BRB No. 07-0770 BLA

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| D.W. | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| ARCH ON THE NORTH FORK, INCORPORATED | ) | |
| | ) | |
| | ) | DATE ISSUED: 06/12/2008 |
| and | ) | |
| | ) | |
| UNDERWRITERS SAFETY & CLAIMS | ) | |
| | ) | |
| 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 - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for employer/carrier.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 Benefits (2005-BLA-05872) of Administrative Law Judge Donald W. Mosser rendered on a duplicate claim filed on September 28, 1989 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). Claimant filed his duplicate claim on September 28, 1989. Although benefits were denied, claimant has kept his claim pending through a series of modifications requests.[1] Claimant's most recent modification request was filed on March 3, 2004. Director's Exhibit 3. The district director issued a Proposed Decision and Order awarding benefits on January 19, 2005. Director's Exhibit 28. Employer requested a hearing, and the case was assigned to Judge Mosser (the administrative law judge). In his Decision and Order dated May 10, 2007, the administrative law judge determined that the newly submitted evidence, considered in conjunction with previous evidence of record, failed to establish

[1] The relevant procedural history of this case is briefly summarized as follows. Claimant filed an initial claim for benefits on February 10, 1987, which was denied by the district director on July 22, 1987 because claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a duplicate claim on September 28, 1989. Director's Exhibit 2. Administrative Law Judge C. Richard Avery denied benefits, finding that while claimant established the existence of pneumoconiosis arising out of coal mine employment and total respiratory disability, he failed to establish that his disabling respiratory impairment was due to pneumoconiosis. Director's Exhibit 2. On appeal, the Board affirmed the administrative law judge's disability causation findings pursuant to 20 C.F.R. §718.204(b) (2000) and the denial of benefits. [*D.W.*] *v. Arch on the North Fork, Inc.*, BRB No. 93-1300 BLA (May 12, 1994) (unpub.); [*D.W.*] *v. Arch on the North Fork, Inc.*, BRB No. 96-1261 BLA (June 17, 1997) (unpub.); Director's Exhibit 2. On August 22, 2000, claimant filed a petition for modification, and the case was assigned to Administrative Law Judge Daniel J. Roketenetz. Director's Exhibit 2. In a Decision and Order issued on March 4, 2003, Judge Roketenetz considered the newly submitted evidence, in conjunction with the previous evidence of record, and found that the evidence was insufficient to establish a mistake in a determination of fact. *Id*. Judge Roketenetz further found that the newly submitted evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* Thus, benefits were denied pursuant to 20 C.F.R. §725.310 (2000). Claimant next filed his current modification request on March 3, 2004. Director's Exhibit 3.

a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[2] Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to credit the opinion of Dr. Rasmussen, that claimant is totally disabled due, in part, to coal dust exposure, pursuant to 20 C.F.R. §718.204(c).[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a motion to remand, asserting the administrative law judge's disability causation findings pursuant to 20 C.F.R. §718.204(c) fail to 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 the administrative law judge did not adequately explain the basis for his rejection of Dr. Rasmussen's opinion at 20 C.F.R. §718.204(c). Employer has filed a reply brief, urging the Board to deny the motion to remand.

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.[4] 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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[2] 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. The revised regulation at 20 C.F.R. §725.310 does not apply to claims, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

[3] The provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

[4] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Claimant may establish a basis for modification by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310 (2000).[5] In considering whether a change in conditions has been established pursuant to 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). The United States Court of Appeals for the Sixth 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 fact, inasmuch as the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits, contained within a case. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994).

Claimant and the Director maintain that the administrative law judge has failed to adequately explain the basis for his credibility determinations at 20 C.F.R. §718.204(c).[6]

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[5] Claimant is seeking modification of a duplicate claim. The regulation at 20 C.F.R. §725.309 (2000) provides that a duplicate claim must be denied unless claimant can establish a material change in condition since the denial of his prior claim. *See* 20 C.F.R. §725.309(d) (2000); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) Claimant's prior claim was denied because he failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. As noted by the Director, Office of Workers' Compensation Programs, because the evidence developed in conjunction with the duplicate claim establishes that claimant has a totally disabling respiratory impairment, claimant "has proved a material change in condition since the 1987 denial and the merits of his 1989 claim, now on its fourth modification request, should be considered." Director's Motion for Remand at 2 n.2.

[6] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We note that since the administrative law judge found the existence of legal pneumoconiosis established pursuant to 20 C.F.R. §§718.201, 718.202(a)(4), he will necessarily have determined the etiology of the pneumoconiosis, obviating the need for a separate inquiry into that issue under 20 C.F.R. §718.203(b). *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); *Kiser v. L&J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999). Thus, we affirm the administrative law judge's finding that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203.

We agree. The APA requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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), *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In this case, the administrative law judge has not explained the basis for the weight accorded the conflicting medical opinion evidence as to the cause of claimant's totally disabling respiratory or pulmonary impairment.

The administrative law judge properly noted that there were three medical opinions, by Drs. Chaney, Jarboe and Rasmussen, submitted in conjunction with claimant's current modification request. Decision and Order at 12. The administrative law judge correctly determined that while Dr. Chaney diagnosed pneumoconiosis, he "offered no opinion as to whether claimant's total disability was due to the disease." Decision and Order at 17. Dr. Jarboe did not diagnose pneumoconiosis and he opined that claimant is totally disabled due to a combination of smoking and asthma. Director's Exhibits 18, 19; Employer's Exhibits 1, 2. Dr. Rasmussen opined that claimant has chronic obstructive pulmonary disease (COPD) due to coal dust exposure and he attributed claimant's respiratory disability to both smoking and coal dust exposure. Director's Exhibits 11, 15.

The administrative law judge found Dr. Jarboe's disability causation opinion to be supported by a "majority of the previously submitted physicians' opinions" but assigned it less weight since Dr. Jarboe was not of the opinion that claimant had legal pneumoconiosis,[7] contrary to the administrative law judge's determination at 20 C.F.R. §718.202(a). The administrative law judge further stated:

> In weighing these conflicting medical opinions, I find that the miner again has failed to establish a mistake in determination of fact or a material change in his condition. 20 C.F.R. § 725.310. The only physician in the current request for modification to opine that the miner is totally disabled due to pneumoconiosis is Dr. Rasmussen. His opinion alone is not strong enough to outweigh the several opinions in the miner's previous claims that found that the total disability was due to other illnesses. In the 2003 decision, the administrative law judge gave great weight to the opinion of Dr. Bruce Broudy, who had the opportunity to examine the claimant on five separate occasions and who opined that the miner's total disability was due to cigarette smoking and asthma. Dr. Broudy also stated that his opinion

[7] Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

> would not change even if the claimant could establish he suffers from simple coal workers' pneumoconiosis. Furthermore, the majority of the physicians in the miner's previous claims found that the miner was totally disabled, but only eight of these physicians found that the total disability was due to pneumoconiosis. (DX 1). Therefore, I find that the miner has failed to establish that his total disability is due to pneumoconiosis. The weight of evidence tends to attribute the miner's disability to his years of cigarette smoking.

Decision and Order at 12.

The administrative law judge's credibility findings are not sufficiently explained. *See Wojtowicz*, 12 BLR at 1-165. Although the administrative law judge credited Dr. Broudy's opinion, along with other unidentified physicians, he did not address the validity of the specific reasoning provided by those doctors for attributing claimant's respiratory disability to smoking and not coal dust exposure. Aside from general conclusions, the administrative law judge did not provide a basis for accepting the opinion of Dr. Broudy over the opinion of Dr. Rasmussen. As noted by the Director, the administrative law judge specifically relied on Dr. Rasmussen's diagnosis of chronic obstructive pulmonary disease due to coal dust exposure, in finding that claimant has legal pneumoconiosis. He also rejected Dr. Jarboe's opinion on disability causation at 20 C.F.R. §718.204(c) because the doctor was not of the opinion that claimant has pneumoconiosis. In accordance with that finding, the administrative law judge erred by failing to also consider whether the prior medical opinions were reasoned and documented on the issue of disease causation, taking into consideration that claimant suffers from legal pneumoconiosis in the form of COPD due to coal dust exposure.

Consequently, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c), and remand the case for further consideration. The administrative law judge on remand should address and weigh all relevant evidence on the issue of disability causation. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). We specifically instruct the administrative law judge to explain the bases for his findings, and provide a rationale for all of his credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. On remand, the administrative law judge must specifically address whether each physicians' opinion is reasoned and documented,[8] and

[8] A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Id*.

determine whether claimant has satisfied his burden of establishing that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Smith*, 127 F.3d at 507; 21 BLR at 1-185-186; *Adams*, 886 F.2d at 825, 13 BLR at 2-63; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent*, 11 BLR at 1-27.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part and vacated in part, and the 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