BRB No. 99-0764 BLA

JENNINGS WATTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order - Motion for Reconsideration of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Jennings Watts, Littcarr, Kentucky, *pro se*.

Jeffrey S. Goldberg (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judge.

PER CURIAM:

Claimant[1], without the assistance of counsel, appeals the Decision and Order and Supplemental Decision and Order - Motion for Reconsideration (1998-BLA-831) of Administrative Law Judge Donald W. Mosser 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). This case is before the Board for the fifth time. The administrative law judge found that because the newly submitted evidence, which he considered in conjunction with the prior evidence, is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4) or 410.414, claimant failed to establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. The administrative law judge affirmed his Decision and Order denying benefits on reconsideration.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), but to vacate the denial of benefits and remand the claim for the administrative law judge to

[1]Claimant is Jennings Watts, the miner, who initially filed a Part B claim for benefits with the Social Security Administration on December 12, 1972, which was denied on December 22, 1976. Director's Exhibit 26. Claimant filed the instant claim for benefits with the Department of Labor on February 19, 1976. Director's Exhibit 1. After denials by the administrative law judge in 1987, 1991, and 1994, this claim was last denied by the administrative law judge on February 28, 1996 because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and the denial was affirmed by the Board on appeal. Director's Exhibits 65, 70; *Watts v. Director, OWCP*, BRB No. 96-0846 BLA (Jan. 29, 1997)(unpub.). Claimant timely filed a petition for modification pursuant to 20 C.F.R. §725.310 on September 30, 1997. Director's Exhibit 75.

reconsider the evidence regarding the length of claimant's coal mine employment, and if necessary, to determine whether claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to 20 C.F.R. §725.310, a party may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or if there was a mistake in a determination of fact in the earlier decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in determining whether claimant has established a mistake in a determination of fact pursuant to Section 725.310, the administrative law judge must consider all of the evidence of record to determine if the evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *see also Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), modifying 14 BLR 1-156 (1990); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The court also held that the scope of modification extends to whether the "ultimate fact (disability due to pneumoconiosis) was wrongly decided...." *Worrell, supra.*

Pursuant to Section 725.310, the administrative law judge considered the newly submitted evidence, which consists of the opinion of Dr. Stumbo, in conjunction with the previously submitted evidence and found that claimant failed to establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(4) or 410.414. Decision and Order at 5-6. In a report dated November 12, 1997, Dr. Stumbo opined that there is a change in claimant's condition, that claimant is having "more frequent occurences [*sic*] of congestion and recurrent bronchitis," that he now requires nebulizer treatments every six hours due to his condition, and that it is the doctor's opinion that claimant's black lung disease is a contributing factor to these medical problems. Director's Exhibit 78. The administrative law judge rationally concluded that Dr. Stumbo's opinion is not reasoned or documented because he sets forth no clinical findings, observations, critical facts or data upon which he based his diagnosis of black lung disease and because he provides no reasoning for his conclusion that claimant has black lung disease and that it is a contributing factor in claimant's medical problems. Decision and Order at 5; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989)*; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Inasmuch as

claimant submitted no other evidence in support of his petition for modification, the administrative law judge acted within his discretion in determining that the newly submitted evidence considered in conjunction with the previously submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Sections 718.202(a) and 410.414. Decision and Order at 6; *Worrell, supra; Lafferty, supra.* Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Sections 718.202(a) and 410.414.

The Director, however, requests remand of the case to the administrative law judge for reconsideration of the evidence relevant to the length of the miner's coal mine employment. Director's Brief at 13-15. In the initial Decision and Order of June 18, 1987, the administrative law judge found that claimant established that he worked at the Troy mine for one and one-half years during the years 1940-1942, that social security records supported a finding that claimant worked at Blue Bird Mining Company for three and three-quarter years between 1946 and 1948, and that claimant established that he worked at Amburgy Coal Company for a total of two years during the years 1953-1956 for a total coal mine employment history of seven and one-quarter years. 1987 Decision and Order at 3. The administrative law judge affirmed these findings on reconsideration. As a result, the administrative law judge found that claimant was not entitled to the interim presumption

pursuant to 20 C.F.R. Part 727 because he has less than ten years of coal mine employment.[2] 1987 Decision and Order at 4.

[2]20 C.F.R. §727.203(a) sets forth the medical criteria that qualified miners or survivors may use to invoke the interim presumption of total disability or death due to pneumoconiosis arising out of coal mine employment. Once invoked, the presumption establishes the four elements of eligibility under the Act: 1) the existence of pneumoconiosis; 2) that the pneumoconiosis arose out of coal mine employment 3) the totally disabling nature of the disease; 4) the causal connection between the total disability and pneumoconiosis (or death due to pneumoconiosis). These elements of eligibility are presumed if claimant establishes at least ten years of coal mine employment and if claimant meets one of five medical requirements: (1) a chest x-ray, biopsy, or autopsy establishes the existence of pneumoconiosis; (2) ventilatory studies establish the presence of a chronic respiratory or pulmonary disease of a specified severity; (3) blood gas studies demonstrate the presence of an impairment in the transfer of oxygen from the lungs to the blood; (4) other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment; or (5) in the case of a deceased miner where no medical evidence is available, the affidavit of a survivor with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §727.203(a)(1)-(a)(5); *Mullins Coal Co., Inc. of Virginia v. Director, OWCP,* 484 U.S. 135, 108 S.Ct. 427, 11 BLR 2-1 (1987).

In making his finding that claimant established only one and one-half years of work at the Troy mine, the administrative law judge noted that claimant testified that he worked three to four days a week and "some of every month." 1987 Decision and Order at 3; Hearing Transcript at 13. The administrative law judge further noted that claimant testified that he did not work as much during the summer as during the winter and that he only worked in the mines through July of 1942. 1987 Decision and Order at 3; Hearing Transcript at 28. The administrative law judge then found that claimant "has not established three years of full-time employment with his father ..." and credited him with only 1-1/2 years of coal mine employment. 1987 Decision and Order at 3. Additionally, in his Decision and Order on Reconsideration, the administrative law judge re-states claimant's testimony and concludes that he affirms his "initial determination to credit the miner with 1-1/2 years, slightly over half of the claimed employment." 1987 Decision and Order on Reconsideration. While the administrative law judge states that the record does not support a finding of three years of full-time employment, the administrative law judge does not provide an explanation for how he determined that claimant was entitled to only one and one-half years of coal mine employment as opposed to any greater number of years.

The administrative law judge's failure to provide an explanation for his determination that claimant's testimony supports a finding of only one and one-half years of coal mine employment is in violation of the Administrative Procedure Act (APA), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 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 U.S.C. §932(a). The failure of the administrative law judge to address all relevant evidence, explain his rationale, or clearly indicate the specific statutory or regulatory provisions involved in his decision, requires remand. An administrative law judge must explain the relationship between the findings and conclusions and independently evaluate the evidence of record. If there is no independent evaluation of the evidence, the parties are deprived of their rights. *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *see Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981).

Further, regarding the administrative law judge's finding that claimant is entitled to only two years of coal mine employment at Amburgy Coal Co. (Amburgy), the administrative law judge states that claimant testified that he only worked from two to five hours each night and that this does not constitute full-time employment. 1987 Decision and Order at 3. The administrative law judge then credited claimant with two years of employment at Amburgy as opposed to the four years alleged by claimant. *Id.* However, subsequent to the administrative law judge's Decision and Order, the United States Court of Appeals for the Sixth Circuit issued *Griffith v. Director, OWCP*, 868 F.2d 847, 12 BLR 2-185 (6th Cir. 1989), which states that a working day means any day or part of a day for which

a miner received pay for work as a miner. *Griffith, supra.* Because it appears that the administrative law judge credited claimant with half of the alleged years because he only worked half a day during the years of 1953-1956, the administrative law judge must re-calculate the number of years that claimant worked at Amburgy based on the court's holding in *Griffith.* Consequently, we vacate the administrative law judge's findings regarding the length of claimant's coal mine employment and remand the claim for the administrative law judge to reconsider the evidence relevant to this issue to determine the amount of claimant's coal mine employment, and if necessary, to determine whether claimant is entitled to invocation of the interim presumption pursuant to Section 727.203(a).

Accordingly, the administrative law judge's Decision and Order denying benefits and Supplemental Decision and Order on Reconsideration are affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge