BRB No. 10-0711 BLA

WILLARD CLARK (Deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PINE CREEK COAL COMPANY	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 12/12/2011
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification and Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Request for Modification and Denying Benefits (2009-BLA-05672) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a miner's claim filed on March 15, 2001.

Administrative Law Judge Janice K. Bullard initially credited claimant with thirty-five years of coal mine employment and found that he was totally disabled due to pneumoconiosis arising out of his coal mine employment.[2] *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.204. Accordingly, Judge Bullard awarded benefits. Upon review of employer's appeal, the Board held that Judge Bullard considered evidence in excess of the limitations imposed by 20 C.F.R. §725.414. Therefore, the Board vacated her decision and remanded the case for further consideration.[3] *Clark v. Pine Creek Coal Co.*, BRB No. 04-0441 BLA (Feb. 28, 2005) (unpub.); Director's Exhibit 75. On remand, Judge Bullard considered the evidence that was in compliance with the evidentiary limitations, and denied benefits. Specifically, Judge Bullard found that claimant was totally disabled by a pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), but that he did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 76.

Claimant timely requested modification, *see* 20 C.F.R. §725.310, which was denied by Administrative Law Judge Adele H. Odegard. Director's Exhibit 105. On modification, the parties stipulated that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and Judge Odegard found that claimant established the existence of pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §718.202(a)(1) and 20 C.F.R. §718.203(b). *Id*. at 17-18. Pursuant to 20 C.F.R. §718.204(c), however, Judge Odegard found that claimant did not establish that he was totally disabled due to pneumoconiosis, precluding an award of benefits. *Id*. at 19.

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[1] Claimant's counsel informed the Board that the miner died on June 17, 2011.

[2] Claimant's coal mine employment was in Pennsylvania. Director's Exhibits 2, 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] The Board affirmed Judge Bullard's unchallenged finding of thirty-five years of coal mine employment. *Clark v. Pine Creek Coal Co.*, BRB No. 04-0441 BLA, slip op. at 2 n.2 (Feb. 28, 2005) (unpub.).

Claimant again timely requested modification. Both claimant and employer submitted medical opinion evidence on the issue of disability causation: Dr. Kraynak opined that claimant's disability was due to his pneumoconiosis, and Dr. Levinson opined that claimant suffered from chronic obstructive pulmonary disease due solely to his history of smoking. Decision and Order at 8-10. Administrative Law Judge Ralph A. Romano (the administrative law judge) found both opinions to be adequately documented, but he found Dr. Levinson's opinion to be better reasoned. *Id*. at 11. The administrative law judge therefore denied claimant's modification request and denied benefits, finding that claimant did not establish that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id*.

On appeal, claimant argues that the administrative law judge erred in finding that he failed to establish that his total disability was due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, noting that Dr. Levinson's opinion "may be hostile" to the Act because of his apparent belief that pneumoconiosis does not result in an obstructive impairment. Director's Letter at 1 n.1.

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).

To establish entitlement to benefits under 20 C.F.R. Part 718, a miner must establish that he has pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Within one year of a denial of benefits, a miner may seek modification based upon a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). To demonstrate a change in conditions, a miner must submit new evidence to establish at least one of the elements of entitlement that he failed to establish in the prior decision; an administrative law judge must independently assess the new evidence and consider it together with previously submitted evidence to determine if an element has been established. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). An administrative law judge has broad discretion to grant modification based on a mistake of fact, including the ultimate fact of

entitlement to benefits. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

A miner is considered totally disabled due to pneumoconiosis if pneumoconiosis is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment, meaning that pneumoconiosis has a material adverse effect on a miner's respiratory or pulmonary condition, or materially worsens a totally disabling respiratory or pulmonary impairment that is unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i), (ii). The cause of a miner's total disability must be established by a documented and reasoned medical report from a physician. 20 C.F.R. §718.204(c)(2).

In connection with his second request for modification, claimant submitted a medical report and testimony from Dr. Kraynak. Director's Exhibit 111; Claimant's Exhibit 3. Although Dr. Kraynak concluded that claimant suffered from a mild obstructive pulmonary disease caused by smoking – a habit claimant gave up in 1987 – the doctor opined that claimant was totally disabled because of pneumoconiosis arising from his coal mine employment. Director's Exhibit 111; Director's Exhibit 114; Claimant's Exhibit 3 at 6, 12. Dr. Kraynak discounted the improvement shown by claimant in pulmonary function testing after bronchodilation, calling the improvement "minimal," and observing that cessation of smoking typically results in some improvement. Director's Exhibit 111; Claimant's Exhibit 3 at 12-13. Furthermore, Dr. Kraynak noted that claimant's pulmonary impairment was not purely obstructive, but was also restrictive. Based on these factors, and the fact that claimant quit smoking more than twenty years earlier and had thirty-five years of coal mine employment, Dr. Kraynak opined that pneumoconiosis was a "substantial contributing factor" in claimant's total disability. Director's Exhibit 111; Claimant's Exhibit 3 at 6, 12-13.

Employer countered with a medical report and testimony from Dr. Levinson, who agreed that claimant was totally disabled, but opined that he did not have pneumoconiosis. Director's Exhibit 114; Employer's Exhibit 2 at 17, 27. Dr. Levinson instead diagnosed claimant with moderate pulmonary emphysema, a chronic obstructive pulmonary disease that Dr. Levinson linked to claimant's smoking, but not to his coal mine employment. Employer's Exhibit 2 at 19-20. Relying on a pulmonary function study that showed moderate airway obstruction with "significant" improvement after bronchodilation, Dr. Levinson reasoned that impairments due to smoking are typically obstructive and improve with bronchodilation, whereas impairments resulting from pneumoconiosis are restrictive and do not improve with bronchodilation, because pneumoconiosis is a fixed, irreversible condition. Director's Exhibit 114; Employer's Exhibit 2 at 14, 18.

The administrative law judge found both medical opinions to be documented, as both were based "on a review of all the medical evidence of record and an examination of Claimant." Decision and Order at 11. In crediting Dr. Levinson with providing the better-reasoned opinion, the administrative law judge cited Dr. Levinson's reliance on the pulmonary function study showing obstruction, which the administrative law judge stated "is associated with cigarette smoking and not coal workers' pneumoconiosis." *Id*. The administrative law judge also noted Dr. Levinson's observation that claimant improved after bronchodilation, which the administrative law judge found "generally does not occur with coal workers' pneumoconiosis." *Id*. The administrative law judge therefore found that the evidence failed to establish that claimant was totally disabled due to pneumoconiosis.

Claimant argues, *inter alia*, that the administrative law judge erred in crediting Dr. Levinson's opinion on the cause of his total disability, when Dr. Levinson did not diagnose claimant with pneumoconiosis. Claimant's Brief at 7-8. Employer does not address this argument in its response brief, contending only that the administrative law judge's decision must be affirmed because it is rational, supported by substantial evidence, and in accord with applicable law. Employer's Brief at 5-6.

Claimant's contention has merit. Claimant previously established that he had pneumoconiosis, and employer did not argue otherwise before the administrative law judge. Once the existence of pneumoconiosis has been established, an administrative law judge making a finding on disability causation may not credit a medical opinion as to the cause of claimant's total disability where the physician did not diagnose claimant with pneumoconiosis, unless the judge offers "specific and persuasive reasons" for relying on that opinion. *Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002). Because the administrative law judge accepted the presence of pneumoconiosis in this case, he erred when he credited Dr. Levinson's disability causation opinion without explaining why he relied upon it in light of Dr. Levinson's conclusion that claimant did not have pneumoconiosis. *See Soubik*, 366 F.3d at 234, 23 BLR at 2-99. We must therefore vacate the administrative law judge's finding that claimant did not establish that his total disability was due to pneumoconiosis, 20 C.F.R. §718.204(c), and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must reconsider and resolve the conflicting medical opinions in accordance with *Soubik*, to determine whether claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In reconsidering the medical opinions, on remand, the administrative law judge must take into account the physicians' qualifications and the explanation and reasoning of their medical opinions, and he must explain his findings. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). In so doing, the administrative law judge should address the Director's argument that Dr. Levinson's conclusions as to the source of claimant's

impairment are based on premises fundamentally at odds with those underlying the statutory and regulatory definition of pneumoconiosis. *See Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge