BRB No. 99-0708 BLA

WILLIAM KEEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KOCH CARBON, 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 on Remand of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

William Keen, Raven, Virginia, *pro se*.[1]

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

McGRANERY, Administrative Appeals Judge:

Claimant, representing himself, appeals the Decision and Order on Remand (97-BLA-0629) of Administrative Law Judge Jeffrey Tureck denying benefits 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 the initial Decision and Order, Administrative Law Judge Stuart A. Levin, after crediting claimant with twenty years of coal mine

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

employment, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Although Judge Levin found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) and (c)(4), he found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge Levin denied benefits. By Decision and Order dated June 28, 1995, the Board affirmed Judge Levin's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Keen v. Koch Carbon, Inc.*, BRB No. 95-0468 BLA (June 28, 1995) (unpublished). The Board, therefore, affirmed Judge's Levin's denial of benefits. *Id.*

Claimant subsequently requested modification of his denied claim. Administrative Law Judge Jeffrey Tureck (the administrative law judge) initially noted that because claimant was not contending that Judge Levin made a mistake in a determination of fact, he would not address that issue. Finding that claimant failed to demonstrate a change in conditions pursuant to 20 C.F.R. §725.310, the administrative law judge denied claimant's request for modification. By Decision and Order dated January 5, 1999, the Board affirmed the administrative law judge's finding that the newly submitted evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Keen v. Koch Carbon, Inc.*, BRB No. 98-0533 BLA (Jan. 5, 1999) (unpublished). The Board, however, vacated the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 inasmuch as the administrative law judge did not consider whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), one of the elements of entitlement previously adjudicated against claimant. *Id.* The Board further vacated the administrative law judge's finding that the issue of whether there was a mistake in a determination of fact was not before him. *Id.* The Board remanded the case to the administrative law judge for further consideration of the evidence to determine whether there was a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *Id.*

On remand, the administrative law judge noted that claimant, at the hearing, withdrew his controversion of the issue of modification based upon a mistake in a determination of fact. The administrative law judge, therefore, held that the only issue before him was whether the evidence was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge further found that inasmuch as the newly submitted evidence established that claimant was no longer disabled, it did not matter whether claimant suffered from pneumoconiosis. Although the administrative law judge found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis, he found that claimant was not disabled due to pneumoconiosis. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge

erred in denying benefits. Employer responds in support of the administrative law judge's finding that claimant withdrew his controversion of modification based upon a mistake in a determination of fact. Employer further responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

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

In his most recent decision, the administrative law judge found that the "evidence on modification showed that the claimant's condition had *improved* so that he no longer has a disabling respiratory or pulmonary impairment." Decision and Order on Remand at 2. As the administrative law judge indicates, Dr. Sargent found that both claimant's pulmonary function studies and blood gas studies improved significantly since his previous examination in 1993, probably due to the fact that claimant stopped smoking sometime after the 1993 exam. Employer's Exhibit 1 at 12-14. The administrative law judge also correctly found that claimant's pulmonary function studies are now completely normal and concluded that the moderate resting hypoxemia shown on the blood gas test would not prevent claimant form returning to work as a roof bolter. In addition, the administrative law judge found that Dr. Sargent's conclusion that claimant is not disabled from performing his usual coal mine work is supported by Dr. Michos.[2]

[2]In a report dated August 19, 1996, Dr. Michos answered "no" to the question of whether claimant is totally disabled from a respiratory standpoint secondary to his past coal mine employment. Director's Exhibit 71. Dr. Michos further observed that "PFT abnormalities" that were described in the past are minimal and lacking a significant impairment. *Id.*

The only other newly submitted medical reports are three reports submitted by Dr. Patel. In his earlier decision, the administrative law judge properly discredited Dr. Patel's reports, noting that Dr. Patel cited no test data to support his conclusion that claimant suffered from a totally disabling respiratory impairment. Since Dr. Patel's newly submitted reports do not contain any test data supporting his conclusion of total disability, any error in failing to specifically address Dr. Patel's new reports is deemed harmless. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); 1997 Decision and Order at 3; Director's Exhibits 65, 77, 81.

Inasmuch as it is based upon substantial evidence,[3] we affirm the administrative law judge's finding that claimant's condition has improved so that he no longer has a disabling respiratory or pulmonary impairment.[4]

In light of our affirmance of the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c), an essential element of

[3]Among the newly submitted evidence, there is no evidence of cor pulmonale with right sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(3).

[4]In considering the issue of disability, the relevant inquiry is claimant's condition at the time of the hearing. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-405 (1982). In the instant case, the administrative law judge recognized that the earlier evidence established total disability, but found that the newly credited evidence established that claimant's condition had improved so that claimant no longer has a disabling respiratory or pulmonary impairment. The administrative law judge has thus fully considered all of the relevant evidence.

entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[5] *See Trent, supra*; *Gee, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority opinion.

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §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 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

[5]In light of our affirmance of the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), we need not address the administrative law judge's findings regarding modification pursuant to 20 C.F.R. §725.310. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

(1992). Judge Levin previously denied benefits because he found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *See* Director's Exhibit 56. The Board subsequently affirmed Judge Levin's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Keen v. Koch Carbon,* Inc., BRB No. 95-0468 BLA (June 28, 1995) (unpublished). Consequently, the issue properly before the administrative law judge on modification was whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The Board remanded the case to the administrative law judge with instructions to address this issue.

On remand, the administrative law judge found that "the evidence submitted on modification overwhelmingly supports the presence of [pneumoconiosis.]" Decision and Order on Remand at 3. Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, F.3d , 2000 WL 524798, No. 98-2051 (4th Cir. May 2, 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). However, inasmuch as the administrative law judge, in the instant case, found that the evidence was "overwhelmingly" supportive of a finding of pneumoconiosis, his finding, if affirmable, would be consistent with the newly adopted Fourth Circuit holding in *Compton*.

The newly submitted evidence is, in fact, overwhelmingly supportive of a finding of pneumoconiosis. The only newly submitted x-ray interpretation supports a finding of pneumoconiosis. Dr. Sargent, a B reader, interpreted claimant's October 14, 1996 x-ray as positive for pneumoconiosis.[6] Director's Exhibit 70; Employer's Exhibit 1.

[6]The newly submitted evidence also includes two interpretations of a January 18, 1996 CT scan. Dr. Patel interpreted the January 18, 1996 CT scan as revealing a "prominence of interstitial lung markings and reticular nodular densities...." Director's Exhibit 66. Dr. Navani interpreted claimant's January 18, 1996 CT scan as positive for pneumoconiosis, noting that the CT scan was "consistent with simple coal workers' pneumoconiosis, p/q 1/2...." Director's Exhibit 70.

The medical opinion evidence is also uniformly supportive of a finding of pneumoconiosis. In reports dated July 17, 1995, September 5, 1996 and November 25, 1996, Dr. Patel diagnosed coal workers' pneumoconiosis. Director's Exhibits 65, 77, 81. In an August 19, 1996 report, Dr. Michos opined that claimant had evidence of simple coal workers' pneumoconiosis based upon his coal mine employment history and claimant's January 18, 1996 CT scan. Director's Exhibit 71. In an October 15, 1996 report, Dr. Sargent opined that claimant suffered from coal workers' pneumoconiosis. Director's Exhibit 79. Dr. Sargent reiterated his opinion during a February 11, 1997 deposition. Employer's Exhibit 1. Inasmuch as it is based upon substantial evidence, I would affirm the administrative law judge's finding that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[7] *See Compton*, *supra*. Moreover, in light of the foregoing, I would also hold that the administrative law judge's finding is equivalent to a finding that the evidence is sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310.[8]

Having found the evidence sufficient to establish modification pursuant to 20 C.F.R.

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[7]Employer contends that the administrative law judge should have rejected Dr. Patel's opinion because the doctor offered no basis for his conclusion that claimant suffered from pneumoconiosis. Employer's Brief at 4. However, inasmuch as the remaining newly submitted evidence is uniformly supportive of a finding of pneumoconiosis, the administrative law judge's error, if any, in his consideration of Dr. Patel's opinion is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8]In light of my affirmance of the administrative law judge's finding of a change in conditions pursuant to 20 C.F.R. §725.310, I would find it unnecessary to address whether claimant waived the issue of modification based upon a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *See Larioni*, *supra*.

§725.310, the administrative law judge should have considered all of the evidence of record to determine whether claimant had established entitlement to benefits on the merits of the claim. *Nataloni*, *supra*; *Kovac*, *supra*. The administrative law judge, however, only addressed whether the newly submitted evidence was sufficient to establish total disability

pursuant to 20 C.F.R. §718.204(c). Consequently, I would remand the case to the administrative law judge to address the merits of the instant claim based upon a consideration of all of the evidence of record.[9]

ROY P. SMITH
Administrative Appeals Judge

[9]I also disagree with the majority's affirmance of the administrative law judge's finding that the newly submitted evidence is insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c). The newly submitted medical evidence is not uniformly supportive of a finding of total disability. Moreover, the administrative law judge mischaracterized the evidence. For example, contrary to the administrative law judge's characterization, Dr. Michos's opinion is not supportive of Dr. Sargent's opinion that claimant does not suffer from a totally disabling respiratory impairment. Dr. Michos merely opined that claimant was not "totally disabled from a respiratory standpoint **secondary to his past [coal mine employment]....**" Director's Exhibit 71 (emphasis added). Dr. Michos opined only that claimant's resting hypoxemia was "not consistent with disability **secondary to [coal workers' pneumoconiosis].**" *Id.* Dr. Michos opined that claimant's objective findings were more consistent with chronic bronchitis and continuous cigarette abuse. *Id.* Dr. Michos did not directly address whether claimant was totally disabled from a respiratory or pulmonary impairment from any cause whatsoever, the relevant inquiry under 20 C.F.R. §718.204(c)(4). The etiology of a claimant's respiratory impairment is properly addressed pursuant to 20 C.F.R. §718.204(b).