BRB No. 98-1337 BLA

THOMAS E. SWINDALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL 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 of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise III (Vinyard & Moise), Abingdon, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-BLA-1285) of Administrative Law Judge John C. Holmes 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). In an initial Decision and Order dated September 30, 1996, the administrative law judge considered the instant claim, filed on June 20, 1994, under the applicable regulations at 20 C.F.R. Part 718. After finding that claimant was a coal miner for a "significant time" during his thirty-eight year tenure with employer, the administrative law judge determined that while employer conceded that claimant was totally disabled, the evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. Thereafter, claimant requested modification.[1]

[1]Claimant filed his request for modification with the district director on July 25, 1997.

In his Decision and Order dated June 15, 1998, the administrative law judge stated that he was adopting his prior Decision and Order in its entirety. The administrative law judge then determined that the "new medical evidence is basically a carbon copy of that presented at the original hearing." Decision and Order at 2. The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a), and that, therefore, claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge also concluded that claimant did not establish a mistake in a determination of fact in the prior Decision and Order. Consequently, finding that modification was not established under Section 725.310, the administrative law judge denied benefits. On appeal, claimant contends that the case must be remanded to the administrative law judge because he failed to render a specific finding with regard to the length of claimant's coal mine employment, and erred in discounting Dr. Robinette's opinion that claimant suffers from pneumoconiosis. Employer responds in support of the decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

Modification may be established pursuant to Section 725.310 by a showing of a change in conditions or a mistake in a determination of fact. In addressing the issue of a change in conditions, 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 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). As the administrative law judge

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Director's Exhibit 53. The district director denied modification and referred the case to the Office of Administrative Law Judges on February 3, 1998 pursuant to claimant's request for a hearing. Director's Exhibits 58, 63. In an Order dated March 23, 1998, the administrative law judge granted claimant's request for an opportunity to take and submit a deposition from Dr. Robinette, and granted the parties ninety days within which to submit evidence on modification. In his Order, the administrative law judge stated that he would issue a Decision and Order on modification on the record, without conducting another hearing in this case. A hearing had been held on December 13, 1995. The parties did not object to the case being decided on the record.

correctly noted in his previous decision, employer waived the issue of total disability at the hearing. 1996 Decision and Order at 5; Hearing Tr. at 10. Consequently, the administrative law judge considered whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis under Section 718.202(a).

On appeal, claimant contends that the administrative law judge's failure to render a specific finding as to the length of claimant's coal mine employment compels remand. Claimant argues that the administrative law judge relied heavily on claimant's smoking history in discounting Dr. Robinette's opinion that claimant has pneumoconiosis, and contends that the administrative law judge's failure to render a specific finding with regard to length of coal dust exposure was patently unfair. Claimant also argues that the administrative law judge improperly found that Dr. Robinette relied upon an inaccurate smoking history, and erred in rejecting the doctor's opinion on that basis. Claimant's contentions have merit.

Where physicians provide conflicting opinions as to the etiology of a miner's condition, an administrative law judge should discuss the conflicting evidence and provide a rationale for choosing one opinion over another. *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). In the instant case, the administrative law judge credited Dr. Sargent's opinion that claimant has emphysema due to cigarette smoking and does not have pneumoconiosis, Director's Exhibits 45, 55, 59, over Dr. Robinette's opinion that claimant suffers from pneumoconiosis, Director's Exhibit 53; Claimant's Exhibit 1. Decision and Order at 1-2. The administrative law judge discounted Dr. Robinette's opinion upon finding that it was based upon incorrect assumptions of a twenty-five year, one-half pack per day smoking history and a fifteen year coal mine employment history. Decision and Order at 2. The administrative law judge further found it significant that Dr. Robinette testified that a longer smoking history and lesser coal dust exposure history would affect his diagnosis of pneumoconiosis. *Id*.

We hold that the administrative law judge failed to provide an adequate finding with regard to the amount of claimant's coal dust exposure, and that this omission tainted his rejection of Dr. Robinette's opinion. In his initial Decision and Order, which he adopted in addressing modification, the administrative law judge found that claimant was a coal miner for employer for thirty-eight years, working in various capacities during this period as a supply clerk, invoice and inventory clerk, warehouse manager and warehouse foreman. 1996 Decision and Order at 1-2. The administrative law judge further noted claimant's hearing testimony that he worked in buildings, *i.e.*, preparation plants and supply houses, performing administrative work, and that, while most of the locations in which he worked were close to the mines or preparation facilities, he did not work on a continuous basis in such facilities or underground in the mines. *Id*.; *see* Hearing Tr. at 15-63. Although the administrative law judge noted that claimant testified that he was exposed to very dusty conditions throughout his employment, the administrative law judge did not make a specific finding as to how many years claimant was exposed to coal dust. 1996 Decision and Order at 2. Instead, the administrative law judge merely stated that he could not imagine that

claimant's coal dust exposure was even one-quarter of what a miner at the face underground would encounter, and believed it to be "far less." *Id*.

We further hold that the administrative law judge failed to adequately explain his finding that "Dr. Robinette was still under the misapprehension that claimant had only a 25 pack year history of smoking." Decision and Order at 2. The administrative law judge merely noted that "other physicians" reported a substantially higher smoking history, referring to his previous findings in his 1996 Decision and Order. *Id*. In his 1996 Decision and Order, however, while the administrative law judge noted that Dr. Paranthaman considered a forty-one year, three pack per day smoking habit and Dr. Iosif assumed claimant had been smoking one-half to one pack per day for forty years, the administrative law judge failed to note the histories relied upon by the other physicians. Significantly, the administrative law judge failed to note that Dr. Sargent, whose opinion he credited over Dr. Robinette's opinion, relied upon a moderate smoking history of only one-quarter to one-half pack per day for forty years, Director's Exhibit 45 at 6, and failed to explain how this history varied significantly from Dr. Robinette's twenty-five year, one-half pack per day history. We, therefore, remand this case for the administrative law judge to render specific findings with regard to length of coal mine employment and claimant's smoking history and to reconsider the medical opinion evidence under Section 718.202(a)(4) in light of those findings.[2] *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *McGinnis, supra*; *Calfee, supra*.

[2]We note that claimant contends that the administrative law judge's improper rejection of Dr. Robinette's opinion is further compounded by the fact that Dr. Robinette is claimant's treating physician. The administrative law judge found in his 1996 Decision and Order that Dr. Robinette was not claimant's treating physician because he treated claimant only once. 1996 Decision and Order at 5. The newly submitted deposition of Dr. Robinette indicates, however, that Dr. Robinette treated claimant on "several occasions" since 1994, testimony which the administrative law judge did not address in his Decision and Order on modification. On remand, the administrative law judge should consider this factor in deciding what weight to accord Dr. Robinette's opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

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

JAMES F. BROWN
Administrative Appeals Judge