0005) of Administrative Law Judge Daniel F. Solomon awarding benefits on a request for modification of the denial of a duplicate 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 has been before the Board previously.[2] In the most recent

[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

appeal, the Board affirmed Administrative Law Judge Joseph E. Kane's November 21, 2002 Decision and Order on Remand finding that claimant failed to establish a material change in conditions, as the evidence did not establish the existence of total disability pursuant to 20 C.F.R. §718.204(b), or complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). The Board, therefore, affirmed the denial of benefits. [*C.E.B.*] *v. Dominion Coal Corp.*, BRB No. 02-0646 BLA (Mar. 19, 2003)(unpub.). The Board's decision was subsequently affirmed by the United States Court of Appeals for the Fourth Circuit.[3] [*C.E.B.*] *v. Dominion Coal Corp.*, No. 03-1521 (4th Cir. Mar. 23, 2004) (unpub.).

On March 10, 2005, claimant submitted additional medical evidence and requested modification of the prior denial of benefits.[4] The claim was transferred to the Office of Administrative Law Judges, and a telephone conference was held on April 21, 2001.[5] In a Decision and Order Granting Modification dated November 2, 2006, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), but established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304, and, consequently, established total disability pursuant to 20 C.F.R. §718.204(b)(1). Therefore, the administrative law judge found that claimant established a mistake in fact in the prior denial of benefits, pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The current claim, claimant's third, was filed on October 15, 1998. Director's Exhibit 1. The complete procedural history of this case, set forth in the Board's prior decisions in [*C.E.B.*] *v. Dominion Coal Corp.*, BRB No. 00-1074 BLA (Aug. 29, 2001)(unpub.), and [*C.E.B.*] *v. Dominion Coal Corp.*, BRB No. 02-0646 BLA (Mar. 19, 2003)(unpub.), is incorporated herein by reference.

[3] The record indicates that claimant's coal mine employment occurred in Virginia. Director's Exhibit 29. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[4] Claimant submitted an x-ray reading, together with the reader's qualifications. However, in response to the administrative law judge's Order to produce the x-ray so that employer could have it re-read, claimant requested that the x-ray reading be withdrawn. Decision and Order at 2.

[5] The parties waived their rights to an oral hearing.

administrative law judge granted claimant's request for modification, and awarded benefits, commencing as of October 1998, the month in which claimant filed his claim.

On appeal, employer contends that the administrative law judge applied an improper legal standard for modifying the denial of a duplicate claim. Employer further asserts that the administrative law judge erred in his analysis of the evidence relevant to the existence of simple and complicated pneumoconiosis at 20 C.F.R. §§718.202, 718.304. Employer also contends that the administrative law judge erred in determining the date of the commencement of benefits. Finally, employer asserts that the administrative law judge failed to consider whether claimant's October 15, 1998 claim was timely filed, or whether granting claimant's modification request would "render justice under the Act." Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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

In this duplicate claim filed on October 15, 1998, which, as noted above, is claimant's third claim, claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), since the denial of his second claim. In *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), the Fourth Circuit held that in order to establish a material change in conditions, claimant must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him. Claimant's second claim was denied because he did not establish total disability. Director's Exhibit 30. Thus, the evidence developed in this claim must establish total disability for claimant to obtain review of the merits of his claim. In considering a request for modification of the denial of a duplicate claim (which, as here, has been denied based upon a failure to establish a material change in conditions), an administrative law judge must determine whether all of the evidence developed in the duplicate claim, including any new evidence submitted with the request for modification, establishes a material change in conditions. *See* 20 C.F.R. §725.309(d) (2000); *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). If the evidence establishes a material change in conditions, the administrative law judge must then consider the merits of the duplicate claim. *Hess*, 21 BLR at 1-143.

Employer contends that the administrative law judge's finding that claimant established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304 is contrary to law and does not comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer's Brief at 23-24, 27-28. Specifically, employer asserts that the administrative law judge applied an improper legal standard for modifying this duplicate claim, and failed to offer sufficient rationale for his conclusions. We agree.

In his analysis of the medical evidence, the administrative law judge stated that he had reviewed the entire record, including the x-ray readings submitted with claimant's first and second claims, and had determined that the prior finding as to the existence of simple pneumoconiosis was correct. Decision and Order at 4. The administrative law judge further found that the prior record contained positive x-ray readings showing complicated pneumoconiosis by Drs. DePonte, Navani, Smiddy, Robinette, Alexander, and Fisher, and also contained readings by Drs. Sargent, Francke, Hickey, Fisher, Siner, Patel, Smiddy, Bassali, Aycoth, Cappiello, and Ahmed, all diagnosing either simple or complicated pneumoconiosis.[6] Decision and Order at 4.

The administrative law judge then noted that, by contrast, Drs. Wheeler, Scott, Forehand, and Branscomb opined that there was no x-ray evidence of pneumoconiosis, either simple or complicated, but that the large masses seen in claimant's lungs were instead due to tuberculosis or histoplasmosis. Decision and Order at 4. In addition, the administrative law judge noted that both Drs. Scott and Wheeler had also read computerized tomography (CT) scans as negative for pneumoconiosis. Decision and Order at 4. The administrative law judge did not clearly indicate whether these negative x-ray and CT scan readings were developed with the current or prior claims. The administrative law judge also noted that Drs. Castle, Michos, and Iosif opined that a positive diagnosis of complicated pneumoconiosis could not be made on the available evidence, but that Dr. Michos diagnosed simple pneumoconiosis. Decision and Order at 4. The administrative law judge did not indicate whether Drs. Castle, Michos, and Iosif had provided x-ray readings, medical reports, or some other form of evidence, or indicate whether their opinions were developed with current or prior claims.

Finally, the administrative law judge noted that Dr. Smiddy, claimant's treating internist, and Dr. Robinette, had both diagnosed complicated pneumoconiosis and had both refuted that tuberculosis exists on this record. Decision and Order at 4-5. Again, the administrative law judge did not indicate the type of evidence these physicians had

[6] The administrative law judge did not indicate that he had considered Dr. Cole's December 12, 1998 reading, 1/1, q, r, of the November 6, 1998 x-ray.

provided, or whether their opinions had been developed in connection with the current or prior claims.

In finding that claimant had established the existence of complicated pneumoconiosis, the administrative law judge discounted the opinions of Drs. Wheeler, Scott, and Branscomb, in part because they did not "even admit that simple pneumoconiosis was established[,]" when "[t]o the contrary, the preponderance of the record shows that pneumoconiosis has been established." Decision and Order at 5-6. The administrative law judge then credited Dr. Smiddy's opinion, ruling out tuberculosis and histoplasmosis as alternative diagnoses, and accorded greatest weight to the opinions of Drs. Alexander and DePonte, diagnosing complicated pneumoconiosis, in part, "because they are more consistent with the evidence and the law of this case." Decision and Order at 6. The administrative law judge thus concluded:

> Therefore, the vast preponderance of the probative evidence establishes not only simple pneumoconiosis but complicated pneumoconiosis. I find that there was a mistake in a determination of fact in assessing the weight given to opinions from physicians who materially rely on the non-existence of pneumoconiosis to controvert complicated pneumoconiosis where the preponderance of the evidence clearly establishes the existence of pneumoconiosis.

Decision and Order at 6. The administrative law judge did not indicate what weight he had accorded to the opinions of Drs. Forehand, Robinette, Castle, Michos, or Iosif, that the evidence did not support a diagnosis of complicated pneumoconiosis.

As employer contends, the administrative law judge applied the wrong legal standard in finding that claimant had established modification based on a mistake in fact. Employer's Brief at 27-28. Based on the administrative law judge's consideration of "the entire file," the administrative law judge concluded that claimant has simple pneumoconiosis. Decision and Order at 4. The administrative law judge then discounted the x-ray readings by Drs. Wheeler, Scott, and Branscomb, again without differentiating between current and prior evidence, because "they do not even admit that simple pneumoconiosis was established." Decision and Order at 5.

In reviewing the entire record *de novo* to find that claimant had established a mistake in fact in the prior determination, the administrative law judge failed to recognize that this was a duplicate claim and that claimant was obliged to establish a material change in conditions, based on evidence developed since the prior denial of benefits, before he is entitled to further adjudication of the merits of his claim. *See Rutter*, 86 F.3d at 1358, 20 BLR at 2-227; *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Here,

the administrative law judge did not confine his analysis of the issues to the evidence developed since the prior denial of benefits. Rather, the administrative law judge relied on both the old and new evidence to establish the presence of complicated pneumoconiosis, and thereby, invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. In treating this case as simply a petition for modification, the administrative law judge ignored the applicable law. *See Rutter*, 86 F.3d at 1358, 20 BLR at 2-227. Thus, we vacate the administrative law judge's findings that claimant established invocation of the irrebuttable presumption at 20 C.F.R. §718.304, and, therefore, established modification based on a mistake in fact pursuant to 20 C.F.R. §725.310 (2000), and remand the case for further consideration of whether the evidence developed in connection with the current claim, together with that submitted in support of claimant's request for modification, establishes a material change in conditions pursuant to 20 C.F.R. 725.309(d) (2000). *Stanley*, 194 F.3d at 499, 22 BLR 2-13; *Hess*, 21 BLR at 1-143.

We further agree with employer that the administrative law judge erred in weighing the medical evidence as to the existence of both simple and complicated pneumoconiosis. The administrative law judge's findings do not comport with the APA, or the holdings of the United States Court of Appeals for the Fourth Circuit.

In finding simple pneumoconiosis established, the administrative law judge simply stated that he had reviewed the file and, without further explanation, found the existence of the disease "based on weighing all types of evidence under 20 C.F.R. §718.202 together." Decision and Order at 4. The administrative law judge did not identify, with specificity, the evidence he had reviewed, or the relative weight he had accorded it. Similarly, in finding the existence of complicated pneumoconiosis established, the administrative law judge did not explain what weight, if any, he had accorded to the opinions of Drs. Forehand, Castle, Michos, and Iosif, that complicated pneumoconiosis had not been established

The APA requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439; 21 BLR 2-269, 2-272 (4th Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Moreover, the Fourth Circuit has held that an administrative law judge must adequately explain his reasons for crediting certain evidence and discrediting other evidence. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Akers*, 131 F.3d at 439; 21 BLR at 2-272. In order to determine whether the administrative law judge properly evaluated the medical evidence, the Board must have before it the administrative law judge's "reasons or basis therefor . . . ." 5 U.S.C. §557(c)(3)(A); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998)(observing that a function of Section

557(c)(3)(A) is to permit appellate review); *Wojtowicz*, 12 BLR at 1-165. On remand, the analysis of the evidence must be supported by sufficient and correct rationale.

In addition, as employer asserts, in discounting the opinions of Drs. Wheeler, Scott, and Branscomb, that the observed large opacities were not complicated pneumoconiosis, but were more consistent with tuberculosis or histoplasmosis, the administrative law judge shifted the burden of proof to employer by requiring that "the diagnosis of tuberculosis and histoplasmosis should be proven, to a reasonable degree of probability, in the nature of an affirmative defense, rather than have the Claimant disprove it." Decision and Order at 6 n.9; Employer's Brief at 16-17, 23-25. Because the administrative law judge improperly concluded that "[t]he burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants," we vacate his finding that Drs. Wheeler, Scott, and Branscomb did not provide "reasoned rebuttal" to Dr. Smiddy's contrary conclusion as to the existence of tuberculosis or histoplasmosis; claimant bears the burden of proof on all issues. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 6.

Based on the foregoing, we remand the case to the administrative law judge for further consideration. Initially, we note that, as employer contends, the record reflects that employer has challenged the timeliness of this duplicate claim at every stage of the proceedings, yet the issue has never been addressed. Thus, on remand, the administrative law judge should first determine whether claimant's October 15, 1998 claim was timely filed. *See Island Creek Coal Co. v. Henline*, 456 F.3d 421, 23 BLR 2-321 (4th Cir. 2006); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). If so, the administrative law judge should conduct a full and comparative review of all of the evidence developed in connection with claimant's October 15, 1998 claim, together with the evidence submitted on modification, to determine whether claimant has established a material change in conditions, and thus, has established a basis for modification, and entitlement to benefits under the Act.[7] The administrative law judge

[7] Contrary to employer's arguments, in considering the evidence developed in connection with claimant's third claim, the administrative law judge is not bound to accept, as law of the case, the prior findings in the third claim of Administrative Law Judge Joseph E. Kane, as affirmed by the Board, and the Fourth Circuit, that the opacity identified on x-ray was not pneumoconiosis. Employer's Brief at 28. Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), a party may request modification of a prior decision on the grounds of a change in conditions or because of a mistake in a determination of fact. Where a party requests modification, the administrative law judge is not bound by the prior factual findings. *Betty B Coal Co. v. Director, OWCP* [*Stanley*],

must provide adequate rationale for his findings. *See Wojtowicz*, 12 BLR 1-165; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). In addition, in determining, on remand, whether claimant has established the existence of complicated pneumoconiosis, the administrative law judge must evaluate the x-rays, CT scans, medical opinions, and other evidence, consistent with the standards set forth by the Fourth Circuit. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006); *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *see also Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007)(holding that the miner must also establish that his complicated pneumoconiosis arose out of coal mine employment).

Finally, we address employer's contention that the administrative law judge erred in determining that benefits commence as of October 1998. Employer argues that, if entitlement is established, benefits are be payable only from the month in which claimant requested modification. Employer's Brief at 33-34. Contrary to employer's argument, the applicable regulation provides that if a claim is awarded through modification based on a mistake in fact, benefits are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, or, if the evidence does not establish the month of onset, from the month in which claimant filed his claim.[8] 20 C.F.R. §725.503(d)(1). However, because we herein vacate the administrative law judge's finding of entitlement to benefits, we similarly vacate his findings as to the date from which benefits commence. If, on remand, the administrative law judge finds that claimant establishes entitlement to benefits, then he must again determine the date from which benefits commence. *See generally Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989).

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194 F.3d 491, 499, 22 BLR 2-1, 2-13 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

[8] While a similar method of determining the date from which benefits are payable applies when a claim is awarded through modification based on a change in conditions, the regulation contains the additional proviso that "no benefits shall be payable for any month prior to the effective date of the most recent denial." 20 C.F.R. §725.503(d)(2).

Accordingly, the administrative law judge's Decision and Order Granting Modification is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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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