BRB No. 98-0926 BLA

ARNOLD HAMILTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Request for Modification of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Arnold Hamilton, Denver, Kentucky, *pro se.*

Rodger Pitcairn (Henry L. Solano, Solicitor of Labor; 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 BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Request for Modification (97-BLA-1821) of Administrative Law Judge Robert L. Hillyard 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 applied for benefits with the Social Security Administration in January 1970. Director's Exhibit 28 at 154. This claim was denied by the Social Security Administration; claimant then elected review by the Department of Labor. Director's Exhibit 28. This claim was ultimately denied, in March 1980, by Administrative Law Judge John W. Earman. Judge Earman found that the existence of pneumoconiosis was not established, and that even if it was established, there was no evidence that it was totally disabling. Further, Judge Earman found that even if pneumoconiosis was established, there was no evidence to show that it was due to coal mine employment. Director's Exhibit 28 at 5.

In May 1988, claimant filed a duplicate claim for benefits with the Department of Labor. Director's Exhibit 1. In June 1995, Administrative Law Judge Robert L. Hillyard (the administrative law judge) issued a Decision and Order Denying Benefits. The administrative law judge found that three and one-half years of coal mine employment were established. The administrative law judge determined that the claim arose within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, and therefore applied the Sixth Circuit's decision in *Sharondale Corporation v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), for determining whether claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309(d). Considering the newly submitted evidence[1] under the regulations at 20 C.F.R. Part 718, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(1)-(4), and insufficient to establish total disability. *See* 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge found that claimant had failed to demonstrate the existence of a material change in conditions since the previous denial, and denied benefits.

Claimant appealed without the assistance of counsel, and the Board issued a Decision and Order affirming the administrative law judge's Decision and Order Denying Benefits. The Board affirmed the administrative law judge's finding that claimant established three and one-half years of coal mine employment. The Board affirmed the administrative law judge's finding that the newly submitted medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), and affirmed the administrative law judge's finding that the newly submitted evidence was insufficient to establish total disability at Section 718.204(c)(1)-(4). Thus, the Board held that the administrative law judge properly concluded that claimant failed to demonstrate a material change in conditions at Section 725.309. Accordingly, the Board affirmed the administrative law judge's denial of benefits. *Hamilton v. Director, OWCP*, BRB No. 95-1655 BLA (Aug. 27, 1996)(unpublished).[2] A motion for reconsideration filed by

[1] The administrative law judge also discussed a 1971 report by Dr. Sowards. 1995 Decision and Order at 7; Director's Exhibits 9, 28 at 109.

[2] The Board agreed with claimant that the administrative law judge had erred in applying the law of the Sixth Circuit, but held that the standard used by the administrative law judge for evaluating a duplicate claim was proper inasmuch as the Fourth Circuit has adopted the duplicate claim standard enunciated by the Sixth Circuit in *Sharondale*

claimant was summarily denied by the Board. *Hamilton v. Director, OWCP*, BRB No. 95-1655 BLA (Feb. 24, 1997)(unpublished Order on Motion for Reconsideration).

Corporation v. Ross, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). *Hamilton v. Director, OWCP*, BRB No. 95-1655 BLA (Aug. 27, 1996), slip opinion at 3 n.3.

In March 1997 claimant filed a request for modification. Director's Exhibits 55, 57. In November 1997 the administrative law judge issued an Order in which he stated that the claim would be decided on the existing record without a formal hearing. In March 1998 the administrative law judge issued a Decision and Order - Denial of Request for Modification. The administrative law judge found that claimant established three and one-half years of coal mine employment.[3] The administrative law judge determined that claimant had not established a change in conditions because there was no newly submitted evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4), nor was there newly submitted evidence sufficient to establish total disability pursuant to Section 718.204(c)(1)-(4). Further, the administrative law judge determined that claimant had failed to establish a mistake in determination of fact. Accordingly, the administrative law judge denied claimant's request for modification.

In the present appeal, claimant, without the assistance of counsel, contends generally that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a response brief supporting affirmance of the administrative law judge's denial of benefits.

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. 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

[3] We affirm the administrative law judge's length of coal mine employment finding as rational and supported by substantial evidence. *See* Director's Exhibit 28 at 142-155; *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72 (1996)(*en banc*)(McGranery, J., concurring in part and dissenting in part).

(1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

In the prior decision, the administrative law judge denied benefits because claimant failed to establish a material change in conditions under Section 725.309. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to Section 725.309. The United States Court of Appeals for the Fourth Circuit, under whose jurisdiction the instant case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has established at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 763 (1997). Claimant's 1970 claim was denied because claimant failed to establish any of the elements of entitlement. Thus, in order to establish a change in conditions, the newly submitted evidence must establish one of the elements of entitlement. *Nataloni*, *supra*.

With regard to a change in conditions, the administrative law judge properly found, with respect to Section 718.202(a)(1), that the one newly submitted x-ray reading, by Dr. Reddy, found that the chest x-ray was normal. Director's Exhibit 55. The administrative law judge correctly found that Section 718.202(a)(2) is inapplicable because there is no biopsy evidence. The administrative law judge correctly found that the presumptions provided under Section 718.202(a)(3) do not apply to the instant living miner's claim filed in 1988 in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.304, 718.305(e), 718.306; Director's Exhibit 1. The administrative law judge also properly found that there are no newly submitted medical reports in the record since the prior denial, and that, therefore, a change in conditions with respect to the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4). 1998 Decision and Order at 6.

Furthermore, the administrative law judge properly found that the record contains the results of two newly submitted pulmonary function studies, neither of which is qualifying.[4] Director's Exhibit 55; *see* 20 C.F.R. §718.204(c)(1). The administrative law judge correctly found that Section 718.204(c)(2) is not applicable inasmuch as no recent arterial blood gas studies are in the record. The administrative law judge correctly found that Section 718.204(c)(3) is also inapplicable because there is no evidence of cor pulmonale with right sided congestive heart failure. With respect to Section 718.204(c)(4), the administrative law judge properly found that there are no opinions in the record since the prior denial that establish the existence of total disability. Therefore, we affirm the administrative law judge's finding that claimant has not shown a change in conditions. *See Nataloni*, *supra*; 1998 Decision and Order at 7.

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Claimant may also establish modification by establishing a mistake in a determination of fact. In *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), the United States Court of Appeals for the Fourth Circuit held that a claimant's allegation of a general error is sufficient to require the administrative law judge to reconsider the entire record in addressing whether there was a mistake in a determination of fact under Section 725.310. *See Jessee*, *supra*.

In his 1998 Decision and Order, the administrative law judge stated that he had reviewed his prior decision dated June 9, 1995 and the medical evidence considered at that time and found no mistake in fact. 1998 Decision and Order at 7. The administrative law judge initially denied claimant's 1988 duplicate claim because claimant failed to establish a material change in conditions under Section 725.309. In considering whether claimant established a mistake in a determination of fact, the administrative law judge stated:

> I have reviewed my prior decision dated June 9, 1995 and the medical evidence considered at that time and find no mistake in determination of any fact. The x-ray evidence, consisting of interpretations of x-rays dated December 1, 1993, March 9, 1990, and June 1, 1988, was read as negative by the physicians. The pulmonary function study dated December 1, 1993 and the arterial blood gas studies dated June 1, 1988 and December 1, 1993 were non-qualifying. The medical reports of Drs. Martin Fritzhand and R.V. Mettu were insufficient to show the presence of pneumoconiosis or a totally disabling pulmonary impairment. Additionally, a letter signed by Dr. Charles Sowards was purely conclusory, did not mention pneumoconiosis, and did not express any opinion as to the cause of the Claimant's pulmonary symptoms. Medical records from the Marrowbone Clinic, where the Claimant had been treated, did not diagnose coal workers' pneumoconiosis.
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> The out-patient report prepared by Dr. Elizabeth P. Fleming and dated January 24, 1969, and the x-ray interpretation by Dr. David White dated September 3, 1990 are not sufficient to show a mistake in determination of fact. The September 3, 1990 x-ray interpretation shows chronic pulmonary disease but does not attribute this to the Claimant's coal mine employment. Additionally, the out-patient report failed to diagnose pneumoconiosis or find the Claimant totally disabled.

1998 Decision and Order at 7-8. The administrative law judge properly found that the September 3, 1990 x-ray interpretation shows chronic pulmonary disease but does not attribute this to coal mine employment. 1998 Decision and Order at 8; Director's Exhibits 53, 55; 20 C.F.R. §§718.102(b), 718.201. The record as a whole contains fourteen x-ray readings, only one of which is positive for pneumoconiosis. This positive reading is by Dr. Clarke, whose qualifications are not of record. Director's Exhibit 28 at 105. By contrast, at least five of the negative readings are by physicians who are both B readers and Board-certified radiologists. Director's Exhibits 12, 13, 21, 22, 24, 26. Where two or more x-ray

reports are in conflict, consideration shall be given to the radiological qualifications of the physicians interpreting the x-rays. 20 C.F.R. §718.202(a)(1). Therefore, any error by the administrative law judge in not discussing Dr. Clarke's x-ray reading is harmless, since the administrative law judge's finding that there was no mistake of fact regarding x-ray evidence is supported by the weight of the evidence. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988).

The administrative law judge correctly found that the pulmonary function study dated December 1, 1993 was non-qualifying. Director's Exhibit 25. However, the administrative law judge did not discuss a March 20, 1974 pulmonary function study administered by Dr. Clarke that is qualifying.[5] Director's Exhibit 28 at 106; Director's Exhibits 45, 52. Inasmuch as the administrative law judge erred in not considering all of the evidence of record, we vacate the administrative law judge's finding that no mistake of fact has been established, and remand for the administrative law judge to discuss Dr. Clarke's March 20, 1974 pulmonary function study. *See Jessee*, *supra*.

The administrative law judge correctly found that both arterial blood gas studies of record were non-qualifying. Director's Exhibits 11, 25. Moreover, the administrative law judge properly found that the medical reports of Drs. Fritzhand and Mettu were insufficient to show the presence of pneumoconiosis or a totally disabling pulmonary impairment.[6]

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[5] The Director, in his response brief, argues that this study did not report claimant's comprehension and weight, and that, therefore, this study cannot establish total disability because it is nonconforming. The Director cites *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987), in which the United States Court of Appeals for the Third Circuit held that the quality standards at 20 C.F.R. §§718.102-107 are mandatory. *Mangifest* is not controlling because the instant case does not arise within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 n.3 (1990). Moreover, the United States Court of Appeals for the Third Circuit indicated that an administrative law judge may consider an objective test if it is found to be in substantial compliance with the quality standards. *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990).

[6] Dr. Mettu noted exertional limits as described by claimant, and stated, "[h]e has exertional shortness of breath after walking 1 block." Dr. Mettu diagnosed chronic bronchitis and angina. His x-ray did not reveal evidence of pneumoconiosis. Dr. Mettu found no impairment and also found no significant impairment from claimant's blood gas study or pulmonary physical examination. Director's Exhibit 10. There are two reports by Dr. Fritzhand of record, one dated in 1979 and one dated in 1993. Director's Exhibit 25; Director's Exhibit 28 at 102. In his 1979 report, Dr. Fritzhand diagnosed chronic obstructive pulmonary disease not related to dust exposure in coal mine employment, and noted shortness of breath upon climbing stairs and walking up grades. Director's Exhibit 28 at 103-104. However, in his 1993 opinion, Dr. Fritzhand, while noting exertional limits, specifically diagnosed no impairment. Director's Exhibit 25.

1998 Decision and Order at 7. The administrative law judge also properly found that medical records from the Marrowbone Clinic did not diagnose coal worker's pneumoconiosis and that Dr. Fleming's report is not sufficient to show a mistake in determination of fact because it failed to diagnose pneumoconiosis or find claimant totally disabled. Director's Exhibits 23, 51. Finally, the administrative law judge, apparently referring to an April 1971 report by claimant's treating physician, Dr. Sowards, permissibly described Dr. Sowards's opinion as purely conclusory, and properly stated that Dr. Sowards did not mention pneumoconiosis and did not express any opinion as to the cause of claimant's pulmonary symptoms. Director's Exhibit 9; Director's Exhibit 28 at 109; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). However, the record contains a second report by Dr. Sowards, dated in December 1972, in which Dr. Sowards specifically diagnoses pneumoconiosis and angina and finds claimant to be totally disabled. Director's Exhibit 28 at 114-116. Therefore, we remand this case for the administrative law judge to discuss this report. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The record also contains a report by Dr. Clarke, noting that claimant is totally disabled. Director's Exhibit 28 at 105. If, as it appears from this document, the sole basis for this opinion had been an x-ray interpretation, it would not be error for the administrative law judge to not consider this opinion on the issue of total disability. *See Pettry v. Director, OWCP*, 14 BLR 1-98, 1-100 (1990). However, the record contains a qualifying pulmonary function study by Dr. Clarke of the same date as Dr. Clarke's x-ray. Therefore, on remand, the administrative law judge should discuss whether Dr. Clarke's finding can be construed as a reasoned and documented report with regard to the issue of disability and mistake of fact. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Accordingly, the administrative law judge's Decision and Order - Denial of Request for Modification is affirmed in part and vacated in part, and this 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

JAMES F. BROWN
Administrative Appeals Judge