BRB No. 05-0208 BLA

CHESTER E. WHITED	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KOCH CARBON, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 11/18/2005
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Chester E. Whited, Raven, Virginia, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order Denying Benefits (03-BLA-0164) of Administrative Law Judge Jeffrey Tureck on modification in a miner's 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).[2] Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge considered the newly submitted evidence and found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b).[3] Decision and Order at 3-4. Therefore, the administrative law judge determined that claimant failed to demonstrate a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[4] *Id.* Additionally, the administrative law judge found that no mistake in a determination of fact pursuant to Section 725.310 (2000) had been made in the previous decisions denying benefits. *Id.* at 4-10. Accordingly, the administrative law judge denied benefits on modification.

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[1]Claimant is Chester E. Whited, the miner, who filed his claim for benefits on August 1, 1996. Director's Exhibit 1. On June 1, 1998, Administrative Law Judge Stuart A. Levin denied benefits. Director's Exhibit 61. Claimant filed an appeal before the Benefits Review Board, which the Board dismissed as untimely. Director's Exhibits 62, 63. On May 27, 1999, claimant requested modification and, subsequently, sent a letter stating that he will not submit any new evidence in support of his request for modification. Director's Exhibits 64, 66. On November 30, 2001, the Board affirmed Administrative Law Judge Pamela Lakes Wood's Decision and Order Denying Modification Request. Director's Exhibit 96. Claimant filed a second request for modification on November 12, 2002. Director's Exhibit 97. The district director referred claimant's request for modification to the Office of Administrative Law Judges. Director's Exhibit 106.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]Judge Levin previously credited claimant with twenty years of coal mine employment. Director's Exhibit 61.

[4]The amended regulation regarding modification, *see* 20 C.F.R. §725.310, applies only to claims filed after January 19, 2001.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits on modification. Employer has filed a response brief, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to this appeal. The Director argues that Dr. Forehand's 1996 report fulfills his obligation to provide claimant with a complete and credible pulmonary evaluation. Director's Brief at 2.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

Pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge considered whether claimant could establish modification by demonstrating either a change in conditions or a mistake in a determination of fact. Decision and Order at 10-11. In order to establish a change in conditions, an administrative law judge must determine if the new evidence, considered in conjunction with the old evidence, is sufficient to establish at least one of the elements of entitlement that defeated entitlement in the prior decision. *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1991); *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Administrative Law Judge Stuart A. Levin previously denied benefits on June 1, 1998 because claimant failed to establish total respiratory disability. Director's Exhibit 61. After considering claimant's first request for modification, Administrative Law Judge Pamela Lakes Wood found that claimant failed to demonstrate a mistake in fact pursuant to Section 725.310 (2000) and denied modification on September 29, 2000.[5] Director's Exhibit 88.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the record evidence to determine whether claimant "present[ed] new evidence that he has a totally disabling respiratory or pulmonary impairment or [has] show[n] that the previous determinations that he does not have a totally [disabling] respiratory or pulmonary impairment are incorrect." Decision and Order at 3. First, the administrative law judge considered Dr. Forehand's 2003 report, opining that claimant is totally disabled due to pneumoconiosis, and found that this report was entitled to "no weight." *Id.* In doing so,

[5]Judge Wood did not consider whether claimant had demonstrated a change in conditions because claimant did not submit new evidence. Director's Exhibit 88.

the administrative law judge stated that Dr. Forehand failed to explain the change in his opinion regarding claimant's degree of impairment between 1999[6] and 2003. In 1999, Dr. Forehand found no evidence of a work-limiting respiratory impairment arising from coal mine employment. Director's Exhibit 74. Given this inconsistency, the administrative law judge concluded that "Dr. Forehand's change of opinion between 1999 and 2003 regarding claimant's degree of impairment in the face of little change in Claimant's test results seriously undermines his credibility." Decision and Order at 3.

Second, with regard to the report of Dr. Castle, who found no respiratory impairment, the administrative law judge noted that this physician's opinion was based on a thorough examination and a review of "much of the medical evidence of record including Dr. Forehand's 2003 report." *Id.* The administrative law judge further noted regarding claimant's low blood gas test results performed by Dr. Forehand, that Dr. Castle pointed out in his report that "Dr. Forehand stated at the time that claimant look[ed] ill, was hyperventilating and had inspiratory crackles which were not present on other occasions, indicating that the low blood gas values were due to a transient condition." *Id.* Accordingly, the administrative law judge credited Dr. Castle's report because he found that it "is consistent with the results of his examination and is based on a review of all of the evidence of record. . . ." *Id.* at 4.

Claimant asserts that the administrative law judge erred in his review of the medical opinion evidence by failing to consider the September 8, 2003 opinion letter of his treating physician, Dr. Peralta, who opined that claimant is totally disabled from coal workers' pneumoconiosis. In his letter, Dr. Peralta stated that he had been treating claimant since December 1, 1997 and noted that he had reviewed Dr. Forehand's July 14, 2003 report and objective test results performed on that date. While Dr. Peralta's 2003 opinion is contained in the record and marked as Claimant's Exhibit 3, the administrative law judge did not consider this physician's report in his Decision and Order. However, because there was no hearing in this case, in which the claimant was unrepresented by counsel before the administrative law judge, it is unclear whether or not this exhibit was, in fact, admitted into evidence. In the administrative law judge's November 25, 2003 Order, discussed below, no mention was made of Dr. Peralta's 2003 report or Claimant's Exhibit 3. In its Response Brief, employer argues that Dr. Peralta's report was not admitted into the record. Employer maintains that claimant informed the parties that he would be submitting Dr. Peralta's report but, instead, submitted the 2003 report of Dr.

[6]While Dr. Forehand's 1999 report is not new evidence submitted with claimant's second request for modification, the administrative law judge used this report as a baseline as a source of comparison with Dr. Forehand's 2003 opinion.

Forehand. Employer notes that in the administrative law judge's September 2003 Order,[7] he accepted Dr. Forehand's report and made it clear that no additional evidence from claimant would be permitted, but left the record open for employer to submit rebuttal evidence. However, none of employer's assertions are reflected in the record. Because the administrative law judge did not discuss Dr. Peralta's 2003 report in his decision and because it is unclear whether or not this report was admitted into the record, we vacate the administrative law judge's denial of modification and remand this case for the administrative law judge to clarify this issue. We instruct the administrative law judge that if he finds Dr. Peralta's 2003 report was admitted into evidence, then he must consider whether it is sufficient to demonstrate a change in conditions. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Pursuant to Section 718.204(b)(2)(ii), the administrative law judge did not consider whether the July 14, 2003 qualifying[8] resting blood gas study obtained by Dr. Forehand is sufficient to demonstrate a change in conditions. Therefore, we instruct the administrative law judge, on remand, to consider the July 14, 2003 qualifying resting blood gas study in conjunction with the other newly submitted blood gas studies at Section 718.204(b)(2)(ii) and determine whether it is sufficient to demonstrate a change in conditions.[9] *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591. Moreover, we instruct the administrative law judge on remand to consider all of the newly submitted evidence in accordance with Section 718.204(b)(2)(i)-(b)(2)(iv) to determine if claimant

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[7]Employer asserts that the administrative law judge reissued his September 15, 2003 Order on November 25, 2003. The record does not contain an order dated September 15, 2003 and there is no indication from the administrative law judge's November 25, 2003 Order that it is a reissuance of the September 2003 Order.

[8]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values, *i.e.*, Appendices B, C to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

[9]The administrative law judge did not consider whether claimant could demonstrate a change in conditions pursuant to 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(iii). Because none of the newly submitted pulmonary function studies yielded qualifying values and because the record does not contain any evidence of cor pulmonale with right-sided congestive heart failure, we deem harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), any error the administrative law judge may have made in not addressing subsections 718.204(b)(2)(i) and (b)(2)(iii). *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986).

has established total respiratory disability and, therefore, a change in conditions pursuant to Section 718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Claimant additionally contends that he and employer were prejudiced by the administrative law judge's November 25, 2003 Order.[10] In his November Order, the administrative law judge noted that the September 3, 2003 hearing scheduled in this case was cancelled pursuant to claimant's request and employer's agreement. The administrative law judge also admitted Dr. Forehand's July 14, 2003 report as Claimant's Exhibit 2 over employer's objection, but gave employer the opportunity to provide evidence in rebuttal of Claimant's Exhibit 2. Claimant maintains, however, that the administrative law judge failed to address claimant's September 15, 2003 request for an extension of time to obtain and submit rereadings of the July 14, 2003 and September 3, 2002 x-ray films and that he was prejudiced by the administrative law judge's failure. If claimant demonstrates a change in conditions on remand, claimant's request to submit rereadings of the July 14, 2003 and September 3, 2002 x-ray films would be relevant to the administrative law judge's inquiry into the existence of pneumoconiosis on the merits pursuant to 20 C.F.R. §718.202(a). Thus, we hereby instruct the administrative law judge, on remand, to address claimant's outstanding request.[11]

Additionally, claimant argues that, given the administrative law judge's finding that Dr. Forehand's 2003 and 1999 reports were inconsistent, the Director has failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Claimant reasons that although the administrative law judge did

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[10]Moreover, claimant argues that employer was prejudiced because the administrative law judge erred in extending the deadline for employer to submit rebuttal evidence to October 17, 2003, a date that had already expired when the administrative law judge issued his November 25, 2003 Order. In its Response Brief, employer asserts that any error the administrative law judge may have made in his "de facto denial of [claimant's] request to submit additional x-ray readings is harmless" because additional x-ray readings would not help claimant in establishing total respiratory disability which is the basis for the denial of benefits. Employer does not respond to claimant's contention, but rather asserts that the administrative law judge's November 25, 2003 Order was a reissuance of his September 15, 2003 Order.

[11]The evidentiary limitations outlined in the amended regulations at 20 C.F.R. §725.414 are inapplicable to this claim filed prior to January 19, 2001.

not address Dr. Forehand's 1996 report,[12] provided by the Director, the administrative law judge "probably" would have found Dr. Forehand's 1996 opinion to be inconsistent and entitled to "no probative value" had he considered it. The Director asserts that he fulfilled his obligation to claimant by providing Dr. Forehand's 1996 opinion which Judge Levin found to be documented and reasoned, but ultimately outweighed by the contrary opinions in the record.[13] Furthermore, the Director correctly notes that he only provided Dr. Forehand's 1996 report. Employer submitted Dr. Forehand's 1999 report and claimant submitted this physician's 2003 report. As the Director states, because he did not develop Dr. Forehand's 1999 and 2003 reports pursuant to Section 413(b), he has no legal obligation to insure that these subsequent reports, submitted by other parties, are complete and credible. Accordingly, we reject claimant's assertion and hold that the Director fulfilled his statutory obligation, as required under Section 413(b) of the Act, 30 U.S.C. §923(b), to provide claimant with a complete and credible pulmonary evaluation by his submission of Dr. Forehand's 1996 examination of claimant. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87 (1994).

Finally, claimant contends that the administrative law judge erred in failing to find a mistake in a determination of fact based on the 1996 opinion of Dr. Forehand and Dr. Sargent's December 9, 1996 exercise blood gas study. Claimant argues that Dr. Forehand's 1996 opinion should have been credited because he is a treating physician and that Dr. Sargent's non-qualifying exercise blood gas study should not have been given any weight because the blood sample was drawn after, rather than during, exercise and, therefore, was not performed in accordance with the provision at 20 C.F.R. §718.105(b). In determining whether claimant has demonstrated a mistake in fact, the administrative law judge considered the previous decisions of Judge Levin and Judge Wood. Decision and Order at 4. The administrative law judge found that Judge Levin "correctly pointed out that, in the record before him, the only evidence of total disability was Dr. Forehand's exercise blood gas test. . .and [h]e properly discounted that evidence based on the other test results and medical opinions." *Id.* With regard to Judge Wood's decision, the administrative law judge found that "[h]er opinion is likewise consistent with the evidence she cites, and there is no indication that a mistake in a determination of

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[12]In his September 9, 1996 report, Dr. Forehand found coal workers' pneumoconiosis and opined that, based on claimant's exercise blood gas study, claimant was totally and permanently disabled. Director's Exhibit 19.

[13]The obligation of the Director, Office of Workers' Compensation Programs (the Director), to provide claimant with a complete and credible pulmonary evaluation does not require him to provide claimant with the most persuasive medical opinion in the record. *See Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

fact was made." *Id.* Notwithstanding claimant's contentions, we affirm the administrative law judge's finding that claimant failed to demonstrate a mistake in a determination of fact pursuant to Section 725.310 (2000) in the prior denials in this claim because his determination is rational and supported by substantial evidence.[14] *See Jessee*, 5 F.3d at 724-25, 18 BLR at 2-28; *see also Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993)

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[14]In a previous decision on this claim, the Board considered and rejected similar arguments raised by claimant in challenging Judge Wood's finding of no mistake in fact in Judge Levin's decision. *See Whited v. Koch Carbon, Incorporated*, BRB No. 01-0197 BLA (Nov. 30, 2001)(unpub.).