BRB No. 97-0825 BLA

CARL ADKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
HELLIER COAL COMPANY	)	
	)	
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Carl Adkins, Pikeville, Kentucky, *pro se*.

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

Edward Waldman (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order - Denying Benefits (95-BLA-2547) of Administrative Law Judge Daniel L. Leland with respect to 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 an application for benefits on May 9, 1972. Director's Exhibit 78. This claim was

initially denied by the Social Security Administration on June 15, 1973. *Id.*. Claimant filed a second application for benefits on December 1, 1975. *Id.*. Inasmuch as his initial claim was still pending, the second claim merged into claimant's first claim. After review by the Department of Labor, the claim was finally denied on May 1, 1980. *Id.*. Claimant filed a third claim on November 9, 1987. Director's Exhibit 1. After this claim was denied by the district director, claimant requested a hearing which was held before Administrative Law Judge Edward J. Murty, Jr., on July 22, 1993. In his Decision and Order, Judge Murty considered the most recent claim on the merits and determined that although there was a reasonable probability that claimant could establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), claimant did not prove that he is totally disabled pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied.

Claimant, through counsel, appealed the denial of benefits to the Board. In a Decision and Order issued on April 26, 1994, the Board affirmed Judge Murty's findings on the merits under Section 718.204(c)(1)-(4) and, therefore, affirmed the denial of benefits. *Adkins v. Hellier Fuel Co.*, BRB No. 94-0151 BLA (Apr. 26, 1994)(unpub.). On January 13, 1995, claimant filed a statement with the district director's office requesting modification of the denial of benefits pursuant to 20 C.F.R. §725.310. Director's Exhibit 71. The district director denied claimant's request and, in accordance with claimant's wishes, transferred the case to the Office of Administrative Law Judges for a hearing. Director's Exhibit 74. The case was assigned to Administrative Law Judge Daniel L. Leland (the administrative law judge). In his Decision and Order - Denying Benefits, the administrative law judge determined that the prior denial contained no mistake in a determination of fact. The administrative law judge further found that the newly submitted evidence did not support a finding of a change in conditions. Accordingly, the administrative law judge denied claimant's request for modification under Section 725.310 and denied benefits. The Director, Office of Workers' Compensation Programs (the Director), has responded to claimant's appeal and asserts that remand is required, as the administrative law judge did not adequately consider whether a mistake of fact was made in the prior denial. Employer filed a response brief in which it specifically opposes the Director's remand request and urges affirmance of the denial of benefits. The Director filed a reply to employer's response brief in which the Director maintains that remand of this case to the administrative law judge is appropriate.[1]

[1]Employer submitted pleadings in response to the reply letter filed by the Director, Office of Workers' Compensation Programs (the Director). The Director moved to strike employer's pleadings on the ground that under the applicable regulations, a party does not have the right to respond to a reply brief. The Board granted the Director's Motion to Strike. *Adkins v. Hellier Fuel Co.*, BRB No. 97-0825

BLA (Nov. 21, 1997)(unpub. Order).

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

With respect to the administrative law judge's finding that the newly submitted evidence does not support a finding of a change in conditions pursuant to Section 725.310, we affirm this determination, as it is rational and supported by substantial evidence. The administrative law judge noted appropriately that the only evidence claimant proffered with his request for modification consisted of Dr. Vuskovich's report of his examination of claimant on March 24, 1995.[2] Director's Exhibit 78. The administrative law judge rationally found that Dr. Vuskovich's report cannot establish a change in conditions, inasmuch as Dr. Vuskovich found no evidence of pneumoconiosis, the objective studies that he obtained are nonqualifying and Dr. Vuskovich concluded that claimant does not suffer from any respiratory or pulmonary impairment.[3] Decision and Order - Denying Benefits at 3; Director's Exhibit 78; *see Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). We affirm, therefore, the administrative law judge's determination that claimant did not establish a change in conditions under Section 725.310. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

---

[2]In considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, an administrative 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 weight of the new evidence is sufficient to establish at least one of the elements of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

[3]A qualifying pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables in Appendices B and C to 20 C.F.R. Part 718. A nonqualifying study exceeds those values.

Regarding the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact under Section 725.310, employer alleges that remand is not necessary for reconsideration of whether the prior denial contained a mistake of fact on two grounds. Employer first contends that under the Board's holding in *Napier v. Director, OWCP*, 17 BLR 1-111 (1993), the Director's failure to identify a specific error in the administrative law judge's "no mistake of fact" determination precludes Board consideration of the Director's argument on this issue. Employer also maintains that inasmuch as a denial of benefits is foreordained on remand, any error by the administrative law judge should be treated as harmless. We reject employer's contention that remand is not necessary in this case.

In *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that Section 725.310 does not require that the analysis of a request for modification adhere rigidly to the two grounds for modification identified in the regulation.[4] Rather, the court ruled, once a request for modification is filed, no matter the grounds stated, if any, the fact-finder "has the authority, if not the duty, to reconsider all of the evidence of record for any mistake of fact or change in conditions." *Worrell*, *supra*, 27 F.3d at 230, 18 BLR at 2-296. Although the court did not explicitly describe the manner in which the administrative law judge is to discharge this duty, the Administrative Procedure Act (APA), 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), requires that in rendering a Decision and Order, the administrative law judge must identify the relevant evidence, discuss it in the context of the regulation at issue, and provide a rationale for his or her findings. *See Wojtowicz v. Duquesne Lighting Co.*, 12 BLR 1-162 (1989).

In the present case, the administrative law judge stated, without elaboration, that:

> Having looked at and considered all of the evidence of record, including both the evidence considered by Judge Murty and any evidence submitted in conjunction with this motion for modification, I see no mistake in a determination of fact.

Decision and Order - Denying Benefits at 3. The administrative law judge's treatment of claimant's request in the present case does not conform to the requirements of the APA or to the holding in *Worrell*, inasmuch as the administrative law judge did not identify the

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. Director's Exhibits 2, 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

evidence that he reconsidered nor did he state the rationale underlying his determination that no mistake of fact was committed in the denial of claimant's third claim. Although employer's citation of *Napier* may be appropriate on its face, *Napier* was issued by the Board more than a year before the Sixth Circuit defined, in *Worrell*, an administrative law judge's duties with respect to the consideration of a request for modification under Section 725.310. In addition, inasmuch as the Sixth Circuit has explicitly held that the *de novo* consideration of evidence is a task that falls solely within the purview of the administrative law judge in his role as fact-finder, *see Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *see also Fagg v. Amax Coal Co.*, 6 BLR 1-107 (1983), we decline to hold that remand is not required merely because the majority of the evidence of record suggests that claimant cannot prove that he is totally disabled due to pneumoconiosis. In order for us to reach the conclusion urged by employer, we would have to engage in fact-finding, a function that we cannot perform. *See Lemar*, *supra*; *Cox*, *supra*; *Fagg*, *supra*. Thus, in light of the fact that the record contains previously submitted evidence which, if fully credited, could establish entitlement to benefits, we vacate the administrative law judge's finding under Section 725.310 regarding the presence of a mistake of fact and remand the case to the administrative law judge for reconsideration of this issue. *See Worrell*, *supra*; *see also Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997). The administrative law judge must set forth his findings in detail and include the underlying rationale. *See Wojtowicz*, *supra*.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge