BRB No. 97-0727 BLA

CARL WOLFORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
MORRIS & MARSHALL, INCORPORATED	)	
	)	
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 on Modification of Christine M. McKenna, Administrative Law Judge, United States Department of Labor.

Carl Wolford, Fayetteville, North Carolina, *pro se*.

Robin H. Terry (Cranfill, Sumner & Hartzog, L.L.P.), Raleigh, North Carolina, for employer.

Before: Administrative Appeals Judges.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order on Modification (96-BLA-1495) of Administrative Law Judge Christine M. McKenna 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). The procedural history of this case is as follows: Claimant, a living miner, filed an application for benefits on July 14, 1992. Director's Exhibit 1. After the district director determined

that claimant was not entitled to benefits, the case was transferred to the Office of Administrative Law Judges (OALJ) for a hearing at claimant's request. On August 14, 1995, the administrative law judge issued a Decision and Order in which she found that claimant's Social Security Administration records reflected seven years and nine months of coal mine employment. The administrative law judge considered the claim under the regulations set forth in 20 C.F.R. Part 718 and found that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that although the evidence of record supported a finding of total disability under 20 C.F.R. §718.204(c), claimant did not prove that his total disability is caused by pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

Claimant filed an appeal of the denial with the Board, but while this appeal was pending, claimant submitted additional medical evidence and asked that the case be remanded to the district director. The Board granted claimant's request in an Order dated January 16, 1996, and returned the case to the district director for a determination of whether the denial of benefits should be modified pursuant to Section 725.310. *Wolford v. Morris & Marshall, Inc.*, BRB No. 95-2165 BLA (Jan. 16, 1996)(unpublished Order). The district director found that claimant failed to demonstrate either a change in conditions or a mistake of fact in the prior denial. The case was transferred to the OALJ and assigned to the administrative law judge for disposition. The administrative law judge denied claimant's request for a hearing on the grounds that there were no credibility determinations at issue and that full consideration of claimant's request for modification

could be obtained based upon a review of the record before her. Order Denying Request for Oral Hearing at 1. *Id.*

In her Decision and Order on Modification, the administrative law judge noted initially that the newly submitted evidence confirmed her previous finding that claimant suffers from a severe disabling condition. Decision and Order on Modification at 3. The administrative law judge further found that claimant established that the initial determination regarding the length of his coal mine employment constituted a mistake of fact. Based upon newly submitted affidavits, the administrative law judge determined that claimant should have been credited with two additional years of coal mine employment. The administrative law judge further concluded, however, that this mistake of fact did not alter her ultimate determination that claimant is not entitled to benefits, inasmuch as the newly submitted evidence did not establish that claimant has pneumoconiosis or a disabling impairment related to dust exposure in coal mine employment. The administrative law judge also noted that even if claimant proved that he has pneumoconiosis and invoked the presumption that his pneumoconiosis arose out of coal mine employment, *see* 20 C.F.R. §718.203(b), employer rebutted the presumption. Accordingly, benefits were denied. Employer has responded to claimant's appeal and

urges affirmance of the denial of benefits.[1] The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

In an appeal by a claimant filed without the assistance of counsel, the Board will consider 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be

[1]We affirm the administrative law judge's decision to credit claimant with more than ten years of coal mine employment and her determination that the prior denial contained a mistake of fact regarding the length of claimant's coal mine employment, as these findings are not adverse to claimant and have not been challenged on appeal. Decision and Order on Modification at 5-6; *see Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[2]The Director, Office of Workers' Compensation Programs (the Director), initially filed a request for an extension of time within which to respond to claimant's appeal. On July 31, 1997, the Board issued an order in which it accepted the Director's subsequent letter indicating that he would not file a response to claimant's statement in support of his appeal. *Wolford v. Morris & Marshall, Inc.*, BRB No. 97-0727 BLA (July 31, 1997)(unpublished Order).

disturbed. 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 United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that Section 725.310 does not require that the analysis of a request for modification adhere rigidly to the two grounds for modification identified in the regulation.[3] *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Once a request for modification is filed, no matter the grounds stated, if any, an administrative law judge has the duty to reconsider all of the evidence of record for any mistake of fact or change in conditions. *See Worrell*, *supra*; *see also Jonida Trucking Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997). After review of the administrative law judge's Decision and Order on Modification and the record, we vacate the denial of benefits and remand the present case to the administrative law judge for reconsideration of claimant's request for modification, as the administrative law judge may not have based her findings on a consideration of all of the evidence of record in accordance with *Worrell*, inasmuch as she may have neglected to consider newly submitted evidence favorable to claimant. In addition, the administrative law judge did not fully consider whether her prior findings contained a mistake of fact regarding proof of the existence of pneumoconiosis arising out of coal mine employment and proof of total disability due to pneumoconiosis.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

In his request for Board review of the administrative law judge's Decision and Order on Modification, claimant alleges, *inter alia*, that the administrative law judge did not consider new medical evidence submitted by Dr. Whetsell. In her Order Denying Request for Oral Hearing, issued on November 20, 1996, the administrative law judge gave the parties thirty days in which to submit additional evidence. The record before the Board includes a letter dated December 16, 1996, in which Dr. Whetsell, one of claimant's treating physicians, states that claimant has chronic obstructive lung disease and coal workers' pneumoconiosis and is totally disabled due to chronic lung disease. Unmarked Exhibit. This letter is accompanied by a memorandum from the OALJ asking the Board to associate Dr. Whetsell's correspondence with the case file. There is no reference to Dr. Whetsell's letter in the administrative law judge's summary of the record before her on modification, *see* Decision and Order on Modification at 1, n.1, nor is there any indication that she either received or considered this letter. Inasmuch as it cannot be determined whether this document should have been included in the record before the administrative law judge, upon which the administrative law judge must base her findings, *see* 20 C.F.R. §725.477(b), we vacate the denial of benefits and remand the case to the administrative law judge so that she can consider whether this evidence was properly submitted in accordance with her Order. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). If the administrative law judge determines that this evidence was not properly submitted, the administrative law judge can either exclude it from the record or remand the case to the district director for further development of the evidence. *See generally* 20 C.F.R. §725.456(b); *Trull v. Director, OWCP*, 7 BLR 1-615 (1984).

If the administrative law judge determines that Dr. Whetsell's letter should have been admitted, she should reconsider whether claimant has established the prerequisites for modification under Section 725.310 with respect to the existence of pneumoconiosis arising out of coal mine employment and with respect to total disability due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c). In considering whether claimant has established a change in conditions, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determining whether the weight of the new evidence is sufficient to establish at least one of the elements of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

We also hold that in assessing whether a mistake of fact existed in her prior finding that claimant did not demonstrate the existence of pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis, the administrative law judge did not reconsider the previously submitted evidence as required under *Worrell*. Rather, she merely cited her Decision and Order Denying Benefits and indicated that repetition of her discussion of the opinions of Drs. Rivers, Whetsell, Powers, Fino, Kraman, and Hayes was not necessary. Decision and Order on Modification at 4. Therefore, the administrative law judge must reconsider on remand whether her prior decision contained a mistake of fact. The administrative law judge must weigh both the previously submitted evidence and the evidence proffered with claimant's request for modification, render a finding in the context of the regulation at issue, and provide a rationale for her

conclusions. *See Worrell*, *supra*; *see also Wojtowicz v. Duquesne Lighting Co.*, 12 BLR 1-162 (1989).

We turn now to a review of the specific findings made by the administrative law judge with respect to whether the newly submitted evidence established a change in conditions under Section 725.310. Regarding proof of the existence of pneumoconiosis under Section 718.202(a)(1), the administrative law judge determined correctly that none of the newly submitted x-ray interpretations of record are positive for pneumoconiosis. Decision and Order Denying Benefits at 11; Decision and Order on Modification at 4. The administrative law judge's initial finding that claimant cannot establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), as the record does not contain any biopsy evidence remains correct, inasmuch as claimant did not submit any such evidence in support of his request for modification. *See* Decision and Order Denying Benefits at 11. The administrative law judge's initial finding that the presumptions set forth in Section 718.202(a)(3) are not available to claimant also remains correct, as the relevant claim was filed by a living miner after January 1, 1982, and the newly submitted evidence does not include material indicating that claimant has complicated pneumoconiosis. *See* Decision and Order Denying Benefits at 11; 20 C.F.R. §§718.304-306.

Regarding consideration of the newly submitted medical reports, the administrative law judge acted within her discretion in declining to treat the records detailing claimant's recent hospitalizations as evidence of pneumoconiosis, as the physicians attending claimant did not diagnose coal workers' pneumoconiosis nor did they attribute claimant's obstructive lung disease to dust exposure in coal mine employment. Director's Exhibit 46 at 120; Claimant's Exhibit 1; *see Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The administrative law judge also acted within her discretion in reaching the same conclusion with respect to the progress note dated February 6, 1996, as the physician, who did not use his full signature, indicated that claimant has severe chronic obstructive pulmonary disease, but did not identify the source of this condition. Director's Exhibit 46 at 111-112; *see Perry*, *supra*. Finally, the administrative law judge rationally determined that Dr. Guberman's opinion was entitled to little weight, as the doctor's diagnosis of pneumoconiosis and his conclusion regarding the source of claimant's lung condition was stated in equivocal terms. Decision and Order on Modification at 5; Director's Exhibit 46 at 131; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge also acted within her discretion in discrediting Dr. Guberman's opinion on the ground that the doctor did not address the significance of claimant's use of cigarettes[4] and did not identify adequately the basis for his diagnosis.[5] Decision and Order on Modification at 5; Director's Exhibit 46 at 131; *see*

[4]In his medical report, Dr. Guberman indicated that claimant stopped smoking in November of 1995, but smoked one package of cigarettes per day for approximately thirty-three years and one-half of a package per day for at least two years prior to quitting. Director's Exhibit 46 at 131.

[5]The administrative law judge also referred to Dr. Guberman's alleged reliance upon "claimant's recitation of a ten year history of coal mine employment" when "claimant has not established such employment." Decision and Order on Modification at 5. The administrative law judge's finding in this regard is unclear, inasmuch as her suggestion that claimant has not established ten years of coal mine employment conflicts with her "mistake of fact" determination. *Id*. Moreover, the administrative law judge implied, without explanation, that one year of underground employment and several years of employment above ground cannot support a conclusion that claimant had a long history of exposure to coal dust. Inasmuch as the administrative law judge provided valid alternative grounds for discrediting Dr. Guberman's opinion, however, the administrative law judge need not reconsider her decision to accord diminished weight to Dr. Guberman's report. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161,164 n.5 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Bobick v. Saginaw Mining Co., 13 BLR 1-52 (1988); *Tackett*, *supra*. Thus, the findings rendered by the administrative law judge with respect to the newly submitted evidence are rational and supported by substantial evidence.

We further hold, however, that the administrative law judge's finding at Section 718.203(b) cannot be affirmed. In stating that the evidence would be sufficient to establish rebuttal of the Section 718.203(b) presumption, the administrative law judge stated that the evidence showed that most of claimant's work was above ground, that his symptoms did not begin until several years after he left the mines - a time during which he smoked cigarettes - and both his respiratory diagnosis and disability are most logically explained by cigarette abuse. Decision and Order on Modification at 6. It is recommended that the Board hold that the administrative law judge erred in this finding, inasmuch as the fact that claimant mostly worked above ground and did not develop symptoms until he left mining are not relevant factors upon which the administrative law judge may rely at Section 718.203(b). In addition, whether or not claimant's respiratory condition arose from his coal mine employment is a medical determination for the physicians, rather than the administrative law judge. *See generally Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986). The administrative law judge must, therefore, reconsider her finding under Section 718.203(b) on remand.

As a final matter, we hold that the Board instruct the administrative law judge must reconsider claimant's request for hearing on remand. The Board has held that the determination of whether a modification hearing is in the interests of justice falls within the discretion of the administrative law judge. *See Wojtowicz*, *supra*. In the present case, claimant submitted two written requests for a hearing. The first was contained in a letter

dated July 25, 1996, in which claimant stated that "more medical evidence can be better explained at the hearing if permitted." Claimant's Exhibit 1. The administrative law judge did not respond directly to claimant's letter, but on October 31, 1996, issued a Order to Show Cause giving the parties fifteen days within which to state in writing, including the reasons in support of their positions, whether they desired an oral hearing. Administrative Law Judge's Exhibit 3. Claimant's daughter responded on his behalf in a letter dated November 14, 1996, and stated that claimant wanted to have a hearing in order to clarify discrepancies in the first hearing and to explain the new evidence regarding his history of coal mine employment and medical condition. Administrative Law Judge's Exhibit 5. Claimant's daughter also indicated that claimant was not represented by an attorney and was presently in the hospital for treatment of respiratory failure and could not communicate because he was on a respirator. Accordingly, claimant's daughter requested an extension of time within which to respond to the Order to Show Cause.

On November 20, 1996, the administrative law judge issued an Order in which she held that a hearing was not required, inasmuch as credibility determinations were not at issue and full consideration of the request for modification could be accomplished by review of the documentary evidence. The administrative law judge did not reply to the request for additional time to respond to the Order to Show Cause nor did she respond directly to claimant's concerns regarding the first hearing, his lack of representation by counsel, and his desire to have an opportunity to explain the newly submitted evidence. It is suggested that in light of the fact that the administrative law judge did not address the latter issues in her Order Denying Request for Oral Hearing, the administrative law judge did not adequately consider whether a hearing on modification would be in the interests of

justice. *See Wojtowicz*, *supra*. The administrative law judge is required, therefore, to reconsider claimant's request for a hearing on remand.

Accordingly, the administrative law judge's Decision and Order on Modification is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge