BRB No. 97-0239 BLA

EMIT DEEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
D. O. & W. COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 on Modification of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Emit Deel, Birchleaf, Virginia, *pro se*.[1]

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

[1] Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal, *see Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order). *Deel v. D.O. & W. Coal Co.*, BRB No. 97-0239 BLA (Nov. 1, 1996) (unpublished Order).

Claimant, without legal representation, appeals the Decision and Order (96-BLA-0891) of Administrative Law Judge Jeffrey Tureck 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*. Claimant filed a claim for benefits on April 1, 1985. Director's Exhibit (DX) 1. Claimant initially was awarded benefits under 20 C.F.R. Part 718 by Administrative Law Judge John J. Forbes on March 17, 1988. DX 29. On appeal, the Board vacated Judge Forbes' finding that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), and remanded the case for further consideration.[2] *Deel v. D.O. & W. Coal Co.*, BRB No. 88-1321 BLA (Sept. 13, 1991) (unpublished); DX 42. On remand, because Judge Forbes was no longer available to reconsider the case, it was reassigned to Administrative Law Judge Ralph Romano. DX 44. Judge Romano reweighed the evidence and found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Thus, Judge Romano issued a Decision and Order on Remand denying benefits dated August 14, 1992. DX 49. Claimant appealed, but the denial of benefits was affirmed by the Board, *Deel v. D.O. & W. Coal Co.*, BRB No. 92-2392 BLA (Jan. 31, 1994) (unpublished); Director's Exhibit 59, and thereafter by the United States Court of Appeals for the Fourth Circuit, *Deel v. D.O. & W. Coal Co.*, No. 94-1239 (4th Cir. Oct. 19, 1994) (unpublished); DX 63. Claimant next filed for modification on October 26, 1994. DX 66. The case was ultimately assigned to Administrative Law Judge Jeffery Tureck (the administrative law judge), who conducted a hearing on July 16, 1996. The administrative law judge determined that claimant failed to establish modification based on a mistake in a determination of fact under 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits on September 24, 1996. Claimant appeals without legal representation, contesting the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the

[2] Following the Board's September 13, 1991 Decision and Order, claimant submitted Dr. Robinette's December 26, 1991 examination report for consideration on remand. Director's Exhibit (DX) 45. Employer filed a motion to strike the evidence, arguing that it was not timely submitted pursuant to 20 C.F.R. §725.456(b). DX 49. In response to employer's motion, Administrative Law Judge James Guill issued an Order on July 31, 1992, excluding Dr. Robinette's report from the record. DX 48.

administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable 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).

When there is a request for modification, a claimant must establish either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. In the instant case, the administrative law judge properly found that claimant seeks modification based solely on the theory of a mistake in a determination of fact. Decision and Order (D&O) on Modification at 2, n 3. The intended purpose of modification based on a mistake in a determination of fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987). If a claimant generally avers that the ultimate fact was mistakenly decided, the administrative law judge has the authority without more, to modify the denial of benefits. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

On the issue of whether there was a mistake in a determination of fact, the administrative law judge initially noted that claimant was previously denied benefits because Judge Romano found that he failed to establish the existence of pneumoconiosis. D&O on Modification at 2. The administrative law judge further noted his agreement with Judge Romano that the prior x-ray evidence failed to establish pneumoconiosis under 20 C.F.R. §718.202(a)(1).[3] D&O on Modification at 2-3. In support of modification, claimant submitted, *inter alia*, a positive x-ray reading of the December 26, 1991 film by Dr. Robinette, a B-reader. DX 70. In weighing Dr. Robinette's positive reading, the administrative law judge considered that employer also submitted negative readings of multiple x-rays, including the December 26, 1991 x-ray, from such outstanding medical experts as Drs. Wiot and Wheeler. D&O on Modification at 3. The administrative law judge concluded that the "more probative x-ray evidence is still negative for pneumoconiosis." *Id*. Implicit in the administrative law judge's analysis is his consideration of the qualifications of the physicians. *Id*. The record reveals that Drs. Wiot and Wheeler are both Board-certified radiologists and B-readers so they may properly be considered better qualified than Dr. Robinette, who is a B-reader but not a Board-certified radiologist. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); DX 70; Employer's Exhibit (EX) 6. Because the administrative law judge has discretion to consider the qualifications of the readers in weighing the x-ray evidence, we

[3] The administrative law judge correctly noted that the record at the time consisted of four positive x-ray interpretations and twelve negative x-ray interpretations for pneumoconiosis. D&O on Modification at 2-3; DXs 9-11, 21, 24-25, 28.

affirm his finding that the more probative evidence as a whole is negative for pneumoconiosis. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) as supported by substantial evidence.

The administrative law judge properly noted that there is no biopsy evidence of record pursuant to 20 C.F.R. §718.202(a)(2). D&O on Modification at 3. Claimant also may not establish pneumoconiosis under 20 C.F.R. §718.202(a)(3) inasmuch as the administrative law judge correctly noted that he is not eligible for the presumptions contained therein. *Id*.; *see* 20 C.F.R. §§718.304, 718.305 and 718.306.

In addressing whether claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4), the administrative law judge first considered the evidence presented to Judge Romano, noting that Judge Romano assigned greater weight to the opinions of Drs. Castle and Dahhan, that claimant suffers from tobacco induced emphysema and not pneumoconiosis, over the contrary opinions of Drs. Kanwal and Sutherland. D&O on Modification at 3. The administrative law judge specifically noted that Judge Romano's findings under Section 718.202(a)(4) were correct. *Id*. With respect to the evidence presented on modification, the administrative law judge noted that claimant submitted an opinion from Dr. Robinette diagnosing pneumoconiosis. *Id*. However, in weighing Dr. Robinette's opinion, the administrative law judge had discretion to reject Dr. Robinette's diagnosis of pneumoconiosis because the doctor relied on discredited evidence, including his own positive reading of the December 26, 1991 x-ray. *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984); Decision on Modification at 3-4; DX 70. Moreover, the administrative law judge permissibly found Dr. Robinette's opinion outweighed by the contrary opinions of Drs. Branscomb, Dahhan, and Castle, since he considered their findings of no pneumoconiosis to be more consistent with the record evidence as a whole. *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); D&O on Modification at 4; EXs 11, 13-16.

Notwithstanding, the administrative law judge erred by not discussing Dr. Patel's treatment notes concerning his examination of claimant on January 16, 1995. DX 89. Therein, Dr. Patel identifies under "impression" that claimant has "underlying CWP," a finding which must be weighed at Section 718.202(a)(4). *Id*. We, therefore, vacate the administrative law judge's finding that claimant failed to establish pneumoconiosis under 20 C.F.R. §718.202(a)(4), and remand this case for consideration of Dr. Patel's report. *See generally Tackett v. Director, OWCP*, 7 BLR 1-703 1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984).

Accordingly, the administrative law judge's Decision and Order on Modification is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge