

BRB No. 11-0252 BLA

DON HAYES, SR.)
)
 Claimant-Respondent)
)
 v.)
)
 ARCH OF THE NORTH FORK,)
 INCORPORATED)
)
 and)
) DATE ISSUED: 02/15/2012
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Modification Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, DC, for employer/carrier.

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

DOLDER, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order on Modification Awarding Benefits (09-BLA-5382) of Administrative Law Judge John P. Sellers, III (the

administrative law judge), rendered on a subsequent claim¹ filed 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).² The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Parts 718 and 725, and credited claimant with twenty years of coal mine employment, as stipulated by the parties. The administrative law judge found that the evidence submitted subsequent to the denial of claimant's initial claim was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby demonstrating a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Reviewing the entire record for a mistake in a determination of fact or a change in conditions sufficient to support modification pursuant to 20 C.F.R. §725.310, the administrative law judge found that the weight of the evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge found that modification was appropriate based on a mistake in Administrative Law Judge Joseph E. Kane's previous determination that claimant's chronic obstructive pulmonary disease (COPD) was not caused by coal dust exposure. Accordingly, benefits were awarded, commencing as of October 1, 2004, the month in which the subsequent claim was filed.

On appeal, employer challenges the administrative law judge's finding of a change in an applicable condition of entitlement under Section 725.309, based on his finding that new evidence established total respiratory disability pursuant to Section 718.204(b). Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish both the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and disability causation pursuant to Section 718.204(c). Lastly, employer

¹ Claimant, Don Hayes, Sr., filed his initial application for benefits on December 19, 1996, which the district director denied on April 17, 1997 for failure to establish the existence of pneumoconiosis arising out of coal mine employment and disability causation. Director's Exhibits 1-113, 1-169. Claimant did not pursue that denial, but filed a subsequent claim for benefits on October 18, 2004, Director's Exhibit 3, which was denied by Administrative Law Judge Joseph E. Kane on February 29, 2008 for failure to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or disability causation pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 94. On June 5, 2008, claimant filed a petition for modification of Judge Kane's denial of his subsequent claim. Director's Exhibit 104.

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the subsequent claim was filed prior to January 1, 2005. Director's Exhibit 3.

maintains that the administrative law judge failed to adequately explain his finding of a mistake in a prior determination of fact pursuant to Section 725.310, and erred in awarding benefits commencing from the filing date of the subsequent claim. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that any error in the administrative law judge's finding of a change in an applicable condition of entitlement under Section 725.309 is harmless, as the administrative law judge conducted a *de novo* review of the evidence of record in its entirety, and the appropriate finding is subsumed in his findings on the merits of entitlement.³

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.⁴ 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).

Initially, employer maintains that a change in an applicable condition of entitlement under Section 725.309 cannot be demonstrated by new evidence of total respiratory disability, because that element of entitlement was not adjudicated against claimant in the district director's denial of claimant's prior claim. Employer's Brief at 10-12. Employer's argument has merit. A review of the record reveals that on April 17, 1997, the district director denied benefits because the evidence did not show that claimant had pneumoconiosis; that the disease was caused by coal mine work; or that claimant was totally disabled by the disease. Director's Exhibit 1-18. The attached explanation indicated that, although claimant's pulmonary function study produced values that qualified for establishing total respiratory disability under the regulations, the "x-ray evidence did not establish the threshold requirement of pneumoconiosis." Director's Exhibit 1-19. Consequently, the finding of a change in an applicable condition of entitlement under Section 725.309 must be based on new evidence establishing the existence of pneumoconiosis or disability causation. *See White v. New White Coal Co.*,

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty years of coal mine employment and total respiratory disability at 20 C.F.R. §718.204(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order on Modification at 4, 18-19.

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 7.

23 BLR 1-1, 1-3 (2004). Because the administrative law judge found the existence of pneumoconiosis and disability causation established, based on new evidence submitted in support of modification of the denial of this subsequent claim,⁵ and he conducted a *de novo* review of the entire record, any error would be harmless if the Board affirms his findings under Sections 718.202 and 718.204(b). However, as we must vacate the administrative law judge's findings on the issues of pneumoconiosis and disability causation for the reasons set forth *infra*, we also vacate his threshold finding of a change in an applicable condition of entitlement under Section 725.309, and remand this case for readjudication of the issue.

Employer next contends that the administrative law judge erred in finding that the weight of the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Employer maintains that the administrative law judge failed to address Dr. Wicker's opinion, and did not provide an adequate explanation for crediting Dr. Mannino's opinion, that coal dust exposure significantly contributed to claimant's COPD, over the contrary opinions of Drs. Broudy, Jarboe, and Rosenberg, in violation of the Administrative Procedure Act (APA), 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). Specifically, employer argues that the administrative law judge selectively analyzed the opinions of Drs. Broudy, Jarboe and Rosenberg, and failed to subject the opinion of Dr. Mannino to the same scrutiny. Noting that Dr. Mannino based his diagnosis upon claimant's "exposure to dusts, fumes and vapors in his working environment," explaining that "[t]here is absolutely no doubt that working in dusty environments can cause and worsen COPD," and that "the degree of lung function impairment in [claimant] is disproportionate to his smoking history," Claimant's Exhibits 3, 4, employer asserts that Dr. Mannino's opinion is speculative, conclusory, and insufficiently reasoned to support a finding of legal pneumoconiosis.⁶ Employer maintains that, by contrast, Drs. Broudy, Jarboe and Rosenberg thoroughly explained

⁵ In originally denying this subsequent claim, Judge Kane also found a change in an applicable condition of entitlement established under 20 C.F.R. §725.309, based on new evidence of total respiratory disability. Director's Exhibit 94.

⁶ Employer properly notes that exposure to coal dust, in and of itself, is not a valid basis for a diagnosis of legal pneumoconiosis, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), and the fact that the degree of impairment exceeds that which one would expect from smoking alone does not necessarily establish that coal dust exposure caused the excess impairment. *See United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999). Moreover, Dr. Mannino's reports do not indicate an awareness of claimant's occupational duties and the extent of his exposure to dust, fumes and vapors. Claimant's Exhibits 3, 4.

how the objective evidence supported their conclusion that claimant's COPD was attributable to smoking, with a possible asthmatic component, and not coal dust exposure. Additionally, employer argues that the administrative law judge failed to address whether Dr. Mannino's statement, that "lesions of progressive massive fibrosis can show a degree of positivity on PET scans, similar to what was seen in [claimant's] scan," Claimant's Exhibit 3, weighs against the credibility of his opinion, given that the administrative law judge found that the x-rays, CT scans and PET scans of record did not establish simple or complicated pneumoconiosis. Employer's Brief at 15-21. Employer's arguments have merit.

After summarizing the medical opinion evidence of record, the administrative law judge determined that Dr. Mannino possessed extensive expertise in pulmonary medicine; that he relied on "an appropriate smoking history;" and that his opinion, which "clearly supports a finding of legal pneumoconiosis," was "credible and entitled to probative weight." Decision and Order on Modification at 25. The administrative law judge then discounted all of the reasons provided by Drs. Broudy, Jarboe and Rosenberg to support their conclusion that claimant's COPD was unrelated to coal dust exposure, finding that these physicians failed to take various possibilities into account, exhibited faulty reasoning, and/or failed to provide adequate explanations for their conclusions. Decision and Order on Modification at 25-29. As the administrative law judge did not explain why Dr. Mannino's opinion was "entitled to probative weight," however, and he did not determine whether the physician adequately explained how the underlying documentation and generalized information derived from the medical literature supported his conclusions regarding this particular claimant, we vacate the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). On remand, the administrative law judge is instructed to reassess the relevant evidence under the same standard of scrutiny, and provide a rationale that comports with the APA in determining whether claimant has satisfied his burden of establishing the existence of pneumoconiosis under Section 718.202(a) by a preponderance of the evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Because the administrative law judge's credibility determinations at Section 718.202(a)(4) affected his weighing of the medical opinion evidence on the issue of disability causation, we also vacate the administrative law judge's findings at Section 718.204(c), for a reevaluation of the evidence on remand.

Lastly, employer challenges the administrative law judge's finding of a mistake in a prior determination of fact based on Dr. Mannino's opinion, and his resultant award of benefits payable from October 2004, the month during which the subsequent claim was

filed. Employer maintains that the administrative law judge failed to explain how the April 29, 2008 and July 20, 2010 reports of Dr. Mannino established a mistake in Judge Kane's February 29, 2008 determination that the evidence before him was insufficient to establish that claimant's COPD was caused by coal dust exposure. Employer asserts that Dr. Mannino's opinion, if credited on remand, supports a finding of a change in conditions, precluding an award of benefits from the filing date of the subsequent claim. Employer's arguments have merit.

Where modification is based on a mistake in fact, and the evidence does not establish the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, benefits are payable beginning with the month during which the claim was filed. 20 C.F.R. §725.503(d)(1). Where modification is based on a change in conditions, however, benefits are precluded for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge, and if the evidence does not establish the month of onset, benefits are payable from the month in which the claimant requested modification. 20 C.F.R. §725.503(d)(2). Consequently, if benefits are awarded on remand, the administrative law judge is directed to provide a rationale that comports with the requirements of the APA in determining whether modification under Section 725.310 is based on a mistake in fact or a change in conditions, and in determining the appropriate date for the commencement of benefits under Section 725.503.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to vacate the administrative law judge's award of benefits and to remand the case for further consideration, as I believe the administrative law judge's findings are supported by substantial evidence and contain no reversible error. Specifically, I would affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established twenty years of coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order on Modification at 4, 18-19. Further, because the administrative law judge found the existence of pneumoconiosis, as well as total disability, established, based on new evidence submitted since the denial of claimant's prior claim, claimant has established a change in an applicable condition of entitlement as a matter of law. Thus, any error in the administrative law judge's findings under 20 C.F.R. §725.309 is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). I would affirm the administrative law judge's findings of pneumoconiosis and disability causation at 20 C.F.R. §§718.202(a)(4), 718.204(c), as he provided valid reasons for discrediting the opinions of the pulmonary experts relied on by employer, and for according determinative weight to the opinion of Dr. Mannino, who possesses impressive credentials⁷ and explained that smoking alone could not have caused claimant's disabling chronic obstructive pulmonary disease. The administrative law judge determined that Dr. Mannino's conclusions were based on physical examination findings, accurate coal mine employment and cigarette smoking histories, and his review of treatment records, chest x-ray films, CT scans and PET scans, pulmonary function studies, medical literature, and Dr. Jarboe's deposition testimony. Decision and Order on Modification at 24-25. Thus, contrary to employer's arguments, the administrative law judge could rationally rely on Dr. Mannino's opinion, as reasoned and documented. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Because the administrative law judge performed a *de novo* review of the entire record and found the evidence sufficient to establish every element of entitlement, I would affirm his finding that modification pursuant to 20 C.F.R. §725.310 is appropriate, and that claimant is entitled to benefits. However, as Dr. Mannino's opinion was submitted in support of modification and appears to establish a change in conditions, rather than a mistake in Judge Kane's finding

⁷ The administrative law judge acknowledged that Dr. Mannino is Board-certified in internal medicine and pulmonary diseases; is an associate professor at the University of Kentucky College of Public Health; and is the Director of the Pulmonary Epidemiology Research Laboratory, with over 100 peer-reviewed publications in the field. Decision and Order on Modification at 25; Director's Exhibit 107-2.

that the evidence before him was insufficient to establish entitlement, I would modify the decision to reflect benefits payable from June 1, 2008, the month in which claimant sought modification of the denial of his subsequent claim. *See* 20 C.F.R. §725.503(d)(2).

BETTY JEAN HALL
Administrative Appeals Judge