BRB No. 97-1121 BLA

EDWARD L. SHERTZER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
McNALLY PITTSBURG MANUFACTURING 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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edward L. Shertzer, Worthington, Indiana, *pro se*.

William H. Howe and Patricia T. Gonsalves (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Edward Waldman (Marvin Krislov, Deputy Solicitor for National Operations; 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 and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (95-BLA-2406) of Administrative Law Judge Donald W. Mosser 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). Claimant initially filed a claim in August, 1983. Director's Exhibit 23. In November, 1983, this claim was denied by the

district director, who found that the evidence was insufficient to establish any of the elements of entitlement. *Id*. In February, 1992, claimant filed the instant claim. Director's Exhibit 1. In his Decision and Order Denying Benefits, issued in July, 1994, the administrative law judge initially found that newly submitted positive x-ray readings and Dr. Powers's medical opinion were sufficient to establish a material change in claimant's condition pursuant to 20 C.F.R. §725.309. 1994 Decision and Order at 4. After crediting claimant with six years of qualifying coal mine employment, the administrative law judge determined that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id*. at 7, 12-14. Further, the administrative law judge found that assuming *arguendo* that claimant had pneumoconiosis, claimant failed to establish that his pneumoconiosis arose out of coal mine employment. *Id*. at 14; *see* 20 C.F.R. §718.203(c). The administrative law judge also found that the evidence was insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(4). *Id.* at 15-16. Accordingly, benefits were denied.

In September, 1994, claimant requested modification of the administrative law judge's denial of benefits. Director's Exhibit 28. In his Decision and Order Denying Benefits, issued in April, 1997, the administrative law judge adhered to his prior finding that claimant established six years of coal mine employment. 1997 Decision and Order at 3. The administrative law judge found that the evidence was insufficient to establish modification based on a mistake of fact or a change in claimant's condition pursuant to 20 C.F.R. §725.310. *Id*. at 10; *see* 20 C.F.R. §725.310. Accordingly, benefits were denied.

On appeal, claimant contends generally that the administrative law judge erred in denying benefits. Employer responds, advocating affirmance of the administrative law judge's Decision and Order Denying Benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a response urging the Board to vacate the administrative law judge's Decision and Order and remand the case to the administrative law judge for further consideration of the evidence, inasmuch as the administrative law judge failed to correct his previous mistake in evaluating Dr. Combs's 1992 medical opinion.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and 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).

Claimant may establish modification by establishing either a change in conditions since the issuance of a previous decision or a mistake in a determination of fact in the

previous decision.[1] 20 C.F.R. §725.310(a). In considering whether a change in conditions has been established pursuant to Section 725.310, 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. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Moreover, the fact-finder has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits, contained within a case. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S.

[1] Claimant specifically requests that the Board admit into evidence and consider medical evidence from Dr. Lenyo. By Order dated October 29, 1996, the administrative law judge allowed claimant, who was represented by counsel, ten days to forward Dr. Lenyo's x-ray reading dated May 15, 1995 to employer's counsel to be reread by a physician of employer's choice. The administrative law judge, in an Order dated February 3, 1997, ordered that Dr. Lenyo's x-ray reading dated May 15, 1995 and those portions of his examination report regarding, or based upon, such x-ray reading be stricken from the record because employer was not afforded the opportunity to have the x-ray reread due to claimant's counsel's failure to comply with the Order. *See* 1997 Decision and Order at 5 n.2. An administrative law judge has broad discretion in resolving procedural issues, and the administrative law judge's action in this instance was proper. *See Wagner v. Beltrami Enterprises*, 16 BLR 1-65, 1-67 (1990). The Board's review authority does not permit consideration of evidence not admitted into the record before the administrative law judge. 20 C.F.R. §802.301. We, therefore, affirm the administrative law judge's decision regarding Dr. Lenyo's reports.

254 (1971); *see also Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Initially, we note that the administrative law judge in the instant case admitted, as post-modification evidence, evidence that pre-dates the July 12, 1994 Decision and Order Denying Benefits by the administrative law judge. 1997 Decision and Order at 4-6. Specifically, this evidence consists of the following: a CT scan of the chest dated January 21, 1993, by Dr. Wendell, Director's Exhibit 25 at 3; Employer's Exhibit 6; a report dated March 2, 1993 by Dr. Cook reviewing chest CT scans performed on January 21, 1993, Employer's Exhibit 7; a letter by Dr. Powers dated September 29, 1992, Director's Exhibit 25 at 4; and reports from Dr. Kovacs dated November 2, 1993, February 2, 1993, January 19, 1993, and October 27, 1992, Employer's Exhibits 6, 8-10.[2]

With the exception of the documents from Drs. Wendell and Powers, this evidence was in existence but was not made available to the administrative law judge at the time the administrative law judge issued his 1994 Decision and Order. *See Wilkes v. F & R Coal Co.*, 12 BLR 1-1 (1988). 20 C.F.R. §725.456(d), which governs the submission of late evidence, mandates the exclusion of withheld evidence in the absence of extraordinary circumstances. 20 C.F.R. §725.456(d); *Wilkes*, *supra*. Thus, the administrative law judge erred in admitting this evidence on modification without considering whether extraordinary circumstances existed so as to excuse its late submission. *Id*.

At Section 718.202(a)(1), the administrative law judge found that the newly submitted evidence failed to establish that claimant suffered from pneumoconiosis. Specifically, the administrative law judge found that two newly submitted "x-ray" interpretations, by Drs. Wendell and Cook, were negative for pneumoconiosis. 1997 Decision and Order at 7; Director's Exhibit 25 at 3; Employer's Exhibit 7. As we noted above, the report of Dr. Wendell was admitted into the pre-modification record and the report of Dr. Cook predates, but was not admitted, into the pre-modification record. Moreover, the administrative law judge erroneously classified the reports of Drs. Wendell and Cook as x-ray readings since these reports were reviews of CT scans. Generally, CT scan evidence is not to be treated as x-ray evidence, *see generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991), and should be considered under Section 718.202(a)(4). However, despite these errors, inasmuch as the record contains no newly submitted x-ray evidence, we affirm the administrative law judge's finding that claimant failed to establish a change in conditions under Section 718.202(a)(1). *See Kingery*, *supra*; *Nataloni*, *supra*.

[2] The CT scan of the chest by Dr. Wendell, and the letter by Dr. Powers, were initially submitted into the record before modification was requested. *See* Hearing Transcript at 12.

The administrative law judge also found that the previously submitted x-ray evidence failed to establish the existence of pneumoconiosis and therefore that there was no mistake of fact in that finding. 1997 Decision and Order at 7; *see* 1994 Decision and Order at 12-13. The administrative law judge, in his 1994 Decision and Order, correctly found that although the June 24, 1992 x-ray was read as positive by Dr. Fisher, a Board-certified radiologist and B reader, it was also read as negative by Drs. Scott and Wheeler, whose qualifications are equal to those of Dr. Fisher. Director's Exhibits 12, 26. The administrative law judge permissibly found that the two negative interpretations of Drs. Scott and Wheeler outweighed the positive x-ray reading by Dr. Fisher. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70, 1-76 (1990). The administrative law judge also permissibly credited the negative readings of the November 16, 1992 x-ray by Drs. Spitz and Wiot based on their superior qualifications as Board-certified radiologists and B readers.[3] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989)(*en banc*); 1994 Decision and Order at 13; Director's Exhibit 26. Therefore, we affirm the findings of the administrative law judge that the previously submitted x-ray evidence fails to establish the existence of pneumoconiosis, and that no mistake was made in concluding that the x-ray evidence failed to support a finding of pneumoconiosis. The administrative law judge's error in considering CT evidence with respect to modification at Section 718.202(a)(1), some of which was erroneously admitted into the record, is harmless, inasmuch as the administrative law judge properly did not find this evidence to be classified as positive for pneumoconiosis. *See* 20 C.F.R. §718.102(b); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

With respect to Section 718.202(a)(2), the administrative law judge properly found that there was no biopsy evidence in the record, 1997 Decision and Order at 8, and we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). With regard to Section 718.202(a)(3), the administrative law judge properly found that there was no evidence of complicated pneumoconiosis in the record, *see* 20 C.F.R. §718.304; that 20 C.F.R. §718.305 did not apply since it pertains only to claims that were filed before January 1, 1982; and that 20 C.F.R. §718.306 was not relevant since it applies to deceased miners. 1997 Decision and Order at 8. We, therefore, affirm the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(3).

[3] The administrative law judge correctly found that the November 16, 1992 x-ray was read as positive by Dr. Harmon, who had no special radiological qualifications and by Drs. Alexander, Cappiello and Ahmed, who are B readers. 1994 Decision and Order at 13; Director's Exhibit 25.

In finding that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), the administrative law judge properly stated that because Dr. Powers's opinion was in the record prior to issuance of the original decision denying benefits, it was insufficient to demonstrate a change in conditions.[4] 1997 Decision and Order at 8; Director's Exhibit 25 at 4; *see Kingery*, *supra* at 1-13. Next, the administrative law judge properly found that while Dr. Lenyo diagnosed claimant as suffering from chronic lung disease, such a diagnosis, in and of itself, does not constitute a finding of coal worker's pneumoconiosis inasmuch as Dr. Lenyo's report was devoid of any evidence which indicated that claimant's lung disease is attributable to coal dust exposure from coal mine employment.[5] 20 C.F.R. §§718.201,

[4] The administrative law judge also properly found that Dr. Powers's 1992 letter diagnosing coal worker's pneumoconiosis was insufficient to establish the existence of pneumoconiosis. 1997 Decision and Order at 8. The administrative law judge correctly noted that, in his 1994 Decision and Order, Dr. Powers's report was discounted because none of the objective evidence upon which the physician relied in making his diagnosis was offered into evidence. 1994 Decision and Order at 14. The administrative law judge permissibly found that, inasmuch as objective evidence had once again not been submitted, Dr. Powers's two-sentence report was unworthy of any probative weight. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-106 (1992); 1997 Decision and Order at 8.

[5] Although Dr. Lenyo made an x-ray diagnosis of pleural thickening and fibrosis compatible with pneumoconiosis, the administrative law judge excluded this evidence from

718.202(a)(4); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); 1997 Decision and Order at 8-9; Director's Exhibit 38. Furthermore, the administrative law judge properly noted that although Dr. Kovacs repeatedly diagnosed pulmonary fibrosis, there is no objective evidence that establishes that such fibrosis was caused by coal mine employment. 1997 Decision and Order at 9; *see* 20 C.F.R. §§718.201, 718.202(a)(4). Finally, the administrative law judge correctly found that Dr. Bennett reported that claimant's fibrosis was likely secondary to post-bypass surgery changes. 1997 Decision and Order at 9; Employer's Exhibit 1. The administrative law judge therefore properly concluded that the newly submitted medical report evidence does not establish the existence of coal worker's pneumoconiosis.[6] *Perry*, *supra*; 1997 Decision and Order at 9. Consequently, we affirm the administrative law judge's finding that, with respect to Section 718.202(a)(4), claimant failed to establish a change in conditions, as supported by substantial evidence.

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the record. Director's Exhibit 38 at 6; 1997 Decision and Order at 5 n.2; February 3, 1997 Order; December 2, 1996 Order; *see supra*.

[6] Although the administrative law judge did not discuss the newly submitted medical opinions by Drs. Cantillo and Parr, this omission constitutes harmless error, inasmuch as these doctors did not diagnose pneumoconiosis, and thus support the administrative law judge's findings. *See Larioni*, *supra*; Employer's Exhibits 3, 5.

With regard to a mistake in fact at Section 718.202(a)(4), the Director argues that the administrative law judge erred by failing to correct a mistake on modification. Specifically, the Director avers that the administrative law judge, in his 1994 Decision and Order, erroneously found that Dr. Combs did not diagnose pneumoconiosis, when Dr. Combs specifically diagnosed a restrictive lung defect *due to coal dust*, welding fumes, and rock dust exposure, which constitutes a diagnosis of "legal" pneumoconiosis. In his 1997 Decision and Order, the administrative law judge stated that he had reconsidered the medical evidence developed in connection with claimant's 1992 claim and concluded that it does not establish the existence of pneumoconiosis. 1997 Decision and Order at 9. In considering the medical opinion evidence in his 1994 Decision and Order, the administrative law judge found that Dr. Combs did not diagnose pneumoconiosis, noting that this opinion was well-reasoned and documented. 1994 Decision and Order at 14. Dr. Combs, in his May, 1992 report, diagnosed restrictive lung defect due to coal dust, welding fumes, and rock dust exposure. Director's Exhibit 9. As argued by the Director, this finding meets the legal definition of pneumoconiosis. *See* 30 U.S.C. §902(b); 20 C.F.R. §718.201. Therefore, we vacate the administrative law judge's finding, in his 1997 Decision and Order, with respect to Section 718.202(a)(4), that the evidence fails to prove that a mistake of fact was made in denying the 1992 claim, and remand this case to the administrative law judge for reconsideration of Dr. Combs's opinion.[7] *See O'Keeffe*, *supra*; *see also Worrell*, *supra*; *Jessee*, *supra*. Should the administrative law judge find the evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) on remand, the administrative law judge should reconsider whether the evidence is sufficient to establish that claimant's pneumoconiosis arose from his coal mine employment pursuant to Section 718.203(c).[8]

Further, on remand, the administrative law judge should consider whether extraordinary circumstances existed so as to excuse the late submission of Dr. Cook's CT

[7] The administrative law judge, in his 1997 Decision and Order, stated that while "Dr. Wendell found radiographic changes consistent with chronic obstructive pulmonary disease, such a finding does not constitute a diagnosis of coal workers' pneumoconiosis." 1997 Decision and Order at 7. In his 1994 Decision and Order, the administrative law judge simply stated that Dr. Wendell's findings "were consistent with chronic obstructive pulmonary disease and pleural parenchymal scarring." 1994 Decision and Order at 11. However, Dr. Wendell stated, "The findings are much more typical of COPD and/or so-called *black lung* disease than with congestive heart failure or interstitial edema." (emphasis added). Director's Exhibit 25; Employer's Exhibit 6. On remand, the administrative law judge must reconsider his assessment of Dr. Wendell's opinion under 20 C.F.R. §718.202(a)(4) in light of this statement.

[8] We affirm, as supported by substantial evidence, the administrative law judge's decision to credit claimant with six years of coal mine employment. Director's Exhibits 2-4; Hearing Transcript at 17, 25-27, 29-30; *see Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988).

scan report and the four reports from Dr. Kovacs, which were in existence but were not made available to the administrative law judge at the time of his 1994 denial. 20 C.F.R. §725.456(d); *Wilkes*, *supra*.

After contending that the administrative law judge properly found in his 1994 Decision and Order that the evidence was insufficient to establish total disability pursuant to Section 718.204(c), employer argues that there is no credible evidence of record to support a finding that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(b). Employer thus concludes that any error by the administrative law judge in his consideration of Dr. Combs's report is harmless. The Director, however, contends that the administrative law judge's erroneous finding on modification at Section 718.202(a)(4), *i.e.*, his failure to find that Dr. Combs diagnosed pneumoconiosis, tainted his finding at Section 718.204(b) that claimant's total disability was not due to pneumoconiosis.

The administrative law judge stated that although there was no question that claimant was impaired as the results of his pulmonary function study were significantly reduced and some of the medical reports indicate that claimant is totally disabled, such evidence did not indicate that claimant's impairment was due to his coal mine employment or pneumoconiosis. 1997 Decision and Order at 9. By not specifically addressing all of the relevant evidence and providing a rationale for his findings, the administrative law judge's findings on modification with respect to the elements of total disability and cause of disability do not meet the requirements of the Administrative Procedure Act. 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 30 U.S.C. §932(a); 20 C.F.R. §725.310(a); *see* 20 C.F.R. §718.204(b), (c); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We therefore vacate these findings. Should the administrative law judge reach the issue of total disability under Section 718.204(c) on remand, the administrative law judge must discuss and weigh the contrary probative evidence against the evidence supportive of a finding of total disability in determining whether claimant has established a totally disabling respiratory or pulmonary impairment under Section 718.204(c). *See Fields*, *supra*. If the administrative law judge finds the evidence sufficient to establish total disability under Section 718.204(c), the administrative law judge must then consider whether the evidence is sufficient to establish that pneumoconiosis was at least a contributing cause of claimant's total disability.[9] *See Mangus v. Director, OWCP*, 882 F.2d 1527, 13 BLR 2-9 (10th Cir. 1989).

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

[9] The instant case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, inasmuch as claimant's most recent coal mine employment occurred in Colorado. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Hearing Transcript at 30, 35; Director's Exhibits 2, 3.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge