BRB No. 03-0670 BLA

CHARLIE MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/26/2004
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Glen B. Rutherford (Slovis, Rutherford & Weinstein P.L.L.C.), Knoxville, Tennessee, for claimant.

Helen H. Cox (Howard 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.

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

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-0358) of Administrative Law Judge Fletcher E. Campbell, Jr. 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*. (the Act).[1] In a Decision and Order dated May 19,

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726

2000, Administrative Law Judge Richard T. Stansell-Gamm found that because claimant's 1998 claim was filed within a year of the district director's November 26, 1997 denial of his earlier 1995 claim, the 1998 claim was properly considered a request for modification of claimant's 1995 claim. In order to properly consider claimant's request for modification, Judge Stansell-Gamm found it necessary to review the entire record in order to determine whether claimant was entitled to benefits. *Id*. In his consideration of the merits of claimant's 1995 claim, Judge Stansell-Gamm found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Accordingly, Judge Stansell-Gamm denied benefits. *Id.*

By Decision and Order dated June 4, 2001, the Board affirmed Judge Stansell-Gamm's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Moore v. Director, OWCP*, BRB No. 00-0903 BLA (June 4, 2001) (unpublished). The Board, therefore, affirmed Judge Stansell-Gamm's denial of benefits. *Id.* The Board summarily denied claimant's subsequent motion for reconsideration. *Moore v. Director, OWCP*, BRB No. 00-0903 BLA (June 4, 2001) (Order) (unpublished).

Claimant subsequently filed a timely request for modification. Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), Administrative Law Judge Fletcher E. Campbell, Jr. (the administrative law judge) denied claimant's request for modification. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance 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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000),[2] an administrative law judge

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the 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). In the prior decision, Judge Stansell-Gamm found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000), a finding that was subsequently affirmed by the Board. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

The newly submitted medical evidence consists of three medical reports submitted by Drs. Kelley and Rehm. The administrative law judge found that neither Dr. Kelly nor Dr. Rehm stated unequivocally that claimant's chronic obstructive pulmonary disease was attributable, in whole or in part, to his coal dust exposure.[3] Decision and Order at 4-

[3] In a report dated August 9, 2001, Dr. Kelley opined that claimant suffered from severe chronic obstructive pulmonary disease. Director's Exhibit 51. However, Dr. Kelly noted that it was "probably impossible to state with any certainty that one specific environmental exposure was the culprit for [claimant's] pulmonary dysfunction." *Id*. Dr. Kelley opined that "smoking, coal dust exposure or asbestos exposure or any combination of the three *could have* played a role in [claimant's] obstructive airways disease." Director's Exhibit 51 (emphasis added).

In a report dated August 22, 2001, Dr. Rehm opined that claimant had "a significant amount of emphysema *which may possibly* [be] related to coal or related to cigarette smoking history." Director's Exhibit 51 (emphasis added).

In a letter dated March 22, 2002, Dr. Rehm stated:

> I have seen [claimant] in pulmonary consultation for questionable occupational exposure to asbestos and coal dust. The patient has worked in a coal mine for approximately ten to twelve years. He worked as a pipe fitter, welder and had asbestos exposure. He is a previous smoker of about one pack a day. He quit about ten years ago. He does cough up sputum on a daily basis. He cannot go upstairs without being short of breath. He did have pulmonary function tests that did indicate that he had severe obstructive lung disease with a tremendous bronchodilator response. His chest x-rays do not show SROs (small round opacifications) which would be diagnostic of pneumoconiosis from silica exposure.

5. Consequently, the administrative law judge permissibly found that the opinions of Drs. Kelley and Rehm were too equivocal to support a finding of "legal" pneumoconiosis.[4] *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 4-5; Director's Exhibits 51, 53. In light of our affirmance of the administrative law judge's finding that Dr. Rehm's opinion is insufficient to support a finding of pneumoconiosis, we need not address claimant's contention that Dr. Rehm's opinion should have been accorded greater weight based upon its recency and the doctor's qualifications. We, therefore, affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

Modification may also be based upon a mistake in a determination of fact. 20 C.F.R. §725.310 (2000); s*ee Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994). In this case, the administrative law judge found that claimant did not demonstrate a mistake in a determination of fact. Decision and Order at 4-5. The administrative law judge found that the neither the x-ray evidence nor the medical opinion evidence was sufficient to establish the existence of pneumoconiosis. Decision and Order at 5. Claimant contends that the administrative law judge erred in finding the x-ray and medical opinion evidence insufficient to establish the existence of pneumoconiosis. Claimant's statements, however, neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Consequently, we affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

> Physical examination shows very diminished lung sounds. Coal dust exposure *can cause* some obstruction.

Director's Exhibit 55 (emphasis added).

[4] "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).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

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