BRB No. 99-1070 BLA

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

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Sarah M. Hurley (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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0680) of Administrative Law Judge Joseph E. Kane denying benefits in this request for modification of a duplicate 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.* In this duplicate claim[1] Administrative Law Judge

[1]Claimant filed a claim for benefits on April 28, 1975. The district director denied the claim on November 9, 1982, and claimant took no further action. Claimant filed the instant claim on November 30, 1994. After a hearing on the merits, Administrative Law Judge

Joseph E. Kane (the administrative law judge) found that claimant had established fifteen and one-quarter years of coal mine employment and the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4) in the prior claim. The administrative law judge found the evidence of record insufficient to establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1)-(c)(4), and thus found the evidence insufficient to establish a change in conditions or a mistake in fact pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. Claimant appeals, generally challenging the administrative law judge's findings pursuant to Section 718.204(c)(4). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Ralph A. Romano issued a Decision and Order on September 13, 1996, in which he credited claimant with fifteen and one-quarter years of coal mine employment. Judge Romano found the evidence of record sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Thus, Judge Romano found that claimant established a material change in conditions at 20 C.F.R. §725.310. The administrative law judge further found, however, that the evidence was insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). On appeal, the Board affirmed the finding at Section 718.204(c). *Osborne v. Director, OWCP*, BRB No. 96-1749 BLA (April 9, 1997)(unpub.). Director's Exhibit 42. Claimant filed a request for modification on July 2, 1997. Director's Exhibit 43. The parties agreed to a decision on the record without a hearing. Administrative Law Judge Joseph E. Kane issued a decision and Order denying benefits on June 30, 1999.

In order to establish entitlement to benefits under Part 718, in a living miner's claim, claimant must establish the existence of pneumoconiosis; that the pneumoconiosis arose out coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *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*).

Pursuant to Section 725.310, claimant may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in determination of fact in the earlier decision. *Worrell v. Consolidation Coal Co.,* 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Further, if a claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the administrative law judge has the authority, without more (*i.e*., "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), to modify the denial of benefits. *See Worrell, supra; Jessee v. Director, OWCP,* 5 F.3d 723, BLR 2-26 (4th Cir. 1993).

In determining whether claimant has established modification pursuant to Section 725.310, the administrative law judge's 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 an element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP,* 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.,* 16 BLR 1-71 (1992); *Wojtowicz v. Dusquesne Light Co.,* 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

In challenging the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4), claimant argues that his age, education, work history, and the progressive nature of pneumoconiosis support a finding that he is totally disabled. Contrary to claimant's contention, those factors are not relevant to establishing total disability pursuant to Section 718.204(c)(4), as the regulatory criteria require claimant to provide medical evidence that he suffers from a pulmonary disability. *See* 20 C.F.R. §718.204(c)(4); *Field v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

In taking exception to the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(c)(4), claimant argues that the administrative law judge erred in failing to identify claimant's usual coal mine employment or the physical requirements of that work. In order to establish entitlement to benefits claimant must demonstrate the presence of a totally disabling respiratory impairment.

Beatty v. Danri Corp., 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991). In this request for modification, the only medical opinion submitted with the request for modification did not address claimant's physical limitations or the issue of disability. In his Decision and Order in the instant case, the administrative law judge recognized that Dr. Bushey's report, dated June 17, 1997, diagnosed chronic lung disease with pulmonary emphysema and compatible with coal workers' pneumoconiosis 2/1, p/q, but did not assess any impairment or exertional limitations. Director's Exhibit 43. Thus, there was no medical assessment to compare against the exertional requirements of claimant's work.[2] Therefore, we hold that claimant failed to establish a change in conditions at Section 725.310.

Considering whether a mistake in fact might have been made at Section 725.310, the administrative law judge reviewed the entire record, and found no mistake in fact, having adopted the reasoning of Administrative Law Judge Romano that the reports of Drs. Jones and Howald were outweighed by the better supported medical reports of record which found claimant could perform his usual coal mine employment. Administrative Law Judge Romano's findings at Section 718.204(c) were affirmed by the Board. *See Osborne v. Director, OWCP*, BRB No. 96-1749 BLA (April 9, 1997)(unpub.). Director's Exhibit 42. Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, recently held in *Cornett v. Benham Coal Co.*, F.3d , BLR , 2000 WL 1262464 (6th Cir. Sep. 7, 2000), that it was error for the administrative law judge not to consider that even a mild respiratory impairment may preclude the performance of a miner's usual employment duties, depending on the exertional requirements of his usual coal mine employment. Additionally, the Court held that an administrative law judge must consider whether medical opinions which term claimant not disabled had any knowledge of the exertional requirements of claimant's usual coal mine employment. *Id.* The Court also held that a medical opinion could not be accorded little weight where a doctor stated that claimant was totally disabled, but relied on a non-qualifying pulmonary function study. *Id.* In light of the holding of *Cornett*, *supra*, we vacate the administrative law judge's findings with respect to a mistake in fact, and remand this case to the administrative law judge to reconsider the findings of Administrative Law Judge Romano with respect to a mistake in a determination of fact at Section 725.310.

[2] All of claimant's coal mine employment occurred in Kentucky. Director's Exhibits 4, 51 at 228. Thus, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge