BRB No. 00-0782 BLA

ELLIOTT ROWE, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
JOHNSON COAL COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS? SELF INSURANCE FUND	)	
	)	
Employer/Carrier Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Research and Defense Fund of Kentucky, Inc.), Prestonsburg, Kentucky, for claimant.

Ronald A. Gilbertson (Bell, Boyd & Lloyd), Washington, D.C., for employer.

Timothy S. Williams (Judith E. Kramer, Acting 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (1999-BLA-0807) of Administrative Law Judge Richard K. Malamphy 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).[1] Claimant filed his application for benefits on April 18, 1989. Director's Exhibit 1. His claim is now before the Board for the fourth time. Previously, the Board discussed fully this claim?s procedural history. *Rowe v. Johnson Coal Co.*, BRB No. 97-1140 BLA (May 15, 1998)(unpub.); Director's Exhibit 75. We now focus only on those procedural aspects relevant to the issues raised in this appeal of the administrative law judge?s decision to grant employer?s request for modification and deny benefits.

The administrative law judge in his initial decision denying benefits found that claimant established the existence of pneumoconiosis, and the Board affirmed that finding. Director's Exhibits 37, 49. However, because the administrative law judge erred in his analysis of the evidence relating to total disability and causation, the Board remanded the case for the administrative law judge to reconsider this evidence. *Id*. The administrative law judge denied benefits on remand, but a second remand was required for him to again reconsider disability and causation. Director's Exhibits 51, 56. Ultimately, in a Decision and Order on Remand issued on May 2, 1997, the administrative law judge accorded ?significant weight? to the opinion of claimant?s treating physician, Dr. Raghu Sundaram, to find that claimant suffers from a totally disabling respiratory impairment that is due to pneumoconiosis arising out of coal mine employment. [1997] Decision and Order on Remand at 7; Director's Exhibit 65. Accordingly, the administrative law judge awarded benefits. Upon consideration of employer?s appeal, the Board affirmed the award of benefits as supported by substantial evidence and in accordance with law. [1998] *Rowe, supra*; Director's Exhibit 75.

[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 noted, refer to the amended regulations.

Subsequently, employer timely filed a petition for modification pursuant to 20 C.F.R. ?725.310, alleging that the award of benefits was a mistake.[2] Director's Exhibit 76. In support of employer?s position, it submitted the reports of Drs. Gregory Fino and B.T. Westerfield, who reviewed the medical evidence of record and concluded that claimant does not have pneumoconiosis or a totally disabling respiratory impairment.[3] Director's Exhibits 83, 85. Claimant responded with two reports by Dr. Sundaram stating that claimant is totally disabled due to pneumoconiosis, and also submitted the records of several recent hospitalizations during which claimant was treated by Dr. Sundaram for respiratory and pulmonary illnesses. Claimant's Exhibits 1-7. Employer then submitted additional reports by Drs. Fino and Westerfield, who reviewed Dr. Sundaram?s reports and the hospitalization records. Drs. Fino and Westerfield again concluded that claimant does not have pneumoconiosis and is not totally disabled. Director's Exhibits 88, 89; Employer's Exhibits 1-5.

The District Director denied modification, and employer requested a formal hearing. Director's Exhibits 95, 96, 99, 100. The case was referred to the Office of Administrative Law Judges for a hearing, but for reasons that are not reflected in the record, a hearing was not scheduled.

The administrative law judge in his Decision and Order summarized the new evidence submitted on modification and stated that he would ?not revisit the presence of coal workers' pneumoconiosis under ?718.202.? Decision and Order at 8. The administrative law judge found, however, ?that the opinions of Drs. Westerfield and Fino demonstrate that there was a mistake of fact in the previous determination of total disability due to CWP.? *Id*. Consequently, the administrative law judge modified the award of benefits to a denial.

On appeal, claimant contends that the administrative law judge did not explain why he credited the opinions of Drs. Fino and Westerfield. Claimant further asserts that the administrative law judge did not determine whether granting modification would render justice under the Act. Employer responds, urging affirmance of the denial of benefits, but also contends that the administrative law judge erred in not

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[2] Employer filed its petition with the Board. Because all requests for modification must be filed with the District Director of the Office of Workers? Compensation Programs, the Board forwarded the case record and employer?s petition to the District Director. Director's Exhibit 77.

[3] Employer also moved to compel claimant to submit to a physical examination, but the District Director denied employer?s motion. Subsequently, the administrative law judge denied employer?s motion, based on the Board?s holding in *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173 (1999)(*en banc*). Order, Aug. 5, 1999. Employer does not challenge the administrative law judge?s ruling.

considering whether the prior finding of the existence of pneumoconiosis was a mistake of fact. The Director, Office of Workers' Compensation Programs (the Director), responds, urging that the denial be vacated and the case remanded for the administrative law judge to set forth the rationale for his findings.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals 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 March 9, 2001, to which all parties have responded. Claimant and the Director agree that none of the regulations at issue in the lawsuit affects the outcome of this case. Employer, however, contends that two challenged regulations, 20 C.F.R. ?718.202(a)(defining ?legal pneumoconiosis?), and 20 C.F.R. ?718.201(c)(recognizing pneumoconiosis as a latent and progressive disease), affect the outcome of this case.

Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. The principle that pneumoconiosis is progressive is the same under both the existing law recognizing the progressive nature of pneumoconiosis, *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh?g denied*, 484 U.S. 1047 (1988); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-85 (6th Cir. 1993), and 20 C.F.R. ?718.201(c), which codifies existing law. 65 Fed. Reg. 79937-38. Similarly, revised 20 C.F.R. ?718.201(a)(2) merely codifies existing law recognizing ?legal pneumoconiosis,? *see Cornett v. Benham Coal Co*., 227 F.3d 569, 575 BLR (6th Cir. 2000); 65 Fed. Reg. 79938. Additionally, based on our review, we conclude that none of the other challenged regulations affects the outcome of this case. Therefore, we will proceed with the adjudication of this appeal.

The Board?s scope of review is defined by statute. The administrative law judge?s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. ?901; 20 C.F.R. ??718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 22 of the Longshore Act, 33 U.S.C. ?922 (the statute underlying 20 C.F.R. ?725.310), provides in part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim, review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation . . . .

?[B]y its plain language, 33 U.S.C. ?922 is a broad reopening provision that is available to employers and employees alike.? *King v. Jericol Mining, Inc*., 246 F.3d 822, 825, BLR (6th Cir. 2001). ?The purpose of this section is to permit a[n] [administrative law judge] to modify an award where there has been ?a mistake in a determination of fact [which] makes such a modification desirable in order to render justice under the act.?? *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-108 (6th Cir. 1982), quoting *Banks v. Chicago Grain Trimmers Association, Inc*., 390 U.S. 459, 464 (1968); *see also Branham v. BethEnergy Mines, Inc*., 21 BLR 1-79, 1-82-84 (1998)(McGranery, J., dissenting). The administrative law judge has the authority on modification ?to reconsider all the evidence for any mistake of fact or change in conditions.? *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

In this case, the administrative law judge found that the ultimate fact of entitlement was mistakenly decided. Claimant and the Director argue that in so finding, the administrative law judge did not comply with the Administrative Procedure Act (APA), 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), because he did not explain why he credited the opinions of Drs. Fino and Westerfield. This

contention has merit.

In the Decision and Order, the administrative law judge merely accepted the opinions of Drs. Fino and Westerfield, but did not provide his rationale for crediting this evidence. Decision and Order at 8; *see Caudill v. Arch of Kentucky, Inc.,* 22 BLR 1-97, 1-101 (2000)(*en banc*)(the administrative law judge must provide an explanation for his findings of fact and conclusions of law). This omission leaves the Board to speculate not only as to the administrative law judge?s reasons for crediting Drs. Fino and Westerfield,[4] but also as to the basis for the mistake of fact finding. That is, did the administrative law judge conclude that, contrary to the prior finding, claimant retains the respiratory or pulmonary capacity to perform his coal mine employment as a beltline head drive operator? Or did the administrative law judge instead find that claimant?s respiratory disability is unrelated to pneumoconiosis? Or did the administrative law judge find that both total disability and its causation were mistakenly decided? These unanswered questions demonstrate that the administrative law judge?s analysis is inadequate for the Board to conduct a proper review of this record. *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 416, 21 BLR 2-192, 2-198 (6th Cir. 1997); *Caudill, supra*.

Therefore, we must vacate the administrative law judge?s finding that a mistake of fact was demonstrated and remand this case for him to reconsider all the evidence for any mistake of fact.[5] *See Worrell, supra*. In so doing, the administrative law judge must include a specific and explanatory discussion of the weight accorded to each physician?s opinion, in view of the opinion?s documentation and reasoning, the authoring physician?s credentials, and any other relevant factors, such as treating physician status. *See* APA, *supra*; *Director, OWCP v. Congleton*, 743 F.2d 428, 430, 7 BLR 2-12, 2-15-16 (6th Cir. 1984); *Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Rowe, supra*; *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993). Ultimately, the administrative law judge should determine whether reopening the claim renders justice under the Act. *See Branham, supra*.

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[4] Employer states that it is clear the administrative law judge ?credited their well documented opinions based upon their superior qualifications.? Employer's Brief at 26. Based upon our review of the administrative law judge?s decision, we simply cannot tell. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983)(the Board should not attempt to fill gaps in the administrative law judge?s decision).

[5] On remand, the administrative law judge should address employer?s contention that the prior finding of the existence of pneumoconiosis was a mistake of fact. *See Branham*, 21 BLR at 1-82 (modification provisions displace traditional notions of *res judicata* and collateral estoppel).

Accordingly, the administrative law judge?s Decision and Order denying benefits is vacated 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge