BRB No. 11-0608 BLA

NICKY WEAVER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	DATE ISSUED: 05/30/2012
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits on Modification of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Maia S. Fisher (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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:

Employer appeals the Decision and Order - Awarding Benefits on Modification (10-BLA-5089) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) rendered on a miner's claim filed pursuant to the provisions of Title IV of the

Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] The administrative law judge credited claimant with 23 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 that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore determined that claimant invoked the rebuttable presumption that his total disability was due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer did not rebut the presumption. Consequently, the administrative law judge found that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established a mistake in a determination of fact at 20 C.F.R. §725.310. Employer also challenges the administrative law judge's finding that it failed to establish rebuttal of the Section 411(c)(4) presumption by showing the absence of pneumoconiosis and disability causation. Claimant responds, urging affirmance of the administrative law judge's award of benefits.[2] The Director, Office of Workers' Compensation Programs, argues that the administrative law judge properly considered claimant's modification petition under Section 411(c)(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 supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 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).

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[1] Claimant filed his claim on October 6, 2005. Director's Exhibit 2. On April 17, 2008, Administrative Law Judge Janice K. Bullard issued a Decision and Order denying benefits because claimant failed to establish total disability due to pneumoconiosis. Director's Exhibit 74. Claimant filed a request for modification on April 8, 2009. Director's Exhibit 75.

[2] Employer has filed a brief in reply to claimant's response brief, reiterating its prior contentions.

[3] The record indicates that claimant was employed in the coal mining industry in West Virginia. Director's Exhibits 4, 71. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Under Section 22 of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), the fact-finder may, on the ground of a change in conditions or because of a mistake in a determination of fact, reconsider the terms of an award or denial of benefits. See 20 C.F.R. §725.310. The intended purpose of modification based on a mistake in a determination of fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."[4] *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Director, OWCP v. Drummond Coal Co.* [*Cornelius*], 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

Initially, we will address employer's contention that the administrative law judge erred in finding that it failed to establish rebuttal of the Section 411(c)(4) presumption by showing the absence of pneumoconiosis. Specifically, employer asserts that the administrative law judge erred in failing to admit Dr. Wiot's interpretations of CT scans dated January 5, 2006, May 2, 2006, and September 15, 2006 into the record on modification. Employer argues that it should be permitted to submit one additional interpretation for each CT scan as "other medical evidence" on modification. Employer

[4] Modification of a claim does not automatically flow from a finding that a mistake was made on an earlier determination, and should be made only where doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (the purpose of modification under the Longshore Act, also applicable to the Black Lung Act, is to "render justice."); *Sharpe v. Director, OWCP*, 495 F.3d 125, 128, 24 BLR 2-56, 2-66 (4th Cir. 2007).

also argues that this CT scan evidence should be considered for good cause shown because it is necessary and relevant for full inquiry of the matters at issue.

The administrative law judge noted that claimant objected to the admission of Employer's Exhibit 1, which contained Dr. Wiot's interpretations of CT scans dated January 5, 2006, May 2, 2006, and September 15, 2006, during the August 11, 2010 hearing. The administrative law judge also noted that he reserved his ruling on the admission of Employer's Exhibit 1 and allowed the parties to submit briefs on this issue. The administrative law judge concluded, "[a]fter considering both briefs, I find in favor of [c]laimant on this issue; these CT scans are in excess of the evidentiary limitations and Employer's Exhibit 1 is not admitted." 2011 Decision and Order at 2.

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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge excluded all of Dr. Wiot's interpretations of CT scans from the record on modification. In so doing, the administrative law judge determined that Dr. Wiot's interpretations of the CT scans were in excess of the evidentiary limitations set forth at 20 C.F.R. 725.414. However, the administrative law judge did not explain why he found that *all* of Dr. Wiot's interpretations of the CT scans were in excess of the evidentiary limitations on modification. *Wojtowicz*, 12 BLR at 1-165. Consequently, we vacate the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption by showing the absence of pneumoconiosis and remand the case to the administrative law judge to consider the admissibility of Dr. Wiot's interpretations of the CT scans in Employer's Exhibit 1. *See* 20 C.F.R. §718.107; *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(en banc).

Next, we address employer's assertion that the administrative law judge erred in failing to consider Dr. Meyer's negative reading of an April 20, 2006 x-ray and Dr. Altmeyer's negative reading of a January 18, 2006 x-ray.[5] At Section 718.202(a)(1), the

[5] In his response brief, claimant contends that employer's assertion that the administrative law judge failed to consider all the relevant x-ray evidence is misleading. Claimant argues that the Board should reject employer's assertion that the administrative law judge erred in failing to consider Dr. Altmeyer's reading of the April 20, 2006 x-ray because, claimant alleges, employer did not submit this reading as affirmative evidence on its June 12, 2007 evidence summary and it would be in excess of the evidentiary limitations. Claimant also argues that the Board should reject employer's assertion that the administrative law judge erred in failing to consider Dr. Wiot's reading of the January

administrative law judge considered nine interpretations of three x-rays dated April 20, 2006, December 6, 2006, and January 18, 2006.[6] The administrative law judge found that the April 20, 2006 x-ray was positive for pneumoconiosis because two physicians, who are dually-qualified as B readers and Board-certified radiologists, read this x-ray as positive, Director's Exhibit 68; Claimant's Exhibit 2, while one dually-qualified radiologist read this x-ray as negative, Director's Exhibit 53. Further, the administrative law judge found that the December 6, 2006 x-ray was negative for pneumoconiosis because one B reader and two dually-qualified radiologists read this x-ray as negative, Director's Exhibit 55; Employer's Exhibits 1, 4, while one dually-qualified radiologist read this x-ray as positive, Director's Exhibit 67. Lastly, the administrative law judge found that the January 18, 2006 x-ray was positive for pneumoconiosis because two dually-qualified radiologists read this x-ray as positive. Director's Exhibits 12, 66. Hence, the administrative law judge found that the x-ray evidence was positive for pneumoconiosis overall.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that when a request for modification is filed, 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. Instead, the administrative law judge has the authority to "reconsider *all the evidence* for any mistake of fact or change in conditions." *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993)(emphasis added). In this case, the administrative law judge did not consider all of the evidence on modification. In her April 17, 2008 Decision and Order Denying Benefits, Administrative Law Judge Janice K. Bullard determined that the record contained Dr. Meyer's negative reading of the January 18, 2006 x-ray and Dr. Altmeyer's negative reading of the April 20, 2006 x-ray. However, in his Decision and Order Awarding Benefits on Modification, the administrative law judge did not consider these x-ray readings by Drs. Meyer and Altmeyer. While an administrative law judge is not required to accept evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Because the administrative law

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18, 2006 x-ray because, claimant alleges, employer did not designate this evidence on any of its evidence summary forms and it was neither mentioned nor admitted into the record by Judge Bullard. In its reply brief, employer notes that it argued that the administrative law judge erred in failing to consider Dr. Meyer's interpretation of the January 18, 2006 x-ray, not Dr. Wiot's interpretation of that x-ray. Further, employer notes that Judge Bullard considered Dr. Altmeyer's reading of the April 20, 2006 x-ray in her prior Decision and Order.

[6] Dr. Gaziano, who is dually-qualified as a B reader and a Board-certified radiologist, read the January 18, 2006 x-ray for quality only. Director's Exhibit 18.

judge erred in failing to consider Dr. Meyer's negative reading of the April 20, 2006 x-ray, Director's Exhibit 25, and Dr. Altmeyer's negative reading of the January 18, 2006 x-ray, Director's Exhibit 64, we vacate the administrative law judge's finding that the x-ray evidence is positive for pneumoconiosis overall. *McCune*, 6 BLR at 1-988. On remand, the administrative law judge must consider all of the x-ray evidence in accordance with the APA.

Employer also contends that the administrative law judge erred in finding that it failed to establish rebuttal of the Section 411(c)(4) presumption by showing the absence of disability causation. Specifically, employer asserts that the administrative law judge erred in summarily dismissing the opinions of Drs. Zaldivar, Altmeyer, and Basheda. In considering rebuttal of the Section 411(c)(4) presumption, the administrative law judge noted that employer had to prove that claimant's disability was caused by something other than coal dust exposure. The record consists of the opinions of Drs. Mavi, Zaldivar, Altmeyer, and Basheda. Director's Exhibits 12, 55, 64; Employer's Exhibit 2. The administrative law judge indicated that he discounted the opinions of Drs. Zaldivar, Altmeyer, and Basheda because they were based, in part, on views that were inconsistent with the regulatory definition of pneumoconiosis and the preamble to the amended regulations.[7] However, the administrative law judge did not explain how the views of Drs. Zaldivar, Altmeyer, and Basheda conflict with the regulatory definition of pneumoconiosis and the preamble with regard to the Department of Labor's position that

[7] In considering the medical opinion evidence, the administrative law judge stated: "All of the doctors agreed that some of [claimant's] disability was caused by smoking. Dr. Mavi believed that coal dust exposure was also an equally contributing factor. The three other doctors [Drs. Zaldivar, Altmeyer, and Basheda] who offered opinions as to disability causation stated that [claimant's] disability was caused entirely by smoking and not coal dust exposure because [claimant's] impairment responded to bronchodilators, [claimant's] cough remains despite having left the coal mines years ago, [claimant] retired before any symptoms started, and [claimant] lost more lung function than is typical of coal dust induced disability." 2011 Decision and Order at 10.

The administrative law judge additionally stated: "I note that while [claimant's] impairment did respond to bronchodilators, [claimant's] pulmonary function test results were still qualifying even after bronchodilators. As coal workers' pneumoconiosis is a latent disease, the fact that [claimant's] symptoms worsened after he left the coal mines is immaterial. Further, that [claimant] lost more lung function than is typical of coal dust exposure is not evidence that none of the impairment was caused by coal dust exposure; [claimant's] impairment could be caused by both coal dust exposure and smoking, causing an overall greater impairment than coal dust induced impairment alone." *Id*.

pneumoconiosis is a latent and progressive disease.[8] *Wojtowicz*, 12 BLR at 1-165. Thus, we hold that the administrative law judge did not comply with the requirements of the APA in setting forth his findings regarding the opinions of Drs. Zaldivar, Altmeyer, and Basheda. Consequently, we vacate the administrative law judge's findings that employer failed to establish that claimant's total disability is not due to pneumoconiosis and, thus, that it failed to establish rebuttal of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

Furthermore, because we vacate the administrative law judge's finding that employer failed to establish rebuttal of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), by establishing either that claimant does not have pneumoconiosis, or that claimant's total disability was not due to pneumoconiosis, we vacate the administrative law judge's finding that claimant established a mistake in a determination of fact at 20 C.F.R. §725.310 and remand the case for further consideration of the evidence thereunder. *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee*, 5 F.3d at 725, 18 BLR at 2-28. If reached, on remand, the administrative law judge must also determine whether reopening the claim would render justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *see also D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33, 1-38 (2008).

[8] In comments regarding the decision of the United States Court of Appeals for the District of Columbia Circuit in *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, BLR (D.D.C. 2001), the Department of Labor noted that the court interpreted the regulatory definition of pneumoconiosis at 20 C.F.R. §718.201(c) to mean that pneumoconiosis can be a latent and progressive disease, not that pneumoconiosis is always or typically a latent and progressive disease. 68 Fed. Reg. 69931 (Dec. 15, 2003). The Department of Labor also noted that there is no irrebuttable presumption that the miner's pneumoconiosis is latent or progressive. *Id*.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits on Modification is vacated, and the case is remanded to the administrative law judge for further proceedings 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