BRB No. 04-0277 BLA

GORDON SKAGGS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CENTRAL APPALACHIAN COAL COMPANY	)	DATE ISSUED: 10/29/2004
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Appeal of the Decision and Order Denying Modification of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

David L. Yaussy (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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:

Claimant appeals the Decision and Order Denying Modification (03-BLA-5188) of Administrative Law Judge Gerald M. Tierney (the administrative law judge) 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] This case involves a duplicate claim filed November 19, 1998 and is before the Board for the second time.[2] On original consideration, Administrative Law Judge John C. Holmes found, in a Decision and Order issued on August 29, 2000, that the evidence of record established that claimant suffered from pneumoconiosis that arose out of his coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203 (2000), but failed to establish the presence of a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, benefits were denied. The Board affirmed Judge Holmes' denial of benefits in a Decision and Order dated September 18, 2001. *Skaggs v. Central Appalachian Coal Co.*, BRB No. 00-1160 BLA (Sept. 18, 2001)(unpublished).

On January 24, 2002, claimant requested modification of the prior denial and submitted a March 5, 2002 report from Dr. Rasmussen in support of his request. Director's Exhibit 44. In a decision dated December 2, 2003, the administrative law judge found the newly submitted report from Dr. Rasmussen, when considered in conjunction with the previously submitted evidence of record, did not establish either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 with respect to the prior denial of his claim. Accordingly, the administrative law judge denied claimant's request for modification and claim for benefits.

Claimant appeals, arguing that the administrative law judge erred in weighing the blood gas study and medical opinion evidence relevant to whether claimant established a totally disabling pulmonary or respiratory impairment. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, and requests that the Board clarify certain statements by the administrative law judge. The Director does not otherwise address claimant's arguments on appeal.

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

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[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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The complete procedural history of this case is set forth in the Board's September 18, 2001 Decision and Order. *Skaggs v. Central Appalachian Coal Co.*, BRB No. 00-1160 BLA (Sept. 18, 2001)(unpublished), slip op. at 2 n.2

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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), a party may request modification of a denial of benefits on the grounds of a change in conditions or because of a mistake in a determination of fact. If a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly. *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). Moreover, in determining whether claimant has established a change in conditions pursuant to Section 725.310, 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 entitlement which defeated entitlement in the prior decision.[3] *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of 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 a finding of 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*).

Claimant initially contends that Dr. Rasmussen's March 5, 2002 report supports a finding of total disability at 20 C.F.R. §718.204(c) and outweighs the previously submitted opinion of Dr. Zaldivar. Claimant argues that Dr. Rasmussen's opinion thus establishes the requisite change in conditions since the prior denial.[4] In his March 5,

[3] As correctly noted by the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge misstated the case when he indicated that the element of entitlement which defeated entitlement in the prior denial was whether claimant established that his total disability was due to pneumoconiosis. Decision and Order at 2, 4. We note that the prior claim was actually denied because claimant failed to establish the existence of a totally disabling pulmonary or respiratory impairment; this therefore is the threshold issue on modification at 20 C.F.R. §725.310 (2000).

[4] In the prior denial, Administrative Law Judge John C. Holmes permissibly found that Dr. Rasmussen's diagnosis of totally disabling pneumoconiosis, the only opinion that was supportive of claimant's burden of proof on the issue of total disability, was

2002 report, Dr. Rasmussen stated that he had reviewed his own prior reports of record and those of Dr. Zaldivar and was not able to determine why his own blood gas results differed from those of Dr. Zaldivar, as both tests were performed correctly. Dr. Rasmussen further stated that he remained confident in his prior test results and that the only way to determine whether his blood gas studies or Dr. Zaldivar's blood gas studies were correct would be to reevaluate claimant. Director's Exhibit 44. Claimant specifically asserts that Dr. Rasmussen's report is better reasoned and documented than Dr. Zaldivar's previously submitted report, and that Dr. Zaldivar's opinion and supporting blood gas studies were previously impermissibly credited by Administrative Law Judge Holmes through a "mechanical application of the latest evidence rule." Claimant's Brief at 5. We disagree.

Contrary to claimant's contention, the administrative law judge acted within his discretion in finding that Dr. Rasmussen's March 5, 2002 opinion, which merely reiterates his prior conclusions and offers no new rationale or supporting objective evidence, when considered in conjunction with the previously submitted evidence, is insufficient to establish either a change in conditions or a mistake in a determination of fact.[5] *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000)(holding that it is the province of the administrative law judge to evaluate the physicians' opinions); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997)(holding that as trier of fact the administrative law judge must evaluate the evidence, weigh it, and draw his own conclusions). Further, the record refutes claimant's assertion that Judge Holmes, in the prior denial, mechanically applied the later evidence rule to credit Dr. Zaldivar's opinion or supportive blood gas studies. *See Skaggs v. Central Appalachian Coal Co.*, BRB No. 00-1160 BLA (Sept. 18, 2001) (unpublished), slip op. at 4, 5.

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unreasoned because the blood gas study the physician relied upon, which qualified on exercise, was contrary to the preponderance of the objective evidence of record, including the testing performed by Dr. Zaldivar. *See generally Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *see* Director's Exhibits 12-14; Judge Holmes' August 29, 2000 Decision and Order at 3-4.

[5] The administrative law judge characterized claimant's assertions in support of his request for modification as an alleged misapplication of law. Claimant and the Director correctly assert, however, that requests for modification are broadly construed, to include an assertion that the ultimate fact of entitlement to benefits was mistakenly decided. *See Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

Claimant further generally asserts that the administrative law judge erred by not considering the results of claimant's objective tests in conjunction with the requirements of his usual coal mine work, to determine the total disability issue. Claimant's Brief at 5. Contrary to claimant's argument, such a comparison by the administrative law judge was not required in this case as he determined that the newly submitted opinion of Dr. Rasmussen, considered with the previously submitted evidence of record, was insufficient to establish any pulmonary or respiratory impairment. *Lane v. Union Carbide Corp.,* 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); Decision and Order at 4.

Based on the foregoing, we affirm the administrative law judge's finding that Dr. Rasmussen's newly submitted opinion fails to establish that claimant suffers from a totally disabling pulmonary or respiratory impairment. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding at 20 C.F.R. §718.204(c) (2000) and his determination that claimant failed to establish a change in conditions at 20 C.F.R. §725.310 (2000) sufficient to warrant modification of the prior denial of benefits.[6] We further affirm the administrative law judge's finding that the prior denial contained no mistake in a determination of fact at 20 C.F.R. §725.310 (2000).

[6] The administrative law judge's Decision and Order does not contain a specific reference to 20 C.F.R. §725.309(d) (2000). This omission is harmless however, in light of the administrative law judge's affirmable findings pursuant to 20 C.F.R. §§725.310 and 718.204(c) (2000). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order Denying Modification is affirmed.

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