

BRB No. 00-0620 BLA

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| DALLAS G. BERRY |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS’ |) | DATE ISSUED: |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits Based On A Request For Modification of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Dallas G. Berry, Pulaski, Virginia, *pro se*.

Timothy S. Williams (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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits Based On A Request For Modification (99-BLA-0003) of Administrative Law

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant Virginia, requested, on behalf of claimant, review of the administrative law judge’s decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1985)(Order).

Judge Richard K. Malamphy 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 March 2, 1994. This claim was denied by Administrative Law Judge Jeffrey Tureck on September 24, 1996 for failure to establish the existence of pneumoconiosis pursuant to 20 C.F.R. 718.202(a). Director's Exhibits 1, 20, 42. Judge Tureck also found that even if claimant had established the existence of pneumoconiosis, benefits would still have been denied as he failed to establish that pneumoconiosis, if any, arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Benefits were accordingly denied. On appeal, the Board noted that Judge Tureck erred in his consideration of the x-ray evidence at Section 718.202(a)(1) and failed to address whether claimant had established the existence of complicated pneumoconiosis under Section 718.304. Nevertheless, the Board held that these errors were harmless, inasmuch as claimant could not carry his burden of establishing that pneumoconiosis, if any, arose out of coal mine employment pursuant to Section 718.203(c). The Board, therefore, affirmed the denial of benefits. *Berry v. Director, OWCP*, BRB No. 97-0233 BLA (Sep. 12, 1997). On May 6, 1998, claimant requested modification. Pursuant to that request for modification, Judge Malamphy found claimant proved less than ten years of coal mine employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3. Judge Malamphy concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) or complicated pneumoconiosis pursuant to Section 718.304, and was, therefore, insufficient to establish a change in conditions sufficient to justify modification of the denial of benefits pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

² Claimant died on June 19, 1999. Claimant's Exhibit 1. His representative requested a decision on the record.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), that the administrative law judge must determine whether a change in conditions or a mistake in a determination of fact has been made even where no specific allegation of either has been made. Furthermore, in determining whether modification has been established pursuant to Section 725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

Considering the newly submitted evidence in conjunction with the prior evidence to determine if a change in conditions was established, Judge Malamphy found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) based on the negative reading by Dr. Forehand, a B reader, of the new x-ray taken on November 20, 1998. Director's Exhibit 59. Judge Malamphy failed, however, to discuss the positive, 1/0, reading by Dr. Bassali, a Board-certified B-reader, of the September 1, 1995 x-ray, Director's Exhibit 3, other than referring to the fact that it had been considered previously by Judge Tureck. Moreover, Judge Malamphy did not discuss other, earlier x-ray evidence which had been considered by Judge Tureck in order to determine whether a mistake in a determination of fact had been made by Judge Tureck in his consideration of that x-ray evidence. As either a mistake in a determination of fact or a change in conditions may be shown in order to establish modification, remand is required for reconsideration of all the x-ray evidence. *See Jessee, supra; Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Brewster v. Director, OWCP*, 7 BLR 1-120 (1984); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979); *see also* 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 30 U.S.C. §932(a). Director's Exhibits 49, 59; Decision and Order at 5. *See Edmiston v. F*

³ Judge Malamphy properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there was no biopsy evidence of record, this is a living miner's claim filed after January 1, 1982, and there is no persuasive

& R Coal Co., 14 BLR 1-65 (1990); see also *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent, supra*. Regarding Section 718.304, Judge Malamphy rationally found that the existence of complicated pneumoconiosis was not established at Section 718.304 as only one of the x-ray readings of record reported category “A” opacities. Decision and Order on Modification at 5; Decision and Order Denying Benefits; Claimant’s Exhibits 3, 4; Director’s Exhibit 59; see *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Judge Malamphy next considered all of the medical opinion evidence of record and found it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The new evidence consists of: Dr. Vasudevan’s diagnosis of “mild to moderate chronic obstructive airway disease most probably secondary to long term smoking, moderate respiratory impairment due to chronic airway disease and no respiratory impairment arising out of coal workers’ pneumoconiosis,” Director’s Exhibit 56; and the death certificate listing the immediate cause of death as adenocarcinoma of the biliary tract due to asbestosis due to coal workers’ pneumoconiosis. Claimant’s Exhibit 1. The previously submitted opinions of Dr. Kelly diagnosed pneumonia, bronchial infection, emphysema, pulmonary fibrosis and chronic obstructive pulmonary disease. Director’s Exhibit 49. Judge Malamphy found the evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) as neither Dr. Kelly nor Dr. Vasudevan made a diagnosis of coal workers’ pneumoconiosis, see *Dockins v. McWane Coal Co.*, 9 BLR 1-57 (1986) and there is no indication that the physician who signed the death certificate mentioning coal workers’ pneumoconiosis ever treated the miner or had any documentation to support the diagnosis. *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Thus, Judge Malamphy rationally found that the new evidence considered in conjunction with the previously submitted reports were insufficient to establish the existence of pneumoconiosis pursuant Section 718.202 (a)(4). *Perry, supra*. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, although Judge Malamphy’s specific findings at Section 718.202(a)(2)-(4) are affirmed, his findings at Section 718.202(a)(1) and Section 725.310 are vacated and the case is remanded for further consideration of those sections and to reweigh all the relevant evidence on the existence of pneumoconiosis along with the x-ray evidence at Section 718.202(a)(1). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2- (4th Cir. 2000); *Jessee, supra*; *Trent, supra*; *Perry, supra*.

Accordingly, Judge Malamphy’s Decision and Order Denying Benefits Based on a Request for Modification is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 5; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge