BRB No. 98-0332 BLA

DEMPSEY E. HIXSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
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 - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Demsey E. Hixson, Connellsville, Pennsylvania, *pro se*.

D. Scott Newman (Burns, White & Hickton), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (95-BLA-2519) of Administrative Law Judge Daniel L. Leland 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). This is the third appeal to the Board in the above-captioned case. Initially, claimant filed a claim in July, 1973. Director's Exhibit 40(23). This claim was denied by the district director in July, 1974. Director's Exhibit 40(23). In a letter dated March, 1980, the district director stated that the claim would be considered abandoned. Director's Exhibit 40(23). Claimant filed a second claim in March, 1984. Director's Exhibit 40(2). This claim was finally denied by the district director on September 18, 1984 on the basis that claimant failed to prove any of the elements of entitlement. Director's Exhibit 40(13). On September 18, 1985, claimant filed a third claim. Director's Exhibit 1. In October, 1989, Administrative Law Judge George P. Morin issued a Decision and Order - Denying Benefits. Judge Morin found that claimant

established twenty-two and one-half years of coal mine employment. Considering the claim pursuant to 20 C.F.R. Part 718, Judge Morin found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that claimant's pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b). However, Judge Morin found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, Judge Morin denied benefits.

Claimant appealed to the Board, and in April, 1991, the Board issued a Decision and Order. The Board affirmed, as unchallenged on appeal, Judge Morin's finding that the existence of pneumoconiosis arising out of coal mine employment was established at Sections 718.202(a)(1) and 718.203(b). Further, the Board affirmed the administrative law judge's findings that total disability was not established pursuant to Section 718.204(c)(1)-(3). Finally, the Board vacated Judge Morin's finding at Section 718.204(c)(4) and remanded the case for Judge Morin to compare the physicians' discussions of claimant's physical limitations with the exertional requirements of claimant's usual coal mine employment. *Hixson v. USX Corp.*, BRB No. 89-3927 BLA (Apr. 18, 1991)(unpub.). In December, 1991, Judge Morin issued a Supplemental Decision and Order on Remand. After discussing the exertional requirements of claimant's coal mine employment and the opinions of Drs. Bloom, Kupfer and Abrons, Judge Morin found that these physicians did not conclude that claimant was totally disabled due to pneumoconiosis. Accordingly, Judge Morin again denied benefits.

Claimant appealed, and the Board, in a Decision and Order issued in April, 1993, affirmed Judge Morin's Supplemental Decision and Order on Remand. The Board affirmed Judge Morin's finding that the evidence was insufficient to establish total disability pursuant to Section 718.204(c)(4). Accordingly, the Board affirmed Judge Morin's denial of benefits. *Hixson v. USX Corp.*, BRB No. 92-0789 BLA (Apr. 28, 1993)(unpub.). Claimant filed a motion for reconsideration, which the Board summarily denied. *Hixson v. USX Corp.*, BRB No. 92-0789 BLA (June 6, 1994)(Order on Motion for Recon.)(unpub.).

In December, 1994, claimant filed a motion for modification. Director's Exhibits 29, 37. In October, 1997, Administrative Law Judge Daniel L. Leland (the administrative law judge) issued a Decision and Order - Denying Benefits. The administrative law judge accepted Judge Morin's findings, as affirmed by the Board, that claimant established the presence of pneumoconiosis and that the pneumoconiosis arose out of his coal mine employment. The administrative law judge found that the evidence of record established total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4). However, he also found that the evidence was insufficient to establish that pneumoconiosis substantially contributed to claimant's total disability at 20 C.F.R. §718.204(b), citing *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). The administrative law judge concluded that claimant established neither a change in conditions nor a mistake in fact, and that, therefore, claimant's request for modification must be denied. *See* 20 C.F.R.

§725.310(a). Accordingly, the administrative law judge denied benefits.[1]

Claimant appeals, contending generally that the administrative law judge erred in denying benefits. Employer has submitted a response brief supporting affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not participate in the appeal unless specifically requested to do so by the Board.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers 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); *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 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 order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is a substantially contributing cause of a total respiratory disability. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Bonessa*, *supra*.[2] Failure to prove any one of these elements precludes entitlement. *Trent*

[1] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(1), that the pneumoconiosis arose out of coal mine employment, *see* 20 C.F.R. §718.203, and that claimant established total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4), inasmuch as these findings are not adverse to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, inasmuch as claimant's most recent coal mine employment occurred in Pennsylvania. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

v. Director, OWCP, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant may establish modification by establishing either a change in conditions since the issuance of a previous decision or a mistake in a determination of fact in the previous decision. 20 C.F.R. §725.310(a). In considering whether a change in conditions has been established pursuant to Section 725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered 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. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Moreover, the fact-finder has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits, contained within a case. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see also Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Initially, we note that the administrative law judge erred in denying claimant's request for modification inasmuch as he found the evidence of record sufficient to establish total disability under Section 718.204(c), an element of entitlement previously adjudicated against claimant. *See Keating*, *supra*. However, we hold that this error by the administrative law judge is harmless, inasmuch as we affirm the administrative law judge's denial of benefits on the merits as discussed *infra*. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit which has held that claimant must prove that pneumoconiosis is a substantial contributor to the miner's disability in order to establish total disability due to pneumoconiosis under Section 718.204(b). *See Bonessa*, *supra*. The record contains sixteen medical opinions offered over an eighteen year period from the following doctors: Wodzinski (1996 and 1997), Whitten (1997), Williams (1994 and 1997), Morgan (1995 and 1996), Martinez (1994), Garson (1992), Kupfer (1984), Abrons (1984), Bloom (1979). After indicating that he accorded more weight to the opinions of Drs. Morgan and Wodzinski on the basis of recency,[3] the administrative law judge stated that he gave greatest weight to the opinion of Dr. Morgan because he, unlike Dr. Wodzinski, was an expert in pulmonary disease and because his opinion was better reasoned. Thus, the administrative law judge concluded that claimant's total disability arose out of his smoking and that pneumoconiosis did not substantially contribute to his total disability. Finally, the administrative law judge

[3] As discussed *infra*, the administrative law judge properly found that the opinion of Dr. Whitten, rendered in a report in 1997, was not relevant to the issue at 20 C.F.R. §718.204(b) as Dr. Whitten did not address the cause of total disability. 1997 Decision and Order at 9; Claimant's Exhibit 1.

noted that Drs. Martinez, Williams and Whitten did not attribute claimant's pulmonary symptoms to pneumoconiosis and that Drs. Garson and Kupfer did not address the issue of whether claimant was totally disabled due to pneumoconiosis. 1997 Decision and Order at 9.

After according greater weight to the conflicting opinions of Drs. Morgan and Wodzinski on the basis that they were more recent than other medical opinions,[4] the administrative law judge permissibly accorded the greatest weight to the opinion of Dr. Morgan on the basis that he is an expert in pulmonary disease.[5] *See Worley v. Blue*

[4] Dr. Wodzinski, in a 1996 opinion, diagnosed severe obstructive lung disease due to tobacco abuse and coal worker's pneumoconiosis. Claimant's Exhibit 2. In 1997, Dr. Wodzinski also found claimant unable to work and totally impaired from lung disease, and diagnosed severe emphysema complicated by chronic hypoxemia and cor pulmonale. Claimant's Exhibit 5. Dr. Morgan, in a 1995 opinion, found no evidence of coal worker's pneumoconiosis, and found severe emphysema as a result of cigarette smoking. Employer's Exhibit 2; *see also* Employer's Exhibit 3. Dr. Morgan concluded that claimant's respiratory impairment was related to smoking. Employer's Exhibit 2.

[5] The record indicates that Dr. Morgan is Board-certified in internal medicine, with a subspecialty in pulmonary disease. Employer's Exhibit 3. The qualifications of the other

Diamond Coal Co., 12 BLR 1-20 (1988). Moreover, the administrative law judge properly found Dr. Morgan's opinion to be better reasoned that Dr. Wodzinski's opinion.[6] *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Finally, the administrative law judge properly found that the opinions of Drs. Martinez, Williams, Whitten, Garson and Kupfer were not relevant to the issue at Section 718.204(b) as none of these physicians addressed the cause of total disability. 1997 Decision and Order at 9; *Bonessa*, *supra*; Director's Exhibits 28, 35, 40(9); Claimant's Exhibit 1.[7] We therefore affirm the administrative law judge's finding that claimant failed to establish that pneumoconiosis substantially contributed to claimant's total disability pursuant to Section 718.204(b). *See Bonessa*, *supra*.

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physicians are not of record, with the exception of Dr. Abrons, who diagnosed emphysema due to smoking. Director's Exhibit 4.

[6] Dr. Wodzinski supplied no underlying documentation and provided no explanation for his conclusion in his 1997 letter. Claimant's Exhibit 5; *see Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

[7] Any error by the administrative law judge in not making a credibility finding regarding Dr. Abrons's opinion is harmless, since Dr. Abrons did not render an opinion supportive of claimant's burden under Section 718.204(b), *i.e.*, Dr. Abrons diagnosed emphysema due to smoking and stated that claimant's emphysema may be disabling with respect to jobs requiring moderate exertion. Director's Exhibit 4; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge