

BRB No. 98-0904 BLA

JOHN A. KADE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: <u>5/12/99</u>
)	
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 on Remand Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John A. Kade, Bluefield, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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 on Remand Denying Benefits (96-BLA-1819) of Administrative Law Judge Richard K. Malamphy 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). The administrative law judge acknowledged that this case was before him on remand from the Benefits Review Board with instructions that the issue of modification raised pursuant to 20 C.F.R. §725.310

be considered under the standard for modification set forth in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993) and *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Decision and Order at 1-2. The administrative law judge noted that the miner's previous claim was denied because it was found that claimant failed to establish that he was totally disabled pursuant to 20 C.F.R. §718.204(c). Decision and Order at 4. After reviewing certain newly submitted evidence in conjunction with other record evidence, the administrative law judge held that claimant again failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Decision and Order at 9. Accordingly, benefits were denied.

This case is before the Board for the fourth time. Claimant originally filed an application for benefits on January 22, 1980, Director's Exhibit 1, and that claim was finally denied on March 9, 1981. Director's Exhibit 34. Claimant did not pursue the claim further. On April 11, 1983, claimant filed the instant claim. Director's Exhibit 2. On March 28, 1988, Administrative Law Judge John Allan Gray issued a Decision and Order awarding benefits. Subsequently, employer's motion for reconsideration was denied. Employer appealed. On appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for reconsideration of whether claimant had, in fact, established total disability. *Kade v. Consolidation Coal Co.*, BRB No. 90-1583 BLA (Mar. 24, 1992)(unpublished). The administrative law judge found on remand that claimant had established total disability due to pneumoconiosis and thus awarded benefits. Employer appealed for a second time. On this second appeal, the Board affirmed the administrative law judge's findings of the presence of simple pneumoconiosis and that total disability was not established pursuant to Section 718.204(c)(1)-(3). The Board vacated the administrative law judge's finding that total disability was established pursuant to Section 718.204(c)(4). *Kade v. Consolidation Coal Co.*, BRB No. 94-3705 BLA (Feb. 22, 1995)(unpublished). The Board remanded the case for reconsideration of whether the evidence established the presence of complicated pneumoconiosis pursuant to Section 718.304 and whether it established total disability pursuant to Section 718.204(c)(4). *Id.* On remand, the administrative law judge denied benefits, finding that claimant failed to establish the presence of complicated pneumoconiosis, and thus, pursuant to Section 718.304, failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis. In addition, the administrative law judge found that claimant failed to establish total disability pursuant to Section 718.204(c)(4). Thereafter, on October 13, 1995, claimant timely requested modification of the administrative law judge's denial of benefits. On October 26, 1996, the administrative law judge denied claimant's request for modification, and claimant appealed. On appeal, the Board vacated the administrative law judge's Decision and Order Denying Modification and

remanded the case to the administrative law judge. *Kade v. Consolidation Coal Co.*, BRB No. 97-0276 BLA (Oct. 23, 1997)(unpublished). On remand, the administrative law judge again denied benefits, and claimant filed the instant appeal. On appeal, claimant generally argues that the administrative law judge erred in finding that the evidence failed to establish that he is totally disabled. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to this appeal.

In an appeal filed by a claimant 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 the 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).

To establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Failure to establish any one of these elements precludes entitlement. *Id.* Additionally, in determining whether claimant has established a change in conditions pursuant to Section 725.310, the 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 of the elements of entitlement which defeated entitlement in the prior decision. See *Jessee, supra*; *Nataloni, supra*; *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Further, under Section 725.310, in considering whether a mistake of fact occurred in the prior determination, the administrative law judge is required to review the entire evidentiary record. See *Nataloni, supra*; *Kovac, supra*. In presenting this issue, the proponent need not show "a smoking-gun factual error, changed conditions or startling new evidence." *Jessee, supra*.

On remand, the administrative law judge first assessed the newly submitted medical report evidence to determine whether claimant had established a change in conditions pursuant to Section 725.310. The administrative law judge noted that, on modification, claimant proffered the medical report of Dr. Sherer to establish total disability. He noted that Dr. Sherer's deposition testimony, diagnosing a totally disabling pulmonary impairment, indicates a change in condition since the previous denial. Decision and Order at 4; Claimant's Exhibit 3. He then weighed Dr. Sherer's opinion against the contrary medical reports of record rendered on modification by Drs. Castle, Fino and Zaldivar and against the previously compiled evidence of record. He found that the reports of Drs. Castle, Fino and Zaldivar, as well as the other evidence of record, outweigh the opinion of Dr. Sherer. Specifically, the administrative law judge noted that although Dr. Sherer, as the treating physician, was most familiar with the miner, he is not a pulmonologist.¹ Decision and Order at 7. He observed that Dr. Castle, who is Board certified in internal medicine and pulmonary diseases, concluded that claimant is not totally disabled following his examination of claimant. Decision and Order at 5. Dr. Castle based his opinion on a normal pulmonary function study, a blood gas study indicating a minor abnormality, review of claimant's other medical records and his understanding that claimant's usual coal mine employment involved sedentary work.² Further,

¹ Dr. Sherer's report indicates that he is a cardiologist. Claimant's Exhibit 2.

²The doctor stated that claimant's "last position in the mines was that of a dispatcher in an air-conditioned office which did not involve a marked amount of exercise." Employer's Exhibit 2. The nature of claimant's usual employment was at issue in previous stages of this litigation. On its second remand of this case, the Board instructed the administrative law judge to "determine whether claimant's last employment as a coal mine dispatcher was in fact his usual coal mine employment." *Kade v. Consolidation Coal Co.*, BRB No. 94-3705 BLA (Feb. 22, 1995)(*unpublished*). On remand, after an exhaustive review of claimant's employment history, the administrative law judge found that claimant's last job as a dispatcher was in fact his usual coal mine employment. In making this determination, the administrative law judge first relied upon claimant's employment history form signed in April of 1983. Director's Exhibit 4. Secondly, he considered Dr. Piracha's 1981 medical report, in which claimant stated his job to be that of a dispatcher. Director's Exhibit 13. Next, the administrative law judge reviewed the 1984 medical report rendered by Dr. Zaldivar, wherein claimant is described as a dispatcher. Director's Exhibit 41. Finally, the

the administrative law judge noted that both Dr. Fino and Dr. Zaldivar, who are also Board certified in internal medicine and pulmonary diseases, concluded that claimant is not totally disabled from performing his last coal mine employment as a dispatcher. *Id.* Based on his weighing of the newly submitted medical reports, the administrative law judge concluded that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. Decision and Order at 8. We affirm the administrative law judge's weighing of the medical reports at Section 718.204(c)(4) as supported by substantial evidence. We note that as fact-finder the administrative law judge has discretion to decide the credibility of the medical reports. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). In the instant case, the administrative law judge properly exercised his discretion as fact-finder to defer to physicians with superior credentials.³ *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Thus, we affirm the administrative law judge's finding of no change in conditions at Section 718.204(c)(4), and at Section 718.204(c) as a whole. However, the administrative law judge did not address whether a mistake of fact had been made in the previous decision, holding that claimant did not make "a specific allegation of error in fact." *Id.* We hold that the administrative law judge erred on modification in failing to assess all of the evidence of record to ascertain whether a mistake of fact had occurred. A party may request modification of an award or a denial of benefits pursuant to 20 C.F.R. §725.310 on the grounds that a change in conditions has occurred or because a mistake in a determination of

administrative law judge credited claimant's 1987 Black Lung hearing testimony that he performed the duties of a dispatcher. Hearing Transcript at 18. Inasmuch as the administrative law judge's finding is rational, supported by substantial evidence, and in accordance with the law, we will not disturb it. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

³We note that with respect to the issue of total disability, the administrative law judge failed to discuss new objective studies, conducted in 1996, which also were submitted on modification. These studies included a pulmonary function study and a blood gas test conducted by Dr. Castle, Employer's Exhibit 2, as well as a pulmonary function study conducted by Dr. Sherer. Claimant's Exhibit 4. Inasmuch as none of these studies yielded qualifying results, the administrative law judge's failure to consider this evidence pursuant to Section 718.204(c)(1)-(2) is deemed harmless error. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

fact was made in the prior decision. 20 C.F.R. §725.310(a); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993). In the instant case, claimant's argument during the modification proceedings was not only that there had been a change in condition, but that the administrative law judge had made a mistake in a determination of fact in his previous decision. The administrative law judge is bound to consider the entirety of the evidentiary record and to make an independent assessment of the evidence as to whether such a mistake has occurred. See *Nataloni, supra*; *Kovac, supra*. Therefore, regardless of claimant's failure to cite a specific error leading to a mistake of fact, the administrative law judge was obligated on modification to correct mistakes of fact whether demonstrated by new evidence, cumulative evidence, or further reflection on the evidence initially submitted. See *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988).

The administrative law judge's conclusory statement, that previously no mistake of fact was made, is not sufficient to meet his obligation to carefully consider and weigh all of the relevant evidence of record under the Act and the regulations. See 20 C.F.R. §725.477(b); 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). Therefore, we vacate the administrative law judge's findings on modification and remand this case for the administrative law judge to assess all of the relevant evidence to determine whether claimant has established a mistake in a determination of fact.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge