BRB Nos. 95-0431 BLA
and 97-1088 BLA

BELVIN P. GIPSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
SAVOY COALS INCORPORATED	)	
	)	
Employer-Petitioner	)	DECISION and ORDER on
	)	RECONSIDERATION *EN BANC*
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	and
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER *EN BANC*
Party-in-Interest	)	

Motion for Reconsideration of the Decision and Order of the Board, and Appeal of the Decision and Order Denying Modification of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Charley Greene Dixon, Jr., Barbourville, Kentucky, for claimant.

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

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

PER CURIAM:

Employer requests reconsideration *en banc* of the Board's Decision and Order in *Gipson v. Savoy Coals, Inc*., BRB No. 95-0431 BLA (May 30, 1995)(unpub.), affirming the award of benefits and appeals the subsequent Decision and Order Denying Modification (96-BLA-0866) of Administrative Law Judge Richard E. Huddleston 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). This case is before the Board for the third time. We discussed fully this claim's procedural history in our prior decision. [1995] *Gipson*, slip op. at 1-2. We now focus only on those procedural aspects relevant to employer's arguments on reconsideration and on appeal of the denial of modification.

After the Board affirmed the award of benefits, employer filed a timely Motion for Reconsideration requesting *en banc* review of the Board's Decision and Order and filed a brief on reconsideration. Director's Exhibit 33 at 66, 68. However, before the Board could act on the motion, employer requested modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 33 at 56, 61. Accordingly, the Board dismissed employer's Motion for Reconsideration, subject to reinstatement, and remanded the case to the district director for modification proceedings. *Gipson v. Savoy Coals, Inc*., BRB Nos. 91-1904 BLA, 92-0687 BLA, and 95-0431 BLA (Aug. 4, 1995)(Order)(unpub.); Director's Exhibit 33 at 311.

The district director denied modification and referred the case to the Office of Administrative Law Judges. The administrative law judge denied modification in a Decision and Order issued on April 9, 1997, concluding that the record failed to demonstrate either a mistake in a determination of fact or a change in conditions under Section 725.310. Accordingly, he again awarded benefits.

Employer appealed from the denial of modification and requested reinstatement of its Motion for Reconsideration. The Board granted reinstatement and indicated that it would address the Motion for Reconsideration together with the appeal of the denial of modification. *Gipson v. Savoy Coals, Inc*., BRB Nos. 95-0431 BLA and 97-1088 BLA (Jul. 2, 1997)(Order)(unpub.). Because employer now concedes on appeal the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), Employer's Brief at 12 n.1, all but one of employer's arguments previously advanced on reconsideration are now moot. We will address the sole issue remaining on reconsideration, and then we will consider employer's arguments on appeal. Claimant has not responded to employer's Motion for Reconsideration or to its appeal. The Director, Office of Workers' Compensation Programs (the Director), has not responded to employer's Motion for Reconsideration but has declined to participate in the appeal.[1]

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 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).

In *Gipson*, the Board held that Dr. Baker's opinion, which attributed claimant's totally disabling respiratory impairment to both smoking and pneumoconiosis, was legally sufficient to support a finding of disability causation pursuant to 20 C.F.R. §718.204(b). [1995] *Gipson*, slip op. at 4. On reconsideration, employer contends that in light of claimant's brief period of coal mine employment and lengthy smoking history, Dr. Baker's opinion is insufficient as a matter of law because it does not demonstrate that

[1] In light of employer's concession on appeal, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

pneumoconiosis was anything more than a *de minimis* causative factor in claimant's respiratory disability. Employer's Brief in Support of Motion for Reconsideration at 12-13.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that evidence that pneumoconiosis plays only a *de minimis* causative role in the miner's respiratory disability is insufficient to establish that the miner's disability is due at least in part to pneumoconiosis pursuant to Section 718.204(b). *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180 (6th Cir. 1997). However, Dr. Baker did not opine that pneumoconiosis played only a *de minimis* causative role. Dr. Baker was aware of claimant's smoking history, yet opined without equivocation that claimant's pulmonary impairment was attributable in part to pneumoconiosis. Director's Exhibits 13, 29. Thus, Dr. Baker's opinion is legally sufficient, if fully credited, to support a finding that the miner's disability was due at least in part to pneumoconiosis pursuant to Section 718.204(b). *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52, 2-63 (6th Cir. 1989). Accordingly, after consideration of employer's contention, we grant employer's motion for reconsideration, but deny the relief requested.

On appeal of the administrative law judge's decision denying modification, employer contends that the administrative law judge conflated his analysis of respiratory disability and disability causation, thereby failing to address the evidence which, employer asserts, demonstrated that a mistake in a determination of fact was made in the administrative law judge's prior decision when he found disability causation established pursuant to Section 718.204(b). Employer's Brief at 13.

Section 725.310 provides that a party may request modification of the terms of an award or denial of benefits within one year on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The administrative law judge has the authority to reconsider all the evidence to determine whether the record demonstrates a change in conditions since the previous denial of benefits or a mistake in a determination of fact in the prior decision. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

In support of its assertion that a mistake in a determination of fact was made in the prior decision, employer submitted a new pulmonary examination report by Dr. Broudy, two reports by physicians who reviewed the medical evidence, and copies of hospitalization records. Dr. Broudy, who is Board-certified in internal and pulmonary medicine, opined that claimant's disabling respiratory impairment was due to smoking, obesity, and congestive heart failure. Director's Exhibit 33 at 27. Dr. Castle, also Board-certified in internal and pulmonary medicine, reviewed the record and concluded that claimant was disabled due to coronary artery disease. Employer's Exhibit 1. Dr. Lane, whose credentials are not of record, reviewed the medical evidence and opined that claimant was disabled due to the effects of smoking. Director's Exhibit 33 at 27. The hospital records in the file related the diagnoses of coronary artery disease, myocardial infarction, hypertension, and chronic

obstructive pulmonary disease.[2] Director's Exhibit 33 at 8; Claimant's Modification Exhibit 1. Based on the evidence that it submitted, employer argued in its brief filed with the administrative law judge on modification that the record "reflect[ed] that [claimant] is disabled by conditions unrelated to coal mine employment, including his back condition,[3] heart disease, and cigarette smoking." Brief on Behalf of Employer and Carrier at 10. (July 11, 1996).

The administrative law judge again found the existence of pneumoconiosis and total respiratory disability due to pneumoconiosis established pursuant to Sections 718.202(a) and 718.204, and denied modification. Decision and Order at 6-7. In so doing, the administrative law judge did not separately analyze the evidence submitted by employer relevant to disability causation at Section 718.204(b). Instead, after finding respiratory disability established, the administrative law judge added that:

> [W]hile there is some evidence that [claimant] suffers from other debilitating conditions, once total pulmonary disability is properly established, a claimant is not disqualified simply because he suffers from other disabling conditions. (Citation omitted). The claimant need only establish that his total pulmonary disability is caused in part [by] his pneumoconiosis. (Citation omitted). I have reviewed the record, including the newly submitted evidence, and find that it does not support a change in conditions or a mistake in fact . . . .

Decision and Order at 7. The administrative law judge cited the correct disability causation standard. *See Adams, supra*. However, by failing to specifically weigh the evidence relevant to disability causation, the administrative law judge failed to address the substance of employer's contention on modification that a mistake in a determination of fact was made at Section 718.204(b). In light of employer's specific assertion that a mistake in a determination of fact was made at causation in the prior decision, evidence of thirty-five to forty years of smoking and six years of coal dust exposure, the diagnosis of coronary artery disease, and the medical opinions by qualified physicians that claimant is disabled due to conditions unrelated to pneumoconiosis, we must vacate the administrative law judge's findings pursuant to Sections 718.204(b) and 725.310 and remand this case for further consideration. On remand, the administrative law judge must weigh all of the evidence

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[2] Under the discharge diagnosis of chronic obstructive pulmonary disease, the hospital records listed "history of black lung," and "[t]obacco abuse, heavy smoker." Director's Exhibit 33 at 8.

[3] The old evidence included a 1989 Social Security Administration disability benefits award for back problems, and a Kentucky Workers' Compensation Board award finding a twenty-five percent permanent occupational disability due to a back injury. Director's Exhibit 28. The date on the state award is illegible.

relevant to disability causation and specifically address employer's assertion that a mistake in a determination of fact has been demonstrated pursuant to Section 725.310. *See Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27, 1-34 (1996). Employer, in this case, bears the burden of persuasion on modification. *Id*.

Accordingly, employer's request for reconsideration is granted but the relief requested is denied. In addition, the administrative law judge's Decision and Order denying modification is affirmed in part and vacated in part, and the case is remanded for further consideration 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

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge