

BRB No. 09-0440 BLA

ORBIE N. JUSTICE)
)
 Claimant-Petitioner)
)
 v.)
)
 PETER CREEK COAL COMPANY)
)
 and)
)
 EMPLOYERS INSURANCE OF WAUSAU) DATE ISSUED: 01/13/2010
)
 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 of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (07-BLA-5442) denying benefits of Administrative Law Judge Kenneth A. Krantz (the administrative law judge) 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).¹ The administrative law judge found that claimant had thirteen years of qualifying coal mine employment and that the claim before him, filed on October 2, 2001, was a subsequent claim. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the new evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.² Benefits were, accordingly denied.

On appeal, claimant asserts that the administrative law judge erred in not finding that the evidence established the existence of pneumoconiosis and total respiratory disability due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) responds, contending that both the administrative law judge who issued the decision currently before the Board on appeal, and Administrative Law Judge Janice K. Bullard, who previously issued a decision denying benefits on the 2001 claim, mistakenly treated claimant's 2001 claim as a subsequent claim. The Director contends that the 2001 claim was not a subsequent claim, but was, instead, a request for modification of the denial of claimant's 1998 claim, as it was filed within one year of the December 28, 2000 denial of claimant's 1998 claim. Thus, the Director contends that, because the 1998 claim was still pending and the 2001 claim was never properly adjudicated as a request for modification, the administrative law judge's decision denying benefits must be vacated and the case remanded for consideration of all of the evidence of record on modification at 20 C.F.R. §725.310 (2000).

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. The regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Only if a change in an applicable condition of entitlement is established, is claimant then entitled to a review of the entire record on his claim.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law,³ they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 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*).

In determining whether a basis for modification has been established pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge must consider whether there has been a change in conditions or whether a mistake in a determination of fact was made in the previous decision. In considering whether a change in conditions has been established, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1993). In considering whether a mistake in a determination of fact has been made, the administrative law judge is required to consider the entirety of the evidentiary record. *Nataloni*, 17 BLR at 1-84.

Claimant filed his first claim for benefits on December 18, 1998. The claim was denied by Administrative Law Judge Thomas F. Phalen, Jr. on December 28, 2000 in *Justice v. Peter Creek Coal Co.*, Case No. 00-BLA-466 (Dec. 28, 2000). Director's Exhibit 1. Claimant initially appealed the denial to the Board, but subsequently withdrew his appeal. The Board dismissed claimant's appeal by Order dated September 25, 2001. *Justice v. Peter Creek Coal Co.*, BRB No. 01-831 BLA (Sept. 25, 2001) (unpublished order). Seven days later, on October 2, 2001, claimant filed a new claim. Director's Exhibit 3. On July 8, 2003, the district director issued a Proposed Decision and Order denying benefits, and claimant requested a hearing before an administrative law judge. Director's Exhibits 19, 20. On October 28, 2005, Judge Bullard, considering the October 2, 2001 claim as a subsequent claim, denied benefits. Director's Exhibit 87. Claimant

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 7, 10.

appealed the denial to the Board on November 14, 2005, but filed a request for modification with the district director on November 23, 2005 and filed a motion with the Board on November 29, 2005 to dismiss his appeal and to remand the case to the district director pursuant to his request for modification. Director's Exhibits 92, 93. The Board granted claimant's motion on December 20, 2005, remanding the case to the district director. *Justice v. Peter Creek Coal Co.*, BRB No. 06-189 BLA (Dec. 20, 2005) (unpublished order). The district director issued a Proposed Decision and Order Denying the Request for Modification on December 15, 2006. Claimant requested a hearing before an administrative law judge on December 15, 2006. On December 12, 2007, a hearing was held before the administrative law judge. By Decision and Order dated February 27, 2009, the administrative law judge denied benefits on the 2001 claim, which he deemed a subsequent claim.

At the outset, we note our agreement with the Director. Claimant's 2001 claim, which was filed within a year of the denial of claimant's 1998 claim, was a request for modification of that claim. The 2001 claim should, therefore, have been treated as a request for modification by both the administrative law judge and Judge Bullard, rather than as a subsequent claim. Consequently, we vacate the administrative law judge's denial of benefits, and we remand the case to the administrative law judge to consider whether modification was established pursuant to Section 725.310 (2000).⁴ The administrative law judge must consider all of the evidence of record, both old and new, in making a determination on modification. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Further, because the 2001 claim was a request for modification of the 1998 claim, the regulatory limitations at 20 C.F.R. §725.414 governing the evidence that the parties may submit in claims filed on or after January 19, 2001 do not apply. *See* 20 C.F.R. §725.2(c).

⁴ Although the administrative law judge makes reference to modification, he considered whether there was a basis to modify the denial of the subsequent claim, and has not, therefore, considered all of the evidence obtained as part of the 1998 claim.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge