BRB No. 11-0682 BLA

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| FRANK B. GRUBB | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| VALLEY CAMP COAL COMPANY | ) | DATE ISSUED: 07/24/2012 |
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| 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 – Denying Benefits on Modification of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Tiffany B. Davis and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits on Modification (2010-BLA-5126) of Administrative Law Judge Michael P. Lesniak (the administrative law judge), with respect to a claim filed on February 5, 2001, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] The administrative law judge initially noted that claimant based his

[1] The amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30

request for modification on the assertion that the prior denial of benefits contained a mistake in a determination of fact regarding the existence of legal pneumoconiosis. The administrative law judge further found that if claimant established a mistake in a determination of fact, granting his request for modification under 20 C.F.R. §725.310 would render justice under the Act.[2] However, the administrative law judge concluded that, because the newly submitted evidence was insufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), claimant could not prove that his disabling respiratory impairment was due to pneumoconiosis at 20 C.F.R. §718.204(c). Consequently, the administrative law judge denied claimant's request for modification and found that he was not entitled to benefits.

On appeal, claimant argues that the administrative law judge erred in finding that he failed to establish a mistake in a determination of fact as to the existence of legal pneumoconiosis.[3] Employer responds, urging affirmance of the denial of benefits. The

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U.S.C. §921(c)(4), and revived Section 422(l) of the Act, 30 U.S.C. §932(l). The amendments do not apply to this claim, as it was filed before January 1, 2005.

[2] Claimant's initial claim, filed on February 5, 2001, was denied by the district director on May 14, 2002. Director's Exhibit 24. The district director found that, although claimant established that he is totally disabled, he did not prove that he suffered from pneumoconiosis. *Id*. Claimant filed a request for modification on July 22, 2002, which was ultimately denied by the district director on May 2, 2003. Director's Exhibits 26, 30. Claimant requested a hearing and Administrative Law Judge Daniel L. Leland issued a Decision and Order denying benefits, in which he found that claimant did not establish the existence of pneumoconiosis and, therefore, did not establish a change in condition. Director's Exhibits 31, 75. The Board affirmed the denial of benefits. *Grubb v. Valley Camp Coal Co.*, BRB No. 06-0183 BLA (Sept. 22, 2006) (unpub.). On July 17, 2007, claimant filed a request for modification in which he alleged a mistake in a determination of fact regarding the existence of legal pneumoconiosis. Director's Exhibit 83. The district director denied claimant's request. Director's Exhibit 88. Claimant requested a hearing and Judge Leland issued a Decision and Order denying benefits on October 2, 2008, finding that claimant did not prove that he has legal pneumoconiosis and, therefore, he did not establish a basis for modification. Director's Exhibits 90, 111. Claimant did not appeal this decision, but filed his current request for modification on June 9, 2009. Director's Exhibit 112.

[3] Claimant states, "[l]ike the prior modification request, this one is based on mistakes in the determination of facts. [Claimant] challenges the finding that he does not have legal pneumoconiosis." Claimant's Brief at 11.

Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[4]

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[5] 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 considering whether claimant established modification by proving a mistake in a determination of fact as to the existence of legal pneumoconiosis[6] at 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the previous findings of Administrative Law Judge Daniel L. Leland and summarized the newly submitted opinions of Drs. Rosenberg, Cohen and Castle. Decision and Order at 6-7; Director's Exhibit 114; Claimant's Exhibit 1; Employer's Exhibits 1, 3. The administrative law judge credited the opinion of Dr. Rosenberg, that claimant's chronic obstructive pulmonary disease (COPD) is due to smoking, rather than coal dust exposure,[7] and discredited Dr. Cohen's opinion, that claimant's COPD is due to both smoking and coal dust exposure, as Dr. Cohen stated that he could not distinguish between the effects of these causal factors. Decision and Order at 7. Accordingly, the administrative law judge concluded that claimant failed to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and a mistake in a determination of fact at 20 C.F.R. §725.310. *Id.*

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[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant had twenty-five years of coal mine employment and that granting his request for modification would be in the interest of justice. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[6] "Legal" pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory of pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[7] The administrative law judge did not assign weight to the newly submitted opinion of Dr. Castle, that claimant does not suffer from coal workers' pneumoconiosis and that his pulmonary disease is caused by his tobacco usage. Employer's Exhibit 3.

Claimant asserts that, rather than conducting a complete review of the record, the administrative law judge merely summarized the evidence from the previous modification proceeding, and the newly submitted evidence, and "summarily concluded that the evidence does not establish legal pneumoconiosis." Claimant's Brief at 12. Claimant contends that the administrative law judge did not discuss Dr. Castle's newly submitted opinion and argues that, to the extent that the administrative law judge considered the new evidence, his decision does not comply with requirements of the Administrative Procedure Act , 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).[8]

Claimant's allegations of error have merit. Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits, based on a change in conditions or a mistake in a determination of fact. The purpose of allowing 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, cumulative evidence, or merely further reflection on the evidence initially submitted." *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

As claimant alleges, the administrative law judge summarized the newly submitted opinion of Dr. Rosenberg and stated, without explanation, "I again find his opinion well reasoned and documented." Decision and Order at 7. Claimant also maintains correctly that the administrative law judge did not address the significance of Dr. Rosenberg's acknowledgement that his position, that a reduced FEV1/FVC ratio excludes coal dust exposure as a cause of claimant's COPD, conflicts with the Department of Labor's (DOL's) view. Employer's Exhibit 1; *see* 65 Fed. Reg. 79,940-43 (Dec. 20, 2000). With respect to Dr. Cohen's opinion, the administrative law judge did not discuss Dr. Cohen's detailed response to Dr. Rosenberg's assertion that it is possible to identify smoking as the sole cause of claimant's COPD. Director's Exhibit 114 at 20-31, 48-50, 70-80, 101; Claimant's Exhibit 1. In addition, as claimant contends, the administrative law judge did not consider the holding of the United States Court of Appeals for the Fourth Circuit, that a physician need not be able to specifically apportion the extent to which various causal

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[8] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 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).

factors contribute to a respiratory or pulmonary impairment, in order to provide a credible opinion regarding the cause of a miner's impairment. *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *see also Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003). Lastly, as claimant maintains, the administrative law judge did not render any findings as to the newly submitted opinion of Dr. Castle, that smoking is the sole cause of claimant's COPD. Employer's Exhibit 3.

Because the administrative law judge did not consider all relevant evidence, did not fully address the opinions of Drs. Rosenberg and Cohen in light of the applicable law, and did not explain his findings, we must vacate his determination that claimant failed to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4); *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We also vacate, therefore, the administrative law judge's determination that claimant did not establish a mistake in a determination of fact on the issue of legal pneumoconiosis under 20 C.F.R. §725.310.

On remand, the administrative law judge must reconsider whether the evidence submitted on modification, considered in conjunction with the previously submitted evidence, is sufficient to establish a mistake in the prior determination that claimant does not have legal pneumoconiosis. *See Jessee*, 5 F.3d at 725, 18 BLR at 2-28. In so doing, the administrative law judge must address all of the relevant medical opinions and render a finding as to the weight to which each opinion is entitled. When considering the conflicting medical opinions, the administrative law judge must address "the qualifications of the respective physicians, the explanation of their medical findings, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-42, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In addition, the administrative law judge should evaluate the physicians' opinions in conjunction with DOL's discussion of sound medical science in the preamble to the amended definition of legal pneumoconiosis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], F.3d , Nos. 05-1620, 11-1450, 2012 WL 1680838 (4th Cir. May 15, 2012). Finally, the administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165. If the administrative law judge determines that claimant has established the existence of legal pneumoconiosis, and a mistake in a determination of fact, he must address claimant's entitlement to benefits on the merits of the claim.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge