BRB No. 97-1328 BLA

WILLIAM H. RASNAKE Claimant-Petitioner v. APACHE COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION AND ORDER

Appeal of the Decision and Order - Denying Request for Modification of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

William H. Rasnake, Davenport, Virginia, *pro se*.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer/carrier.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order - Denying Request for Modification (94-BLA-1320) of Administrative Law Judge Clement J. Kichuk regarding 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 present appeal concerns the administrative law judge's denial of claimant's

second request for modification pursuant to 20 C.F.R. §725.310.[1] In a Decision and Order issued on September 15, 1995, the administrative law judge weighed the newly submitted evidence and determined that it did not support a finding of a change in conditions, inasmuch as the evidence did not demonstrate either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or that claimant is totally disabled pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge also stated that claimant did not demonstrate that the prior denial of benefits contained a mistake in a determination of fact. Accordingly, benefits were denied and claimant's appeal followed.[2] Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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[1]Claimant filed an application for benefits on January 11, 1984. This claim was denied in a Decision and Order issued by Administrative Law Judge John S. Patton on August 25, 1988, on the ground that claimant failed to establish that he was totally disabled under 20 C.F.R. §718.204(c)(1)-(4). Claimant filed a request for modification on August 3, 1989, pursuant to 20 C.F.R. §725.310, which was denied by the district director. Following transfer to the Office of Administrative Law Judges for a hearing, the parties asked that the case be decided on the record. Administrative Law Judge Clement J. Kichuk (the administrative law judge) issued a Decision and Order on July 29, 1991, in which he determined that the newly submitted evidence did not support a finding either of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) or that claimant was suffering from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1)-(4). Accordingly, the administrative law judge found that claimant failed to establish a change in conditions and benefits were denied. Claimant appealed the denial of benefits to the Board. In a Decision and Order issued on April 21, 1993, the Board affirmed the administrative law judge's finding that the newly submitted evidence was insufficient to establish total disability under Section 718.204(c)(1)-(4). *Rasnake v. Apache Coal Co.*, BRB No. 91-2066 BLA (Apr. 21, 1993)(unpub.). The Board, therefore, affirmed the administrative law judge's determination that claimant did not demonstrate a change in conditions pursuant to Section 725.310 and affirmed the denial of benefits. *Rasnake*, *supra*. Claimant then filed a second request for modification on November 22, 1993, and submitted additional medical evidence. The district director rejected claimant's request and the case was transferred to the administrative law judge for a hearing.

[2]By Order issued August 22, 1997, the Board acknowledged that on June 23, 1997, it received from the Office of Administrative Law Judges claimant's letter, dated October 3, 1995, appealing the administrative law judge's Decision and Order - Denying Request for Modification. Inasmuch as claimant's appeal was timely filed with an office of the Department of Labor within thirty days of the date of filing of the administrative law judge's decision, the appeal was timely filed with the Board. 20 C.F.R. §802.207(a)(2); *Rasnake v. Apache Coal Co.*, BRB No. 97-1328 BLA (Aug. 22, 1997)(unpub. Order).

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 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).

Upon review of the administrative law judge's findings under Section 725.310 and the applicable law, we vacate the administrative law judge's determination that claimant did not establish either of the prerequisites for modification pursuant to Section 725.310, as the administrative law judge did not properly consider whether claimant established the presence of a mistake in a determination of fact. Under the precedent established by the United States Court of Appeals for the Fourth Circuit in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), an administrative law judge is required to determine, based upon a consideration of all of the evidence of record, whether a mistake was made in any of the previous findings of fact.[3] In his Decision and Order on Remand, the administrative law judge did not review all of the evidence of record and the prior findings of fact to ascertain whether a mistake was made. Rather, the administrative law judge stated, without elaboration, that claimant has not "established a mistake in a determination of fact since the Decision and Order of the Benefits Review Board on April 21, 1993, affirming the denial of modification and denial of benefits." Decision and Order at 10. Therefore, we vacate the administrative law judge's finding under Section 725.310 and remand this case to the administrative law judge to permit him to determine, in accordance with *Jessee*, whether any of the previous findings of fact was in error. The administrative law judge must set forth his conclusions regarding this issue and the underlying rationale. *See Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

With respect to the administrative law judge's analysis of the issue of whether the newly submitted evidence demonstrated a change in conditions under Section 725.310, the administrative law judge acted properly in weighing the newly submitted evidence, in conjunction with the previously submitted evidence, to determine whether the new evidence is sufficient to establish at least one of the elements of entitlement previously adjudicated against the claimant. *See Jessee*, *supra*; *see also Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Moreover, we affirm the findings rendered by the

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

administrative law judge under Section 718.202(a)(1)-(4). Concerning Section 718.202(a)(1), the administrative law judge acted within his discretion in finding that claimant did not establish the existence of pneumoconiosis by a preponderance of the evidence, as the physicians who are both B readers and Board-certified radiologists were divided as to whether claimant's chest x-rays demonstrated the presence of pneumoconiosis. Decision and Order at 7; *see Director, OWCP v. Greenwich Collieries [Ondecko],* 114 S.Ct. 2251, 18 BLR 2A-1 (1994); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). The administrative law judge properly found that claimant could not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), as the record does not contain any biopsy or autopsy evidence. Decision and Order at 8; 20 C.F.R. §718.202(a)(1). With respect to Section 718.202(a)(3), the administrative law judge stated correctly that the presumptions referred to in this subsection are not available to claimant, as the relevant claim was filed by a living miner after January 1, 1982, and the record does not contain any evidence suggesting that claimant has complicated pneumoconiosis. Decision and Order at 8; 20 C.F.R. §§718.202(a)(3), 718.304-306.

Regarding the newly submitted medical opinions, the administrative law judge acted within his discretion in determining that the medical opinion in which Dr. Shoukry stated that claimant does not have pneumoconiosis, was entitled to greater weight than the contrary opinions of Drs. Patel, Baxter, and Robinette. The administrative law judge rationally accorded little weight to Dr. Patel's opinion on the ground that Dr. Patel only identified pneumoconiosis as a possible diagnosis. Decision and Order at 8; Director's Exhibit 109; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). In addition, the administrative law judge acted within his discretion in finding that Dr. Shoukry's opinion is more persuasive than the opinions of Drs. Baxter and Robinette on the grounds that Dr. Shoukry identified the bases for his conclusions in greater detail and Dr. Shoukry's opinion is corroborated by the newly submitted review reports proffered by Drs. Fino and Tuteur. Decision and Order at 9; Employer's Exhibits 9, 15, 16, 18, 19; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Regarding the issue of total disability pursuant to Section 718.204(c)(1), the administrative law judge rationally determined that the newly submitted pulmonary function studies did not warrant a finding of a change in conditions, as all of the valid studies produced nonqualifying values.[4] Decision and Order at 9; Claimant's Exhibits 7, 10; Employer's Exhibit 10; 20 C.F.R. §718.204(c)(1); Appendix B to 20 C.F.R. Part 718. With respect to the qualifying post-bronchodilator study obtained by Dr. Baxter on June 20, 1994, the administrative law judge acted within his discretion in crediting the opinions in which Drs. Fino and Tuteur reviewed the relevant tracings and concluded that the results of this study were not valid on the ground that claimant did not perform the

[4]A qualifying pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables in Appendices B and C to 20 C.F.R. Part 718. A nonqualifying study exceeds those values.

maneuvers adequately. Dr. Baxter's report did not contain any statement regarding claimant's comprehension or cooperation nor did Dr. Baxter otherwise comment on the validity of the study. Decision and Order at 5; Claimant's Exhibit 10; *see generally Siegel v. Director, OWCP*, 8 BLR 1-156 (1985).

With respect to Section 718.204(c)(2), the administrative law judge determined correctly that none of the newly submitted blood gas studies produced qualifying values. Decision and Order at 10; Claimant's Exhibits 7, 11; Employer's Exhibit 10; 20 C.F.R. §718.204(c)(2); Appendix C to 20 C.F.R. Part 718. The administrative law judge also found properly that claimant could not establish total disability pursuant to Section 718.204(c)(3), as there is no evidence of record indicating that claimant is suffering from cor pulmonale with right sided congestive heart failure. Decision and Order at 10; 20 C.F.R. §718.204(c)(3). Regarding his consideration of the newly submitted medical opinions under Section 718.204(c)(4), the administrative law judge rationally determined that these opinions did not support a finding of total disability, inasmuch as none of the physicians diagnosed a totally disabling respiratory or pulmonary impairment nor did any physician report physical limitations which could be compared to the exertional requirements of claimant's usual coal mine employment. Decision and Order at 10; Director's Exhibit 109; Claimant's Exhibits 7, 10, 12; Employer's Exhibits 9, 15, 16, 18; *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*).

In light of the foregoing, we affirm the administrative law judge's determination that claimant did not establish a change in conditions as is required under Section 725.310, as the administrative law judge properly considered the newly submitted evidence in conjunction with the previously submitted evidence of record. However, we vacate the administrative law judge's finding that claimant has not established a mistake in fact and remand the case to the administrative law judge for consideration of this issue in accordance with *Jessee*.

Accordingly, the Decision and Order - Denying Request for Modification of the administrative law judge 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.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge