

BRB No. 02-0863 BLA

CHARLES TIPTON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WOLFE CREEK COLLIERIES)	
)	DATE ISSUED: 07/25/2003
and)	
)	
ZEIGLER COAL HOLDING 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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Charles Tipton, Inez, Kentucky, *pro se*.

1

Bonnie Hoskins (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

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

¹ Susie Davis, with the Kentucky Black Lung Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (02-BLA-0166) 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).² After crediting claimant with twenty and one-quarter years of coal mine employment, the administrative law judge considered whether the evidence was sufficient to establish modification pursuant to 20 C.F.R. '725.310 (2000). The administrative law judge found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. '718.204(b). Consequently, the administrative law judge found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. '725.310 (2000). The administrative law judge also found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. '725.310 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge=s denial of benefits. The Director, Office of Workers= Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

²The 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

The administrative law judge initially erred in finding that the issue properly before him was whether the evidence was sufficient to establish modification of the district director's denial of benefits pursuant to Section 725.310 (2000).³ Claimant sought modification of the denial of benefits rendered by the district director. After claimant's modification request was denied, claimant requested a formal hearing before an administrative law judge. *See* Director's Exhibits 12-16, 18-20, 49. The Board has held that in cases where a claimant seeks modification of a denial of benefits by the district director, the administrative law judge shall conduct a *de novo* hearing on the merits of entitlement instead of making a preliminary determination regarding the grounds for modification since the modification finding is subsumed in the administrative law judge's finding on the merits of entitlement. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992). Consequently, in this case, the administrative law judge should have considered all of the evidence of record and addressed claimant's 1998 claim on the merits.

Although this case must be remanded for the administrative law judge's consideration of claimant's 1998 claim on the merits, in the interest of judicial economy, we will address certain of the errors committed by the administrative law judge in his consideration of whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. ' 718.204(b).⁴

First, we note that the administrative law judge, in his summary of the pulmonary function study evidence, did not include claimant's non-qualifying February 17, 1999 pulmonary function study.⁵ *See* Decision and Order at 8; Director's Exhibit 18.

The administrative law judge also committed several errors in his consideration of whether the newly submitted medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. ' 718.204(b)(2)(iv). First, in his summary of the medical

³ Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

⁴ The provision pertaining to total disability, previously set out at 20 C.F.R. ' 718.204(c), is now found at 20 C.F.R. ' 718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. ' 718.204(b), is now found at 20 C.F.R. ' 718.204(c).

⁵ Of the eight pulmonary function studies of record, only claimant's October 11, 1994 and February 27, 1996 pulmonary function studies are qualifying. *See* Director's Exhibits 7, 8.

opinion evidence, the administrative law judge did not include Dr. Burki=s opinion that claimant does not have a pulmonary impairment.⁶ *See* Decision and Order at 10-13; Director=s Exhibit 48.

The administrative law judge also erred in according Dr. Hippensteel=s opinion

⁶ In addition to not considering Dr. Burki=s opinion, the administrative law judge inaccurately indicated that Dr. Burki rendered a positive interpretation of claimant=s October 10, 1994 x-ray. *See* Decision and Order at 6. It was Dr. Wells, not Dr. Burki, who rendered a positive interpretation of claimant=s October 10, 1994 x-ray. *See* Director=s Exhibit 7.

⁷ Alittle weight because of its patent bias.@ Decision and Order at 19; Director=s Exhibit 45. The administrative law judge asserted that Dr. Hippensteel, while questioning the opinions of physicians who determined that claimant was totally disabled, essentially provided a Afree pass@ to opinions that were Abeneficial to his employer.@ *Id.* at 18. In support of his finding, the administrative law judge noted that Dr. Hippensteel, while criticizing Dr. Clarke for failing to consider claimant=s cigarette smoking as a possible cause of his pulmonary impairment, accepted Dr. Jarboe=s finding that claimant=s chronic bronchitis was due to cigarette smoking even though Dr. Jarboe did not explain why claimant=s chronic bronchitis could not have been caused by coal dust exposure. *Id.* Contrary to the administrative law judge=s finding, the fact that a physician criticizes the opinions of some physicians, while accepting the opinions of others, does not demonstrate bias. The relevant inquiry is whether Dr. Hippensteel provided an adequate basis for finding that claimant, from a pulmonary standpoint, could continue his regular coal mine employment.⁸ *See* Director=s Exhibit 45.

The administrative law judge also erred to the extent that he credited Dr. Rasmussen=s opinion that claimant was totally disabled because the doctor provided a

⁷ Dr. Hippensteel reviewed the medical evidence of record. In a report dated December 1, 2000, Dr. Hippensteel opined that, from a pulmonary standpoint alone, claimant could continue to work at his regular job in the mines. Director=s Exhibit 45.

⁸ The administrative law judge failed to address whether Dr. Hippensteel=s criticism of Dr. Clarke=s opinion was valid. Moreover, Dr. Hippensteel=s failure to comment upon Dr. Jarboe=s finding, rather than representing bias, appears to be attributable to the fact that Dr. Jarboe=s conclusion corresponds to Dr. Hippensteel=s own independent assessment of the cause of claimant=s chronic bronchitis.

Additionally, the relevant issue at Section 718.204(b) is the extent of claimant=s disability, not its cause.

detailed discussion of the physical requirements of claimant=s coal mine employment. Decision and Order at 19; Director=s Exhibit 39. The administrative law judge did not render a finding as to the exertional requirements of claimant=s usual coal mine employment.

⁹ Moreover, the administrative law judge failed to explain how Dr. Rasmussen=s understanding of the exertional requirements of claimant=s usual coal mine employment provided him with an advantage over the other physicians of record in assessing the extent of claimant=s pulmonary impairment.

Finally, the administrative law judge weighed the relevant newly submitted evidence together, both like and unlike, to determine whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. ' 718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (*en banc*). The administrative law judge found that the pulmonary function and arterial blood gas study evidence was entitled to additional weight because it was Alater evidence.@ Decision and Order at 19. The administrative law

⁹ It is claimant=s burden of proof to establish the exertional requirements of his usual coal mine employment. *See Cregger v. United States Steel Corp.*, 6 BLR 1-1219 (1984). Additionally, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that an administrative law judge should consider whether a physician who finds that a claimant is not totally disabled had any knowledge of the exertional requirements of the claimant=s last coal mine employment before crediting that physician=s opinion. *Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-135 (6th Cir. 2000).

judge, however, erred in failing to explain why the Alater@ objective evidence called into question the medical opinions of Drs. Rasmussen and Castle, opinions that the administrative law judge credited at 20 C.F.R. ' 718.204(b)(2)(iv).

Consequently, we remand the case to the administrative law judge to consider claimant=s entitlement to benefits based upon a consideration of all of the relevant medical evidence of record.¹⁰

¹⁰ In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. ' ' 718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge