BRB No. 07-0654 BLA

W.H.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TORIE MINING INCORPORATED/ BRANHAM AND BAKER UNDERGROUND	)	DATE ISSUED: 04/28/2008
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denial of Employer's Request for Modification and Order Denying Employer's Motion to Compel of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, P.S.C., Pikeville, Kentucky, for claimant.

Timothy J. Walker (Ferreri & Fogle), Lexington, Kentucky, for employer.

Richard A. Seid (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; 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, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (06-BLA-0029) of Administrative Law Judge Daniel F. Solomon denying employer's request for modification of 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).[1] Employer also appeals from the administrative law judge's November 6, 2006 Order denying employer's Motion to Compel claimant to undergo a new medical examination. This claim was before the Board previously.[2] In the most recent appeal, the Board affirmed the April 9, 2002 Decision and Order on Remand Awarding Benefits of Administrative Law Judge Thomas F. Phalen, Jr., finding that claimant established entitlement to benefits. [*W.H.B.*] *v. Torie Mining Inc.*, BRB No. 02-0549 BLA (Apr. 29, 2003)(unpub.).[3]

On October 14, 2003, employer requested modification of the award of benefits, alleging a mistake in the original determination of fact. On October 25, 2005, the district director issued a Proposed Decision and Order denying employer's request for modification of the award of benefits. Employer requested a hearing, and the case was transferred to the Office of Administrative Law Judges. Prior to the hearing, on August 15, 2006, employer filed a Motion to Compel claimant to undergo a new physical examination and medical testing. In a response dated August 11, 2006, claimant objected to employer's Motion. By Order dated August 23, 2006, Administrative Law Judge Daniel F. Solomon (the administrative law judge) denied employer's Motion to Compel on the ground that employer had not raised a credible issue pertaining to the validity of the original adjudication of disability. The administrative law judge further found, however, that if claimant submitted an additional medical opinion based upon a new examination, then employer would be entitled to have claimant examined. Employer

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The current claim was filed on June 29, 1998. Director's Exhibit 1. The complete procedural history of this case, set forth in the Board's prior decisions in [*W.H.B*] *v. Torie Mining Inc.*, BRB No. 01-0217 BLA (Oct. 19, 2001)(unpub.), and [*W.H.B.*] *v. Torie Mining Inc.*, BRB No. 02-0549 BLA (Apr. 29, 2003)(unpub.), is incorporated herein by reference.

[3] When the initial claim was on appeal to the Board, employer was identified as Torie Mining. It is unclear from the record why the designation was changed. However, as employer does not contest its status as responsible operator, it appears this was a change in name only.

requested reconsideration, which was denied by Order dated November 6, 2006, on the grounds that claimant had not submitted the results of a new examination, and employer had again failed to raise a credible issue pertaining to the validity of the original adjudication of disability.

Following the hearing, held on November 1, 2006, in a Decision and Order dated March 27, 2007, the administrative law judge noted that employer submitted several x-ray re-readings, as well as depositions from Dr. Broudy and Dr. Potter, in support of its contention that the prior administrative law judge made a mistake in a determination of fact in awarding benefits. Following his review of the findings on the previously submitted evidence made by Judge Phalen, and his consideration of the newly submitted evidence, the administrative law judge determined that employer had not established a basis for modification based on a mistake of fact.[4] Accordingly, the administrative law judge denied employer's modification request.

On appeal, employer argues that the administrative law judge applied an incorrect burden of proof in his consideration of the evidence and arguments on modification. Employer further contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and relevant to the cause of claimant's total respiratory disability pursuant to 20 C.F.R. §718.204(c). In addition, employer asserts that the administrative law judge erred in denying its Motion to Compel claimant to undergo a new medical examination. Claimant responds, urging affirmance of the administrative law judge's denial of modification, and of the administrative law judge's denial of employer's Motion to Compel. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response, contending that the administrative law judge properly applied the burden of proof, and noting that employer was not automatically entitled to have claimant undergo a new examination and testing.

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. 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).

[4] In the Decision and Order, the administrative law judge erroneously stated that he was granting claimant's request for modification on the grounds that he had proved all of the elements formerly found against him and, therefore, had established a change in conditions. Decision and Order at 13. As set forth above, however, the procedural history of this case reflects that it was employer who sought modification, based on a mistake in fact, of the prior award of benefits to claimant.

Initially, we reject employer's argument that the administrative law judge applied an incorrect burden of proof in evaluating the evidence on modification. Employer's Brief at 15. While employer may establish a basis for modification of the award of benefits by establishing either a change in conditions since the issuance of the previous decision or a mistake in a determination of fact in the previous decision, 20 C.F.R. §725.310(a) (2000); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993), as the Director correctly asserts, the burden of proof to establish a basis for modifying the award of benefits rests with employer. Claimant does *not* have the burden to reestablish his entitlement to benefits. *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997); Director's Brief at 2.

We find merit, however, in employer's contention that the administrative law judge erred in his evaluation of the medical opinion evidence relevant to the issue of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Initially, employer contends, correctly, that the administrative law judge erred in discrediting the opinions of Drs. Broudy and Fino, that claimant is not disabled from a respiratory standpoint, because they did not diagnose pneumoconiosis, contrary to the administrative law judge's own findings. Decision and Order at 12; Employer's Brief at 21; Director's Exhibits 25, 43, 50, 89. Unlike the issues of the existence of pneumoconiosis and disability causation, which may be linked, *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), the issues of pneumoconiosis and total respiratory disability are distinct and separate. 20 C.F.R. §§718.202(a); 718.204(b)(1). Thus, a physician's opinion as to the existence of pneumoconiosis does not bear on his opinion as to the existence of a totally disabling respiratory impairment.

In addition, while the administrative law judge also discredited Dr. Broudy's opinion because the doctor diagnosed a mild impairment, which the administrative law judge found would prevent claimant from performing his usual coal mine work, the administrative law judge did not give any additional reason for discrediting the opinion of Dr. Fino. Decision and Order at 12. Moreover, as employer contends, the administrative law judge failed to properly analyze the remaining evidence in crediting, as reasoned, the opinions of Drs. Younes, Baker, and Potter, that, presumably, are the basis for the administrative law judge's finding that a mild impairment necessarily precludes claimant from performing his usual coal mine work. Employer's Brief at 19-21; Director's Exhibits 11, 24, 33, 34, 108. Thus, the administrative law judge's additional reason for discrediting Dr. Broudy is also called into question.

Specifically, in evaluating the opinions of Drs. Younes, Baker, and Potter, relevant to whether claimant is totally disabled due to a respiratory impairment, the administrative law judge stated:

> Dr. Baker and Dr. Potter both note that smoking and pneumoconiosis significantly contributed to total disability. I accept the [c]laimant's testimony that his work required heavy lifting and require[d] significant stooping and crawling. I accept Dr. Baker's and Dr. Potter's findings that the [c]laimant has severe obstructive airway disease constituting both clinical and legal pneumoconiosis and which preclude past relevant work. Based on reasons more fully set forth above in the discussions of pneumoconiosis and total disability,[5] I accept this premise.
>
> Drs. Younes, Baker and Potter rendered opinions that [c]laimant is unable to return to his usual coal mine employment or comparable work due to his respiratory impairment. Dr. Baker even went so far as to note that [c]laimant is 100% occupationally disabled from working in the mines or similar dusty occupations.

Decision and Order at 12.

Initially, we note that it was error for the administrative law judge to simply "accept," without critical analysis, the opinions of Drs. Younes, Baker, and Potter as supporting a finding that claimant has a totally disabling respiratory impairment. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Decision and Order at 12.

Further contrary to the administrative law judge's statement, quoted above, neither Dr. Baker nor Dr. Potter diagnosed "severe obstructive airway disease." Decision and Order at 12. Rather, Dr. Potter diagnosed "significant obstructive lung disease" resulting in a "moderate impairment" and Dr. Baker diagnosed a Class II impairment with a *mild* obstructive ventilatory defect. Director's Exhibits 24, 42, 108. Moreover, the administrative law judge did not explain his conclusion that Dr. Baker's opinion, that claimant has a Class II impairment and is 100% disabled for working in the mines and *similar dusty occupations*, supports a finding of total disability and is not merely an admonition against further dust exposure. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); Employer's Brief at 20; Director's Exhibit 24.

[5] A review of the administrative law judge's decision does not reveal any additional "reasons more fully set forth above" relevant to the issue of total disability. Decision and Order at 12. The administrative law judge's discussion of total disability on page twelve of the decision is the first discussion of this issue.

In addition, as employer asserts, while Dr. Younes' disability opinion is based in part on a pulmonary function study that he stated showed "severe obstructive impairment," Dr. Fino opined that the same test showed only "mild obstruction with reversibility following the use of bronchodilators," and the administrative law judge did not resolve this discrepancy. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Employer's Brief at 20-21; Director's Exhibits 11, 43.

Therefore, because the administrative law judge improperly discredited the opinions of Drs. Broudy and Fino, and further failed to explain his rationale for crediting the opinions of Drs. Younes, Baker, and Potter, we vacate the administrative law judge's finding as to the medical opinion evidence relevant to the issue of total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

Employer next contends that the administrative law judge erred in his evaluation of the medical opinions relevant to the issue of the cause of claimant's totally disabling respiratory impairment, at 20 C.F.R. §718.204(c). Specifically, employer contends that in discrediting the opinions of Drs. Broudy and Fino, that pneumoconiosis did not contribute to claimant's disability, the administrative law judge selectively analyzed the opinions. Employer's Brief at 24. Employer further asserts that the administrative law judge erred in crediting, as unequivocal, the contrary opinion of Dr. Younes. Employer's Brief at 23. We agree.

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge discredited the opinions of Drs. Broudy and Fino solely because they did not diagnose pneumoconiosis, contrary to the administrative law judge's own findings. Decision and Order at 13; Director's Exhibits 25, 43, 50, 89. As employer correctly asserts, however, the administrative law judge failed to address the fact that both Drs. Broudy and Fino went on to state that, even if they assumed that claimant had simple pneumoconiosis, their opinion as to whether it contributed to claimant's disabling respiratory condition would not change. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; Director's Exhibits 43, 89. Thus, on remand, the administrative law judge must consider this aspect of the physicians' opinions.

In addition, in crediting the opinion of Dr. Younes, as supportive of a finding that pneumoconiosis contributed to claimant's total respiratory disability, the administrative law judge stated that Dr. Younes "unequivocally found that [c]laimant suffers from pneumoconiosis due to cigarette smoking and coal dust exposure." Decision and Order at 12. We note, however, that this statement appears to address the cause of claimant's pneumoconiosis, not the cause of claimant's respiratory disability. Director's Exhibit 11. Moreover, the administrative law judge did not explain his crediting of Dr. Younes'

opinion as unequivocal in light of the physician's statements that claimant's "impairment is caused primarily by cigarette smoking" and that "occupational dust exposure *may* be a contributing factor." *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000)*; Griffith v. Director, OWCP*, 49 F.3d 184, 186-7, 19 BLR 2-111, 2-117 (6th Cir. 1995); Decision and Order at 8; Director's Exhibit 11. Thus, on remand, the administrative law judge must reconsider the opinions of Drs. Broudy, Fino, and Younes, and fully explain his reasons for crediting or discrediting their opinions. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6.

Finally, we hold that, on remand, the administrative law judge must issue a more complete decision explaining his denial of employer's Motion to Compel claimant to undergo a new medical examination. First, we note that, contrary to employer's contention, in considering employer's request for a new examination, both initially, and on reconsideration, the administrative law judge applied the proper standard by requiring employer to establish that there is "an issue pertaining to the validity of the original adjudication of disability" so that an order compelling claimant to submit to examinations or tests would be in the interest of justice. 20 C.F.R. §718.404(b) (2000); *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173, 1-179 (1999); Administrative Law Judge's Orders dated August 26, 2003 and November 6, 2006. Employer is not automatically entitled to have claimant re-examined as a matter of right on modification. *See Selak*, 21 BLR at 1-179. However, in finally denying employer's motion, the administrative law judge simply stated that he had been fully advised of the arguments presented by employer, claimant, and the Director, and found, without further explanation, that employer had "not proffered a valid reason to compel an examination." Administrative Law Judge's Order dated November 6, 2006.

The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). In order to determine whether the administrative law judge properly denied employer's motion to compel, the Board must have before it the administrative law judge's "reasons or basis therefor . . . ." 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); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998)(observing that a function of Section 557(c)(3)(A) is to permit appellate review); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). As the administrative law judge's ruling does not allow us to conduct a proper appellate review of his holdings, on remand, the administrative law judge must reconsider employer's motion to compel a new medical examination and fully explain the rationale for his findings. 5 U.S.C. §557(c)(3)(A).

Accordingly, the administrative law judge's Decision and Order Denial of Employer's Request for Modification and Order Denying Employer's Motion to Compel are affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring in part, and dissenting in part:

I respectfully dissent from the majority's determination to vacate the administrative law judge's denial of employer's Motion to Compel. Employer based its request for a new examination on its contention that Judge Phalen erred in the initial proceedings by according increased weight to Dr. Potter based on his treating physician status. Specifically, employer contended that because Dr. Potter's opinions were formed at a time when he was not yet claimant's treating physician, his opinion was not entitled to increased weight. Hearing Tr. at 19; Employer's Motion for Reconsideration at 4. However, in support of its request for modification, employer deposed Dr. Potter regarding his treating relationship with claimant, and employer has not explained how a new medical examination, by another physician, would further assist the administrative law judge, on remand, to determine whether Judge Phalen erred in according treating physician status to Dr. Potter. Thus, employer has not shown how Judge Phalen's mistake, if any, in granting treating physician status to Dr. Potter, calls into question the validity of the prior award such that an order compelling claimant to submit to examinations or tests would be in the interest of justice. 20 C.F.R. §718.404(b) (2000);

Selak v. Wyoming Pocahontas Land Co., 21 BLR 1-173, 1-179 (1999). Therefore, I would affirm the administrative law judge's denial of employer's Motion to Compel on the ground that employer has not established that the administrative law judge abused his discretion in denying employer's request. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

I concur in all other respects in the majority opinion.

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BETTY JEAN HALL
Administrative Appeals Judge