

BRB No. 04-0369 BLA

M.C. SMITH)
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 Claimant-Petitioner)
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 v.)
)
 NEW WHITE COAL COMPANY) DATE ISSUED: 01/12/2005
)
 and)
)
 LIBERTY MUTUAL INSURANCE GROUP)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Order Granting Summary Judgment of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmund Collett, P.S.C.), Hyden, Kentucky, for claimant.

Francesca L. Maggard, W. Barry Lewis (Lewis and Lewis Law Office), Hazard, Kentucky for employer/carrier.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor, Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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.

PER CURIAM:

Claimant appeals the Order Granting Summary Judgment (03-BLA-0204) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge found that the evidence submitted with claimant's motion for modification was relevant only to his mental health status and not his respiratory condition, and therefore, not relevant to establish a change in conditions pursuant to 20 C.F.R. §725.310(a). The administrative law judge, therefore, granted employer's motion for summary judgment. Accordingly, the administrative law judge denied the claim.

The relevant procedural history of this claim is as follows: claimant filed his first claim with the Department of Labor (DOL) on December 22, 1986. Director's Exhibit 33. This claim was administratively denied because it was deemed abandoned on March 4, 1987. *Id.* Claimant filed a second claim with DOL on April 23, 1987. Director's Exhibit 34. This claim was denied by the district director on August 19, 1987. Director's Exhibit 34. The record indicates that claimant took no further action on this claim, and the denial became final. Claimant filed a third claim with DOL on September 30, 1998. Director's Exhibit 1. The claim was denied by the district director on December 2, 1999. Director's Exhibit 16. Following a hearing, Administrative Law Judge Daniel J. Roketenetz issued a Decision and Order dated June 14, 2001 denying the claim because he found that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) and failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv). Director's Exhibit 57. Following claimant's appeal, the Board affirmed the administrative law judge's denial by affirming only his findings pursuant to Section 718.202(a)(1)-(4). *Smith v. New White Coal Co.*, BRB No. 01-0781 BLA (April 5, 2001)(unpub.). Director's Exhibit 65. Claimant filed a timely motion for modification pursuant to Section 725.310(a) on January 30, 2003. Director's Exhibit 66. Administrative law Judge Joseph E. Kane (the administrative law judge) issued a Decision and Order dated December 17, 2003 granting employer's motion for summary judgment and dismissing claimant's motion for modification. Claimant then filed the instant appeal with the Board.

On appeal, claimant challenges the administrative law judge's determination to grant employer's motion for summary judgment thus denying claimant's motion for modification. Claimant asserts that Dr. Baker's opinion addressing claimant's respiratory condition, which is part of the previous record in this claim, as well as the hospital records from Baptist Regional Hospital he submitted in support of his motion for modification, are sufficient to establish a change in conditions pursuant to Section 725.310(a). Employer responds, asserting that the administrative law judge's granting of its motion for summary judgment was appropriate and urging affirmance of the administrative law judge's denial of the motion for modification. The Director, Office of Workers' Compensation Programs (the Director),

responds, asserting that pursuant to Section 725.310(a), claimant is entitled to a *de novo* review of the case for consideration of whether a mistake in a determination of fact was made in the previous denial, which the administrative law judge failed to do. The Director, therefore, urges that the case be remanded to the administrative law judge, so that such determination can be made.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially asserts that the administrative law judge erred by granting employer's motion for summary judgment, and in so doing, denying claimant's motion for modification. The evidence that claimant submitted with his motion for modification consists of a medical report by Dr. W.E. Becknell documenting that claimant suffers from various mental problems listed as "HTN, paranoia and depression", Director's Exhibit 66, and hospital records from Baptist Regional Hospital during claimant's hospitalizations between August of 1997 and May of 1998. Claimant's Exhibit 1. The administrative law judge stated:

Claimant's records, totaling 125 pages, indicate his exclusive treatment there to be related to mental illness. He was hospitalized, involuntarily and voluntarily, and treated for schizophrenia, personality disorder, and other psycho-social ailments. Nothing in these records reflects any physical disabilities that are not psychologically related with the exception of claimant's obesity. Nothing in the record even hints at so much as a respiratory "cold" much less a diagnosis of pneumoconiosis. But perhaps more egregious is the fact that the records predate the claim and occurred in 1997 and 1998.

Order at 2. The administrative law judge granted employer's motion for summary judgment because he concluded that the evidence submitted with claimant's modification motion was irrelevant to the issue of the existence of pneumoconiosis pursuant to Section 718.202(a), and therefore, was insufficient to establish a change in conditions pursuant to Section 725.310(a). Order at 2-3. We agree.

Claimant asserts, however, that that administrative law judge erred in granting employer's motion for summary judgment because the administrative law judge failed to consider both whether a change in condition and a mistake in a determination of fact was made. In support of his argument, claimant asserts that in addition to the hospital records he

submitted in support of modification, the administrative law judge should have considered Dr. Baker's opinion addressing claimant's respiratory condition. Dr. Baker's opinion was, however, submitted with the prior claim and considered by the prior administrative law judge when he found that claimant did not establish entitlement. *Smith v. New White Coal Co.*, BRB No. 01-0781 BLA (April 5, 2002). Dr. Baker's opinion cannot, therefore, establish a change in conditions.

Nonetheless, because, as the Director contends, the administrative law judge considered only whether a change in conditions had been established, and did not consider whether a mistake in a determination of fact occurred in the prior denial, a consideration which does not require new evidence, the administrative law judge's order granting summary judgment must be vacated and the case must be remanded for a *de novo* review of the entire record to determine whether a mistake in a determination of fact was made in the prior denial. *See Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Accordingly, the administrative law judge's Order Granting Summary Judgment is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge