BRB No. 97-0291BLA

EUGENE NAPIER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JERICOL MINING, INC.,	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Order on Motion for Reconsideration of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Nora J. Clark (Douglass Law Office), Harlan, Kentucky, for claimant.

Karen Rapaport Esser (Arter & Hadden), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order on Motion for Reconsideration (95-BLA-1170) of Administrative Law Judge Rudolf L. Jansen 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 administrative law judge found that the evidence was sufficient to establish 20 years of qualifying coal mine employment, and that claimant had four dependents for purposes of augmentation. The administrative law judge found that the evidence established the existence of

pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4); 718.203, and total respiratory disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge granted modification pursuant to 20 C.F.R. §725.310 and awarded benefits with an onset date for the commencement of benefits of February 1994. Following claimant's motion for reconsideration, the administrative law judge revised the onset date to June 1, 1992.

On appeal, employer contends that the administrative law judge erred by failing to make the requisite finding as to whether the evidence established a change in conditions pursuant to Section 725.310 prior to considering the merits of the claim. Employer also asserts that the administrative law judge erred when he found that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4). Employer further challenges the administrative law judge's finding that the evidence establishes total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), (c). Employer also challenges the administrative law judge's determination on reconsideration in regard to the onset date of entitlement. Employer argues that it is irrational for the administrative law judge to award benefits prior to the date upon which modification was sought, as the previous evidence was already considered, and rejected. Claimant, in response, asserts that the administrative law judge's findings that the evidence establishes entitlement are supported by substantial evidence, and accordingly, he urges affirmance of the administrative law judge's award of benefits beginning on June 1, 1992. The Director, Office of Workers' Compensation Programs (the Director), in response, asserts that employer's position regarding modification is incorrect, and that no preliminary inquiry is necessary. The Director takes no position with respect to the merits. Employer replies, asserting that both opposing parties' position with respect to modification is supported only by *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), but that it was effective overruled by the United States Supreme Court's holding in *Director, OWCP v. Greenwich Collieries (Ondecko)*, 114 S.Ct. 2251, 18 BLR 2A-1(1994), *aff'd sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993) because the Court held that claimant must prove all of the essential elements of entitlement by a preponderance of evidence. Employer repeats its earlier contentions regarding the merits, generally.[1]

[1] Inasmuch as no party has challenged the administrative law judge's findings that claimant established 20 years of qualifying coal mine employment, that claimant has four dependents for purposes of augmentation should benefits be awarded, that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), (3), but if established, arose out of coal mine employment pursuant to Section 718.203(b),

The Board's scope of review is defined by statute. 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contends that the administrative law judge erred when he proceeded directly to the merits in this modification case. The Director, in response, asserts that no preliminary finding is required. We agree. The Board has held that, in cases involving modifications pursuant to Section 725.310, the administrative law judge must determine whether claimant has demonstrated a mistake in a determination of fact or if the evidence establishes a change in conditions. The administrative law judge is obligated to make an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the newly submitted evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR*, 14 BLR 1-156 (1990), *modified on recon.* 16 BLR 1-71 (1992); *Worrell, supra*.

The administrative law judge's *de novo* decision on the merits of entitlement provides a determination regarding the question of whether a basis for modification has been demonstrated. *Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14 (1992). The administrative law judge acknowledged:

> "there is evidence submitted since the time of the prior award of the miner's claim, which, if fully credited, could change the prior administrative result. Therefore, I will proceed to review the claim on the merits, while weighing all of the medical evidence of record.

---

these findings are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Decision and Order at 5. However, contrary to employer's brief, there is no indication that the administrative law judge "mechanically granted modification," or actually applied the case law in *Shupink v. LTV Steel Co.*, 17 BLR 1-124 (1992). Employer's Brief at 15. The administrative law judge merely attempted to review the entire record on the merits and his findings, if affirmable, *see infra*, would have been sufficient to satisfy a modification analysis.[2] We therefore hold that in this case it was not necessary for the administrative law judge to make a specific preliminary determination regarding the grounds for modification inasmuch as the modification finding is subsumed in the administrative law judge's findings on the merits of entitlement.

[2] The arguments raised by employer regarding the administrative law judge's misplaced burden of proof on claimant in adjudicating the merits of the claim will be discussed, *infra*.

Employer next challenges the administrative law judge's finding that the evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Employer contends that the administrative law judge selectively analyzed the evidence and that his findings fail to comply with the Administrative Procedure Act (APA).[3] Employer argues that the administrative law judge failed to explain his rationale, and, in effect, provided claimant with a presumption of pneumoconiosis because the record contains positive x-ray readings. The administrative law judge summarized all of the 32 interpretations of 14 x-rays of record, and then concluded that 18 were read by Board-certified radiologists or B-readers. The administrative law judge then stated that he was giving more weight to the more qualified readers and the most recent x-ray evidence. Decision and Order at 10. He then discussed all the x-rays and concluded that the more recent positive readings of the March 9, 1994 and September 1, 1994 x-rays were more persuasive than the negative re-readings, without any rationale for this finding. The administrative law judge also found, without any rationale, that the positive reading of the September 6, 1995 x-ray more persuasive than the November 27, 1995 negative readings by two B-readers, one whom was also a Board-certified radiologist. Decision and Order at 10. The record contains 20 negative interpretations, and all of the readers who read negative x-rays have at least B-reader status while some are dually-qualified. Thus, the administrative law judge's finding is violative of the APA, and he has apparently selectively analyzed the evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); 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). We therefore vacate the administrative law judge's finding at Section 718.202(a)(1), and on remand he must fully explain the findings that he renders in compliance with the APA.

Employer also challenges the administrative law judge's finding that the evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer contends that the administrative law judge failed to consider the substance of the medical opinions, and their corresponding qualitative factors. Moreover, employer contends that it was irrational for the administrative law judge to credit the opinions diagnosing pneumoconiosis over those that did not diagnose pneumoconiosis on the basis of the superior credentials of the physicians, when in fact, they had the same credentials. Employer also contends that the administrative law judge improperly relied upon his x-ray

[3] The Administrative Procedure Act (APA) provides that every adjudicatory decision must 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), 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).

findings at Section 718.202(a)(1), when weighing the medical reports. Employer's contentions have merit.

The administrative law judge accurately summarized the six opinions of record, and concluded that Drs. Miller, Baker, Frank and Kabani opined that claimant had pneumoconiosis while Drs. Broudy and Dahhan concluded that he did not. Decision and Order at 11. He found that the opinions of Drs. Miller, Baker and Frank were well documented and well-reasoned and accorded more weight to the opinions of Drs. Baker and Frank because they were board-certified in internal medicine and pulmonary medicine. *Id*. Further, the administrative law judge found that Dr. Baker had examined claimant from 1992-1995, and thus had the best overall picture of the claimant's health and was most familiar with his medical condition. He noted that the opinions of Drs. Broudy and Dahhan were adequately documented and that they possessed impressive qualifications, but he chose to discount these opinions because they were "belied by [claimant's] extensive coal mine employment history and the positive x-ray readings." Decision and Order at 11. The administrative law judge accorded less weight to the opinions of Drs. Broudy and Dahhan and found that claimant had established the existence of pneumoconiosis. Inasmuch as we have vacated the administrative law judge's finding that the x-ray interpretations established the existence of pneumoconiosis at Section 718.202(a)(1), we likewise vacate his finding at Section 718.202(a)(4), as it is affected by his x-ray analysis. In addition, Drs. Broudy and Dahhan relied on the same number of years of coal mine employment history as the doctors whose opinions were credited by the administrative law judge. Therefore, it was irrational to give the opinions of Drs. Broudy and Dahhan less weight on this basis. On remand, the administrative law judge must similarly render findings at Section 718.202(a)(4) which comply with the APA.

Employer also challenges the administrative law judge's findings at Section 718.204(c). Employer contends that the administrative law judge again does not comply with the APA, and has not made the requisite *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987) and *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986) analysis. Employer's contentions have merit. Originally, the administrative law judge incorrectly found that all of the pulmonary function studies and blood gas studies produced qualifying values. Decision and Order at 12. Later, on reconsideration, the administrative law judge recognized that his finding with respect to the blood gas studies was error, as they all were non-qualifying. Order on Motion for Reconsideration at 2. The administrative law judge however failed to weigh together all of the relevant, probative evidence regarding total disability, both like and unlike evidence, as required by *Fields, supra* and *Shedlock, supra*, and instead, he simply stated that the medical evidence supports a finding of total disability. *Id*. Further, when weighing the medical reports, the administrative law judge stated that all six physicians opined that claimant was totally disabled. The record however indicates that although Dr. Frank diagnosed an occupational lung disease caused by coal mine employment, he provides no assessment as to whether claimant is totally disabled. Director's Exhibit 46. Dr. Broudy stated that claimant suffered from a chronic obstructive airways disease which *may* prevent him from doing the work of an underground miner. (emphasis added). Director's Exhibit 45. In addition, the administrative law judge did not discuss that Dr.

Dahhan initially opined that claimant retained the respiratory capacity to perform his usual coal mine employment, Director's Exhibit 45; but later concluded that claimant was totally disabled. Employer's Exhibit 2. As employer correctly contends, the administrative law judge must consider the weight accorded to any qualified or inconsistent opinions. *See Justice v. Director, OWCP*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Further, this reweighing of the medical opinions could affect the weighing required pursuant to *Fields, supra; Shedlock, supra.* We vacate, therefore, the administrative law judge's findings at Section 718.204(c), and on remand instruct him to address the above concerns.

We also find merit in employer's argument that the administrative law judge improperly found that claimant's total disability was due to pneumoconiosis at Section 718.204(b). Although the administrative law judge correctly cites the standard as set forth in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), (claimant must establish that his total disability is due "at least in part" to pneumoconiosis). The administrative law judge found that Dr. Frank attributed claimant's total disability to pneumoconiosis, when, in fact, Dr. Frank's opinion is silent as to whether claimant is totally disabled and fails to cite any source. Director's Exhibit 46. Moreover, the administrative law judge found the opinions of Drs. Baker and Frank to be corroborated by the qualifying pulmonary function studies and blood gas studies of record. Decision and Order at 13. As indicted previously, all of the blood gas studies are non-qualifying, and the administrative law judge did not address this error, but rather, discussed his finding regarding onset date. We vacate, therefore, the administrative law judge's finding pursuant to Section 718.204(b). On remand, the administrative law judge must again apply the standard set forth in *Adams, supra*.

Finally, employer challenges the administrative law judge's finding that the correct date of onset of entitlement is June 1, 1992. Initially, the administrative law judge found that the onset date commenced February 1994, the month that claimant filed his motion for modification. After claimant requested reconsideration, the administrative law judge changed the onset date to commence June 1992, the month in which Dr. Baker's report opined total disability. Employer asserts that it is improper for the administrative law judge to do this, as Dr. Baker's report was initially rejected, and the administrative law judge appears to base his modification findings on a change in condition, and not a mistake of a conclusion of fact. We reject employer's contention, and hold that, as a modification is a *de novo* proceeding, the administrative law judge may determine whether any evidence in the record establishes a correct onset date. *See* 20 C.F.R. 725.310; *Williams v. Director, OWCP*, 13 BLR 1-28 (1989). The administrative law judge, however, does not fully explain his determination to credit Dr. Baker's initial report in 1992 as establishing total disability. In addition, we note that his findings on remand may effect this finding. Therefore, although we reject employer's contention that Dr. Baker's report cannot establish the appropriate onset date, we are compelled to vacate his onset date finding. On remand, the administrative law judge must fully explain his onset date finding in compliance with the APA.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits

and the Order on Motion for Reconsideration are affirmed in part, vacated in part, and this case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge