BRB No. 97-1814 BLA

JOHNNY CAUDILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOLBROOK MINING COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED:
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

John T. Chafin (Kazee, Kinner & Chafin), Prestonsburg, Kentucky, for employer/carrier.

Cathryn Celeste Helm (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, a miner, appeals the Decision and Order Denying Benefits (96-BLA-1976) of Administrative Law Judge Donald W. Mosser with respect to 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). The relevant procedural history of this case is as follows: Claimant filed an application for benefits on October 23, 1985. Director's Exhibit 1. This claim was initially denied by the district director on March 19, 1986. At claimant's request, the case was transferred to the Office of Administrative Law Judges (OALJ) and a hearing was held before Administrative Law Judge Donald W. Mosser (the administrative law judge) on March 19, 1989. The administrative law judge issued a Decision and Order denying benefits on September 27, 1989. Director's Exhibit 45. The administrative law judge credited claimant with ten and three-quarter years of coal mine employment and considered the claim under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and that claimant was entitled to the presumption, set forth in 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment. The administrative law judge further found that the evidence of record was sufficient to establish total disability under 20 C.F.R. §718.204(c)(4). The administrative law judge also determined, however, that claimant did not prove that pneumoconiosis caused his total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. Director's Exhibit 45.

Claimant appealed the denial of benefits to the Board. In a Decision and Order issued on November 20, 1990, the Board vacated the administrative law judge's finding under Section 718.204(b) and remanded the case to the administrative law judge for reconsideration in light of the decision in which of the United States Court of Appeals for the Sixth Circuit adopted a new standard applicable to Section 718.204(b).[1] *Caudill v. Hancock Mining Co.*, BRB No. 89-3539 BLA (Nov. 20, 1990)(unpublished), *slip opinion at 2*, *citing Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); Director's Exhibit 50. The Board affirmed as unchallenged on appeal the administrative law judge's findings under Sections 718.202(a), 718.203(b), and 718.204(c). *Id.*, *slip opinion at 2*, *n.1*.

On remand, the administrative law judge considered whether, in accordance with the Sixth Circuit's holding in *Adams*, the evidence relevant to Section 718.204(b) supported a finding that claimant's total disability was caused, at least in part, by

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

pneumoconiosis. Director's Exhibit 55. The administrative law judge found that the evidence did not meet claimant's burden of proof. Accordingly, benefits were denied. Claimant appealed to the Board once again. In a Decision and Order issued on September 11, 1992, the Board held that the administrative law judge erred in neglecting to address fully the medical opinions of Drs. Hieronymous and Wright. *Caudill v. Holbrook Mining Co.*, BRB No. 92-1185 BLA (Sept. 11, 1992)(unpublished); Director's Exhibit 60. The Board, therefore, remanded the case to the administrative law judge for reconsideration of these opinions.

The administrative law judge found on remand that the evidence was adequate to prove that claimant's totally disabling impairment is due, at least in part, to pneumoconiosis pursuant to Section 718.204(b). Accordingly, benefits were awarded in a Decision and Order issued on March 12, 1993. Director's Exhibit 61. Employer initially filed a Notice of Appeal with the Board, but then filed a petition for modification with the district director based upon an alleged mistake in a determination of fact in the Decision and Order awarding benefits and a change in condition. Director's Exhibit 69. Employer also filed a motion requesting that the Board remand the record to the district director for consideration in conjunction with employer's petition for modification. In an Order issued on August 16, 1993, the Board granted employer's request, dismissed employer's appeal, and transmitted the record file to the district director. *Caudill v. Hancock Mining Co.*, BRB No. 93-1301 BLA (Aug. 16, 1993)(unpublished Order); Director's Exhibit 80.

The district director concluded that employer failed to establish either a mistake in fact or a change in conditions under 20 C.F.R. §725.310 and, therefore, denied employer's petition for modification. Director's Exhibit 131. The case was returned to the administrative law judge who issued an Order asking the parties to show cause why a hearing was necessary. Director's Exhibit 134. After the resolution of a dispute concerning whether there was sufficient evidence in the record to determine the number of persons dependent upon claimant, both employer and claimant indicated that the administrative law judge need not hold a hearing with respect to employer's petition for modification. The administrative law judge then issued the Decision and Order which is the subject of claimant's present appeal.

The administrative law judge determined that the newly submitted evidence established that he made a mistake in a determination of fact in finding that claimant proved the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). The administrative law judge also found that employer demonstrated that his findings under 718.204(b) and (c)(4) were in error. Accordingly, the administrative law judge granted employer's petition for modification and denied benefits. Claimant argues on appeal that the administrative law judge erred in implicitly determining that employer had the right to seek modification under Section 725.310. Claimant also alleges that the administrative law judge erred in considering evidence submitted by employer after the hearing conducted on March 19, 1989 and in finding that this evidence established mistakes in the administrative law judge's determinations of fact. Employer has

responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has responded solely with respect to the issue of whether employer has the right to pursue modification under Section 725.310 and contends that the administrative law judge acted properly in considering employer's petition.[2]

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 applicable law. 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).

As an initial matter, we note that subsequent to the issuance of the administrative law judge's most recent Decision and Order, the United States Court of Appeals for the Sixth Circuit held in *Cunningham v. Island Creek Coal Co*., 144 F.3d 388, BLR (6th Cir. 1998), that the parties to a claim are entitled to a hearing on modification under Section 725.310 and, therefore, it is error to deny a party's request for a hearing. *See also Robbins v. Cyprus Cumberland Coal Co*., 146 F.3d 425, BLR (6th Cir. 1998). In the present case, employer, claimant, and the Director responded in the negative to the administrative law judge's Order requesting that the parties indicate whether a hearing was necessary with respect to employer's request for modification. In light of this fact, remand of this case to the administrative law judge for a hearing is not required under *Cunningham*.

With respect to claimant's allegations of error, we hold that the administrative law judge acted within his authority in considering employer's petition for modification.[3] In *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996), the Board determined that the party opposing entitlement in a claim arising under the Black Lung Benefits Act may petition for modification based upon a mistake in a determination of fact pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated in the Black Lung Benefits Act by 30 U.S.C. §932(a) and implemented for black lung claims by Section 725.310. Thus, the administrative law judge did not err in considering employer's request for modification in this case. Moreover, contrary to

[2]We affirm the administrative law judge's determination that the evidence does not support a finding of a change in conditions under 20 C.F.R. §§718.202(a) and 718.204(c), as this determination is unchallenged on appeal. Decision and Order Denying Benefits at 18-19; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3]Claimant has cited a number of cases which stand for the proposition that the district director does not have the authority to modify an administrative law judge's Decision and Order. These cases are not relevant, as in the present case, the district director did not alter the administrative law judge's Decision and Order awarding benefits.

claimant's contention, the fact that employer actually filed the petition for modification with the district director while its appeal was pending before the Board did not bar the administrative law judge from considering employer's request for modification, inasmuch as the Board dismissed employer's appeal upon notification that employer was seeking modification of the award of benefits and transmitted the case file to the district director. *Caudill v. Hancock Mining Co.*, BRB No. 93-1301 BLA (Aug. 16, 1993)(unpublished Order); Director's Exhibit 80.

The remainder of claimant's arguments concern the administrative law judge's admission and consideration of the evidence relevant to employer's allegations of mistakes in the administrative law judge's prior factual findings. Claimant states that the administrative law judge should have restricted his mistake of fact analysis to a review of the evidence that was present in the record when the hearing was held before the administrative law judge in this case on March 29, 1989.[4] This contention is without merit. It is well-established that modification can be premised upon an examination of new evidence, in addition to further reflection on the evidence initially submitted. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Accordingly, employer acted within its rights in proffering new evidence in support of its petition for modification and the administrative law judge did not err in accepting and weighing this evidence.

Claimant also states that the administrative law judge erred in admitting into the record evidence submitted after employer's request for modification was sent from the district director to the OALJ. Inasmuch as the admission of evidence proffered subsequent to the transfer of a case to the OALJ is not barred by the regulations, *see*, *e.g.*, 20 C.F.R. §§725.456(b), 725.461(a), and claimant has not identified any support for his argument in this regard, we reject claimant's allegation of error.[5] *See Cox v. Benefits*

[4]Claimant also alleges that the administrative law judge erred in admitting into the record on modification the depositions of Hugh and Alan Holbrook which he excluded at the hearing with respect to the merits of claimant's application for benefits. Any error in this regard is harmless, however, as the administrative law judge did not refer to these depositions in considering employer's request for modification. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

[5]Claimant objected to the admission of a number of employer's proposed exhibits on the grounds that they exceeded the scope of the administrative law judge's Order concerning the development of additional medical evidence, they were not submitted by the date designated in the administrative law judge's Order, and they were developed subsequent to the award of benefits on March 12, 1993. The administrative law judge rejected all of these objections in an Order issued on August 21, 1996. Claimant has not attempted to identify any error in the administrative law judge's decision to overrule his objections to the admission of this evidence.

Review Board, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

With respect to the administrative law judge's determination that the newly submitted evidence supported a finding of mistake in fact under Section 718.202(a)(1) and (a)(4), and Section 718.204(b) and (c)(4), claimant maintains that the administrative law judge did not properly weigh the relevant evidence.[6] Claimant essentially asserts that the evidence proffered by employer in support of the petition for modification does not establish that the administrative law judge's prior findings were in error. Rather, according to claimant, it merely establishes that employer did a better job of gathering x-ray readings and medical opinions than it did when the case was before the administrative law judge on its merits. Claimant also contends that the administrative law judge did not sufficiently consider the previously submitted evidence of record.

In assessing employer's request for modification, the administrative law judge indicated that because he had discussed the previously submitted evidence in detail in his prior decisions, he saw no need to summarize this evidence. Decision and Order Denying Benefits at 2, 6. The administrative law judge then rendered specific findings solely with respect to whether the evidence submitted with the petition for modification established that the claimant is not suffering from pneumoconiosis and is not totally disabled, at least in part, due to pneumoconiosis. *Id.* at 17-20. Thus, the administrative law judge did not consider whether employer demonstrated a mistake of fact under Section 725.310 in light of a weighing of all of the evidence of record as is required by the United States Court of Appeals for the Sixth Circuit in its decision in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). The court held in *Worrell* that once a request for modification is filed, no matter the grounds stated, if any, the fact-finder "has the authority, if not the duty, to reconsider all of the evidence of record for any mistake of fact or change in conditions." *See Worrell*, *supra*, 27 F.3d at 230, 18 BLR at 2-296; *see also Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997).

In addition, the absence of an explicit weighing of the previously submitted evidence, in conjunction with the new evidence, lends credence to claimant's allegation that the administrative law judge merely afforded employer a second chance at assembling evidence sufficient to defeat claimant's application for benefits. In order to set forth a conclusion regarding the existence of a mistake in a determination of fact that complies with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), the administrative law judge must explain how the new evidence demonstrates that the

[6]Claimant cites a number of cases concerning the proper consideration of the issue of a material change in conditions under 20 C.F.R. §725.309 with respect to duplicate claims. These cases are inapposite, inasmuch as the present case involves a request for modification based upon a mistake of fact pursuant to 20 C.F.R. §725.310.

previous factual findings were in error. *See Wojtowicz v. Duquesne Lighting Co.*, 12 BLR 1-162 (1989). Recognizing a shift in the balance of the medical evidence is not a sufficient basis, in and of itself, for a finding of mistake in fact. Moreover, with respect to x-ray evidence, the Sixth Circuit has ruled that neither the recency of negative films nor the sheer weight of negative readings constitute appropriate grounds upon which to base a finding regarding the existence of pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

The administrative law judge appeared to recognize these principles himself inasmuch as he expressed doubt regarding the extent to which his determinations under Section 725.310 were just, since his findings of mistake in fact were based primarily upon a "mountain" of potentially duplicative new evidence proffered by employer. Decision and Order Denying Benefits at 15, 19-20. At the same time, the administrative law judge suggested that he had no choice but to give full consideration to all of the newly submitted evidence. Decision and Order Denying Benefits at 15. To the contrary, the administrative law judge possesses the authority to hold that modification of the award of benefits does not serve justice in a particular case. *See Branham*, *supra*. Under the terms of the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*, as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), the administrative law judge can exclude, or accord less weight to, evidence which he deems cumulative or unduly repetitious. 5 U.S.C. §556(d); *see* 29 C.F.R. §18.403; *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *see also Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). It is within the administrative law judge's discretion, therefore, to consider whether modification of the prior award of benefits would serve justice under the circumstances of this case.

Inasmuch as the administrative law judge did not explicitly weigh the previously submitted evidence and did not sufficiently explain the rationale underlying his finding of mistake in fact, we vacate the administrative law judge's determination under Section 725.310. This case is remanded to the administrative law judge for reconsideration of the issue of mistake of fact based upon a weighing of all of the evidence of record and for a consideration of whether modifying the previous award of benefits is in the interest of justice. *See Worrell*, *supra*. The administrative law judge must set forth his findings on remand in detail and include the rationale underlying these findings. *See Wojtowicz*, *supra*.

Finally, claimant alleges generally that the evidence of record supports a finding of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4) and a finding of total disability due to pneumoconiosis under Section 718.204(b) and (c). We decline to address claimant's general assertions, in light of our decision to vacate the administrative law judge's findings with respect to the x-ray evidence and the medical opinion evidence and remand for reconsideration under Section 725.310.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge