BRB No. 04-0128 BLA

JAMES M. FERRIS (Surviving Son of JAMES E. FERRIS) Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/29/2004 DECISION and ORDER

Appeal of the Decision and Order On Remand of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

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

Michelle S. Gerdano (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2000-BLA-1019) of Administrative Law Judge Mollie W. Neal denying employer's request for modification of an award of benefits on a survivor'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).[1] The procedural history of this case is as follows. In a Decision and Order issued on November 16, 1999, Administrative Law Judge John C. Holmes determined that claimant, the adult adopted child of the deceased miner, established that he was disabled in accordance with the definition of "disability" under Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), based on the uncontradicted findings issued on May 14, 1997 by the Social Security Administration (SSA) that claimant, who was born on April 22, 1970, had been unable to engage in substantial gainful activity due to schizophrenia since July 10, 1990, while he was a student under the age of 22. Director's Exhibit 50. Judge Holmes found that the relationship and dependency requirements of 20 C.F.R. §§725.208 and 725.209 were satisfied, and that claimant was automatically entitled to benefits under 20 C.F.R. §725.218(a). *Id.*

Following employer's timely request for modification and the submission of new evidence, Judge Holmes denied modification on December 14, 2001, again finding that claimant met the regulatory requirements of relationship and dependency. On appeal, the Board rejected employer's arguments that Judge Holmes erred in shifting the burden of proof on modification to employer and in not applying the regulatory disability criteria of the SSA, codified at 20 C.F.R. Part 404, to determine claimant's level of functioning. Because Judge Holmes did not indicate what weight he accorded to the opinions of Drs. Wright and Burstein, however, the Board remanded this case for consideration of all relevant evidence in determining whether modification of Judge Holmes's November 16, 1999 award of benefits was appropriate. *Ferris v. Eastern Associated Coal Corp.*, BRB No. 02-0307 BLA (Oct. 31, 2002)(unpublished).

On remand, this case was assigned to Judge Neal (the administrative law judge), who found that employer failed to establish either a change in conditions or a mistake in a prior determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied modification of the award of benefits.

In the present appeal, employer challenges the administrative law judge's denial of

[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 (2004). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

modification and again asserts that the administrative law judge impermissibly shifted the burden of proof to employer. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge's allocation of the burden of proof to employer to establish a basis for modifying the benefits award is both legally correct and consistent with the Board's prior holding.

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

Employer contends that the administrative law judge erred in evaluating the conflicting evidence of record and denying modification, arguing that claimant does not qualify as a dependent because the weight of the evidence demonstrates that claimant is not currently disabled and was not disabled at the time he ceased to be a student in May 1992, when he graduated from college with a high grade point average in computer science. [2] Employer maintains that the administrative law judge improperly equated evidence of mental illness with disability, failed to scrutinize claimant's evidence to determine whether it was sufficient to establish disability at the pertinent times, and provided invalid reasons for discounting the opinions of employer's experts. Employer's arguments are without merit.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order on Remand of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge accurately

[2]Under the Social Security Act, "disability" means an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . .". 42 U.S.C. §423(d)(1)(A); 20 C.F.R §404.1505(a). Additionally, "a disabling impairment is an impairment (or combination of impairments) which, of itself, is so severe that it meets or equals a set of criteria in the Listing of Impairments [in 20 C.F.R. Part 404, Appendix 1 to Subpart P]...." 20 C.F.R. §404.1511(a). In the present case, the Social Security Administration found that claimant was continuously disabled due to schizophrenia since June 10, 1990, as he suffered from hallucinations, had moderate restrictions in activities of daily living, marked difficulties in social functioning, seldom to often deficiencies of concentration, persistence or pace, and repeated episodes of deterioration or decompensation in work or work-like settings outside of a supportive environment, thus meeting the conditions of 20 C.F.R. Part 404, Subpart P, Appendix 1, Listing of Impairments, 12.00 Mental Disorders at 12.03 A, B. Director's Exhibit 6.

reviewed the new evidence submitted in support of modification, considered this evidence in conjunction with the earlier evidence, and acted within her discretion in finding that employer failed to meet its burden of establishing either a mistake in fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In so finding, the administrative law judge determined that the earlier SSA award of benefits to claimant constituted probative and persuasive evidence that since July 10, 1990, claimant has been under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), as buttressed by the newly-submitted opinions of Dr. McFadden, a psychologist, and Phyllis C. Shapero, a vocational consultant, that claimant's psychiatric condition prevents him from engaging in substantial gainful activity. Decision and Order on Remand at 4-5, 7-8; Director's Exhibits 6, 65; Claimant's Exhibit 1. The administrative law judge reasonably rejected employer's argument that claimant's successful completion of a difficult degree program demonstrates that claimant was not disabled in 1992 and is currently capable of substantial gainful activity, as she found that the same conduct acceptable in a student would not necessarily be acceptable in a work environment. Decision and Order on Remand at 7. Although Dr. Hutton, Board-certified in psychiatry, neurology, and forensic medicine, did not believe that claimant's psychiatric condition was disabling in 1992 or presently, the administrative law judge noted that the physician recommended that claimant be evaluated for additional training and refreshing of past skills, and that claimant receive supportive services and rehabilitative therapies relative to improved socialization, development of interpersonal confidence, and maintenance/development of cognitive integrity. Decision and Order on Remand at 3-4, 6; Director's Exhibit 70; Employer's Exhibit 5. The administrative law judge further determined that Dr. Hutton found claimant to be immature, socially awkward, significantly impacted by idiosyncracies and on medications, and the physician conceded at deposition that he could not state whether claimant would be subject to deterioration or decompensation in a work-like setting. Decision and Order on Remand at 6-7; Director's Exhibit 70; Employer's Exhibit 5. The administrative law judge thus reasonably concluded that Dr. Hutton essentially speculated that claimant would be employable with counseling, treatment and support, but that this opinion was insufficient to support an affirmative finding that claimant was, in fact, able to engage in substantial gainful activity. Decision and Order on Remand at 7; *see generally Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984).

The administrative law judge similarly found that although Vocational Rehabilitation Consultant Errol Sadlon determined that claimant was not disabled as of July 10, 1990 or currently, the opinion, at best, presented a question as to claimant's actual ability to engage in substantial gainful activity, as Mr. Sadlon's reports indicated that claimant would require psychiatric treatment and rehabilitative services in order to function in the workforce, and Mr. Sadlon conceded at deposition that if he were to rely upon all the medical data and reports of record, he would have to say that there was a question as to whether claimant was employable. Decision and Order on Remand at 4-5, 8; Employer's Exhibits 1, 2, 6. As the remaining physicians, Drs. Wright and Burstein, merely performed record reviews, and Dr.

Wright conceded that he was unable to address claimant's current functional status without evaluating him personally in light of the disagreement in the records regarding the issue of disability, the administrative law judge permissibly found their opinions unpersuasive.[3] Decision and Order on Remand at 8; *see generally Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996). The administrative law judge thus properly concluded that employer failed to meet its burden of establishing either a change in conditions or a mistake in a determination of fact. Decision and Order on Remand at 8-9; *Jessee*, 5 F.3d 723. The administrative law judge's findings pursuant to Section 725.310 (2000) are affirmed as supported by substantial evidence. Consequently, we affirm her denial of modification.

[3]Dr. Wright, Board-certified in psychiatry and neurology, opined that claimant was not disabled as of his 22nd birthday, Employer's Exhibit 3, while Dr. Burstein, Board-certified in psychiatry, neurology and forensic psychiatry, found that claimant was capable of significant employment notwithstanding his chronic undifferentiated schizophrenia, Employer's Exhibit 4. Decision and Order on Remand at 5. The administrative law judge permissibly found that Dr. Wright could not render an accurate determination regarding claimant's ability to work at age 22 based solely on a record review, when Dr. Wright admitted that he could not make a current assessment of claimant's disability without evaluating claimant personally. Decision and Order at 8. The administrative law judge then rationally concluded that the lack of a personal evaluation was a serious limitation to reaching an opinion regarding claimant's ability to work, which also rendered Dr. Burstein's opinion worthy of less weight. *Id.*

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge