

BRB No. 08-0535 BLA

G.C.)
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 Claimant-Petitioner)
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 v.)
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 JAMES RIVER COAL SERVICE)
 COMPANY)
)
 and)
) DATE ISSUED: 02/27/2009
 JAMES RIVER COAL COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Reconsideration of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John Hunt Morgan, Hyden, Kentucky, for claimant.

Paul E. Jones and Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Rita Roppolo (Carol A. DeDeo, Deputy Solicitor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Decision and Order on Reconsideration (07-BLA-5067) of Administrative Law Judge Thomas F. Phalen, Jr. granting modification 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 involves a claim filed on March 17, 2005. In a Proposed Decision and Order dated December 27, 2005, the district director awarded benefits. Based upon employer's failure to timely respond, the district director's decision became "final and effective" pursuant to 20 C.F.R. §725.419(d).

Employer filed a request for modification on March 10, 2006. 20 C.F.R. §725.310. After crediting claimant with at least twenty-eight years of coal mine employment,¹ the administrative law judge found that a preponderance of the evidence did not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge, therefore, found that the evidence revealed that a mistake in a determination of fact had occurred in the prior award of benefits. Consequently, the administrative law judge granted employer's request for modification and denied benefits. For the "purpose of completeness," the administrative law judge further found that the preponderance of the evidence also did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing "a second mistake in a determination of fact in the previous award of benefits."

The Director, Office of Workers' Compensation Programs (the Director), filed a request for reconsideration, arguing that the administrative law judge, in considering employer's request for modification, incorrectly shifted the burden of proof from employer to claimant. In a Decision and Order on Reconsideration dated March 27, 2008, the administrative law judge denied the Director's motion.

On appeal, claimant contends that the administrative law judge failed to apply the correct burden of proof in evaluating the evidence on modification. Employer responds in support of the administrative law judge's denial of benefits. The Director has filed a response brief, arguing that the administrative law judge improperly put the burden on claimant, rather than employer, in considering employer's request for modification. The Director also contends that that the administrative law judge erred in his consideration of the medical evidence.

¹ The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

Claimant and the Director contend that the administrative law judge impermissibly shifted the burden of proof on modification from employer to claimant. We agree. 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); *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), 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. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997). Employer, as the proponent of an order terminating an award of benefits, bears the burden of disproving at least one element of entitlement. *Id.*; *see also Branham v. BethEnergy Mines*, 20 BLR 1-27 (1996).

In the present case, the administrative law judge considered all of the evidence of record, and readjudicated the claim *de novo* with the burden on claimant to establish entitlement, rather than placing the burden of proof on employer to justify modification of the prior decision.² Consequently, we vacate the administrative law judge's granting

² The administrative law judge's statements demonstrate that he improperly placed the burden of establishing modification on claimant. For example, the administrative law judge, in considering the issue of the existence of pneumoconiosis, stated that "[c]laimant has not proven a change of conditions under subsection (a)(1)." Decision and Order at 15 (emphasis added). The administrative law judge also stated that "[c]laimant has not established the existence of pneumoconiosis through biopsy evidence under subsection (a)(2)" and "[c]laimant cannot establish pneumoconiosis under subsection (a)(3)." *Id.* In regard to the issue of total disability, the administrative law judge similarly found that "[c]laimant has failed to establish the existence of total disability under subsection (b)(2)(iii)." Decision and Order at 19 (emphasis added).

Moreover, the administrative law judge found that the evidence "[did] not support a finding of pneumoconiosis . . ." and "[did] not support a finding of total pulmonary disability." Decision and Order at 18, 20 (emphasis added). The administrative law judge should have addressed whether employer effectively disproved the existence of pneumoconiosis or a totally disabling pulmonary impairment, not whether the evidence was insufficient to support these elements of entitlement.

of employer's request for modification at 20 C.F.R. §725.310 and his denial of benefits, and remand this case for the administrative law judge to consider whether employer has satisfied its burden of disproving either the existence of pneumoconiosis or a totally disabling respiratory impairment. *See Rambo*, 521 U.S. at 139; *Branham*, 20 BLR at 1-34.

In the interest of judicial economy, we will address the Director's contentions of error regarding the administrative law judge's weighing of the medical evidence. The Director initially contends that the administrative law judge erred in his consideration of Dr. Dahhan's opinion pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge found that Dr. Dahhan's opinion, that claimant's lung condition was attributable to cigarette smoking, was supported by claimant's bronchodilator response on his pulmonary function study. Decision and Order at 16. Dr. Dahhan explained that claimant's response to bronchodilator treatment indicated that his respiratory defect was "partially reversible," and that this finding was "inconsistent with the permanent adverse [e]ffects of coal dust on the respiratory system." Director's Exhibit 13; Employer's Exhibit 2 at 10. However, as the Director notes, the administrative law judge did not address the fact that Dr. Dahhan subsequently acknowledged that coal dust exposure can cause a partially reversible obstructive ventilatory impairment. Employer's Exhibit 2 at 16. Consequently, in his consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the effect of this apparent inconsistency on the probative value of Dr. Dahhan's opinion. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

The Director also argues that the administrative law judge did not consider all of the relevant evidence in his consideration of the issue of total disability. The Director correctly notes that the administrative law judge did not address the significance of Dr. Rasmussen's comments regarding the validity of claimant's March 23, 2006 exercise arterial blood gas study,³ a study conducted by Dr. Dahhan. An administrative law judge is required to consider all relevant evidence in the record. *See* Administrative Procedure Act, 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, on remand, the administrative law judge is instructed to address all of the relevant evidence regarding the reliability of the arterial

³ Dr. Rasmussen opined that the two minutes of exercise that occurred during claimant's March 23, 2006 blood gas study was "grossly inadequate for assessing gas exchange." Director's Exhibit 21. Dr. Rasmussen explained that "one may obtain either a falsely abnormal or falsely negative test at [two] minutes of exercise." *Id.* Dr. Rasmussen also criticized the study because there was "no measurement of actual oxygen consumption." *Id.*

blood gas study evidence, including Dr. Rasmussen's assessment of claimant's March 23, 2006 arterial blood gas study. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge