BRB No. 03-0283 BLA

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| HAROLD RAY SMITH | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| PEABODY COAL COMPANY | ) | DATE ISSUED: 10/30/2003 |
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| Employer-Respondent | ) | |
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| DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-0977) of Administrative Law Judge Robert L. Hillyard 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).[1] The administrative law judge noted that the instant claim was a request for

[1] 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

modification of a duplicate claim and that the parties had stipulated to thirty-six years of qualifying coal mine employment and that employer was the proper responsible operator. Decision and Order at 2-3, 5, 16-17; Hearing Transcript at 11-12; Director=s Exhibit 68. The administrative law judge, based on the date of filing, considered entitlement in this living miner=s claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 17. The administrative law judge, noting the applicable standard, considered the newly submitted evidence of record and concluded that this evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. '718.204(b) and therefore it was insufficient to establish a material change in conditions pursuant to 20 C.F.R. '725.309 (2000). Decision and Order at 17-22. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to apply the proper standard in addressing modification and in failing to grant modification. 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 participate in this appeal.[3]

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 into the Act by 30 U.S.C. '932(a); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his initial claim for benefits on March 26, 1990, which was denied by the Department of Labor on September 7, 1990 as claimant failed to establish any element of entitlement. Director=s Exhibit 38. Claimant took no further action until he filed a second application for benefits on February 14, 1997. Director=s Exhibit 1. The district director denied benefits on June 11, 1997. Director=s Exhibit 37. Claimant requested a hearing and the case was transferred to the Office of Administrative Law Judges on April 30, 1998. Director=s Exhibit 39. This claim was finally denied by Administrative Law Judge Donald W. Mosser on May 26, 1999 as claimant, although establishing a material change in conditions, failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director=s Exhibit 46. Claimant requested modification, the subject of the instant appeal, on July 12, 1999, which was denied by the district director on May 15, 2000. Director=s Exhibits 49, 58, 62. Claimant requested a formal hearing and the case was referred to the Office of Administrative Law Judges on July 3, 2001. Director=s Exhibits 66-68.

[3] The administrative law judge=s length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. '718.204(b)(2)(i)-(ii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner=s claim filed pursuant to 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant asserts that the administrative law judge erred in failing to find modification established pursuant to 20 C.F.R. ' 725.310 (2000) as the administrative law judge did not apply the proper modification standard in making his findings.[4] Claimant=s Brief at 6-8. We agree. The administrative law judge denied benefits on the ground that claimant failed to establish a material change in conditions at 20 C.F.R. ' 725.309 (2000) in light of the standard set forth in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).[5] Decision and Order at 16-22. In the prior decision, however, Administrative Law Judge Mosser specifically found that claimant established a material change in conditions pursuant to *Ross*, but denied benefits because he found that the evidence of record was insufficient to establish a totally disabling respiratory or pulmonary impairment. Director=s Exhibit 46. Consequently, the issue properly before the administrative law judge in this modification request was whether there was a mistake in a prior determination of fact by Judge Mosser or whether the newly-submitted evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. ' 718.204(b) and thus established a change in conditions.[6] *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5] The United States Court of Appeals for the Sixth Circuit 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 proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

[6] The United States Court of Appeals for the Sixth Circuit held in *Consolidation Coal v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), with respect to modification, that the administrative law judge must determine whether a change in conditions or a mistake in a determination of fact has been made even where no specific allegation of either has been asserted by claimant. Furthermore, in determining whether claimant has established a change in conditions pursuant to Section 725.310 (2000), 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 the element or elements of

1994). We therefore vacate the administrative law judge=s finding that claimant failed to establish a material change in conditions, and remand the case to the administrative law judge for further consideration of the medical opinion evidence in accordance with the applicable modification standard.

With respect to the administrative law judge=s weighing of the medical opinion evidence pursuant to Section 718.204, claimant contends that the administrative law judge erred in mischaracterizing the opinion of Dr. O=Bryan in regard to the issue of total respiratory disability. The administrative law judge found that Dr. O=Bryan=s opinion was insufficient to establish that claimant was totally disabled due to pneumoconiosis. Decision and Order at 20-22. Dr. O=Bryan opined that the blood gas studies indicated a complex metabolic problem and that claimant=s restrictive abnormality would prevent him from working again in the coal mine.[7] Employer=s Exhibit 1. Although this opinion may be sufficient to negate disability causation, the administrative law judge must initially determine if claimant has established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. ' 718.204(b).[8] *Worrell*, 27 F.3d 227, 18 BLR 2-290. Consequently, we vacate the administrative law judge=s weighing of the medical opinion evidence and remand this case for the administrative law judge to determine whether the evidence is sufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). If on remand the administrative law judge finds total disability established, he must then determine whether the evidence is sufficient to establish disability causation under the appropriate standard pertaining to this issue. 20 C.F.R. ' 718.204(c); *see Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Accordingly, the administrative law judge=s Decision and Order 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.

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entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O=Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

[7] Dr. O=Bryan further opined that claimant=s diabetic medications and his heart disease explain his dyspnea and restrictive ventilatory impairment. Employer=s Exhibit 1.

[8] Administrative Law Judge Mosser did not reach the issue of disability causation in the previous decision as he denied benefits on the ground that claimant failed to establish a totally disabling respiratory or pulmonary impairment. Director=s Exhibit 46.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge