BRB No. 06-0718 BLA

DIONIGI RASI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 06/28/2007
	)	
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 of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Mary K. Prim (Johnstone, Gabhart & Prim, LLP), Charleston, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-0225) of Administrative Law Judge Edward Terhune Miller denying benefits on a duplicate 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] This case involves a request for

[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

modification of a duplicate claim. The pertinent procedural history of this case is as follows: Claimant filed a claim on July 26, 1983. Director's Exhibit 29. This claim was denied by a Department of Labor claims examiner on December 8, 1983 because the evidence did not show that claimant was totally disabled by pneumoconiosis. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on January 21, 1987. Director's Exhibit 1. The 1987 claim has been before the Board on several occasions.[2] On the last appeal by claimant, the Board affirmed Administrative Law Judge Clement J. Kichuk's finding, in a Decision and Order on Remand dated May 10, 2001, that the newly submitted evidence (*i.e*., the evidence submitted subsequent to the Department of Labor claims examiner's 1983 denial of benefits) was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The Board also affirmed Judge Kichuck's finding that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] The Board therefore affirmed Judge Kichuck's denial of benefits. *Rasi v. Eastern Associated Coal Corp*., BRB Nos. 01-0717 BLA and 01-0717 BLA-A (June 13, 2002)(unpub.).

Claimant filed a request for modification on August 13, 2002. Director's Exhibit 214. In a Decision and Order dated June 8, 2006, Judge Miller (the administrative law judge) credited claimant with thirty-seven and one-half years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence (*i.e*., the evidence submitted subsequent to Judge Kichuk's May 10, 2001 Decision and Order on Remand) insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found the newly submitted evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge also found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits.

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The full procedural history of this case before the Board is set forth in the Board's prior decision in *Rasi v. Eastern Associated Coal Corp.*, BRB Nos. 01-0717 BLA and 01-0717 BLA-A (June 13, 2002)(unpub.).

[3] The revisions to the regulations at 20 C.F.R. §§725.309 and 725.310 apply only to claims filed after January 19, 2001.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310 (2000). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[4]

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

After consideration of the administrative law judge's Decision and Order, the arguments of the parties, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310 (2000), 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. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *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 (1992). In his 2001 Decision and Order on Remand denying benefits, Judge Kichuk found that claimant failed to establish a material change in conditions because the newly submitted evidence (*i.e.*, the evidence submitted subsequent to the Department of Labor claims examiner's 1983 denial of benefits) was insufficient to establish total disability and total disability due to pneumoconiosis. Director's Exhibit 29. Consequently, the relevant issue before the administrative law judge was whether the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Judge Kichuk's 2001 Decision and Order on Remand denying benefits) was sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000), thereby establishing a change in conditions at 20 C.F.R. §725.310 (2000). *Kingery*, 19 BLR at 1-11; *Nataloni*, 17 BLR at 1-84; *Kovac*, 14 BLR at 1-158.

[4] Because the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant initially contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish a change in conditions at 20 C.F.R. §725.310 (2000). Specifically, claimant argues that the newly submitted medical opinion evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant's contention is based on the premise that he has satisfied the standard adopted by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,[5] in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), for establishing a material change in conditions since the last denial of benefits in his 1987 claim. The administrative law judge considered the reports of Drs. Zaldivar and Krishnan, which were submitted subsequent to Judge Kichuk's 2001 Decision and Order on Remand denying benefits. In a March 15, 2004 report, Dr. Zaldivar diagnosed asthma that is unrelated to pneumoconiosis and opined that claimant is capable of performing his usual coal mining work from a pulmonary standpoint. Employer's Exhibit 1. Further, during a December 29, 2004 deposition, Dr. Zaldivar opined that claimant is not disabled from a respiratory or pulmonary impairment. Employer's Exhibit 2. In a March 28, 2003 report, Dr. Krishnan opined that claimant has moderately severe coal workers' pneumoconiosis. Director's Exhibit 221. Although Dr. Krishnan noted that claimant had marked shortness of breath on the slightest exertion, Dr. Krishnan did not render an opinion with regard to whether claimant has a disabling respiratory or pulmonary impairment. *Id*.

The administrative law judge found that Dr. Krishnan implicitly opined that claimant's work capacity is impaired. Decision and Order at 8. However, the administrative law judge accorded greater weight to Dr. Zaldivar's opinion than to Dr. Krishnan's contrary opinion. The administrative law judge determined that Dr. Zaldivar's opinion is credible because Dr. Zaldivar relied upon nonqualifying blood gas studies and pulmonary function studies. In contrast, the administrative law judge determined that the credibility of Dr. Krishnan's opinion is diminished because of the omissions in it. The administrative law judge specifically stated:

> However, Dr. Krishnan did not link the shortness of breath to a pulmonary or respiratory cause, or assess the effects of [c]laimant's smoking history or his coronary artery disease. He did not address whether [c]laimant's pulmonary impairment would allow him to return to his usual coal mine employment. Dr. Krishnan also failed to rely upon objective testing in

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in West Virginia. *See* Director's Exhibit 1-224; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

> reporting his medical conclusions. These omissions diminish the credibility of Dr. Krishnan's medical opinion so that it does not outweigh Dr. Zaldivar's opinion of no pulmonary disability.

Decision and Order at 8. Thus, the administrative law judge found the newly submitted medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, the administrative law judge found the newly submitted evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. The Fourth Circuit has adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions at 20 C.F.R. §725.309(d) (2000). *Rutter*, 86 F.3d at 1362, 20 BLR at 2-235.

Contrary to claimant's contention, the administrative law judge properly considered the newly submitted medical evidence regarding the issues of total disability and total disability due to pneumoconiosis in accordance with the standard adopted by the Fourth Circuit in *Rutter*. The administrative law judge noted that "[i]n evaluating a request for modification, an administrative law judge must first consider whether [c]laimant established a change in conditions pursuant to §725.310(c) under the standard adopted by…the Fourth Circuit in [Rutter]." Decision and Order at 8. The administrative law judge then noted that "Judge Kichuck denied benefits [in May 2001], on the basis that [c]laimant did not establish a 'material change in conditions' in that he did not demonstrate a totally disabling pulmonary condition, as required by §725.202(d)(2)(iii) and defined in §718.204(b)(1). DX 199." *Id*. Next, the administrative law judge stated that "[c]laimant must submit new evidence which establishes a totally disabling pulmonary condition." *Id*. Lastly, the administrative law judge concluded that "because [c]laimant has not established that at least one of the elements of entitlement previously adjudicated against him has changed, he is not entitled to benefits due to a change in condition." *Id*. at 8.

In considering the newly submitted medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge rationally found that Dr. Zaldivar's opinion outweighed Dr. Krishnan's opinion, on the ground that Dr. Zaldivar's opinion is more credible. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee*

v. Director, OWCP, 8 BLR 1-7 (1985). Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Furthermore, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2) overall, as supported by substantial evidence.[6] In addition, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge stated that "[b]ecause [c]laimant has failed to demonstrate total disability, he has not, under §725.202(d)(2)(iv), proved that his pneumoconiosis contributed to his total disability." Decision and Order at 8.

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Judge Kichuk's 2001 Decision and Order on Remand) is insufficient to establish both total disability at Section 718.204(b)(2) and total disability due to pneumoconiosis at Section 718.204(c), the administrative law judge properly found that the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). *Rutter*, 86 F.3d at 1362, 20 BLR at 2-235.

Claimant next contends that the administrative law judge erred in finding that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). Specifically, claimant asserts that he satisfied the standard adopted by the Fourth Circuit in *Rutter* for establishing a material change in conditions based on Administrative Law Judge Edith Barnett's July 31, 1992 Decision and Order awarding benefits. Claimant's assertion is based on the premise that Judge Barnett found that total disability was established in her 1992 decision. Claimant essentially requests that the Board reinstate Judge Barnett's prior finding.

The Fourth Circuit has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In considering whether there was a mistake in a determination of fact, the administrative law judge stated that he examined the evidentiary record before Judge Kichuk in conjunction with Judge Kichuk's 2001 Decision and Order on Remand denying benefits. As discussed *supra*, Judge Kichuk, in his decision, found that claimant failed to establish total disability, based on the evidence submitted subsequent to the

[6] The administrative law judge stated that "[t]he pulmonary [function] studies and arterial blood gas studies are not qualifying and the medical opinion evidence does not support a finding of disability under the applicable regulations." Decision and Order at 8.

Department of Labor claims examiner's 1983 denial of benefits. Consequently, Judge Kichuk found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309 (2000). In our 2002 Decision and Order, the Board affirmed Judge Kichuk's findings that claimant failed to establish total disability at Section 718.204(b)(2) and a material change in conditions at Section 725.309 (2000). *Rasi v. Eastern Associated Coal Corp*., BRB Nos. 01-0717 BLA and 01-0717 BLA-A, slip op. at 7 (June 13, 2002)(unpub.). Based upon his review of Judge Kichuk's decision, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). Further, the administrative law judge stated that "[c]laimant has not identified a mistake of fact that would require a review of the entire record." Decision and Order at 9.

Contrary to claimant's assertion, the administrative law judge properly considered Judge Kichuk's 2001 Decision and Order on Remand, rather than Judge Barnett's July 31, 1992 Decision and Order, in determining whether the evidence is sufficient to establish a mistake in a determination of fact at Section 725.310 (2000). Although Judge Barnett's 1992 and 1995 decisions are part of the record in this case, the request for modification was filed in response to Judge Kichuk's 2001 Decision and Order on Remand denying benefits. In its 2002 Decision and Order, the Board rejected claimant's assertion that Judge Barnett's prior award of benefits should be reaffirmed based on her finding that total disability was established. The Board stated:

> Claimant notes that Judge Barnett previously credited the opinions of Drs. Gaziano and Daniel over Dr. Zaldivar's contrary opinion in finding total disability established in her 1992 Decision and Order awarding benefits and contends that Dr. Fino's subsequent medical reports were submitted by employer on remand merely in an attempt to overrule Judge Barnett's findings. Thus, claimant urges the Board to vacate the administrative law judge's Second Decision and Order On Remand denying benefits and reaffirm Judge Barnett's award of benefits. However, inasmuch as Judge Barnett's award of benefits based on her findings under Section 718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), was previously vacated by the Board, *see* [*Rasi v. Eastern Associated Coal Corp.*, BRB No. 95-1117 BLA (June 23, 1997)(Smith, J., concurring and dissenting)(unpub.)], we reject claimant's contention.

Rasi, BRB Nos. 01-0717 BLA and 01-0717 BLA-A, slip op. at 6.

Because we find no error in the administrative law judge's determination that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000), it is affirmed. *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge