BRB No. 98-1524 BLA

JAMES McCOY, Jr.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOLLY BETH COAL COMPANY, INC.	)	
	)	
Employer-Respondent	)	DATE ISSUED:
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Caleb Echterling (UMWA Legal Department), Castlewood, Virginia, for claimant.

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

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (98-BLA-0074) of Administrative Law Judge Richard A. Morgan 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). This case arises from a second request for modification pursuant to 20 C.F.R. §725.310.[1] Administrative Law Judge Richard A. Morgan (the administrative law

[1]Claimant filed his claim on February 2, 1987; employer contested the claim. In a Decision and Order issued in November 1990, Administrative Law Judge Giles J.

judge) determined that the initial Administrative Law Judge, Giles J. McCarthy, found the evidence sufficient to establish simple pneumoconiosis at 20 C.F.R. §718.202(a), but insufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304,

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McCarthy credited claimant with twenty-eight and three-quarters years of coal mine employment. Judge McCarthy found the evidence sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), but he found the evidence insufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge further found that claimant was entitled to the presumption at 20 C.F.R. §718.203(b). Judge McCarthy, however, found the evidence insufficient to establish the existence of total disability pursuant to 20 C.F.R. §718.204(c). Thus, Judge McCarthy denied benefits. Claimant appealed to this Board, which affirmed the denial of benefits. *See McCoy v. Holly Beth Coal Company*, BRB No. 91-0488 BLA (Feb. 19, 1993) (unpub.). Claimant timely requested modification in January 1994 and submitted additional evidence. In November 1995, Administrative Law Judge Charles P. Rippey found that claimant failed to establish a totally disabling respiratory impairment, and thus had failed to establish a change in conditions. No appeal of Judge Rippey's decision was taken. Claimant again requested modification of the denial of benefits in October 1996.

and insufficient to establish total disability at 20 C.F.R. §718.204(c). The administrative law judge then found the newly submitted medical evidence insufficient to establish a change in conditions or a mistake in a determination of fact with respect to the issue of complicated pneumoconiosis at Section 718.304. After reviewing all of the evidence of record, the administrative law judge further found that claimant failed to establish either a mistake in a determination of fact or a change in condition with respect to the issue of total disability at Section 718.204(c). Accordingly, benefits were denied. Claimant appeals, asserting that the administrative law judge erred in his consideration of the evidence at Section 718.304. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In requests for modification, Section 22 of the Longshore and Harbor Workers' Compensation Act provides the administrative law judge with the authority to reconsider the previous decisions and to correct prior mistakes in fact or to decide if a change in conditions has been established. *See* 33 U.S.C. §922, as incorporated by 30 U.S.C. §932 (a); 20 C.F.R. §725.310; *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corporation*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In requests for modification, the party seeking modification bears the burden of proving a mistake in a determination of fact or a change in conditions. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct.

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[2] Claimant does not challenge the administrative law judge's findings that claimant failed to establish total disability at 20 C.F.R. §718.204(c)(1)-(4). Claimant also does not challenge the administrative law judge's findings at 20 C.F.R. §718.304(b) and (c). Nor does claimant challenge the administrative law judge's finding that claimant failed to establish a change in conditions at 20 C.F.R. §725.310. Inasmuch as claimant has not specifically challenged these findings, we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 930, 17 BLR 2-64 (3d Cir. 1993). The United States Court of Appeals for the Fourth Circuit, under whose jurisdiction the present case arises, has held that if a claimant avers generally that the ultimate fact was mistakenly decided, the district director (or administrative law judge) has the authority, without more, to modify the denial of benefits. *Jessee v. Director, OWCP,* 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). At 20 C.F.R. §725.310, an administrative law judge may rely on wholly new evidence, cumulative evidence, or merely further reflect on evidence initially submitted, to correct a mistake of fact. *Branham v. Bethenergy Mines, Inc.*, 21 BLR 1-79 (1997)(McGranery, J., dissenting).

Claimant argues that he is entitled to invocation of the irrebuttable presumption at Section 718.304, as the evidence of record establishes a mistake in a determination of fact in the prior finding that complicated pneumoconiosis was not established. Claimant argues that the administrative law judge erred in considering only the newly submitted x-ray evidence, rather than all of the x-ray evidence of record in determining whether a mistake in fact had been made. In the instant case, the administrative law judge reviewed the eighteen readings of the four recent films of acceptable quality. While we find no specific error in the administrative law judge's treatment of the evidence considered, *see discussion, infra*, we must vacate the administrative law judge's findings at Section 718.304(a) and remand this case for further consideration, since the administrative law judge considered only the newly submitted evidence, rather than all of the x-ray evidence of record. Therefore we additionally vacate the administrative law judge's finding that claimant failed to establish modification pursuant to Section 725.310. *See Jessee, supra*; *Nataloni, supra.* On remand, pursuant to *Melnick v. Consolidation Coal Company*, 16 BLR 1-31 (1991)(*en banc)*, if the administrative law judge finds the existence of complicated pneumoconiosis established at Section 718.304(a), he must weigh the finding of complicated pneumoconiosis at Section 718.304(a) against the contrary findings at Section 718.304(b) and (c). *See* 20 C.F.R. §718.304(a)-(c).

In the interest of judicial economy, we now address claimant's specific argument regarding the administrative law judge's treatment of the x-ray evidence. Claimant specifically contends that in considering the evidence of complicated pneumoconiosis the administrative law judge improperly required that the opacity be irregular and progressive, and by doing so the administrative law judge added extra factors with respect to the x-ray requirements at Section 718.304(a). In the instant case, as noted, *supra*, the administrative law judge reviewed the newly submitted x-ray readings of films of acceptable quality. The majority of the physicians who interpreted these films noted the presence of an opacity greater than 1 cm in diameter in claimant's upper left lung. Director's Exhibits 96, 98, 100, 101, 104, 105, 107; Claimant's Exhibits 1, 3, 5; Employer's Exhibits 2, 6, 7, 8, 9, 10, 11, 12, 13, 14. The administrative law judge considered these x-rays to determine if the noted opacity was complicated pneumoconiosis. Drs. Fino, Wheeler and Scott opined that the

opacity was granuloma, because it was irregular and had not progressed in size since 1971, which in their opinions, was not consistent with complicated pneumoconiosis. Based on their statements, the administrative law judge concluded that this newly submitted evidence was insufficient to establish the existence of complicated pneumoconiosis at Section 718.304(a). Contrary to claimant's argument, the administrative law judge reasonably relied on the medical opinions which included the physicians' reasons for concluding that the noted opacity is not complicated pneumoconiosis. The interpretation of medical data is for the medical experts, and the weighing of the evidence is for the administrative law judge. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Thus, while we cannot affirm the administrative law judge's ultimate finding that complicated pneumoconiosis has not been established, as it is not based on all of the evidence of record, the administrative law judge's method of weighing that evidence which he did consider is clearly permissible.

Accordingly, the administrative law judge's Decision and Order on Second Modification denying benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge