

BRB No. 93-1979 BLA

LONNIE HOLMES)

)
Claimant-Petitioner)

)

v.

)
DATE ISSUED:

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DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Robert J. Shea, Administrative Law Judge, United States Department of Labor.

Lonnie Holmes, Kerkee, Virginia, *pro se*.

Gary K. Stearman (Thomas S. Williamson, Jr., Solicitor of Labor; 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (92-BLA-0800) of Administrative Law Judge Robert J. Shea affirming the onset date of disability 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). Claimant filed a claim for benefits on April 4, 1973 which was denied by Administrative Law Judge Ellin M. O'Shea in a Decision and Order dated January 16, 1987. Claimant then sent a letter requesting reconsideration and an appeal. In a Decision and Order on Reconsideration, dated

August 3, 1987, Administrative Law Judge O'Shea granted the motion for reconsideration and affirmed the Decision and Order denying benefits. On February 8, 1989, the Board acknowledged receipt of additional evidence from claimant and sent claimant instructions on filing a request for modification. See *Holmes v. Director, OWCP*, BRB No. 87-276 BLA (Feb. 8, 1989) (unpub.). On March 6, 1989, claimant again requested an appeal. In an Order dated August 31, 1989, the Board acknowledged receipt

of the Notice of Appeal and again instructed claimant on the procedures for filing a request for modification. See *Holmes v. Director, OWCP*, BRB Nos. 87-276 BLA and 89-2596 BLA (Aug. 31, 1989)(unpub.). On July 11, 1990, Claimant filed a request for modification of the Board's Order of August 31, 1989. In an Order dated February 5, 1991, the Board dismissed the pending appeal and remanded the case to the district director for consideration of the request for modification. See *Holmes v. Director, OWCP*, BRB No. 89-2596 BLA (Feb. 5, 1991)(unpub.). On October 3, 1991, the district director issued an award of benefits and determined the date of onset of total disability to be March 1, 1988. Claimant, by attorney, sent a letter, dated October 31, 1991, stating that he wished to appeal the onset date to the Office of Administrative Law Judges. By letter dated January 8, 1992, claimant, by counsel, requested that the district director reconsider the onset date of disability and requested that the Board reinstate his original appeal. In the present Decision and Order, the administrative law judge considered the date of onset and affirmed the prior finding of March 1, 1988 as the date of the onset of total disability. Claimant, without the assistance of counsel, appeals the administrative law judge's affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a motion to remand the case to the Office of Administrative Law Judges for consideration of additional evidence and for a determination of whether modification was based on a change of condition or a mistake of fact.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As the Director asserts, the administrative law judge erroneously stated that uncontradicted medical evidence establishes that claimant was not disabled prior to January 16, 1987. The record contains a report from Dr. Joseph F. Smiddy, dated March 14, 1984, in which he states that claimant "would not meet objective criteria for total disability by pneumoconiosis alone, however considering his underlying chronic bronchitis and particularly considering his abnormal pulmonary function study, it would be my opinion that this patient's respiratory impairment in its totality would preclude the type of physical activity required for underground coal mine employment." See Director's Exhibit 46. Administrative Law Judge O'Shea did not admit or consider Dr. Smiddy's opinion in her Decision and Order denying benefits or the Decision and Order on Reconsideration because it was not properly served on the Solicitor's office. See Director's Exhibits 48, 51. In his motion for remand, the Director states that his files now contain Dr. Smiddy's

opinion and asserts that this opinion must now be considered. See Director's Motion to Remand at 3 n. 1. As the administrative law judge is required to consider all relevant evidence of record in determining the onset date of disability and must assess the credibility of that evidence, the administrative law judge's Decision and Order is vacated and the case is remanded for the administrative law judge to consider and weigh all relevant evidence of record, including Dr. Smiddy's report, in determining the date of onset of total disability. See *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); see also *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Further, as neither the administrative law judge nor the district director has previously stated whether modification pursuant to 20 C.F.R. §725.310 was granted based on a change in condition or a mistake in a determination of fact, on remand the administrative law judge must render a determination on this issue as it is relevant to the onset date of disability.¹ See generally *Eifler v. Peabody Coal Co.*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991).

Accordingly, the administrative law judge's Decision and Order affirming the onset date of disability is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN

¹If claimant's modification is based on a change in condition, the Director concedes that benefits are payable from September, 1986, the month following claimant's initial hearing before an administrative law judge. See Director's Motion to Remand at 3. If the modification is based on a mistake in a determination of fact, benefits may be payable prior to the original hearing date. See generally *Eifler, supra*.

Administrative Appeals Judge