BRB No. 04-0500 BLA

DONNIE BLAKE ADKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENTLAND ELKHORN COAL CORPORATION	)	
	)	
	)	DATE ISSUED: 03/23/2005
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 – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Donnie Blake Adkins, Kimper, Kentucky, *pro se.*[1]

Lois A. Kitts and James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, 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.

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[1] Susie Davis, President of the Kentucky Black Lung Coalminers and Widows Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-0130) of Administrative Law Judge Robert L. Hillyard rendered 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). Claimant filed the instant request for modification on March 12, 2001.[2] Previously, the Board affirmed Administrative Law Judge Clement J. Kichuk's findings, on remand from the United States Court of Appeals for the Sixth Circuit, that the evidence of record was insufficient to establish either invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) or the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Adkins v. Kentland-Elkhorn Coal Corp.*, BRB No. 98-0952 BLA (Apr. 9, 1999)(unpub.). Accordingly, the Board affirmed Judge Kichuk's denial of benefits. Claimant petitioned the Sixth Circuit for review of the Board's Decision and Order, which affirmed it in *Adkins v. Kentland-Elkhorn Coal Corp.*, No. 99-3739 (6th Cir. Mar. 21, 2000)(unpub.). On March 12, 2001, claimant timely requested modification of the prior denial of benefits, and submitted new evidence. Administrative Law Judge Robert L. Hillyard (the administrative law judge), found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)–(4) and found no mistake in a determination of fact in Judge Kichuk's prior denial of benefits or change in claimant's condition pursuant to 20 C.F.R. §725.310 (2000). Specifically, the administrative law judge found that Judge Kichuk did not err in finding the previously submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. § 718.202(a)(1)–(4). Accordingly, benefits were denied.

In response to claimant's appeal, employer urges the Board to affirm the administrative law judge's Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief. While taking no position on the correctness of the administrative law judge's finding at Section 718.202(a) or the ultimate question of claimant's entitlement to benefits, the Director notes that the claim is subject to review under 20 C.F.R. Part 727, and that the administrative law judge failed to consider it thereunder. The Director asserts that since the evidence submitted with claimant's request for modification includes a blood gas study that produced qualifying values under 20 C.F.R.

[2] The early procedural history of this claim is set forth in *Adkins v. Kentland-Elkhorn Coal Corp.*, BRB No. 98-0952 BLA (Apr. 9, 1999)(unpub.).

§727.203(a)(3), the case should be remanded for the administrative law judge to reconsider the evidence. The Director argues that a finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. § 718.202(a)(1)–(4) is not equivalent to a finding that employer has disproved the existence of pneumoconiosis on rebuttal at 20 C.F.R. §727.203(b)(4).

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Modification may be based upon a mistake in a determination of fact. 20 C.F.R. §725.310 (2000).[3] The Sixth Circuit, within whose jurisdiction this case arises, has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Modification may also be based on a change in claimant's condition since the prior denial of benefits. 20 C.F.R. §725.310 (2000). In considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000), an administrative law judge law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the

[3]Although the regulation at 20 C.F.R. §725.310 has been amended, the amendments do not apply to claims, such as the instant claim, which were pending on January 19, 2001. 20 C.F.R. §725.2.

weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In the prior decision, Judge Kichuk found, on remand from the Sixth Circuit, that the evidence was insufficient to establish either invocation of the interim presumption provided at 20 C.F.R. §727.203(a)(1) or the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), findings that were subsequently affirmed by the Board. Consequently, the issue properly before the administrative law judge was whether claimant established a ground for modification at 20 C.F.R. §725.310 (2000).

At 20 C.F.R. §718.202(a)(1), the administrative law judge properly found that, of the newly submitted x-ray interpretations, all of the highly qualified readers interpreted the x-rays as negative.[4] He thus properly found that claimant failed to establish a change in conditions at Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*). Accordingly, we affirm the administrative law judge's finding that the newly submitted x-ray evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1), as it is supported by substantial evidence and is in accordance with law.

At Section 718.202(a)(2), the administrative law judge correctly determined that claimant cannot establish the existence of pneumoconiosis thereunder, as there is no biopsy evidence of record. We thus affirm the administrative law judge's finding at Section 718.202(a)(2).

The administrative law judge also found that none of the presumptions referred to in Section 718.202(a)(3) is applicable, noting, *inter alia*, that 20 C.F.R. §718.305 is not applicable to claims filed after January 1, 1982. *See* 20 C.F.R. §718.305. The instant claim, however, was filed in 1978. Director's Exhibit 1. The administrative law judge's finding is, nonetheless, harmless error, as he ultimately correctly concluded that 20

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[4] Drs. Barrett and Wiot, both dually qualified as Board-certified radiologists and B readers, interpreted the May 23, 2002 x-ray as negative, while Drs. Narra and Sundaram, who have no special radiological qualifications, interpreted this x-ray as positive for pneumoconiosis. Director's Exhibits 179, 182; Employer's Exhibits 1, 11. Dr. Halbert, dually qualified as a Board-certified radiologist and B reader, and Dr. Rosenberg, who has no special radiological qualifications, each interpreted the July 29, 2003 x-ray as negative. Employer's Exhibits 3, 5.

C.F.R. §718.305 does not apply in the instant claim. Administrative Law Judge's February 27, 2004 Decision and Order at 8. Specifically, claimant has established ten years and nine months of coal mine employment, which is less than the fifteen years required for consideration under 20 C.F.R. §718.305. *See* 20 C.F.R. §718.305(a); *see also Adkins v. Kentland-Elkhorn Coal Corp.*, BRB No. 98-0952 BLA (Apr. 9, 1999)(unpublished) at 2 n.4.

Considering the two newly submitted medical reports at 20 C.F.R. §718.202(a)(4), the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis by medical opinion evidence: Dr. Rosenberg opined that claimant did not have coal workers' pneumoconiosis or associated impairment, Employer's Exhibit 3, and Dr. Fino opined that there was "insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis," Employer's Exhibit 9. *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). We thus affirm the administrative law judge's findings that the existence of pneumoconiosis was not established by the newly submitted evidence at Section 718.202(a)(1)-(4) as they are supported by substantial evidence. Consequently, we also affirm the administrative law judge's finding that claimant failed to establish a change in conditions at 20 C.F.R. §725.310 (2000) since the prior denial of benefits. Administrative Law Judge's February 27, 2004 Decision and Order at 8-10.

The administrative law judge further found that there was no mistake in a determination of fact contained in Judge Kichuk's consideration of the x-ray evidence at 20 C.F.R. §718.202(a)(1) or his weighing of the medical opinions at 20 C.F.R. §718.202(a)(4). Specifically, the administrative law judge determined that Judge Kichuk found, consistent with the record before him, that of the thirty-seven x-ray interpretations he considered, the vast majority of those rendered by the most qualified physicians was negative. Administrative Law Judge's February 27, 2004 Decision and Order at 8. The administrative law judge further found that Judge Kichuk's analysis of the previously submitted medical opinions was consistent with the record and the prior holdings of, *inter alia*, the Board and the Sixth Circuit. *Id.* at 9-10. We affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000) in Judge Kichuk's prior denial of benefits, as it is supported by substantial evidence in the record.

In light of the foregoing, we affirm the administrative law judge's denial of claimant's request for modification, as well as his denial of benefits under 20 C.F.R. Part 718.

We next address the applicability of 20 C.F.R. Part 727 to this claim, which was filed in 1978. Director's Exhibit 1. Claims filed after December 31, 1973 and by March

31, 1980 are subject to the regulations at 20 C.F.R. Part 727. *See* 30 U.S.C. § 931; 20 C.F.R. § 718.2. Thus, as the Director correctly asserts, the administrative law judge should have considered this claim pursuant to 20 C.F.R. Part 727, having denied benefits pursuant to 20 C.F.R. Part 718.[5] We, therefore, remand this case to the administrative law judge for further consideration of the claim on modification pursuant to Part 727. On remand, the administrative law judge must consider whether the relevant newly submitted evidence can establish invocation of the interim presumption, *i.e.*, the x-ray interpretations at Section 727.203(a)(1), the pulmonary function study evidence at Section 727.203(a)(2), the blood gas study evidence at Section 727.203(a)(3) or the medical opinion evidence at Section 727.203(a)(4). If the administrative law judge finds invocation of the interim presumption established at any subsection, then claimant has established a change in conditions since the prior denial of benefits. If the administrative law judge determines that claimant successfully established modification of the prior denial, either by proving a change in conditions or a mistake in a determination of fact contained in the prior denial, he must then consider claimant's entitlement to benefits under Part 727 on the merits of the claim.

Based on the foregoing, we affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(1)-(4) and the denial of benefits under 20 C.F.R. Part 718. We remand the case for consideration of claimant's request for modification and entitlement to benefits, if reached, under 20 C.F.R. Part 727.

[5] The administrative law judge's failure to consider the evidence under 20 C.F.R. Part 727 in addition to under 20 C.F.R. Part 718 was not harmless as the record contains evidence that may support a finding of entitlement under Part 727, while not supporting entitlement under Part 718. Specifically, the results of the new blood gas study dated July 29, 2003, *see* Employer's Exhibit 3, would support a finding of invocation at 20 C.F.R. §727.203(a)(3), but would not qualify under 20 C.F.R. Part 718, Appendix C to support a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge