BRB No. 98-0616 BLA

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

Appeal of the Decision and Order - Denying Modification and the Order Denying Claimant's Request for Reconsideration of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Lonnie Bentley, Virgie, Kentucky, *pro se*.[1]

Jeffrey S. Goldberg (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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

[1]Susie Davis, with the Kentucky Black Lung Association of Pikeville, Kentucky, requested on behalf of claimant that the Board review the administrative law judge's decision. In a letter dated January 27, 1998, the Board stated that it will review this case under the general standard of review, which is whether the administrative law judge's Decision and Order is rational, is in accordance with law and is supported by substantial evidence. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Modification and the Order Denying Claimant's Request for Reconsideration (97-BLA-0839) of Administrative Law Judge Daniel F. Sutton 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). In his decision, the administrative law judge noted the parties' agreement to at least ten years of coal mine employment and adopted the prior administrative law judge's finding of ten years and three months of coal mine employment. The administrative law judge considered this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 727. With regard to 20 C.F.R. Part 727, the administrative law judge found the evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). With regard to 20 C.F.R. Part 718, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). However, the administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge concluded that the evidence is insufficient to establish either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 and, thus, denied benefits.[2] In a subsequent Order,

[2]Claimant filed his initial claim on November 7, 1973. Director's Exhibit 33. On August 1, 1986, Administrative Law Judge Bernard J. Gilday, Jr. issued a Decision and Order denying benefits based on claimant's failure to establish a totally disabling respiratory impairment due to pneumoconiosis under 20 C.F.R. §727.203(a) and 20 C.F.R. Part 410, Subpart D. *Id*. Further, on September 11, 1986, Judge Gilday issued an Order, which denied the request of the Director, Office of Workers' Compensation Programs (the Director), for reconsideration. *Id*. Although the Director appealed Judge Gilday's decision to the Board on October 14, 1986, the Director subsequently moved that the Board dismiss his appeal, *id*., which the Board granted with prejudice, *Bentley v. Tri-Moore Mining Co.*, BRB No. 86-2680 BLA (Nov. 24, 1987)(Order)(unpub.). On April 29, 1988, claimant sent correspondence to the Department of Labor (DOL), which the DOL construed as a request for modification. *Id*. The DOL denied claimant's request for modification on June 22, 1988. *Id*. Moreover, on October 31, 1988, Judge Gilday issued an Order dismissing claimant's request for a hearing for want of jurisdiction based on the Board's holding in *Lukman v. Director, OWCP*, 11 BLR 1-71 (1988), *rev'd* 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990). *Id*. Claimant filed another claim on November 4, 1988, which the DOL treated as a duplicate claim. Director's Exhibit 1. The DOL subsequently denied benefits on May 2, 1989, August 6, 1990, October 5, 1993 and

March 4, 1994 based on claimant's failure to establish a **material** change in conditions. Director's Exhibits 28, 32, 45, 49. On March 16, 1994, claimant requested a hearing. Director's Exhibit 50. The DOL issued an Order to Show Cause why claimant's appeal should not be denied as abandoned on May 12, 1994. Director's Exhibit 52. On May 2, 1995, the DOL advised claimant's attorney that claimant's claim had been administratively closed and deemed abandoned because of claimant's failure to respond to its Order to Show Cause. Director's Exhibit 54. However, the DOL informed claimant's counsel that if claimant wrote to it before May 12, 1995, the claim would be subject to reopening under 20 C.F.R. §725.310. *Id*. On May 8, 1995, claimant sent the DOL correspondence, which the DOL construed as a request for modification. Director's Exhibits 55, 56. The DOL denied claimant's request for modification on December 13, 1995. *Id*. On March 28, 1996, claimant filed another request for modification, Director's Exhibit 62, which the DOL denied on June 25, 1996, Director's Exhibit 65. In response to claimant's request

the administrative law judge denied claimant's request for reconsideration. On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge erred by failing to compare the exertional requirements of claimant's usual coal mine employment with Dr. Mettu's assessment of claimant's respiratory impairment. The Director also contends that the administrative law judge erred by failing to independently consider the previously submitted medical opinion evidence of record with respect to the issue of total disability.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See 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

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for reconsideration of the DOL's denial of claimant's request for modification, the DOL denied benefits based on claimant's failure to establish a **material** change in conditions. Director's Exhibits 66, 69. On November 25, 1996, claimant requested a hearing which was held before Administrative Law Judge Daniel F. Sutton (the administrative law judge) on July 22, 1997. In his decision, the administrative law judge correctly stated that although the November 4, 1998 claim "was treated as a 'duplicate' claim by OWCP, it should have been treated as another request for modification." Decision and Order at 5. Although claimant filed several requests for modification after his November 4, 1988 claim, the administrative law judge considered all of the evidence submitted after the November 4, 1988 claim as newly submitted evidence for purposes of determining whether the evidence is sufficient to establish a change in conditions at 20 C.F.R. §725.310.

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).

In finding the newly submitted evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), the administrative law judge considered the newly submitted x-ray evidence of record, which consists of seven x-ray interpretations. Director's Exhibits 25-27, 44, 60, 64, 68. The administrative law judge correctly stated that "[o]nly one interpretation is positive for pneumoconiosis, a reading of a June 29, 1993 film by...[Dr.] Kim." Decision and Order at 7; Director's Exhibit 60. Further, the administrative law judge correctly stated that "[t]he June 29, 1993 film was reread by...[Dr.] Sargent...whose interpretation was negative for pneumoconiosis." Decision and Order at 7-8; Director's Exhibit 64. The administrative law judge properly accorded greater weight to Dr. Sargent's negative reading of the June 29, 1993 x-ray than to Dr. Kim's positive reading of the same x-ray because of "Dr. Sargent's superior qualifications as a B-reader and Board-certified radiologist."[3] *Id*. at 8; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Moreover, since six of the seven newly submitted x-ray interpretations of record are negative for pneumoconiosis, and since there is no biopsy or autopsy evidence of record, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *see also Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

[3]The administrative law judge correctly stated that Dr. Kim's "radiological qualifications are not contained in the record." Decision and Order at 7.

In addition, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(2) and (a)(3) since none of the newly submitted pulmonary function studies or arterial blood gas studies of record yielded qualifying[4] values.[5] Director's Exhibits 15, 24, 44, 60.

[4]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 727. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §727.203(a)(2) and (a)(3).

[5]Although claimant's initial request for modification was filed in 1988, the administrative law judge considered the newly submitted pulmonary function studies dated November 12, 1981, December 30, 1982 and June 11, 1985 in finding the evidence insufficient to establish a change in conditions at 20 C.F.R. §725.310. However, since none of these studies yielded qualifying values, we hold that any error by the administrative law judge in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Next, the administrative law judge found the newly submitted evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4). The administrative law judge considered the newly submitted opinions of Drs. Mettu, Sundaram and Wright.[6] Dr. Mettu opined that claimant suffers from a mild pulmonary impairment. Director's Exhibit 44. Dr. Sundaram opined that claimant is not physically able, from a pulmonary standpoint, to do his usual coal mine employment. Director's Exhibit 60. Dr. Wright opined that claimant is occupationally disabled for coal mining and work in a dusty environment. Director's Exhibit 18. The administrative law judge properly accorded greater weight to the opinion of Dr. Mettu than to the opinions of Drs. Sundaram and Wright because Dr. Mettu's opinion is better reasoned and documented.[7] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge also properly accorded greater weight to the opinion of Dr. Mettu than to the opinions of Drs. Sundaram and Wright because of Dr. Mettu's superior qualifications.[8] *See*

[6]As previously noted, claimant filed his initial request for modification in 1988. The administrative law judge considered the newly submitted opinion of Dr. Wright dated November 16, 1981 in finding the evidence insufficient to establish a change in conditions at 20 C.F.R. §725.310. Since the administrative law judge properly accorded greater weight to the newly submitted opinion of Dr. Mettu than to the opinion of Dr. Wright because Dr. Mettu's opinion is better reasoned and documented, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), and because of Dr. Mettu's superior qualifications, *see Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), we hold that any error by the administrative law judge in this regard is harmless. *See Larioni, supra*.

[7]The administrative law judge stated that Dr. Mettu's "opinions are well-supported by reference to the objective medical evidence, whereas the reports from Drs. Wright and Sundaram are presented in conclusory terms, devoid of any explanation as to how they arrived at their conclusions that the Claimant is totally disabled." Decision and Order at 12.

[8]The administrative law judge stated that "Dr. Mettu is obviously well-qualified by virtue of his Board-certification in internal medicine and pulmonary disease to express an opinion as to the existence and severity of any respiratory or pulmonary impairment, while the record does not show that Drs. Wright and Sundaram possess any particular experience or training in the diagnosis and evaluation of respiratory or

*Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

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pulmonary disease." Decision and Order at 12.

However, as argued by the Director, the administrative law judge failed to identify the exertional requirements of claimant's usual coal mine employment and compare them with Dr. Mettu's opinion that claimant suffers from a mild pulmonary impairment. Dr. Mettu's opinion concerning the extent of claimant's impairment may, if credited and when compared with the exertional requirements of claimant's usual coal mine employment, support a finding of total disability.[9] *See Parsons v. Director, OWCP*, 6 BLR 1-272 (1983). Thus, we vacate the administrative law judge's finding that the evidence is insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4), and remand the case to the administrative law judge to compare Dr. Mettu's opinion with the exertional requirements of claimant's usual coal mine employment to determine whether the medical opinion evidence is sufficient to establish a change in conditions at 20 C.F.R. §725.310. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153 (1985); *see also Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8, 1-11 (1994); *Napier v. Director, OWCP,* 17 BLR 1-111, 1-113 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Turning to the administrative law judge's findings under 20 C.F.R. Part 718, with regard to 20 C.F.R. §718.202(a)(4), the administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis. The administrative law judge stated that "a preponderance of the physician opinion evidence, particularly the medical opinions of Drs. Penman and Anderson...which I find to be well-reasoned and comprehensive in terms of their consideration of the Claimant's coal mining and smoking histories as possible causative factors, establishes the presence of pneumoconiosis." Decision and Order at 13. The Director asserts that the administrative law judge erred by relying on the opinions of Drs. Penman and Anderson because they are based solely on discredited positive x-ray interpretations. Contrary to the Director's assertion, Drs. Penman and Anderson based their opinions on physical examinations, smoking and coal mine employment histories and x-ray evidence. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields, supra*; *Fuller, supra*; *Ogozalek v. Director, OWCP*, 5 BLR 1-309 (1982). An administrative law judge must consider a medical report as a whole, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984), and may not discredit an opinion merely because it is based on an x-ray interpretation which is outweighed by the other x-ray interpretations of record, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Taylor v. Director,*

[9]The record contains a Description of Coal Mine Work and Other Employment form, which describes the physical activity required by claimant's usual coal mine employment. Director's Exhibit 9. Claimant stated that he was required to break rock and maintain a belt line. *Id*.

*OWCP*, 9 BLR 1-22 (1986); *cf. Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Nonetheless, although the administrative law judge noted that "Dr. Broudy and Dr. Mettu both diagnosed the Claimant with chronic bronchitis and attributed this condition to his cigarette smoking" when considering the evidence at 20 C.F.R. §718.203(b), the administrative law judge did not provide any explanation for his rejection of these medical opinions in his analysis of the evidence under 20 C.F.R. §718.202(a)(4). Decision and Order at 13. An administrative law judge must not reject relevant evidence without an explanation. *See Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). Thus, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). If the administrative law judge does not find the existence of pneumoconiosis established under 20 C.F.R. §718.202(a)(4), he must consider whether claimant has demonstrated the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3). Further, inasmuch as we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), we vacate the administrative law judge's finding that the evidence is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). On remand, if reached, the administrative law judge must reconsider all relevant evidence at 20 C.F.R. §718.203.

In finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1), the administrative law judge considered all of the pulmonary function studies of record. Director's Exhibits 12-15, 33, 44, 60. The administrative law judge stated that "[n]one of the values produced by the newly-submitted studies and only one of the studies before Judge Gilday, the November 15, 1973 study by Dr. Penman, produced values equal to those established in Appendix B to Part 718 for a finding of total disability." Decision and Order at 14-15. However, an examination of the record reveals that the pulmonary function study dated November 19, 1973 yielded qualifying[10] values pursuant to the criteria set forth in the tables at 20 C.F.R. Part 718, Appendix B. Director's Exhibit 33. Since the administrative law judge mischaracterized the pulmonary function study evidence under 20 C.F.R. Part 718,

[10]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

we vacate the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1), and instruct the administrative law judge to further consider the pulmonary function study evidence, if reached. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Since none of the arterial blood gas studies of record yielded qualifying values, we affirm the administrative law judge's finding that the evidence of record as a whole is insufficient to establish total disability at 20 C.F.R. §718.204(c)(2). Director's Exhibits 24, 33, 44. Furthermore, since the administrative law judge properly found that "[t]here is no evidence in the record that the Claimant suffers from cor pulmonale with right sided congestive heart failure," we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3). Decision and Order at 15.

Further, the administrative law judge found the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). The administrative law judge stated that although "Drs. Wright and Sundaram have provided opinions that the Claimant is totally disabled..., I have found that their opinions are outweighed by the significantly more thorough and better documented reports from Dr. Mettu who concluded that the Claimant has no more than a mild pulmonary impairment." *Id*. The administrative law judge also stated that he "adopt[ed] Judge Gilday's findings concerning the medical opinion evidence in the record before him on the question of total disability." *Id*. As previously noted, the administrative law judge erred by failing to compare the exertional requirements of claimant's usual coal mine employment with Dr. Mettu's opinion, since Dr. Mettu's opinion may support a finding of total disability. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. en banc*, 9 BLR 104 (1986). Thus, we vacate the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). If reached on remand, the administrative law judge must compare Dr. Mettu's opinion with the exertional requirements of claimant's usual coal mine employment to determine whether the medical opinion evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c)(4).

Finally, we vacate the administrative law judge's conclusion, pursuant to 20 C.F.R. §725.310, that the evidence is insufficient to establish a mistake in a determination of fact with respect to the previous findings made under 20 C.F.R. §§727.203(a)(1)-(4) and 718.204(c)(1) and (c)(4). *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Although the administrative law judge noted the conclusions of the prior administrative law judge, he did not

adequately set forth the underlying rationale for his determination that these findings did not include a mistake in a determination of fact. *See Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt, supra*. On remand, the administrative law judge must independently evaluate all of the relevant evidence to determine whether the prior denial of benefits contained a mistake in a determination of fact with respect to these findings pursuant to 20 C.F.R. §725.310.

In sum, we remand this case to the administrative law judge to reconsider whether the newly submitted evidence supports a finding of invocation of the interim presumption under 20 C.F.R.§727.203(a)(4), the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4), or total disability under 20 C.F.R. §718.204(c)(1) and (c)(4). *See Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). We also remand the case to the administrative law judge for reconsideration of whether the prior administrative law judge's findings contained a mistake in a determination of fact. If the administrative law judge determines that claimant has established a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, he must then consider entitlement on the merits based upon a consideration of all of the evidence of record under 20 C.F.R. Part 727 and 20 C.F.R. Part 718. *See Worrell, supra*; *Knuckles, supra*.

Accordingly, the administrative law judge's Decision and Order - Denying Modification and Order Denying Claimant's Request for Reconsideration are affirmed in part and vacated in part, and the 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge