BRB No. 10-0160 BLA

DARRELL WHITAKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH ON THE NORTH FORK, INCORPORATED	)	
	)	
	)	DATE ISSUED: 11/30/2010
and	)	
	)	
UNDERWRITERS SAFETY & CLAIMS	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Granting Modification and Awarding Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald Gilbertson (K&L Gates LLP), Washington, D.C., for employer/carrier.

Helen H. Cox (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 on Remand Granting Modification and Awarding Benefits (2005-BLA-05872) of Administrative Law Judge Donald W. Mosser rendered on a duplicate claim, filed on September 28, 1989, pursuant to the provisions 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). Claimant's 1989 claim has been kept alive through a series of modification requests, the most recent of which was filed on March 3, 2004.[1] In his Decision and Order dated May 10, 2007, the administrative law judge found that, because the parties have stipulated, in this duplicate claim, that claimant is totally disabled, claimant demonstrated a material change in conditions since the denial of his first claim pursuant to 20 C.F.R. §725.309 (2000).[2] The administrative law judge then considered claimant's

[1] The procedural history of this case is as follows. Claimant filed an initial claim for benefits on February 10, 1987, which was denied by the district director on July 22, 1987 because claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a duplicate claim on September 28, 1989. Director's Exhibit 2. Administrative Law Judge C. Richard Avery denied benefits on March 17, 1993, finding that while claimant established the existence of pneumoconiosis arising out of coal mine employment and total respiratory disability, he failed to establish that his disabling respiratory impairment was due to pneumoconiosis. *Id*. The Board affirmed the denial of benefits. *Whitaker v. Arch on the North Fork, Inc.*, BRB No. 93-1300 BLA (May 12, 1994) (unpub.). On July 8, 1994, claimant filed a request for modification, which Judge Avery denied in a Decision and Order dated June 19, 1996, on the ground that claimant failed to establish that his disabling respiratory impairment was due to pneumoconiosis. Director's Exhibit 2. The denial was affirmed by the Board on appeal. *Whitaker v. Arch on the North Fork, Inc.*, BRB No. 96-1261 BLA (June 17, 1997) (unpub.). On August 10, 1997, claimant filed a second modification request, which was also denied by Judge Avery on June 26, 1998, on the ground that claimant failed to establish that his disabling respiratory impairment was due to pneumoconiosis. Director's Exhibit 2. On appeal, the Board affirmed Judge Avery's disability causation findings and the denial of benefits. *Whitaker v. Arch on the North Fork, Inc.*, BRB No. 98-1399 BLA (Sept. 30, 1999) (unpub.). On August 22, 2000, claimant filed a third modification request and the case was assigned to Administrative Law Judge Daniel J. Roketenetz. Director's Exhibit 2. Judge Roketenetz issued a Decision and Order denying modification on February 27, 2003, which was filed with the district director on March 4, 2003, on the ground that claimant failed to establish that his disabling respiratory impairment was due to pneumoconiosis. *Id*. Claimant filed his current modification request on March 3, 2004. Director's Exhibit 3.

[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

most recent modification request and determined that, while claimant established the existence of legal pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(4), the evidence was still insufficient to prove that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge therefore concluded that the newly submitted evidence, considered in conjunction with the previously submitted evidence of record, failed to establish either a mistake in a determination of fact or a change in conditions, with regard to the issue of disability causation, pursuant to 20 C.F.R. §725.310 (2000). Thus, the administrative law judge found that claimant failed to demonstrate a basis for modification and denied benefits.

Pursuant to claimant's appeal, the Board affirmed, as unchallenged, the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *D.W.* [*Whitaker*] *v. Arch on the North Fork, Inc.*, BRB No. 07-0770 BLA (June 12, 2008) (unpub.). The Board, however, vacated the denial of benefits, holding that the administrative law judge erred in failing to explain, in accordance with the Administrative Procedure Act (APA),[4] 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), the bases for the weight he accorded the conflicting medical opinion evidence, as to the cause of claimant's disabling respiratory impairment. Thus, the case was remanded for further consideration pursuant to 20 C.F.R. §§718.204(c) and 725.310 (2000).

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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. The revised regulation at 20 C.F.R. §725.310 does not apply to claims, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

[3] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[4] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

On remand, the administrative law judge noted that he previously found legal pneumoconiosis established, based on Dr. Rasmussen's opinion that claimant has chronic obstructive pulmonary disease (COPD) due to both coal dust exposure and smoking. In reweighing the medical opinions at 20 C.F.R. §718.204(c), the administrative law judge assigned less probative weight to the physicians who did not diagnosis legal pneumoconiosis, and controlling weight to Dr. Rasmussen's opinion, that claimant is totally disabled due, in part, to coal dust exposure, as he found Dr. Rasmussen's opinion to be reasoned and documented. The administrative law judge found that claimant satisfied his burden to establish disability causation pursuant to 20 C.F.R. §718.204(c), and a basis for modification under 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge awarded benefits from March 2004, the month in which claimant filed his most recent modification request.

On appeal, employer contends that Dr. Rasmussen's opinion is legally insufficient to satisfy claimant's burden of proof, and that the administrative law judge erred in his treatment of the opinions of Drs. Jarboe and Broudy. Employer urges the Board to reverse the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c). Additionally, employer asserts that proper modification procedures were not followed in this case, as claimant was not entitled to receive a Department of Labor (DOL)-sponsored examination by Dr. Rasmussen in 2004. Employer also asserts that the administrative law judge erred by not considering whether granting claimant's modification request would render justice under the Act.

Claimant has not filed a response brief in this appeal. The Director has filed a letter in response to employer's appeal, asserting that employer has waived its right to challenge the admission of Dr. Rasmussen's medical report in the record, as employer did not raise this issue before the administrative law judge below, or in the prior appeal to the Board. The Director further states that, while the administrative law judge did not render a specific finding as to whether granting modification would render justice under the Act, "[a]ny error, however, is harmless because the Board can infer that, implicit in the [administrative law judge's] finding that claimant has established his entitlement to benefits, is the determination that granting modification renders justice here." Director's Letter Brief at 2.

By Order dated April 22, 2010, the Board allowed the parties to submit supplemental briefing to address the impact, if any, of Section 1556(c) of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. The Director and employer have responded and maintain that the recently enacted amendments to the Act have no impact on this case, based on the filing date of the claim. In a related matter, claimant's counsel has filed a petition for attorney's fees with respect to services performed in the prior appeal to the Board, *Whitaker*, BRB No. 07-0770 BLA.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

Initially, we note that employer incorrectly asserts that claimant has not established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Employer's Brief in Support of Petition for Review at 11 n.1. Employer specifically argues that "[p]roving a disabling impairment in the current proceeding cannot establish a change in the miner's condition, because claimant has been disabled from a respiratory standpoint for many years." *Id.* Contrary to employer's assertion, because claimant's initial claim, filed on February 10, 1987, was denied for failure to establish any element of entitlement, the administrative law judge properly found, based on the parties' stipulation that claimant is totally disabled, that claimant has demonstrated a material change in conditions since the denial of his prior claim. We, therefore, affirm the administrative law judge's findings pursuant to 20 C.F.R. §725.309 (2000). Decision and Order on Remand at 4.

Claimant may establish a basis for modification of his duplicate claim by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310 (2000). In considering whether a change in conditions has been established pursuant to 20 C.F.R. §725.310 (2000), 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. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The sole issue that has defeated entitlement to benefits in the prior decision was disability causation; therefore, claimant must establish that element. As to the issue of a mistake in a determination of fact, the United States Court of Appeals for the Sixth Circuit has held that 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, because the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits, contained within a case. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

Because we affirmed the administrative law judge's finding of legal pneumoconiosis in the prior appeal, the sole issue remaining for disposition in this case is whether the administrative law judge properly found, on remand, based on his review of all of the record evidence, that claimant is totally disabled due to pneumoconiosis. Pursuant to 20 C.F.R. §718.204(c), a miner is considered to be totally disabled due to pneumoconiosis if pneumoconiosis, as defined in 20 C.F.R. §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. The "substantially contributing cause" standard is met when, *inter alia*, it is established that pneumoconiosis "[h]as a material adverse effect on the miner's respiratory or pulmonary condition." 20 C.F.R. §718.204(c). The Sixth Circuit has also held that, in order to establish total disability due to pneumoconiosis, a claimant must prove that his or her totally disabling impairment was due, at least in part, to pneumoconiosis. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Failure to establish this element of entitlement precludes an award of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

On remand, the administrative law judge followed the Board's directive and reweighed the medical opinions pursuant to 20 C..F.R. §718.204(c). The administrative law judge initially discussed the newly submitted medical opinions of Drs. Rasmussen and Jarboe.[6] Decision and Order on Remand at 6. Dr. Rasmussen attributed claimant's respiratory disability to COPD caused by both smoking and coal dust exposure. Director's Exhibits 11, 15. The administrative law judge found that Dr. Rasmussen's opinion was reasoned and entitled to "significant weight." Decision and Order on Remand at 5. In contrast, the administrative law judge assigned less probative weight to Dr. Jarboe's opinion, that claimant's disabling COPD was due entirely to smoking, and explained:

> His reasoning is based on the reversibility component of claimant's airflow obstruction. He additionally stated that it would be highly unlikely to develop pneumoconiosis twenty years after leaving coal mine employment, and that only five to ten percent of miners progress to a higher category of pneumoconiosis than documented when they first left the mines. I previously found Dr. Jarboe's opinions regarding the miner's condition entitled to less weight because the physician did not provide adequate rationale for excluding claimant's twenty-two years of coal mine employment as a significant cause of his respiratory impairment.

[6] The administrative law judge gave no weight to the opinion of Dr. Chaney as he did not address the cause of claimant's disability respiratory impairment. Decision and Order on Remand at 6.

Id. at 6. The administrative law judge next considered the evidence submitted with the prior claim, consisting of medical opinions, dating from 1985 to 2000, by Drs. Baker, Broudy, Meyers, Bushey, Marshall, Nash, Anderson, Williams and Jackson. The administrative law judge specifically noted that "[t]he majority of the medical evidence in claimant's previous claims (sic) is more than ten to fifteen years older than the evidence submitted in the current claim and entitled to less weight." Decision and Order on Remand at 6. The administrative law judge noted, however, that Dr. Rasmussen's disability causation opinion was supported by the opinions of Drs. Baker, Meyers, Bushey, Marshall and Nash, who have each opined that claimant has a disabling respiratory impairment due to coal dust exposure. *Id*.; *see* Director's Exhibits 1, 2. In contrast, the administrative law judge noted that Drs. Broudy, Anderson, Williams and Jackson opined that claimant was totally disabled due smoking, and not coal dust exposure; however, because they did not diagnose legal pneumoconiosis, their opinions were entitled to little probative weight on the issue of disability causation.[7] *Id*.

Employer asserts that the administrative law judge erred in crediting Dr. Rasmussen's opinion and in not explaining the bases for his credibility findings in accordance with the APA. We disagree. Because Dr. Rasmussen specifically opined that both smoking and coal dust exposure were substantially contributing factors to claimant's disabling obstructive impairment, we reject employer's assertion that Dr. Rasmussen's opinion is legally insufficient to satisfy claimant's burden of proof under 20 C.F.R. §718.204(c). *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Furthermore, the administrative law judge permissibly found that Dr. Rasmussen's opinion is reasoned and documented:

> Regarding disability causation, [Dr. Rasmussen] stated that "the risk factors include his cigarette smoking, his coal mine dust exposure, and asthma.

[7] With respect to Dr. Broudy, the administrative law judge found that while Dr. Broudy had examined claimant five separate times between 1985 and 2000 and consistently diagnosed chronic obstructive pulmonary disease due to smoking and not coal dust exposure, "his failure to diagnose pneumoconiosis is inconsistent with the findings in this case." Decision and Order on Remand at 7. The administrative law judge further noted that Dr. Broudy "did not diagnose [legal] pneumoconiosis because [claimant] demonstrated an obstructive defect and his condition developed years after his exposure to coal dust ceased." *Id*. The administrative law judge considered Dr. Broudy's disability causation opinion to be "inconsistent with the regulations" recognizing that coal dust exposure may be latent and progressive and may cause an obstructive respiratory impairment. *Id.*, citing 65 Fed. Reg. 79,971 (Dec. 20, 2000).

> His cigarette smoking and coal mine dust exposure have resulted in his COPD. His asthma could have been aggravated by his cigarette smoking and his coal mine dust exposure. Hyperactive airways disease may cause increase in one's susceptibility to the adverse effects of cigarette smoking and coal mine dust exposure. The patient's coal mine dust exposure contributed significantly to his disabling lung disease." This physician offered studies to support his conclusions.

Decision and Order on Remand at 5; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge also permissibly assigned less weight to the disability causation opinions of Drs. Jarboe and Broudy, as neither physician believed that claimant has legal pneumoconiosis, contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(4). *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams*, 886 F.2d at 826, 13 BLR at 2-63-64; *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214 (2002) (*en banc*); Decision and Order on Remand at 6.

Employer's assignments of error to the administrative law judge's credibility findings at 20 C.F.R. §718.204(c) amount to little more than a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The determination of whether a medical opinion is documented and reasoned rests within the discretion of the administrative law judge, *see Fields*, 10 BLR at 1-21, as does the assessment of the weight and credibility to be accorded to the conflicting medical evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Because the administrative law judge explained the bases for his credibility findings in accordance with the APA, and substantial evidence supports the administrative law judge's determination that claimant is totally disabled due to pneumoconiosis, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Peabody Coal Co. v. Hill*, 123 F.2d 412, 21 BLR 2-192 (6th Cir. 1997); *Cross Mountain Coal Inc. v. Ward*, 83 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).[8]

[8] Employer also contends that "[p]roper procedures were not followed by the district director for processing a modification petition." Employer's Brief at 28.

Notwithstanding, employer correctly asserts that the administrative law judge did not render a specific finding as to whether granting claimant's modification request would render justice under the Act, prior to concluding that claimant established a basis for modification. We, therefore, vacate the administrative law judge's findings pursuant to 20 C.F.R. §725.310 (2000), and the award of benefits, and remand this case in order for the administrative law judge to render a specific finding with respect to whether granting claimant's modification request would render justice under the Act. *See generally Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *McCord v. Ciphas*, 523 F.2d 1377 (D.C. Cir. 1976); *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999).

Additionally, claimant's counsel has filed a complete, itemized statement, requesting a total fee of $1,406.25, representing 6.25 hours of attorney services for work performed before the Board in claimant's prior appeal, *Whitaker*, BRB No. 07-0770 BLA, at an hourly rate of $225.00. No objection to the fee petition was filed. Upon review of the fee petition, the Board finds the requested fee to be reasonable in light of the services performed and approves a fee of $1,406.25, to be paid directly to claimant's counsel by employer, contingent on the successful prosecution of this case. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §§725.367(a); 802.203; *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

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

However, we decline to consider, for the first time in this appeal, employer's assertion that claimant was not entitled to receive a medical examination sponsored by the Department of Labor in conjunction with his modification request, as employer did not raise this evidentiary issue before the administrative law judge. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991) (Stage, J., dissenting).

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