BRB No. 99-1251 BLA

JOHN A. KADE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
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 of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John A. Kade, Bluefield, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (96-BLA-1819) of Administrative Law Judge Richard K. Malamphy 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). This case is before the Board for the fifth time.[1] In the instant appeal, claimant generally challenges the findings of the

[1] In this modification of a duplicate claim, Administrative Law Judge John Allan Gray, in the first Decision and Order, found that employer was the responsible operator and credited claimant with at least thirty years of coal mine employment. Based on the filing date of April 11, 1983, Judge Gray adjudicated this claim pursuant to 20 C.F.R. Part 718. Judge

Gray found the evidence of record sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §§718.202(a)(1) and to entitle claimant to the irrebuttable presumption at 20 C.F.R. §718.304. Accordingly, benefits were awarded. Administrative Law Judge Marvin Bober denied employer's request for reconsideration by Order dated May 9, 1990. On appeal, the Board found that Judge Gray's failure to consider the provisions of 20 C.F.R. §725.309 harmless error as the Board held that the evidence of record was sufficient to prevent automatic denial of the claim. The Board, however, vacated the findings of Judge Gray at Section 718.304 and on onset and remanded this case for further consideration. *See Kade v. Consolidation Coal Co.*, BRB No. 90-1583 BLA (Mar. 24, 1992)(unpub.).

On remand, Administrative Law Judge Richard K. Malamphy (the administrative law judge) found that claimant was not entitled to the irrebuttable presumption at Section 718.304 as the evidence of record was insufficient to establish complicated pneumoconiosis. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(b), and sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), (b). Accordingly, benefits were awarded. In the second appeal, the Board vacated the administrative law judge's findings at Section 718.304. The Board affirmed the findings of the administrative law judge at Section 718.204(c)(1)-(3), but vacated his findings at Section 718.204(c)(4) and remanded this case for further consideration. The Board also directed the administrative law judge to determine claimant's usual coal mine employment. *See Kade v. Consolidation Coal Co.*, BRB No. 94-3705 BLA (Feb. 22, 1995)(unpub.).

On remand, the administrative law judge found the evidence of record insufficient to establish complicated pneumoconiosis at Section 718.304. After reviewing the evidence of record, the administrative law judge determined that claimant's usual coal mine employment was as a dispatcher and that claimant had not established the presence of a totally disabling respiratory impairment at Section 718.204(c) as the physicians concluded that claimant could perform the sedentary work of a dispatcher. Accordingly, benefits were denied. Claimant did not appeal this Decision and Order dated June 22, 1995.

On October 31, 1995, claimant requested modification of his claim. Claimant's Exhibit 1. The administrative law judge found the medical opinion of Dr. Sherer sufficient to establish a material change in conditions at 20 C.F.R. §725.310. After weighing all the medical evidence, the administrative law judge concluded that the physicians had not expressed opinions which meet the criteria at Section 718.204(c)(4) and denied benefits. In the third appeal, the Board vacated the findings of the administrative law judge as he failed to consider the evidence under the proper standards for Section 725.310 and remanded this case for further consideration. *See Kade v. Consolidation Coal Co.*, BRB No. 97-0276 BLA (Oct. 23, 1997)(unpub.).

On remand, the administrative law judge weighed the new medical opinion evidence and found it insufficient to establish a totally disabling respiratory impairment at Section 718.204(c)(4), and thus, claimant failed to establish a material change in condition at Section 725.310. The administrative law judge also found that claimant did not specifically allege a mistake in a determination of fact and denied modification. On the merits, the administrative law judge reviewed all the medical reports of record and found this evidence insufficient to establish a totally disabling respiratory impairment due to pneumoconiosis at Section 718.204(c). Accordingly, benefits were denied. In the fourth appeal, the Board affirmed the administrative law judge's findings that the newly submitted evidence was insufficient to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c), and that claimant had failed to establish a material change in conditions at Section 725.310 as supported by substantial evidence. The Board, however, vacated the denial of modification by the administrative law judge and remanded this case for further consideration with directions for the administrative law judge to make specific findings on whether a mistake in a determination of fact had occurred under Section 725.310. *See Kade v. Consolidation Coal Co.*, BRB No. 98-0904 BLA (May 12, 1999)(unpub.).

administrative law judge on the presence of a totally disabling respiratory impairment and his usual coal mine employment. 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 (the Director), has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

On remand, the administrative law judge reviewed all the medical opinion evidence and concluded that he had not made a mistake in a determination of fact in his prior decisions as the evidence of record did not establish a totally disabling respiratory impairment due to pneumoconiosis. Accordingly, benefits were denied.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 one of these elements precludes entitlement.[2] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant argues that the issue of whether he is totally disabled from coal mine employment is being judged only by his five years of outside work as a dispatcher and not by his thirty-nine years of work inside the coal mines. Thus, claimant argues that his last job as a dispatcher was not his usual coal mine employment, and that the administrative law judge should have reconsidered, on remand, whether there had been a mistake in fact in his determination that claimant's usual coal mine employment was as a dispatcher.

[2] Since the miner's last coal mine employment took place in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Claimant's argument has merit. The administrative law judge found that claimant's last coal mine employment, as a dispatcher, was his usual coal mine employment, based on claimant's testimony that he bid on the dispatcher job and that the physicians' reports listed dispatcher as his job.[3] *See* Decision and Order dated June 22, 1995. In addition to the two factors which the administrative law judge cited as the basis for his finding that claimant's dispatcher job was his usual coal mine employment, however, the record contains statements made by the claimant in 1980 concerning his reasons for bidding on the dispatcher job, as well as his hearing testimony discussing the reasons he bid on this job and describing all of his duties during his forty-five years of working in the mines. *See* Director's Exhibit 8; Hearing Transcript at 10-22, 33. As the administrative law judge did not review all this evidence, we vacate his denial of modification and remand this case for the administrative law judge to review his findings regarding claimant's usual coal mine employment to decide if a mistake in a determination of fact was made. *See* 20 C.F.R. §§725.310, 718.204(b)(1); *Jessee*, *supra*; *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). When considering the issue of claimant's usual coal mine employment, the administrative law judge must inquire into the question of whether claimant bid on the dispatcher job, which involves less strenuous duties, because of an inability to perform his previous, more strenuous duties. *See* 20 C.F.R. §§718.204(b)(1), 718.204(d)-(f); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *see also Vargo v. Valley Camp Coal Co.*, 6 BLR 1-1217 (1984). Should the administrative law judge conclude that a mistake in a determination of fact regarding claimant's last usual coal mine employment was made, the administrative law judge must reconsider whether claimant could perform his usual coal mine employment from a respiratory standpoint. *See* 20 C.F.R. §§725.310, 718.204(c), (b); *Nataloni*, *supra*; *Kovac, supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits on modification is vacated and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief

[3] The medical opinions of the physicians in the instant case also identify claimant's coal mine work prior to his work as a dispatcher. The majority of physicians based their opinions of claimant's ability to perform his job duties on his work as a dispatcher. *See* Director's Exhibits 13-15, 41; Employer's Exhibits 1, 4-6, 9-10; Claimant's Exhibits 1-3, 5.

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge