BRB No. 01-0929 BLA

JIMMY LITTLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTOVER MINING COMPANY	)	
	)	DATE ISSUED:
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

Mary Forrest-Doyle (Eugene Scalia, 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 GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Modification (2001-BLA-00172) of Administrative Law Judge Thomas M. Burke awarding 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

[1]The Department of Labor has amended the regulations implementing the Federal Coal

instant claim was a request for modification of a duplicate claim and in accordance with the parties' stipulation, found thirteen years of qualifying coal mine employment. Decision and Order on Modification at 3-4; Hearing Transcript at 20. 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 on Modification at 4, 18-23. The administrative law judge noted that the miner's prior two claims, which were denied and administratively closed, were not part of the record as they were accidently destroyed at the Federal Records Center. Decision and Order on Modification at 3; Director's Exhibits 28, 57. The administrative law judge, based upon a *de novo* review of the evidence of record, concluded that the evidence was sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b), 718.204(b), (c). Decision and Order on Modification at 18-23. Accordingly, benefits were awarded beginning March 1, 1999. Decision and Order on Modification at 24.

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

[2]Claimant filed applications for benefits under the Act on November 12, 1985 and August 21, 1992, which were denied and subsequently administratively closed. The records were accidently destroyed at the Federal Records Center. Director's Exhibits 28, 57. Claimant took no further action until he filed the current application for benefits on March 31, 1999, which was finally denied by the district director on June 22, 1999. Director's Exhibits 1, 26. Claimant requested modification, the subject of the instant appeal, on May 17, 2000, which was granted by the district director on October 16, 2000. Director's Exhibits 31, 53. Employer requested a formal hearing and the case was referred to the Office of Administrative Law Judges on November 7, 2000. Director's Exhibits 54, 57.

On appeal, employer contends that it should be dismissed as the responsible operator and liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund (Trust Fund) since the destruction of the prior claims violated its right to due process. Employer also contends that the administrative law judge erred in failing to make the proper material change in conditions analysis, in failing to properly analyze the claim under the standards for modification, in failing to properly explain his basis for finding disability causation established pursuant to Section 718.204(c), and in finding March 1999 to be the date of onset for the commencement of benefits. Claimant has not filed a response brief in the instant appeal. The Director, Office of Workers' Compensation Programs (the Director), contends that liability for this claim correctly rests with employer and there is no legitimate basis for transferring liability to the Trust Fund. The Director further asserts that the administrative law judge properly performed a duplicate claim and modification analysis and rationally determined the date of onset. The Director declined to take a position with respect to the administrative law judge's weighing of the medical opinion evidence.[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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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*).

[3]We affirm the findings of the administrative law judge on the length of coal mine employment and at 20 C.F.R. §§718.202(a), 718.203(b) and 718.204(b)(2)(i)-(iv), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order on Modification, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order must be vacated and the case remanded to the administrative law judge for further consideration. Initially, we address employer's contention that it should be dismissed as the responsible operator and liability for the payment of benefits should be transferred to the Trust Fund since it was denied its right to due process. Employer's Brief at 10-13. Employer specifically contends that the lack of the prior records has prevented it from establishing that a material change in conditions was not established or that the claim was untimely filed pursuant to the terms of 20 C.F.R. §725.308[4] in light of the recent decision by the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).[5] Employer's Brief at 11. The Director however asserts that employer is barred from raising the issue of timeliness, and consequently the issue of transfer of liability.

Contrary to the Director's position, the Board has recently held that the Sixth Circuit in *Kirk*, provided a detailed interpretation of Section 725.308 and provided guidance on the provision's applicability to duplicate claims. *Furgerson v. Jericol Mining, Inc.*, BLR 1- , BRB No. 01-0728 BLA (Sept. 24, 2002); *see Kirk, supra*. We further reject the Director's contention that because employer initially stipulated that the claim was timely filed before the administrative law judge, it has waived reliance on the issue of timeliness under Section 725.308. *See* Director's Exhibits 56; Hearing Transcript 19-20. We acknowledge that at the time the instant case was filed, the Board adhered to a position contrary to that of the Sixth Circuit in *Kirk*. Thus, it would have been futile for employer to raise the applicability of Section 725.308 before the administrative law judge. *See Furgerson, See Youakim v. Miller*, 425 U.S. 231 (1976); *Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995); *The Youghiogheny and Ohio Coal Co. v. Warren*, 841 F.2d 134, 11 BLR 2-73 (6th Cir. 1987); *Kyle v. Director, OWCP*, 819 F.2d 139, 10 BLR 2-112 (6th Cir. 1987), *cert. denied*, 488 U.S. 997 (1988). Therefore, we hold that in light of our recent decision in

[4]The amended regulations did not alter 20 C.F.R. §725.308.

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

Furgerson, the issue of timeliness, and consequently the issue of transfer of liability, were not waived by employer.

Regarding the loss of the evidentiary record involving the previous two denials, employer argues that its right to due process has been denied and thus this current claim requires the transfer of liability to the Trust Fund. Employer relies upon the decision by the Sixth Circuit in *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), to support its argument.[6] As we have acknowledged that it would have been futile for employer to challenge the timeliness of the instant claim prior to the decision by the Sixth Circuit in *Kirk*, this issue has not been considered by the administrative law judge. The regulations state that the Board "is not empowered to engage in a de novo proceeding or unrestricted review of a case" and is only authorized to review the administrative law judge's findings of fact and conclusions of law. 20 C.F.R. §802.301; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *see Greer, supra*; *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990). Inasmuch, as it is the administrative law judge's duty to make factual determinations, we must vacate the administrative law judge's award of benefits and remand this case to the administrative law judge for further consideration. *See Furgerson, supra.* On remand, the administrative law judge must specifically discuss the impact of the loss of the prior evidentiary record on this case and determine if the parties' right to due process have been denied and, if so, whether the transfer of liability to the Trust Fund is the appropriate remedy. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) and *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

We are mindful, however, that employer has also raised specific allegations of error regarding the administrative law judge's analysis of the evidence with respect to the material change in conditions determination and pursuant to 20 C.F.R. Part 718. Accordingly, in the interest of judicial economy, we now address those allegations.

Employer argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C.

[6]In *Holdman*, the Department of Labor lost the evidentiary record during the pendency of employer's motion for reconsideration of an administrative law judge's award of benefits. The court, after noting that the Office of Workers' Compensation Programs has the responsibility to safeguard all documents related to a claim of entitlement, held that employer was not required to make a showing of actual prejudice, *i.e.*, that benefits would have been denied if the record had not been lost, inasmuch as employer was deprived of a fair day in court, thereby suffering a core violation of its due process rights. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000).

§932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in finding a material change in conditions established pursuant to 20 C.F.R. §725.309 (2000), in finding a change in condition established pursuant to 20 C.F.R. §725.310 (2000), in finding that the medical opinion evidence of record was sufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and in determining the date of onset.[7] Employer's Brief at 13-39.

Employer asserts that the administrative law judge erred in finding modification and a material change in conditions established pursuant to Sections 725.309 (2000) and 725.310 (2000) as the administrative law judge did not offer a basis for his finding. Employer's Brief at 13-22. We disagree. The administrative law judge properly noted that this case involves a request for modification of a denied duplicate claim and that the records pertaining to the two prior claims have been destroyed. Decision and Order on Modification at 3-4. After considering the available prior evidence, submitted by employer, and the newly submitted evidence on modification, the administrative law judge, based on the record before him, rationally determined whether the evidence of record was sufficient to establish the elements of entitlement to benefits pursuant to Sections 718.202(a) and 718.204(b), (c). Decision and Order on Modification at 13-24; *Worrell, supra*; *see generally Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Motichak v. Beth Energy Mines, Inc*, 17 BLR 1-14 (1992); Decision and Order on Modification at 18-23. Therefore, based on the circumstances of this case, we reject employer's contention that the administrative law judge violated the APA in considering the merits of this claim.

Turning to the issue of disability causation under Section 718.204(c), employer argues that the administrative law judge did not render findings in accordance with the APA in determining that claimant's total disability was due to pneumoconiosis as he selectively analyzed the relevant medical opinion evidence. Employer's Brief at 22-37. Employer's contention has merit with respect to the administrative law judge's consideration of the medical opinions of Drs. Dahhan, Fino, and Branscomb. Regarding the opinions of Drs.

[7]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

Paranthaman and Forehand, however, the administrative law judge provided valid rationales for determining that they were not entitled to great weight.

The administrative law judge acted within his discretion in according little weight to Dr. Paranthaman's opinion with respect to causation as it was equivocal. Decision and Order on Modification at 22; Employer's Exhibit 2; *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-209 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Further, contrary to employer's contention, the administrative law judge rationally found that Dr. Forehand's opinion was entitled to little weight as the physician did not diagnose the existence of pneumoconiosis. Decision and Order on Modification at 23; Director's Exhibits 13, 50. An administrative law judge may permissibly accord less weight to an opinion regarding causation where it is based on a faulty underlying premise regarding the presence or absence of pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

Employer argues correctly, however, that the administrative law judge's findings with respect to the opinions of Drs. Dahhan and Fino cannot be affirmed. The administrative law judge accorded less weight to the opinions of Drs. Dahhan and Fino because they failed to diagnose pneumoconiosis in their earlier opinions. The administrative law judge also found that the qualifying values produced in claimant's post-bronchodilator pulmonary function studies undermined the physicians' determination that the reversibility of claimant's impairment was incompatible with a coal dust related condition.[8] Decision and Order on Modification at 22-23. As the administrative law judge acknowledged, and the record supports, however, Drs. Dahhan and Fino recognized the presence of pneumoconiosis in their opinions. Decision and Order on Modification at 22-23; Employer's Exhibits 3-5. Moreover, as employer asserts, the qualifying nature of an objective study supports a finding that claimant is suffering from a totally disabling respiratory or pulmonary impairment, but does not afford claimant a presumption that pneumoconiosis is a contributing cause of his total disability. *See* 20 C.F.R. §718.204(c). Rather, claimant has an affirmative duty to establish this separate element of entitlement by competent medical evidence. *See Gee, supra*; *Trent, supra*; *Perry, supra*. Thus, the administrative law judge's determination regarding the significance of the qualifying post-bronchodilator results regarding the source of claimant's impairment constituted a medical judgment, which the administrative law judge

[8]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

is not empowered to make. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Thus, we must vacate the administrative law judge's findings with respect to the opinions of Drs. Dahhan and Fino.

Employer also maintains that the administrative law judge erred in according little weight to the opinion of Dr. Branscomb on the ground that the doctor found claimant's pneumoconiosis to be localized and minimal. We agree. Inasmuch as no physician of record contradicted Dr. Branscomb's assessment that the coal workers' pneumoconiosis was localized and minimal and the administrative law judge's finding that claimant established pneumoconiosis also does not conflict with Dr. Branscomb's diagnosis, the administrative law judge's rationale for discrediting of Dr. Branscomb's opinion is not sufficient on its face. Decision and Order on Modification at 22-23; Employer's Exhibits 3-5; *Marcum, supra*. We must also, therefore, vacate the administrative law judge's finding regarding Dr. Branscomb's opinion.

Inasmuch as we have vacated the administrative law judge's weighing of the opinions of Drs. Dahhan, Fino, and Forehand, we also vacate the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c) and remand the case to the administrative law judge for reconsideration. On remand, before addressing the factors relevant to determining the weight to be assigned a particular medical opinion, the administrative law judge must first determine if the opinions of record are reasoned and documented and, therefore, credible and specifically set forth the bases for these findings. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Greer, supra*; *Lemar, supra*; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

With respect to the administrative law judge's onset of disability finding, employer contends that the administrative law judge erroneously considered the district director's determination. Employer's Brief at 37-39. We disagree with employer's specific argument. In requests for modification, Section 22 of the Longshore and Harbor Workers' Compensation Act vests the administrative law judge with the authority to reconsider the previous decision and to correct prior mistakes in fact or to decide if claimant established a change in condition. *See* 33 U.S.C. §922; 30 U.S.C. §932(a); 20 C.F.R. §725.310 (2000); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). The administrative law judge can determine whether a mistake in fact in the prior decision occurred by reviewing wholly new evidence, cumulative evidence, or merely upon further reflection of the evidence initially submitted. *O'Keeffe, supra*; *Kovac, supra*. The administrative law judge's authority to correct mistakes is not limited to any kind of factual mistake, but rather, extends to any

mistake of fact, including the ultimate fact of entitlement. *Worrell, supra*. Therefore, as the administrative law judge has the authority, if not the duty, to reconsider all the evidence for any mistake of fact, including the ultimate fact of entitlement, we hold, based upon the circumstances of the instant case, that there is no merit in employer's contention that the onset date determination was outside the administrative law judge's scope of authority on modification. *See O'Keeffe, supra*; *Kovac, supra*.

Employer also argues that the administrative law judge erred in identifying March 1, 1999, the first day of the month in which claimant filed the instant claim, as the date from which his entitlement to benefits began. Employer specifically contends that the administrative law judge has failed to explain the basis for his determination pursuant to 20 C.F.R. §725.503. In this case, the administrative law judge found that the evidence from claimant's prior claim was insufficient to establish the presence of pneumoconiosis and inconclusive regarding the presence or absence of total respiratory disability. He determined that the more recent evidence clearly establishes that claimant has pneumoconiosis and is totally disabled by it. Decision and Order on Modification at 24. Nevertheless, the administrative law judge concluded that since "the evidence does not establish the month of onset of total disability," benefits should commence beginning on the first day of the month in which the current claim was filed. *Id*. The administrative law judge did not, however, specifically state a medical basis for his onset determination. Decision and Order on Modification at 24. Inasmuch as he did not provide an analysis of what evidence he relied on in reaching his conclusion and failed to provide any basis or rationale for finding that benefits commence as of March 1, 1999, the administrative law judge's determination cannot be affirmed since his explanation fails to comply with the APA. *Wojtowicz, supra*; *McCune, supra*. In the instant case, there is conflicting evidence regarding the onset date which must be addressed and resolved by the administrative law judge. *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). Consequently, we vacate the administrative law judge's onset date determination and, on remand, if entitlement is again established, the administrative law judge is instructed to reconsider the evidence relevant to this issue and to make a specific finding with regard to the date of onset of total disability due to pneumoconiosis specifically addressing the relevant medical evidence and the appropriate regulations. *See Eifler v. Director, OWCP*, 926 F.2d 633, 15 BLR 2-1 (7th Cir. 1991); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *Owens, supra*; *see also Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986).

Accordingly, the administrative law judge's Decision and Order on Modification awarding 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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge