BRB No. 99-0980 BLA

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

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Barry H. Joyner (Henry L. Solano, 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: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0027) of Administrative Law Judge Ralph A. Romano 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). This case is before the Board for the third time.[1] The administrative law

[1] Claimant originally filed a claim on April 5, 1994, Director's Exhibit 1, and in a Decision and Order issued on February 8, 1996, the administrative law judge found twelve and one-half years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), but further found that total disability was not established pursuant to 20 C.F.R.

judge considered claimant's petition for modification at issue, herein, pursuant to 20 C.F.R. §725.310, without the benefit of a hearing. The administrative law judge initially found that claimant failed to establish a mistake in a determination of fact in either the Board's or the administrative law judge's prior Decision and Orders. Next, the administrative law judge considered whether the newly submitted evidence established a change in conditions, *i.e.*, total disability pursuant to 20 C.F.R. §718.204(c). Although the administrative law judge found the newly submitted pulmonary function study evidence demonstrated total disability pursuant to 20 C.F.R. §718.204(c)(1), the administrative law judge found the newly submitted medical opinion evidence insufficient to demonstrate total disability pursuant to 20 C.F.R. §718.204(c)(4). Finally, the administrative law judge found that the newly submitted pulmonary function study evidence, which demonstrated total disability, was outweighed by the contrary blood gas study and medical opinion evidence, which had been previously submitted and found insufficient to establish total disability, as well as by the newly submitted medical opinion evidence which the administrative law judge found insufficient to demonstrate total disability. Thus, the administrative law judge found that claimant failed to establish total disability pursuant to Section 718.204(c), or, therefore, a basis for modification based on a change in conditions pursuant to Section 725.310. Accordingly, benefits were denied.

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§718.204(c)(1)-(4). Accordingly, benefits were denied.

Claimant appealed and the Board initially affirmed the administrative law judge's findings that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to Sections 718.202(a)(1) and 718.203(b), and that total disability was not demonstrated pursuant to Section 718.204(c)(2)-(4), Director's Exhibit 55. *Kehler v. Director, OWCP*, BRB No. 96-0708 BLA (Sep. 24, 1996)(unpub.). However, the Board vacated the administrative law judge's finding that total disability was not demonstrated pursuant to Section 718.204(c)(1) and remanded the case for the Department of Labor to offer claimant a complete credible pulmonary evaluation, although the Board noted that claimant could choose not to undergo another pulmonary examination.

On remand, claimant elected not to undergo another pulmonary examination, Director's Exhibits 57, 59, 61. In a Decision and Order On Remand issued on May 5, 1997, the administrative law judge found that total disability was not demonstrated pursuant to Section 718.204(c)(1) and that total disability was not established pursuant to Section 718.204(c), Director's Exhibit 66. Accordingly, benefits were denied. Claimant appealed, but claimant's appeal was dismissed as abandoned, Director's Exhibit 71. *Kehler v. Director, OWCP*, BRB No. 97-1173 BLA (Sep. 2, 1997)(unpub. order). Subsequently, on May 29, 1998, claimant filed a request for modification based on a mistake of fact and worsening of condition, Director's Exhibit 74, at issue herein.

On appeal, claimant contends that the administrative law judge erred in finding that he had not established a mistake in a determination of fact pursuant to Section 725.310 and in finding the newly submitted evidence insufficient to establish total disability pursuant to Section 718.204(c). In response, the Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, agreeing with claimant's contention that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability pursuant to Section 718.204(c).[2] In addition, the Director contends that the administrative law judge erred in failing to give the Director an opportunity to respond to a pulmonary function study submitted by claimant in support of his request for modification. Finally, the Director contends that the Board may wish to remand this case for the administrative law judge to hold a hearing as requested by claimant.

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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. If a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), *see Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26-28 (4th Cir. 1993).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*. In the instant case, the administrative law judge found the newly

[2] We accept the Director's Motion to Remand as his response brief, and herein decide the case.

submitted evidence insufficient to establish total disability pursuant to Section 718.204(c). Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

The administrative law judge considered the newly submitted pulmonary function study evidence pursuant to Section 718.204(c)(1), which consisted of a qualifying pulmonary function study dated May, 1998, from Dr. Raymond Kraynak, which was found invalid by Dr. Sahillioglu, Director's Exhibit 72, but valid by Dr. Raymond Kraynak, Claimant's Exhibit 1, and a qualifying pulmonary function study dated November, 1998, from Dr. Matthew Kraynak, Claimant's Exhibit 2.[3] Although the administrative law judge found that the May, 1998, pulmonary function study from Dr. Raymond Kraynak did not conform to the quality standards and could not demonstrate total disability because it was found invalid by Dr. Sahillioglu, the administrative law judge found that total disability was demonstrated pursuant to Section 718.204(c)(1) by the most recent pulmonary function study from Dr. Matthew Kraynak. Decision and Order at 5.

Pursuant to Section 718.204(c)(4), the administrative law judge found the newly submitted opinions of Dr. Raymond Kraynak, that claimant was totally disabled due to coal workers' pneumoconiosis and that claimant's condition had worsened, Director's Exhibit 76; Claimant's Exhibit 3, and of Dr. Matthew Kraynak, that claimant was totally disabled due to coal workers' pneumoconiosis, Claimant's Exhibit 4, were not reasoned or documented, Decision and Order at 5-6. The administrative law judge found that Dr. Raymond Kraynak's opinion was provided without the benefit of a blood gas study, that it gave no explanation for why the November, 1998, pulmonary function study indicated higher values than the May, 1998, pulmonary function study, and that it relied on the May, 1998, pulmonary function study which the administrative law judge found was invalid. The administrative law judge found that Dr. Matthew Kraynak's opinion also was provided without the benefit of a blood

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

gas study, that it failed to adequately explain his conclusion, and that it did not acknowledge claimant's coal mine employment or smoking histories. Ultimately, the administrative law judge found that the qualifying November, 1998, pulmonary function study was outweighed by the contrary blood gas study and medical opinion evidence which had been previously submitted, as well as the newly submitted medical opinion evidence.

However, as both claimant and the Director contend, the administrative law judge found the May, 1998, pulmonary function study from Dr. Raymond Kraynak invalid based on Dr. Sahillioglu's opinion, without discussing or resolving Dr. Raymond Kraynak's subsequent conflicting opinion validating the results of the pulmonary function study, *see* Claimant's Exhibit 1. The administrative law judge's function is to resolve the conflicts in the medical evidence, see *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989). Moreover, although the November, 1998, pulmonary function study indicated higher values than the qualifying May, 1998, pulmonary function study relied on by Dr. Raymond Kraynak, the November, 1998, pulmonary function study nevertheless was also qualifying. Thus, the administrative law judge has not adequately explained why he found the November, 1998, pulmonary function study inconsistent with the May, 1998, pulmonary function study, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). Similarly, with regard to Dr. Matthew Kraynak's opinion, while the fact that he did not acknowledge claimant's smoking history is relevant to the etiology of claimant's pulmonary or respiratory disability, *see* 20 C.F.R. §718.204(b), it is not relevant in determining whether claimant is disabled from a pulmonary or respiratory standpoint under Section 718.204(c).

In addition, as both claimant and the Director contend, there is no requirement that a physician's opinion regarding disability include blood gas study results. The administrative law judge must consider the applicable quality standard for medical reports at 20 C.F.R. §718.104, which constitutes a mandatory, although not rigid, guideline by which an administrative law judge can determine that a medical report is reasoned and documented under Section 718.204(c) if it is in substantial compliance with the quality standard, *see Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). Section 718.104 states that "[i]n addition to the chest x-ray and pulmonary function tests, the physician shall use his or her judgment in the selection of other procedures such as ... blood gas studies ... in his or her evaluation of the miner," *see* 20 C.F.R. §718.104. Moreover, in the absence of contrary evidence, a valid and qualifying pulmonary function study can be sufficient, in and of itself, to establish total disability pursuant to Section 718.204(c), *see* 20 C.F.R. §718.204(c). Finally, the administrative law judge did not adequately explain his finding that the previously submitted blood gas study and medical opinion evidence was "contrary" to the newly submitted, qualifying November, 1998, pulmonary function study,

see Tenney, *supra*.[4] Consequently, we vacate the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c) and, therefore, a basis for modification based on a change in conditions pursuant to Section 725.310 and remand the case for reconsideration.

The administrative law judge also found no mistake in a determination of fact in either the Board's previous Decision and Order, Director's Exhibit 55, *Kehler*, BRB No. 96-0708

[4] Although the previously submitted blood gas study evidence may be non-qualifying, a non-qualifying blood gas study does not absolutely rule out the existence of a totally disabling respiratory or pulmonary impairment, inasmuch as blood gas studies and pulmonary function studies measure different types of impairment, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797 (1984); *see also Estep v. Director, OWCP*, 7 BLR 1-904 (1985); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the previously submitted medical opinion evidence consists of Dr. Kraynak's 1995 opinion finding claimant totally disabled, Director's Exhibits 35, 44, and two medical opinions from Dr. Ahluwalia, Director's Exhibits 13, 25. The administrative law judge discredited Dr. Kraynak's 1995 opinion in his original Decision and Order and characterized the previously submitted opinions from Dr. Ahluwalia as finding that claimant was not totally disabled. However, Dr. Ahluwalia only found that claimant suffered from "moderate airflow limitation," Director's Exhibit 13, and a "mild impairment," Director's Exhibit 25, but did not state whether he believed that claimant's impairment would prevent claimant from performing his usual coal mine employment or be disabling.

BLA, or the administrative law judge's subsequent Decision and Order on remand denying benefits, Director's Exhibit 66. Decision and Order at 4. Claimant contends that the administrative law judge did not provide any explanation or rationale for his finding and did not review the previously submitted evidence or claimant's contentions regarding a mistake of fact raised in his brief before the administrative law judge. We agree. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that pursuant to a petition for modification, the administrative law judge must review all evidence of record, both the newly submitted evidence and the evidence previously in the record and determine whether there was any mistake of fact made in the prior adjudication, including the ultimate fact, *see Keating*, 71 F.3d at 1123, 20 BLR at 2-63. Moreover, an administrative law judge must provide a full, detailed opinion which complies with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(a), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), and which fully explains the specific bases for his decision, the weight assigned to the evidence and the relationship he finds between the evidence and his legal and factual conclusions, *see Tenney*, *supra*. Consequently, we vacate the administrative law judge's finding that no mistake in a determination of fact was established pursuant to Section 725.310 and remand the case for reconsideration and further explanation, *see Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987).

Finally, the Director contends that the administrative law judge abused his discretion in failing to give the Director an opportunity to respond to the November, 1998, pulmonary function study submitted by claimant in support of his request for modification. However, as the Director further notes, although claimant requested a hearing on modification, Director's Exhibit 78, and reiterated his request in response to a Order to Show Cause issued by the administrative law judge as to why a hearing was necessary regarding claimant's request for modification, the administrative law judge subsequently issued an order holding that no hearing would be held.[5] The Act and regulations mandate that an administrative law judge

[5] On November 23, 1998, the administrative law judge issued an order holding that no hearing would be held and requiring the parties to submit any further documentary evidence on or before December 28, 1998. By letter dated December 17, 1998, claimant submitted the November, 1998, pulmonary function study, which was received by the Department of Labor on December 21, 1998, Claimant's Exhibit 2. On December 29, 1998, the Director filed a motion for an enlargement of time to file a validation report regarding the November, 1998, pulmonary function study submitted by claimant, noting that counsel for the Director was out of the office until December 29, 1998. On January 5, 1999, the administrative law judge issued an order denying the Director's motion for lack of showing of good cause. On January 6, 1999, the Director attempted to submit an invalidation report regarding the November, 1998, pulmonary function study submitted by claimant, but by order issued January 26, 1999, the administrative law judge held that the Director's submission would not

hold a hearing on any claim, including a request for modification, whenever a party requests such a hearing, unless such hearing is waived by the parties or a party requests summary judgment. *Pukas v. Schuylkill Contracting Co.*, 22 BLR , BRB No. 99-0786 BLA (May 9, 2000).[6] Consequently, because the administrative law judge did not hold a hearing on modification, we remand the case for the administrative law judge to hold a hearing on claimant's petition for modification, as requested by claimant, and, ultimately, for reconsideration pursuant to Sections 725.310 and 718.204(c).

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be received into the record because it was not timely filed.

[6] Section 22 of the Longshore and Harbor Workers' Compensation Act [LHWCA] specifies that modification requests are to be reviewed "in accordance with the procedure prescribed in respect of claims in section [19 of the LHWCA, 33 U.S.C. §919]," 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a); *accord* 20 C.F.R. §725.310(b)("modification proceedings shall be conducted in accordance with the provisions of [20 C.F.R. Part 725, setting forth the procedures for the adjudication of black lung claims] as appropriate"). Section 19 of the LHWCA provides for a hearing whenever a party requests such a hearing, 33 U.S.C. §919(c), as incorporated into the Act by 30 U.S.C. §932(a). Thus, 30 U.S.C. §932(a), as implemented by 20 C.F.R. §§725.450, 725.451, 725.421(a), mandates that an administrative law judge hold a hearing on any claim filed with the district director whenever a party requests such a hearing, unless waived by the parties, *see* 20 C.F.R. §725.461(a), or a party requests summary judgement, *see* 20 C.F.R. §725.452(c). *See also* 20 C.F.R. §725.310(c).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge