BRB No. 08-0362 BLA

M.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	DATE ISSUED: 01/29/2009
	)	
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 on Remand– Granting Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Granting Modification (05-BLA-6153) of Administrative Law Judge Daniel F. Solomon rendered 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 has previously been before the Board, and the relevant procedural history is as follows: Claimant filed his initial claim for benefits on February 9, 1998, and was initially found entitled to benefits by the district director on August 5, 1998. Director's Exhibit 1. Following a hearing, in a decision dated April 26, 2000, Administrative Law Judge Daniel L. Leland found that

the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) (2000),[1] and denied the claim. Director's Exhibit 1. On appeal, the Board affirmed the denial of benefits. [*M.C.*] *v. Hobet Mining, Inc.*, BRB No. 00-0891 BLA (June 13, 2001)(unpub.).

On October 13, 2001, claimant requested modification pursuant to 20 C.F.R. §725.310 (2000)[2] and submitted medical evidence in support of his request. Director's Exhibit 2. The case was subsequently assigned to Administrative Law Judge Daniel F. Solomon (the administrative law judge), who issued a Decision and Order dated May 5, 2006, wherein he found that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203(b). Thus, the administrative law judge found the evidence sufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), and, therefore, awarded benefits.

Employer appealed and, in a decision dated June 29, 2007, the Board initially affirmed the administrative law judge's determinations that this case involves a timely request for modification of the prior denial of benefits, pursuant to 20 C.F.R. §725.310 (2000), and not a subsequent claim pursuant to 20 C.F.R. §725.309, and that employer is the responsible operator. [*M.C.*] *v. Hobet Mining, Inc.*, BRB No. 06-0648 BLA (June 29, 2007)(unpub.), slip op. at 4-5. Regarding the merits of entitlement pursuant to 20 C.F.R. §718.304, the Board further affirmed the administrative law judge's determination to accord diminished weight to the opinions of Dr. Repsher. [*M.C.*], BRB No. 06-0648 BLA, slip op. at 9-10. However, because the administrative law judge set forth and discussed the x-ray evidence and medical opinion evidence, but did not render specific findings under the separate subsections of 20 C.F.R. §718.304, the Board vacated the administrative law judge's finding that claimant established the existence of complicated

[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 (2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation that was applied by the administrative law judge is no longer applicable, or where a former version of a regulation remains applicable, we will cite to the 2000 version of the Code of Federal Regulations.

[2] The amendments to the regulation pertaining to requests for modification, set forth in 20 C.F.R. §725.310, do not apply to requests for modification of claims filed before January 19, 2001. 20 C.F.R. §725.2.

pneumoconiosis pursuant to 20 C.F.R. §718.304, and remanded the case to the administrative law judge for reevaluation of the evidence in each category of 20 C.F.R. §718.304(a) and (c), before weighing all relevant evidence together to determine whether invocation of the irrebuttable presumption was established. [*M.C.*], BRB No. 06-0648 BLA, slip op. at 7.

In a decision dated February 6, 2008, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis, and therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge, therefore, found that claimant established a mistake in a determination of fact in Judge Leland's prior decision. Accordingly, the administrative law judge awarded benefits, commencing March 1, 1998, the month in which the evidence first established the existence of complicated pneumoconiosis.

On appeal, employer challenges the administrative law judge's weighing of the medical evidence of record pursuant to 20 C.F.R. §718.304. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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).

The administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a) (2000). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." 20 C.F.R. §725.310 (2000); *see Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Employer asserts that in evaluating the x-ray and medical opinion evidence pursuant to 20 C.F.R. §718.304(a) and (c), the administrative law judge erred in discrediting the opinions of employer's physicians who did not diagnose simple pneumoconiosis, contrary to the prior finding of Judge Daniel L. Leland, that claimant had established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer specifically contends that the prior findings of Judge Leland are

not the law of the case, as the doctrine is not applicable to proceedings on modification. Further, employer contends that, even assuming its applicability, the administrative law judge erred in applying the doctrine of law of the case inconsistently, to discredit only employer's physicians.

In finding that the evidence established the existence of complicated pneumoconiosis, the administrative law judge initially reviewed, in detail, the multiple readings of the twelve x-rays of record. Decision and Order on Remand at 3-12. The administrative law judge found that three of the x-rays were read either entirely negative, or as positive only for the existence of simple pneumoconiosis. Decision and Order on Remand at 11. However, nine of the x-rays, including the eight most recent films, were read as both positive and negative for the presence of large opacities of complicated pneumoconiosis by B readers or physicians dually-qualified as Board-certified radiologists and B readers. Decision and Order on Remand at 4-12. Specifically, Drs. Ranavaya, Gaziano, Leef, Robinette, Aycoth, Cappiello, Ahmed, Patel, and DePonte, who read the x-rays on behalf of claimant, or as part of the Department of Labor-sponsored pulmonary evaluation, each read x-rays as positive for the existence of large opacities of complicated pneumoconiosis. Director's Exhibits 1, 15, 19, 20, 23, 25; Claimant's Exhibits 1-4. By contrast, Drs. Repsher, Scott, Wheeler, and Kim, reading on behalf of employer, found no evidence of complicated pneumoconiosis by x-ray, but found markings consistent with tuberculosis. Director's Exhibits 1 (internal exhibits EX3, EX8-11), 16, 34, 35, 37; Employer's Exhibits 1, 2, 6-9, 11, 12.

In resolving the conflicting x-ray evidence, the administrative law judge discredited the readings of Drs. Wheeler, Scott, and Kim, in part, as contrary to the law of the case because they were unanimous in finding no evidence of even simple pneumoconiosis, the existence of which had been found by Judge Leland, and affirmed, as unchallenged, by the Board in its 2001 decision. Decision and Order on Remand at 11. Employer's assertion that this was error has merit. Employer's Brief at 4-6. Given the nature of modification, the "law of the case" doctrine is generally not applicable. Rather, it has been routinely held that the "'principle of finality' just does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits." *Jessee*, 5 F.3d at 725, 18 BLR at 2-29, *citing Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 461-65 (1968). Thus, where a request for modification has been properly filed, it is the duty of the second administrative law judge to conduct a *de novo* review of all of the facts in order to determine whether there was a mistake in a determination of fact in the prior decision. *See Banks*, 390 U.S. 459; *Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

However, the administrative law judge further discredited the opinions of Drs. Wheeler, Scott, and Kim as speculative and unsupported by the evidence of record as to their diagnoses of tuberculosis, and employer has not challenged this finding.

Specifically, in discounting the opinions of Drs. Wheeler, Scott, and Kim, the administrative law judge initially noted Dr. Wheeler's own testimony that, without clinical correlation, x-rays are an inconclusive method for diagnosing tuberculosis. Decision and Order on Remand at 3. In determining that no such clinical correlation exists in the record, the administrative law judge found that, with the exception of Dr. Repsher, none of the physicians who examined claimant found tuberculosis to be a viable diagnosis. Decision and Order on Remand at 3. Specifically, the administrative law judge found that Drs. Crisalli, Robinette, and Rasmussen, each of whom examined claimant, did not note a history of, or exposure to, tuberculosis. Decision and Order on Remand at 3; Director's Exhibits 1 (internal exhibits CX1, EX4), 15, 16. Similarly, the administrative law judge found that Drs. Renn, Dahhan, and Fino, who reviewed claimant's medical records, did not find evidence of tuberculosis or state that the record shows any evidence of tuberculosis. Decision and Order on Remand at 3; Director's Exhibits 1 (internal exhibit EX 5), 6, 7, 9, 10. Regarding the opinion of Dr. Repsher, the administrative law judge noted, correctly, that in the prior appeal, the Board affirmed his determination to accord less weight to Dr. Repsher's x-ray readings because the physician failed to reconcile his finding of tuberculosis with his earlier opinion that the evidence established simple pneumoconiosis and not tuberculosis. Decision and Order on Remand at 2; [*M.C.*], BRB No. 06-0648 BLA, slip op. at 9-10. Consequently, the administrative law judge found that tuberculosis was not a viable diagnosis in this case. Decision and Order on Remand at 2-3.

The administrative law judge then weighed the x-ray evidence regarding the existence of complicated pneumoconiosis and reinstated his prior determination to discredit Dr. Repsher's x-ray readings as inconsistent. Decision and Order on Remand at 2, 4, 6, 7. In addition, having found that tuberculosis was not a viable diagnosis in this case, the administrative law judge also discredited the x-ray readings of Drs. Wheeler, Scott, and Kim, that the x-rays support a diagnosis of tuberculosis, and not complicated pneumoconiosis, finding them to be speculative. The administrative law judge further discredited the readings by Drs. Wheeler, Scott, and Kim as collectively inconsistent because, while their predominant diagnosis was tuberculosis, they frequently compounded and qualified their diagnoses, indicating the possible presence of inflammatory disease, histoplasmosis, a granulomatous process, cancer, and even coal workers' pneumoconiosis. Decision and Order on Remand at 12. Thus, having discredited the opinions of Drs. Repsher, Wheeler, Scott, and Kim, the administrative law judge determined that the remaining positive x-ray readings for complicated pneumoconiosis by Drs. Ranavaya, Gaziano, Leef, Robinette, Aycoth, Cappiello, Ahmed, Patel, and DePonte far outweighed the remaining x-ray readings of record, including the positive reading for only simple pneumoconiosis by Dr. Cole, and established the existence of complicated pneumoconiosis. Decision and Order on Remand at 12.

Evaluating all of the medical evidence of record relevant to 20 C.F.R. §718.304(a)-(c), the administrative law judge determined that the x-ray evidence was the most probative as to the existence of complicated pneumoconiosis, in this case where there is no autopsy or biopsy evidence in the record. Decision and Order on Remand at 12-14. The administrative law judge also found that claimant's complicated pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). Decision and Order on Remand at 14-15. Thus, the administrative law judge concluded that because the evidence of record established the existence of complicated pneumoconiosis, arising out of coal mine employment, it also established a mistake in a determination of fact in Judge Leland's decision. Decision and Order on Remand at 15.

As noted above, in our 2007 decision in this case, the Board affirmed the administrative law judge's determination to discredit Dr. Repsher's opinions, and employer has not demonstrated any reason why we should revisit our prior holding. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). In addition, as employer does not challenge the administrative law judge's determinations to discredit the opinions of Drs. Wheeler, Scott, and Kim as speculative and collectively inconsistent regarding the diagnoses they provided, or to accord greater probative value to the x-ray evidence, these findings are also affirmed. *See Coen v. Director*, *OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal* Co., 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's finding that the positive x-ray readings for complicated pneumoconiosis by Drs. Ranavaya, Gaziano, Leef, Robinette, Aycoth, Cappiello, Ahmed, Patel, and DePonte outweighed the remaining x-ray readings of record, including the positive reading for only simple pneumoconiosis by Dr. Cole, and established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203(b). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order on Remand at 12.

In light of the foregoing, we affirm the administrative law judge's finding that claimant established a mistake in a determination of fact in Judge Leland's opinion, and that therefore, he established a basis for modification, and established his entitlement to benefits under the Act. *See Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

Accordingly, the administrative law judge's Decision and Order on Remand – Granting Modification affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge