BRB No. 00-0576 BLA

CLIFFORD R. SKINNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-0385) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) denying claimant's request for modification and further denying the 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).[1] The administrative law judge noted the parties'

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise

stipulations to: at least 40 years of coal mine employment; that claimant has pneumoconiosis which arose out of his coal mine employment; and that claimant is totally disabled due to a respiratory or pulmonary impairment. The administrative law judge stated that the issues were whether claimant had established a mistake in a determination of fact or a change in conditions under 20 C.F.R. §725.310(2000) since the prior denial[2] and whether claimant's totally disabling respiratory or pulmonary impairment is due to his occupational pneumoconiosis. The administrative law judge found that the medical opinions submitted since his November 26, 1997 Decision and Order did not constitute "new" evidence and thus, claimant was unable to establish total disability due to pneumoconiosis based on a change in conditions. Specifically, the administrative law judge determined that the medical opinions, of Drs. Naeye, Morgan and Renn were affirmations of previous opinions, while Dr.

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noted, refer to the amended regulations.

[2]In his Decision and Order dated November 26, 1997, the administrative law judge found that claimant failed to prove that his totally disabling respiratory or pulmonary impairment was contributed to or caused by his occupational pneumoconiosis. Director's Exhibit 85. Weighing Dr. Abrahams's opinion that claimant's coal workers' pneumoconiosis contributed to his total disability, the administrative law judge noted Dr. Abrahams's failure to mention claimant's history of adult respiratory distress syndrome (ARDS). *Id.* at 4. Claimant's counsel asked Dr. Abrahams to review the medical record to address claimant's history of ARDS; Dr. Abrahams issued his ensuing report on October 21, 1997. Claimant's Exhibit 1. On December 15, 1997, claimant filed a request for modification and submitted this report in support of the request. Director's Exhibit 86. A hearing was subsequently held before the administrative law judge on September 21, 1999.

Abrahams's July 9, 1998 report was a clarification of an earlier report. In this regard the administrative law judge found, "[t]here has been no additional examinations of the Claimant, no additional testing performed or records compiled." Decision and Order at 5. The administrative law judge determined that because no "new" evidence had been submitted, he was compelled to make a determination regarding the previously submitted evidence and whether it was sufficient to establish that claimant's respiratory or pulmonary disability was due, at least in part, to pneumoconiosis.

Without specifically identifying it, the administrative law judge next addressed Dr. Abrahams's report dated October 21, 1997 upon which claimant relied to request modification of the prior denial. He found:

> Although Claimant submits a purportedly "new" report by Dr. Abrahams, I find this report to be an impermissible attempt to correct Dr. Abrahams [sic] previous failure to consider the extensive evidence in the medical records of Claimant'[s] [adult respiratory distress syndrome or ARDS] history. I find this to be an impermissible "back door' attempt to retry this case. *Henderson v. Bethlehem Mines Corp.*, BRB No. 98-1357 BLA ([Sep. 16,] 1999)(unpublished).

Decision and Order at 6. The administrative law judge added:

> I find that Claimant has failed to prove that his totally [sic] disability is due, at least in part, to pneumoconiosis. Claimant must prove that his total disability was due to pneumoconiosis by a preponderance of the evidence. Both Drs. Naeye and Morgan, who reviewed the records, determined that the pneumoconiosis was too minimal to have contributed to the Claimant's impairment. Dr. Abrahams' [sic] originally failed to consider Claimant's history of [adult respiratory distress syndrome]. Moreover, even considering Claimant's history of ARDS, Dr. Abrahams' [sic] based his opinion that Claimant's pneumoconiosis contributed to his respiratory impairment on the fact that simple pneumoconiosis showed up on one x-ray in 1985, prior to Claimant's bout with ARDS. I find Dr. Abraham's [sic] opinion is not well-reasoned and therefore, cannot be relied upon to show that Claimant's totally disabling respiratory impairment is contributed to, at least in part, by pneumoconiosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Thus, the preponderance of the evidence does not establish total disability due to pneumoconiosis under [20 C.F.R. §718.204(b)(2000)] and *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994).

Id. at 6. The administrative law judge found that, based on his review of the record as a whole, claimant failed to establish a change in conditions or mistake in a determination of

fact, and further failed to establish that his totally disabling respiratory or pulmonary impairment is contributed to or caused by pneumoconiosis. Accordingly, the administrative law judge denied claimant's request for modification and further denied the claim.

On appeal, claimant argues that he properly sought Dr. Abrahams's clarification of his opinion relevant to claimant's condition and filed for modification based on Dr. Abrahams's ensuing opinion dated October 21, 1997.[3] Claimant further challenges the administrative law judge's statement that no new evidence was submitted in connection with claimant's request for modification. Claimant asserts that the administrative law judge's failure to consider all the relevant evidence constitutes reversible error pursuant to *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997) and *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), and requires a remand of the case or, alternatively, the entry of an award of benefits. Claimant also asserts that the administrative law judge erred by not acknowledging Dr. Abrahams's status as claimant's treating physician.

Employer responds, and argues that there is no cause to alter the administrative law

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[3]In his medical opinion dated October 21, 1997, Dr. Abrahams opined that claimant's severe disabling diffusion impairment is a result of both pneumoconiosis arising from coal and silica dust exposure, emphysema from cigarette smoking, and possibly prior adult respiratory distress syndrome. Dr. Abrahams added:

> His mild obstructive airway disease is also a result of industrial bronchitis from coal dust exposure and cigarettes. I feel within a reasonable degree of medical certainty that his coal/silica dust exposure is at the very least a significant contributing factor to his pulmonary impairment.

Claimant's Exhibit 1.

judge's prior denial as claimant failed to establish that he is totally disabled due to pneumoconiosis. Employer asserts that the administrative law judge's failure to consider Dr. Fino's opinion was harmless as the opinion supports the administrative law judge's denial of the claim. Employer further contends that the administrative law judge properly determined that claimant's attempt to rehabilitate Dr. Abrahams's prior opinion was an impermissible attempt to have the administrative law judge retry the case. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief on the merits of the appeal.

Pursuant to a lawsuit challenging the revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which each party has responded. The Director asserts that the regulations governing this case, namely the regulation at 20 C.F.R. §725.310(2000) and the revised regulation at 20 C.F.R. §718.204(c)(1), have not changed in any material way and the outcome of this case is not affected by any revision to the regulations.

Employer argues that the revised regulations at 20 C.F.R. §718.201(c), 20 C.F.R. §718.104(d) and 20 C.F.R. §718.204(a) could affect the outcome of this case and requests a stay of the Board's disposition.[4]

With regard to the revised regulation at 20 C.F.R. §718.201(a), recognizing the progressivity of pneumoconiosis, claimant argues that this theory is important to this case if the Board "feels" that the 1985 x-ray originally read by Dr. Harron shows the existence of pneumoconiosis. Claimant's Response to the Board's Order dated Feb. 21, 2001 at 5. Claimant requests a stay of the case on this basis.

Alternatively, claimant contends that this case must be remanded in light of the

[4]Employer generally contends that the amendments to 20 C.F.R. Part 718 affecting the nature and interpretation of medical data, should not be retroactively applied to claims filed prior to January 19, 2001, such as the instant claim, as the parties did not develop evidence under those regulations. In this regard, employer characterizes as a "drastic change in law," the amendments to, *inter alia*, the definition of pneumoconiosis at 20 C.F.R. §718.201 and the weight to be accorded medical opinions rendered by treating physicians at 20 C.F.R. §718.104(d).

revised regulation at 20 C.F.R. §718.104(d) which "would have a bearing on the final outcome of this case." *Id.* at 8. Specifically, claimant argues that the administrative law judge refused to comment on the "treating physician doctrine." *Id.* at 7. Claimant also generally contends that the revised regulation at 20 C.F.R. §718.204(a) could have an effect on this case, but he does not provide any specific argument. Claimant concludes that the case should be remanded to the Office of Administrative Law Judges because the administrative law judge failed to comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §§919(d) and 30 U.S.C. §932(a), and asserts that further delay of the case would be an injustice to claimant.

Based on the briefs submitted by the Director, employer and claimant, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. The existence of pneumoconiosis is not at issue because, as the administrative law judge noted, employer conceded the presence of the disease based on the biopsy evidence. Decision and Order at 2 n.1. Moreover, the progressivity of pneumoconiosis is not at issue here. Further, the amendments to the regulation at 20 C.F.R. §725.310(2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001, *see* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057, and the modification issue in this case is not impacted by any revision to 20 C.F.R. §725.310(2000). Similarly, the revised regulation at 20 C.F.R. §718.104 applies only to medical evidence developed after January 19, 2001 and is not applicable here. The cental issue in this case is the cause of claimant's respiratory or pulmonary impairment under 20 C.F.R. §718.204(c)(1)[5] and this revised regulation is not challenged in the lawsuit. We, therefore, proceed to adjudicate the merits of this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant's contention, that the administrative law judge did not consider all the evidence submitted in connection with claimant's request for modification, has merit. The administrative law judge's failure to consider all the relevant evidence, and therefore to base his findings thereon, constitutes a violation of the APA. The administrative law judge also mischaracterized the record by indicating that since the prior denial, there has been no

[5]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

additional examination of claimant, and no additional testing performed or records compiled. Decision and Order at 5. The record shows that claimant was most recently examined by Dr. Abrahams on July 27, 1999, and that claimant underwent objective testing at that time. Dr. Abrahams's deposition testimony taken on September 8, 1999, addressed this new evidence. Claimant's Exhibit 2. Additionally, claimant's x-ray dated April 15, 1985, originally read as positive by Dr. Harron in 1985, prior to the onset of claimant's adult respiratory distress syndrome, was reread as positive by Drs. Abrahams and Brandon. *Id.* The administrative law judge also did not address Dr. Fino's deposition testimony taken on October 1, 1999, and his interpretation of this x-ray and its impact on his opinion relevant to the cause of claimant's respiratory or pulmonary disability. Employer's Exhibit 19.

Moreover, the administrative law judge's errors are not harmless. The administrative law judge considered Dr. Abrahams's opinion contained in his reports dated October 21, 1997 and July 9, 1998, *see* Claimant's Exhibit 2. Decision and Order at 4-6. Although it was within the administrative law judge's discretion to find that Dr. Abrahams's opinion was unpersuasive, his basis for so finding is tainted by his mischaracterization of the record and thus cannot stand. Specifically, the administrative law judge found:

> Dr. Abrahams' [sic] originally failed to consider Claimant's history of ARDS. Moreover, even considering Claimant's history of ARDS, Dr. Abrahams' [sic] based his opinion that Claimant's pneumoconiosis contributed to his respiratory impairment on the fact that simple pneumoconiosis showed up on one x-ray in 1985, prior to Claimant's bout with ARDS. I find Dr. Abrahams's opinion is not well-reasoned and therefore, cannot be relied upon to show that Claimant's totally disabling respiratory impairment is contributed to, at least in part, by pneumoconiosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Decision and Order at 6. The record shows that Dr. Abrahams's opinion, that claimant's coal workers' pneumoconiosis contributed to his total respiratory or pulmonary disability, most recently expressed by the physician in his 1999 deposition which the administrative law judge did not address, was actually based on physical examination, medical history, and review of the medical records, including the x-ray and pulmonary function evidence. Claimant's Exhibit 21 at 21, 22. The administrative law judge's weighing of the evidence thus cannot be affirmed. Consequently, we vacate the administrative law judge's findings with regard to the issues of modification and the cause of claimant's totally disabling respiratory or pulmonary impairment.

Employer argues that claimant misused the modification process by seeking to retry the case. Contrary to employer's contention, claimant properly sought modification of the prior denial under 20 C.F.R. §725.310(2000). *Stevens Shipping Co. v. Kinlaw*, 238 F.3d 414 (Table), 2000 WL 1804524 (4th Cir. 2000), *affirming Kinlaw v. Stevens Shipping and*

Terminal Co., 30 BRBS 68 (1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). We note, however, that claimant has advanced his request for modification of the prior denial based on a mistake in the ultimate fact of his entitlement to benefits under the Act. *Id.* On remand, the administrative law judge must determine whether claimant has established modification under 20 C.F.R. §725.310(2000) with specific reference to an alleged mistake in a determination of fact. If the administrative law judge finds a mistake in a determination of fact, he should then make a finding as to whether the interest of justice would be served by reopening this case for reconsideration on its merits. *O'Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254 (1971).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge