BRB No. 95-0537 BLA

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

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr., Raleigh, Illinois, for claimant.

Cathryn Celeste Helm (Thomas S. Williamson, Jr., 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 and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (93-BLA-1184) of Administrative Law Judge John C. Holmes denying benefits on a claim filed pursuant to the

[1]Claimant is Percy Neal, the miner, whose first claim for benefits was filed on January 26, 1973 and denied on August 19, 1975. Director's Exhibit 52. Claimant filed a second claim for benefits on February 19, 1975, which was ultimately denied on April 18, 1980. Director's Exhibits 1, 43. Subsequently, claimant filed a third

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 case is before the Board for the second time. Administrative Law Judge Michael H. Schoenfeld credited claimant with thirty-five years of qualifying coal mine employment and found the existence of pneumoconiosis arising out of coal mine

---

application on July 9, 1981. Director's Exhibit 2.

employment established pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b). The administrative law judge then found that claimant failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Director's Exhibit 60.

On appeal, the Board held that the administrative law judge properly found that the 1981 claim did not merge with the claim filed on February 19, 1975, and affirmed the administrative law judge's findings pursuant to Section 718.204(c) and the denial of benefits. *Neal v. Director, OWCP*, BRB No. 85-2748 BLA (Nov. 30, 1988)(unpub.); Director's Exhibit 66. On reconsideration, the Board affirmed its Decision and Order. *Neal v. Director, OWCP*, BRB No. 85-2748 BLA (Feb. 22, 1989)(unpub.); Director's Exhibit 68.

On September 12, 1989, claimant filed a petition for modification which was denied on May 7, 1991. Director's Exhibits 69, 79. Claimant then requested a formal hearing. Director's Exhibit 80. Judge Holmes found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), total disability due to pneumoconiosis pursuant to Section 718.204, and "a material change in circumstances" pursuant to 20 C.F.R. §725.310. Decision and Order at 3-4. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.204(c) and in failing to find a change in conditions established pursuant to Section 725.310. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to remand the case for reconsideration.

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 applicable law, 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director argues that this case must be remanded because the administrative law judge failed to determine whether the claim must be denied as a duplicate claim pursuant to Section 725.309 and *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991). Motion to Remand at 5. We agree. While the Board affirmed Judge Schoenfeld's finding that claimant's 1981 claim did not merge with an earlier claim pursuant to Section 725.309(c) and *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988), *Neal*, slip op. at 2, the United States

Court of Appeals for the Seventh Circuit, within whose appellate jurisdiction this case arises, subsequently held that the *Spese* standard is invalid. *McNew*, 946 F.2d at 556; 15 BLR at 2-229; *see Freeman United Coal Mining Co. v. Hilliard*, 65 F.3d 667 (7th Cir. 1995). Inasmuch as Judge Holmes failed to render findings regarding a material change in conditions occurring from the final denial of the 1975 claim, we vacate his decision and remand this case for the administrative law judge to apply the *McNew* standard. *See McNew*, *supra*; *cf. Spese v. Peabody Coal Co.*, 19 BLR 1-45 (1995).

The Director also argues that the administrative law judge erroneously considered the issue of the existence of pneumoconiosis pursuant to Section 718.202(a). Motion to Remand at 4. Judge Schoenfeld determined that claimant established the existence of pneumoconiosis arising out coal mine employment pursuant to Sections 718.202(a)(1) and 718.203(b). These findings were not vacated on appeal and the Director concedes they were not contested by the Director during subsequent modification proceedings. Director's Exhibit 93; 20 C.F.R. §725.463; *see Neal*, *supra*; *Kott v. Director, OWCP*, 17 BLR 1-9 (1992). Thus, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and instruct him on remand that Sections 718.202(a)(1) and 718.203(b) are not at issue.

In the interest of promoting judicial economy, we will also address the arguments raised by the Director and claimant regarding the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.204(c)(4). Claimant's Brief at 1; Motion to Remand at 5. The administrative law judge noted that Dr. Sanjabi found "no impairment expected" and stated that while Dr. Sanjabi "is an expert in the field and the medical evidence supports his conclusions, he does not fully elaborate how he reached his findings. I give his opinion, nevertheless, substantial weight." Decision and Order at 3; Director's Exhibit 87. As the Director argues, the administrative law judge erred in weighing Dr. Sanjabi's opinion because he failed to provide a rationale for crediting an opinion he found to be insufficiently explained. Decision and Order at 10; Motion to Remand at 7. Inasmuch as the administrative law judge's findings do not comply with the Administrative Procedure Act, 5 U.S.C. 557(c)(3)(A), as incorporated into the Act by 30 U.S.C. 932(a), by means of 33 U.S.C. 919(d) and 5 U.S.C. 554 (c)(2); *see Wensel v. Director, OWCP*, 888 F.2d 14, 13 BLR 2-88 (3d Cir. 1989); *Freeman United Coal Mining Co. v. Benefits Review Board* [*Jones*], 879 F.2d 245 (7th Cir. 1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986), we vacate his determination regarding Dr. Sanjabi's opinion and remand the case for the administrative law judge to explain his weighing of this evidence.

In rejecting Dr. West's opinion,[2] Director's Exhibit 70, the administrative law judge found that Dr. West is not a specialist in pulmonary medicine and that he based his conclusion of total disability on the precipitous drop in pulmonary function results from 1989 to 1992 and the recent blood gas exercise test. The administrative law judge then stated:

> . . . Dr. West was not cross-examined as to how he could connect a precipitous pulmonary function decrease during this period [from 1989 to 1992] which was approximately 20 years after leaving the mines to pneumoconiosis. Moreover, claimant at the time of hearing was 82 years of age, certainly a factor in a declining ability to continue in coal mine employment, which anyone would logically conclude, but upon which Dr. West was not cross-examined.

Decision and Order at 3. The administrative law judge stated that neither of Dr. West's conclusions -- that claimant should not be exposed further to coal dust and that claimant cannot physically do what he formerly could in the mines -- is "tantamount" to a finding of total disability due to pneumoconiosis. Decision and Order at 3.

The fact that Dr. West was not cross-examined regarding claimant's age and the drop in ventilatory test results is not a valid legal reason for discrediting his opinion. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The burden of cross-examination rests with the opposing party, in this case, the Director, who did

---

[2]Dr. West, in a report dated September 25, 1989, stated that claimant has shortness of breath due to pneumoconiosis which was caused by his occupation as a coal miner and is of such severity
that it would prevent him from working at the present time. He further opined that claimant was becoming so short of breath at the time he last worked that he was disabled at that time. Dr. West restated this opinion in his deposition of March 8, 1993. Director's Exhibits 70, 91.

not attend Dr. West's deposition on March 8, 1993, Director's Exhibit 91, and did not object to its admission at the formal hearing, Hearing Transcript at 7.

Section 554(d)(2) of the APA, 5 U.S.C. §554(d)(2) is concerned with ensuring that the trier-of-fact is not influenced in his legal conclusions and factual evaluations by the parties to a case. *King v. Caesar Rodney School District*, 380 F.Supp. 1112 (D. Del. 1974). While the Director is a party in any proceeding involving a claim for benefits, 30 U.S.C. §932(k), the administrative law judge is not subject to the Director's "supervision or direction" and cannot "participate or advise" the administrative law judge in rendering his decision. *Wells v. Falcon Coal Co.*, 17 BLR 1-62 (1992). Inasmuch as the administrative law judge here permitted the Director's lack of cross-examination to influence his weighing Dr. West's opinion, we vacate the administrative law judge's finding. *See Wells*, *supra*; *see generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

In addition, the administrative law judge erroneously engaged in medical speculation and substituted his opinion for that of the physician by discrediting Dr. West's opinion based on his beliefs that the drop in pulmonary function study values from 1989 to 1992 could not be connected to claimant's coal mine employment twenty years earlier and that claimant's age would prevent him from performing his coal mine employment. Motion to Remand at 8-9; Decision and Order at 3; *see Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986); *Bogan v. Consolidation Coal Company*, 6 BLR 1-1000 (1984); *Dolzanie v. Director, OWCP*, 6 BLR 1-865 (1984). Thus, we vacate the administrative law judge's findings pursuant to Section 718.204(c).[3]

[3]The administrative law judge erred in adopting Judge Schoenfeld's Decision and Order in its entirety and in relying on Judge Schoenfeld's reasoning and analysis in making his findings. Decision and Order at 3-4. In evaluating a request for modification pursuant to Section 725.310, the administrative law judge must review all evidence of record, including new evidence submitted on modification as well as evidence previously of record, and determine whether claimant has established a change in conditions or a mistake in a determination of fact. *See Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *see also Keating v. Director, OWCP*, F.3d , No. 94-3593 (3d Cir. Dec. 12, 1995).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge