

BRB No. 11-0764 BLA

STEPHEN R. JOHNSTON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
U.S. STEEL MINING COMPANY, LLC)	DATE ISSUED: 08/17/2012
)	
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 Request for Modification of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Request for Modification (2010-BLA-5286) of Administrative Law Judge Thomas M. Burke, rendered on an initial claim filed on August 25, 2003, 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 relevant procedural history of the case is as follows. On April 28, 2006, Administrative Law Judge Richard A. Morgan issued a Decision and Order Denying Benefits. Pursuant to claimant's appeal, the Board affirmed Judge Morgan's findings that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and total disability at 20 C.F.R. §718.204(b)(2). *Johnston v. U.S. Steel Corp.*, BRB No. 06-0628 BLA, slip op. at 3-4 (Mar. 27, 2007) (unpub.). However, the Board vacated Judge Morgan's determination that claimant failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remanded the case for further consideration. *Id.* at 5.

On July 9, 2008, Judge Morgan issued a Decision and Order on Remand Denying Benefits. Judge Morgan determined that Dr. Forehand's opinion, the only physician's opinion supportive of claimant's burden of proof, was insufficiently reasoned to establish that claimant was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant appealed, and the Board affirmed Judge Morgan's credibility determinations, as they pertained to Dr. Forehand, and also affirmed the denial of benefits. *S.J. [Johnston] v. U.S. Steel Corp.*, BRB No. 08-0726 BLA (June 18, 2009) (unpub.).

On August 4, 2009, claimant requested modification. Director's Exhibit 51. The district director issued a Proposed Decision and Order denying benefits on November 23, 2009. Director's Exhibit 55. Claimant requested a hearing, and the case was assigned to Judge Burke (the administrative law judge), who issued his Decision and Order Denying Request for Modification on July 29, 2011, which is the subject of this appeal.

In evaluating claimant's request for modification, the administrative law judge noted that the only new evidence submitted by claimant was a positive x-ray reading by Dr. Ahmed of a film dated July 20, 2009. *See* Director's Exhibit 50. The administrative law judge found that claimant failed to demonstrate a change in conditions pursuant to 20 C.F.R. §725.310, as the new evidence did not establish that claimant's disability was due to pneumoconiosis.² Furthermore, based on his *de novo* review of the entire record, the

¹ Amendments to the Black Lung Benefits Act, contained in Section 1556 of the Patient Protection and Affordable Care Act, Public Law No. 111-148 (2010), do not apply to this case, based on the filing date of the claim.

² The record reflects that employer submitted additional evidence on modification, including two negative readings for pneumoconiosis of the x-rays dated August 5, 2005 and July 20, 2009, and an examination report by Dr. Zaldivar, wherein Dr. Zaldivar opined that claimant did not have pneumoconiosis. Employer's Exhibits 1-3.

administrative law judge determined that the evidence was insufficient to establish that claimant has either clinical or legal pneumoconiosis,³ and he denied benefits.⁴

On appeal, claimant argues that the administrative law judge erred in determining that claimant does not have pneumoconiosis since that element of entitlement was found to be established by Judge Morgan, and that finding was affirmed by the Board. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Program, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis arising out of coal mine employment, and that he is totally disabled due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Pursuant to 20 C.F.R. §725.310(a), a miner may, at any time before one year after the denial of a claim, file a request for modification on the grounds of a change in conditions or because of a mistake in a determination of fact, including the ultimate fact

³ Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses." 20 C.F.R. §718.201(a)(1). "This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." *Id.* Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

⁴ Because the administrative law judge found that claimant failed to establish the existence of pneumoconiosis, based on all of the evidence of record, he did not reach the issues of total disability or disability causation on the merits.

⁵ The record indicates 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*, 12 BLR 1-200 (1989) (en banc).

of entitlement. 20 C.F.R. §725.310(a); *see Betty B Coal Co. v. Director, OWCP* [Stanley], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). Claimant argues on appeal that the administrative law judge was bound by Judge Morgan's prior finding that claimant established the existence of clinical pneumoconiosis, and erred in revisiting that issue in his consideration of claimant's modification request.⁶ We disagree.

Contrary to claimant's argument, modification proceedings displace traditional notions of res judicata and collateral estoppel. *Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27, 1-32 (1996). Further, the United States Court of Appeals for the Fourth Circuit has stated that an administrative law judge exercises broad discretion on modification and "ha[s] the duty and full authority to review any and all prior findings of fact under the modification procedure." *Jessee*, 5 F.3d at 725, 18 BLR at 2-28. 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'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971).

In this case, claimant's request for modification triggered the administrative law judge's authority to reconsider the entirety of the record relevant to the propriety of the prior denial of benefits. *Jessee*, 5 F.3d at 725, 18 BLR at 2-28; *see also Stanley*, 194 F.3d at 499, 22 BLR at 2-13. Therefore, we reject claimant's assertion of error and conclude that the administrative law judge acted within his discretion in determining that evidence submitted before Judge Morgan, considered in conjunction with the new evidence submitted on modification, did not establish the existence of pneumoconiosis. *See Jessee*, 5 F.3d at 725, 18 BLR at 2-28; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

Although claimant generally states that "the administrative law judge erroneously determined that [he] does not suffer from pneumoconiosis," claimant alleges no specific error with regard to the manner in which the administrative law judge weighed the conflicting x-ray readings or medical opinions at 20 C.F.R. §718.202(a)(2), (4). Because the Board must limit its review to contentions of error that are specifically raised by the parties, we affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(1), (4), and further affirm his conclusion, based on a weighing of all the evidence of record,

⁶ We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that claimant failed to establish a change in conditions, based on the newly submitted evidence, pursuant to 20 C.F.R. §725.310. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

that claimant failed to satisfy his burden of proving that he suffers from pneumoconiosis under 20 C.F.R. §718.202(a).⁷ See 20 C.F.R. §§802.211, 802.301; *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); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the Decision and Order Denying Request for Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁷ Because we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, it is not necessary that we remand the case for the administrative law judge "to evaluate the doctor's opinions on causation." Claimant's Brief at 6.