BRB No. 97-0719 BLA

LOWELL B. STEWART	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order - Denial of Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Lowell B. Stewart, Elkhorn City, Kentucky, *pro se*.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denial of Benefits (95-BLA-1767) of Administrative Law Judge Paul H. Teitler on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act

[1] The Board, in acknowledging claimant's Notice of Appeal, stated that claimant was not represented by legal counsel and, therefore, the Board would provide a general review of the administrative law judge's Decision and Order to determine whether the decision is rational, is in accordance with law and is supported by substantial evidence. 20 C.F.R. §§802.211, 802.220; *see Stewart v. Bethenergy Mines, Inc.*, BRB No. 97-0719 BLA (Feb. 25, 1997)(Order)(unpub.).

of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Initially, the administrative law judge stated that the instant case involves claimant's request for modification dated August 30, 1994, and adjudicated the claim pursuant to 20 C.F.R. Part 718, in light of claimant's original July 1993 filing date. Based on a stipulation of the parties, the administrative law judge credited claimant with at least sixteen years of coal mine employment. The administrative law judge thereafter found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). He further found the objective medical evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3). Lastly, the administrative law judge found the medical opinion evidence insufficient to establish a pulmonary or respiratory disability or any disability caused by pneumoconiosis. In addition, the administrative law judge found that the medical evidence supported Dr. Hippensteel's opinion that the evidence was insufficient to show a deterioration in claimant's condition since he left the mines and, therefore, was insufficient to establish a material change in conditions under 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[2]

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).

In rendering his Decision and Order, the administrative law judge must base his findings solely on the record made before him. 20 C.F.R. §725.477(b). Section 725.456(b)(2) allows the administrative law judge to admit documentary evidence not submitted to the district director and not exchanged by the parties within twenty days before a hearing if the parties waive the requirement or if a showing of good cause is

[2] The parties do not challenge the administrative law judge's decision to credit claimant with at least sixteen years of coal mine employment. Inasmuch as this finding is not adverse to claimant, it is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

made as to why such evidence was not exchanged. 20 C.F.R. §725.456(b)(2). If the administrative law judge permits the late evidence into the record, Section 725.456(b)(3) requires that the record be left open for thirty days thereafter to permit the parties to take such action as each considers appropriate in response to such evidence. *See Baggett v. Island Creek Coal Co.*, 6 BLR 1-1311 (1984).

A review of the hearing transcript in the instant case indicates that the parties agreed that employer would be allowed to submit post hearing evidence to rebut the medical report by Dr. Guberman, which claimant introduced and the administrative law judge admitted at the hearing but a copy of which was not physically included in the formal record at that time.[3] Hearing Transcript at 6-8; 20 C.F.R. §725.456(b)(3); *see Baggett, supra*; *see generally Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). Following the hearing, claimant's representative withdrew the proffered medical opinion of Dr. Guberman prior to forwarding a copy to either employer or the administrative law judge. *See Somonick v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-892 (1984). Consequently, claimant has not submitted the medical evidence for which employer was given leave to submit post-hearing rebuttal evidence. However, the record file contains the post-hearing medical report and deposition testimony of Dr. Hippensteel, for which there is no indication in the record that this late evidence was accepted into the record.[4] Moreover, the record does not contain employer's motion to take a post-hearing deposition of Dr. Hippensteel or an order from the administrative law judge permitting the taking of Dr. Hippensteel's deposition.[5] 20 C.F.R. §725.458; *see Lee v. Drummond Coal Co.*, 6 BLR 1-544 (1983). Inasmuch as the administrative law judge relied on the post-hearing medical evidence of Dr. Hippensteel in denying benefits, we vacate the administrative law judge's denial of benefits and remand the case for the administrative law judge to determine whether this post-hearing medical evidence was properly submitted and received into evidence. 20 C.F.R. §725.456(b)(2), (b)(3); *see generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). If the administrative law judge determines that this evidence was not properly submitted under Section 725.456(b), the

[3] Claimant's representative introduced Dr. Guberman's medical report, for the first time, at the formal hearing and requested that it be admitted into the record. Hearing Transcript at 6. The administrative law judge admitted the report into the record. *Id*. However, claimant's representative, only having one copy of the report, was permitted to retain this copy of the report in order to make copies of it and mail them to the administrative law judge and employer after the hearing. Hearing Transcript at 7.

[4] A review of the record file indicates that Dr. Hippensteel's medical report, dated June 24, 1996 and received by the Office of Administrative Law Judges on September 30, 1996, and a copy of the July 23, 1996 deposition testimony of Dr. Hippensteel, received by the Office of Administrative Law Judges on August 2, 1996, were both obtained and submitted after the administrative law judge's formal hearing on May 23, 1996.

[5] Section 725.458 states that no post-hearing deposition or interrogatory shall be permitted unless authorized by the administrative law judge upon motion of a party to the claim. 20 C.F.R. §725.458.

administrative law judge must either exclude it from the record or remand the case to the district director for further development of the evidence. 20 C.F.R. §725.456(b)(2); *see Farber v. Island Creek Coal Co.*, 7 BLR 1-428 (1984); *Trull v. Director, OWCP*, 7 BLR 1-615 (1984).

In addition, we vacate the administrative law judge's finding that the evidence of record is insufficient to establish a material change in conditions inasmuch as this is not the proper inquiry under the regulations governing modification requests set forth at Section 725.310. Section 725.310 requires the administrative law judge to render a finding concerning whether the record supports a determination of a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310. However, since the record is not clear as to whether claimant's August 1994 letter to the district director was a request for modification, the administrative law judge must determine initially whether this claim involves a request for modification or whether it is a continuation of claimant's original claim filed in July 1993.[6] If the administrative law judge determines that claimant's August 1994 letter was a request for modification, *see* Director's Exhibit 35, he must then determine whether the newly submitted evidence, *i.e.*, the evidence submitted after the original denial of benefits, establishes a change in conditions or whether the record as a whole establishes a mistake in a determination of fact. 20 C.F.R. §725.310; *Worrell v. Consolidation Coal Co.*, 8 BLR 1-158 (1985); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). If, however, the administrative law judge determines that it was not claimant's intention to request modification but rather his letter was in response to the district director's Show Cause Order, *see* Director's Exhibit 34, the administrative law judge must consider all of the evidence of record to determine whether it is sufficient to establish entitlement to benefits pursuant to Part 718.[7]

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[6] Claimant filed his application for benefits on July 14, 1993, Director's Exhibit 1, which was denied by a claims examiner on January 10, 1994. Director's Exhibit 26. On January 20, 1994, claimant's counsel filed a letter stating that he disagreed with the initial determination and that he would submit additional evidence in support of the claim. Director's Exhibit 27. However, on July 13, 1994, the district director issued a Show Cause Order as to why this claim should not be dismissed by reason of abandonment, for failing to submit any additional evidence. Director's Exhibit 34. On August 25, 1994, claimant responded to the Show Cause Order, stating that his attorney failed to submit the additional evidence, but that he was not abandoning the claim and did not want it dismissed. Director's Exhibit 35. Rather, he would be submitting additional evidence on his own behalf. *Id.* The Office of Workers' Compensation Programs, on September 9, 1994, however, accepted this letter as a request for modification. Director's Exhibit 36.

[7] In considering entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge must first determine whether claimant has established the existence of pneumoconiosis under one of the four subsections set forth at 20 C.F.R. §718.202(a)(1)-(4); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *see also Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). If, the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis, he then must consider whether the evidence is

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is 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

NANCY S. DOLDER
Administrative Appeals Judge

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sufficient to rebut the presumption that claimant's pneumoconiosis arose out of his coal mine employment under 20 C.F.R. §718.203(b). Finally, the administrative law judge must consider whether claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and whether the disability was due, at least in part, to his pneumoconiosis. 20 C.F.R. §718.204(b); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Perry, supra*.