BRB No. 97-1058 BLA

BOBBY R. YATES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
T. J. B. MINING, INC.	)	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 Modification - Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Vinyard & Moise), Abingdon, Virginia, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Modification - Denying Benefits (96-BLA-1757) of Administrative Law Judge David W. Di Nardi 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 case is before the Board for the second time. The administrative law judge found that the evidence failed to establish the existence of pneumoconiosis at 20

[1] Claimant is Bobby R. Yates, the miner, who filed an application for benefits with the Department of Labor (DOL) on December 4, 1990, Director's Exhibit 1.

C.F.R. §718.202(a), or that claimant is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204. He then found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied the motion for modification and the claim.

The procedural history of this case is as follows: claimant filed an application for benefits with the Department of Labor (DOL) on December 4, 1990. Director's Exhibit 1. Following a formal hearing held on July 21, 1993, Administrative Law Judge Di Nardi issued a Decision and Order denying the claim dated October 12, 1993. Director's Exhibit 70. Therein, he found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(1) and 718.203, but that the evidence failed to establish total respiratory disability pursuant to Section 718.204(c). Accordingly, the administrative law judge denied the claim. *Id.* Following claimant's appeal, the Board affirmed the administrative law judge's denial of benefits pursuant to Part 718. *Yates v. T. J. B. Mining Inc.*, BRB No. 94-0294 BLA (Sept. 29, 1994)(unpub.). Director's Exhibit 80. The Board denied claimant's motion for reconsideration by Order dated December 8, 1994. Director's Exhibit 82. Claimant then requested modification filing new evidence on September 9, 1995. Director's Exhibit 87. The administrative law judge issued a Show Cause Order on December 31, 1996, ordering the paries to show cause within two weeks regarding why a new hearing was necessary. ALJ Exhibit A. Claimant responded, requesting a hearing so he could testify as to "the worsening of his breathing condition with the passage of time." Claimant's Exhibit A. The administrative law judge issued an Order dated January 22, 1997, denying claimant's request for a new hearing, but instead, gave him until February 14, 1997, to file an affidavit and he left the record open until March 3, 1997. ALJ Exhibit B. Claimant filed an untimely response to the administrative law judge's Order. Claimant's Exhibits D, E. Following employer's objection, the administrative law judge denied admission of claimant's response into the record, because he found it untimely submitted and questioned the credibility of the claimant's signature. Decision and Order at 4. The administrative law judge rendered findings on the record and denied modification in a Decision and Order dated April 18, 1997.

On appeal, claimant initially contends that he was denied due process when the administrative law judge denied his request for a new hearing because he was not provided the opportunity to testify as to his condition and to call expert witnesses. Claimant also challenges the administrative law judge's failure to allow Dr. Robinette to have an opportunity to respond to the invalidation reports of Drs. Castle and Branscomb. Claimant further asserts that the administrative law judge should have provided claimant with "a more even playing field", by affording him a hearing and an opportunity to respond to employer's evidence. Claimant's Brief at 2. Employer, in response, urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not file a

response.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially challenges the administrative law judge's denial of his request for a hearing prior to his adjudication of the motion for modification, asserting that such denial violates his procedural due process. Claimant asserts that he could have documented a worsening of his breathing condition, and could have secured expert testimony to document his medical condition. We reject claimant's contentions. The administrative law judge issued a Show Cause Order so that claimant could reply to the issue of whether a new hearing was necessary. Claimant responded only that he wanted to testify, without noting any desire to present expert testimony. Inasmuch as lay testimony alone is insufficient to establish either the existence of pneumoconiosis or total respiratory disability under 20 C.F.R. Part 718, the administrative law judge did not abuse his discretion in denying claimant a new hearing. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). In addition, although the administrative law judge denied claimant's request for a new hearing, he allowed claimant until February 14, 1997, to submit an affidavit or deposition, and he left the record open until March 3, 1997. ALJ Exhibit B. Claimant submitted a letter purporting to document his condition dated March 4, 1997, which was not received by the administrative law judge until March 10, 1997. The administrative law judge excluded this letter on the grounds that it was submitted untimely and contains a questionable signature that is not verified or attested to.

The Board has held that an administrative law judge has discretion as to whether to grant a hearing in a modification proceeding. *See Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *aff'd on recon.* 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In the instant case, the administrative law judge allowed claimant to submit a written affidavit or disposition regarding his condition, but claimant failed to respond in a timely manner. We hold therefore that the administrative law judge did not abuse his discretion, given the facts of the instant case, and reject claimant's contention, that his due process required remand.

Claimant's only contention with respect to the administrative law judge's findings at Section 718.204(c) is procedural in nature involving the pulmonary function studies of record. Claimant asserts that the administrative law judge failed to allow claimant, and more specifically, Dr. Robinette, to respond to the invalidation reports of Drs. Castle and Branscomb, submitted in February 1997. Claimant contends that a new hearing would have afforded him the opportunity to so respond. Based on claimant's response to the

administrative law judge's Show Cause Order,[2] claimant was granted an opportunity to respond with the evidence relating to his request. Claimant however did not subsequently object to the submission of employer's evidence or request permission to submit written expert testimony until he filed his Petition for Review before the Board. Inasmuch as the administrative law judge left the record open until March 3, 1997 and claimant had an opportunity to respond to the invalidation reports of Drs. Castle and Branscomb, but failed to object to employer's evidence submitted before the record closed or submit rebuttal evidence, we hold therefore that the administrative law judge did not abuse his discretion in the instant case. *See Kovac, supra; Wojtowicz, supra*. As claimant raises no substantive challenge to the administrative law judge's finding that the newly submitted evidence fails to establish total respiratory disability at Section 718.204(c), and we have disposed of his procedural contentions, we affirm this finding as unchallenged. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] In his response to the administrative law judge's Show Cause Order, claimant's counsel stated that claimant "would request an oral hearing so as to testify as to the worsening of his breathing capacity with the passage of time. Although the issue of Mr. Yates' medical condition, is primarily a medical question, he can certainly testify as to a worsening of symptoms he has personally experienced." Claimant's Exhibit A.

Although not raised by any party, we note that the administrative law judge initially correctly references Section 725.310 and the change in conditions requirement, along with the requirement to determine whether a mistake in a determination of fact had been established. Decision and Order at 5. Thereafter, however, he consistently states that claimant is required to establish a material change in conditions and consistently cites Section 725.309. Decision and Order at 6, 19, 20, 21 and 22. It is clear however from the administrative law judge's review of the evidence in the Decision and Order that he considers all of the newly submitted evidence that was submitted with claimant's motion and his previous findings and finds that there has been no change in claimant's condition. We hold therefore that the administrative law judge's error is harmless in the instant case and we affirm the administrative law judge's finding that the evidence fails to establish modification at Section 725.310.[3] *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *see also Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

[3] We hold that it is unnecessary to address claimant's contentions pursuant to Section 718.202(a), as they are rendered moot by our disposition of the case. *See Cochran v. Director, OWCP*, 16 BLR 1-101 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge