BRB No. 04-0861 BLA

WILLIAM C. HERRING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 06/30/2005
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Modification and Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Modification and Denying Benefits (04-BLA-0013) of Administrative Law Judge Paul H. Teitler 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's initial claim, filed on

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

February 6, 1995, has previously been before the Board.[2] Director's Exhibit 1. Most recently, in *Herring v. Director, OWCP*, BRB No. 01-0754 BLA (Apr. 6, 2001)(unpub.), the Board affirmed the administrative law judge's determination that claimant established four years of coal mine employment and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) (2000), but failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000).

On July 20, 2001, claimant requested modification, and in a decision dated August 13, 2001, the administrative law judge denied claimant's request on the grounds that claimant had not established the existence of pneumoconiosis, and, therefore, had not established a mistake in fact or a change in conditions since the prior denial.[3] On January 4, 2003 and May 8, 2003, claimant submitted requests for modification, together with additional evidence.[4] In a decision dated July 28, 2004, the administrative law judge

[2] Initially, the administrative law judge credited claimant with four years of coal mine employment and accepted the parties' stipulation to the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) (2000). The administrative law judge found, however, that the medical evidence of record failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000) and denied benefits. Claimant appealed, and in *Herring v. Director, OWCP*, BRB No. 97-1051 BLA (Apr. 9, 1998) (unpub.), the Board vacated the administrative law judge's Decision and Order and remanded the case for him to consider the evidence at 20 C.F.R. §718.202(a)(1), (3) and (4) (2000). On remand, the administrative law judge found that the medical evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (3) and (4) (2000) and therefore denied benefits. Claimant appealed, and in *Herring v. Director, OWCP*, BRB No. 99-0247 BLA (Nov. 17, 1999)(unpub.), the Board vacated the administrative law judge's Decision and Order at 20 C.F.R. §718.202(a)(1) and (a)(4) (2000) and remanded the case for the administrative law judge to consider the evidence pursuant to 20 C.F.R. §718.202(a)(1) and (4) (2000) and then weigh the evidence together to determine whether the existence of pneumoconiosis was established in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). On remand, considering both x-ray and medical opinion evidence, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis as defined by the Act and again denied benefits. Claimant appealed, and in *Herring v. Director, OWCP*, BRB No. 01-0754 BLA (Apr. 6, 2001) (unpub.), the Board affirmed the administrative law judge's Decision and Order.

[3] Claimant appealed, but the appeal was dismissed by the Board on December 31, 2002 for failure to file a petition for review and brief.

[4] By letter to the Board dated January 4, 2003, claimant requested a remand to pursue modification, but that letter was not received by the Board until after the

found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), and thus insufficient to establish a mistake in fact or a change in conditions since the prior denial. Accordingly, benefits were denied.

Claimant appeals, arguing that the administrative law judge committed several procedural errors, including applying the evidentiary limitations of 20 C.F.R. §725.414 to this claim on modification. Claimant further contends that the administrative law judge's evaluation of the x-ray and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) does not comport with the Administrative Procedure Act (APA). 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 U.S.C. §932(a). The Director, Office of Workers' Compensation Programs (the Director), has filed a letter agreeing with claimant that the administrative law judge erred in applying the limitations of 20 C.F.R. §725.414 to this claim, and in doing so, wrongfully excluded some of claimant's evidence, but disagreeing with claimant's remaining arguments. The Director requests that this case be remanded for further consideration of the evidence.

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).

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, *see* 20 C.F.R. §725.2(c), 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, 1123, 20 BLR 2-53, 2-62 (3d Cir. 1995), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). Moreover, 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 newly submitted evidence and evidence previously in the record,

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December 31, 2002 dismissal. Because the Board no longer had jurisdiction over the claim, the Board forwarded the letter to the district director, who construed the letter as a request for modification. On May 8, 2003, claimant submitted an additional request for modification, together with additional evidence.

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.

To establish entitlement 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).

Initially, the Board holds that the administrative law judge erred in applying the evidentiary limitations set forth at 20 C.F.R. §725.414 to this claim, and in doing so, erred in excluding the positive x-ray reading of Dr. Miller. Hearing Transcript at 6, 21. Claimant's original claim was filed on February 6, 1995. While claimant's most recent request for modification was filed on January 4, 2003, and renewed on May 8, 2003, the regulations at 20 C.F.R. §725.2 specifically provide that the revised evidentiary limitations set forth at 20 C.F.R. §725.414 do not apply to pending claims, such as the instant one, filed before the effective date of the new regulations and kept alive through modification requests. *See* 20 C.F.R. §725.2. Thus, we vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(1) and remand this case for reconsideration of all the evidence.

Claimant also argues that the administrative law judge erred in failing to make the necessary finding of "good cause," as set forth at 20 C.F.R. §725.456(b) (2000), prior to allowing the Director's late submission into the record of Dr. Rashid's medical report. We disagree.

Prior to the scheduled hearing, by letter dated January 6, 2004, with a copy to claimant's counsel, the Director moved to compel claimant to undergo a complete pulmonary evaluation, and further asked to be allowed to submit the results of the examination inside the 20 day rule.[5] The Director asserted that on November 10, 2003 and December 19, 2003, claimant's counsel had refused to schedule the examination on the grounds that because total disability had been stipulated by the parties, she did not feel further objective testing was necessary. By Order dated January 8, 2004, the

[5] The regulation at 20 C.F.R. §725.456(b) (2000) provides that evidence which was not submitted to the deputy commissioner, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim, or upon a showing of good cause why such evidence was not exchanged accordingly. 20 C.F.R. §725.456(b)(1), (2) (2000).

administrative law judge granted the Director's motion to compel, and request for post hearing submission, and noted that no response had been received from claimant. At the hearing, the administrative law judge entertained claimant's objection to the Director's Motion to Compel. Specifically, claimant objected to the scope of the examination, again asserting that objective testing was not necessary as total respiratory disability had been stipulated to by the parties, but did not object to the late submission of the report. Hearing Transcript at 8. The administrative law judge again granted the Director's Motion to compel a complete pulmonary evaluation, including objective testing. Hearing Transcript at 12-13, 16. The administrative law judge stated that the record would be held open until April 4th 2000 for the receipt of all evidence from all parties. Hearing Transcript at 14.

As the administrative law judge considered the arguments raised by both claimant and the Director, as well as the delay in the scheduling of Dr. Rashid's examination, we hold that, in granting the Director's motion, the administrative law judge implicitly found that the Director had established good cause for the late submission of Dr. Rashid's report. Furthermore, we note that, at the hearing, claimant did not object to the late submission of Dr. Rashid's report, but only objected to the scope of the examination. 20 C.F.R. §725.456(b)(3). Thus, we affirm the administrative law judge's admission of Dr. Rashid's report into the record.

We further reject claimant's argument that the administrative law judge erred in declining claimant's request for the opportunity to rebut Dr. Rashid's report. Following the hearing, by letter dated March 29, 2004, the Director explained that the complete pulmonary evaluation was not scheduled to be performed by Dr. Rashid until April 8, 2004, and thus requested an additional sixty days from the date of Dr. Rashid's examination for the submission of final briefs and evidence. By Order dated April 2, 2004, the administrative law judge granted the Director's request for an extension of time until June 11, 1004. By letter dated June 17, 2004, claimant's counsel asserted that she had not received Dr. Rashid's examination report until June 8, 2004, and thus requested an additional forty-five days to submit rebuttal evidence. Claimant also asked to review the original objective test results and x-rays. By Order dated June 22, 2004, the administrative law judge denied claimant's motion for an extension of time to submit rebuttal evidence. On June 28, 2004 claimant attempted to submit a rebuttal report from Dr. R. Kraynak dated June 24, 2004, which was rejected by the administrative law judge. Thus, in light of the prior delays in the adjudication of this case, and the fact that Dr. Rashid's examination was obtained by the Director in response to the numerous reports already submitted by claimant, the administrative law judge acted within his discretion in refusing to allow claimant to submit additional medical evidence. *See North American Coal Company v. Miller*, 870 F.2d 948, 952 (3d Cir. 1989).

Claimant also asserts that the administrative law judge erred in refusing to strike from the record Dr. Rashid's pulmonary function and blood gas study results. Director's Exhibit 122. Specifically, claimant contends that these additional tests were unnecessary in light of the fact that the parties had stipulated to the existence of a totally disabling respiratory impairment, and thus should not have been considered by the administrative law judge. Again we disagree. Contrary to claimant's arguments, the regulations specifically set forth that objective studies, such as blood gas and pulmonary function studies, are relevant to the issue of the existence of pneumoconiosis, the disputed issue in this case. *See* 20 C.F.R. §718.202(a)(4); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Morgan v. Bethlehem Steel Corp.*, 7 BLR 1-226 (1984).

We also reject claimant's argument that the administrative law judge failed to review the evidence specifically for a mistake of fact and/or a change of condition. Contrary to claimant's arguments, throughout his decision, the administrative law judge properly considered the newly submitted evidence in conjunction with the prior evidence of record and specifically held that neither the x-ray nor medical opinion evidence was sufficient to establish any mistake in fact or change in condition. Decision and Order at 8, 9, 10; *see Keating v. Director, OWCP*, 71 F.3d at 1123, 20 BLR at 2-62.

Finally, claimant contends that the administrative law judge's evaluation of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) does not comport with the APA as the administrative law judge offered no rationale for his conclusions. We agree.

In evaluating the medical evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge noted that in their opinions, submitted on modification, Drs. M. Kraynak, R. Kraynak and Prince diagnosed the existence of coal workers pneumoconiosis, while Dr. Rashid, the physician who performed a complete pulmonary evaluation on behalf of the Director, diagnosed no pneumoconiosis.[6] Claimant's Exhibits 7, 9, 12, 15; Director's Exhibits 109, 111; Decision and Order at 9-10. The administrative law judge noted that in the previous denial of modification, he found the medical opinion reports insufficient to establish the existence of pneumoconiosis because the opinions did not clearly

[6] The administrative law judge correctly noted that Dr. Fitzpatrick, who did not offer any findings relevant to the issue of legal or clinical pneumoconiosis, and the Drs. Kraynak, who each diagnosed pneumoconiosis, were identified as treating physicians. He discussed the Kraynaks' opinions pursuant to 20 C.F.R. §718.104(d) and found no grounds for according their opinions any additional weight. Decision and Order at 10. We note, however, that the administrative law judge did not discuss their opinions in light of *Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82 (3d Cir. 2004), holding, subsequent to the effective date of the revised regulations, that treating physicians should be accorded additional deference.

establish why the miner's remote and minimal smoking history was excluded as a causative agent, but the miner's remote and minimal coal mine employment was not excluded as a causative agent. Decision and Order at 9. The administrative law judge acknowledged, however, that in their most recent reports, the physicians had provided the necessary rationale for why they believed that claimant suffered from pneumoconiosis and not a smoking related condition. Specifically, the doctors explained that the miner's coal mine employment, although remote and minimal, involved intense dust exposure, and that while a patient's pulmonary condition would improve after the cessation of smoking, the toxic effects of coal mine dust exposure do not improve, even after the cessation of coal mine employment, but worsen over time. Claimant's Exhibits 7, 10, 12, 14; Director's Exhibits 109, 111; Decision and Order at 9. The administrative law judge nonetheless declined to credit these opinions, finding them "insufficient to establish the presence of pneumoconiosis." Decision and Order at 9. Because of the inconsistency in the administrative law judge's reasoning, we must vacate the administrative law judge's finding that the opinions of Drs. M. Kraynak, R. Kraynak and Prince do not support a finding of pneumoconiosis and remand the case for the administrative law judge to reconsider their opinions in their entirety. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

The administrative law judge also concluded that as the "medical opinion reports which discuss the presence or absence of pneumoconiosis all rely primarily on equally persuasive chest x-ray reports in concluding that pneumoconiosis is or is not present" the medical opinion reports of record were "evenly balanced" and claimant failed to meet his burden of proof to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and, therefore, failed to establish a basis for modification pursuant to 20 C.F.R. §725.310. Decision and Order at 10.

Contrary to the administrative law judge's findings, however, the medical opinions of record are not evenly balanced. Drs. M. Kraynak, R. Kraynak, Kruk, Simelaro and Prince diagnosed the existence of coal workers' pneumoconiosis, while only Dr. Rashid found no pneumoconiosis. Although the administrative law judge discusses the opinions of Drs. Kruk and Simelaro in his summary of the medical evidence, Decision and Order at 5, he does not include them in his discussion of the medical opinions at 718.202(a)(4). Decision and Order at 9-10. The failure of an administrative law judge to address all relevant evidence requires remand. *See Hall v. Director, OWCP*, 12 BLR 1-80 (1988). Furthermore, the APA requires that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented. . . ." 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 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(4) and remand this case for further consideration and discussion of all the relevant medical opinion evidence. The

administrative law judge's analysis of the evidence must be supported by sufficient and correct rationale.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge