BRB No. 98-1187 BLA

JAMES W. DUTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order On Claimant's Petition for Modification of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

James W. Duty, Cedar Bluff, Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order On Claimant's Petition for Modification (98-BLA-0161) of Administrative Law Judge Clement J. Kichuk with respect to 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 relevant procedural history of this case is as follows: Claimant filed an application for benefits in January 1985.[1] Director's Exhibit 1. In April 1988, Administrative Law Judge John H. Bedford issued a Decision and Order Denying

[1] There is evidence that claimant filed two earlier claims that were denied. Director's Exhibit 31 at 4; *see also* Director's Exhibit 4.

Benefits. Director's Exhibit 31. Judge Bedford credited claimant with thirty-nine and one-half years of coal mine employment and considered the claim pursuant to the regulations set forth in 20 C.F.R. Part 718. *Id*. Judge Bedford found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(4) and 718.203(b). *Id*. However, Judge Bedford found that the evidence was insufficient to establish total disability under 20 C.F.R. §718.204(c). *Id*. Accordingly, benefits were denied. *Id*.

Claimant, without the assistance of counsel, appealed. The Board affirmed Judge Bedford's finding that pneumoconiosis due to coal mine employment was established, but vacated his finding under Section 718.204(c)(4) and remanded for discussion of the reports of Drs. Rasmussen and Krishnan. *Duty v. Consolidation Coal Co.*, BRB No. 88-1417 BLA (July 31, 1990)(unpublished); Director's Exhibit 42. On remand the case was reassigned to Administrative Law Judge G. Marvin Bober due to Judge Bedford's unavailability. In a Decision and Order issued in October 1991, Judge Bober found that the evidence was insufficient to establish total disability pursuant to Section 718.204(c). Accordingly, benefits were denied. Director's Exhibit 48.

Claimant, without the assistance of counsel, appealed and the Board affirmed Judge Bober's findings that total disability was not established under Section 718.204(c)(1)-(3). However, the Board vacated Judge Bober's finding that total disability was not established under Section 718.204(c)(4), and remanded the case for reconsideration of Dr. Rasmussen's impairment rating of fifty percent in conjunction with the exertional requirements of claimant's usual coal mine employment as a stationary equipment operator. *Duty v. Consolidation Coal Co.*, BRB No. 92-1390 BLA (Sept. 17, 1993)(unpublished); Director's Exhibit 54. Employer moved for reconsideration, and in a Decision and Order issued on May 29, 1996, the Board reiterated its holding that the administrative law judge must discuss claimant's testimony regarding the exertional requirements of his job in the context of Dr. Rasmussen's assessment. *Duty v. Consolidation Coal Co.*, BRB No. 92-1390 BLA (May 29, 1996)(unpublished) (Decision and Order on Recon.); Director's Exhibit 56. Inasmuch as the administrative law judge who presided at the formal hearing was no longer with the Office of Administrative Law Judges, the Board instructed Judge Bober to consider reopening the record to hold a new hearing. *Id*. The Board also directed the administrative law judge to reconsider the opinions of Drs. Abernathy and Morgan. *Id*.

Prior to the transmittal of any correspondence from the Office of Administrative Law Judges to the parties concerning the proceedings on remand, claimant was examined by Dr. Castle at employer's request on July 24, 1996. Employer submitted Dr. Castle's opinion to the Office of Administrative Law Judges on August 20, 1996. Director's Exhibit 54. By Order dated August 28, 1996, the parties were informed that the case would be assigned to another administrative law judge, as Judge Bober was not available, noting that the parties could object within thirty days. The parties were also given thirty days to submit briefs regarding the issues identified by the Board. On

September 4, 1996, employer requested a *de novo* hearing or that the record be reopened for the submission of additional evidence. On September 18, 1996, the parties were informed that Administrative Law Judge Clement J. Kichuk (the administrative law judge) would adjudicate the case on remand. By Order dated October 10, 1996, the administrative law judge stated that a new hearing was not necessary and gave the parties until November 15, 1996 to submit additional evidence in support of their positions on the issues identified by the Board. Employer submitted updated opinions from Drs. Morgan and Abernathy in addition to Dr. Castle's deposition testimony. Director's Exhibit 64. Claimant did not proffer any evidence on remand.

In a Decision and Order issued in December 1996, the administrative law judge found that Dr. Rasmussen's opinion was entitled to little weight due to "infirmities found in Dr. Rasmussen's evaluation of total disability by superior qualified physicians," particularly Dr. Castle. 1996 Decision and Order at 10. The administrative law judge concluded, therefore, that claimant failed to establish total disability under Section 718.204(c)(4) and denied benefits accordingly.

In October 1997, claimant, without the assistance of counsel, filed a request for modification. Director's Exhibit 67. Claimant limited the basis of his request to an allegation of a mistake in fact. Citing *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984), claimant argued that the administrative law judge erred on remand by admitting into the record the examination report by Dr. Castle, and that the administrative law judge erred by not informing claimant, who was without the assistance of counsel, of his right to object to this evidence.[2] The district director notified claimant that inasmuch as he was alleging a mistake in fact in the administrative law judge's Decision and Order, the administrative law judge must adjudicate the request for modification. The district director then transmitted the case to the administrative law judge for a formal hearing. Director's Exhibit 69.

In an Order issued on December 12, 1997, the administrative law judge instructed employer to set forth its position with respect to claimant's petition for modification. On March 3, 1998, the administrative law judge allowed the parties time within which to submit motions, additional evidence, and written legal arguments, but

[2]In *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984), the Board held that when a claimant appears at a hearing without the assistance of counsel, the administrative law judge must inform claimant of his right to counsel, set forth the issues to be decided, and give claimant the opportunity to seek the admission of evidence and to object to the admission of his adversary's evidence.

did not refer to holding a hearing on modification. In his Decision and Order on Claimant's Petition for Modification, the administrative law judge rejected claimant's contentions as raising a question of law and not of fact. 1998 Decision and Order at 2. The administrative law judge further determined that he did not err by failing to inform claimant of his rights under *Shapell*. *Id*. The administrative law judge further found that claimant had "full opportunity and ample time" to object to any requests by employer for further development of the record. *Id.* The administrative law judge also determined that he had not made a mistake in a determination of fact in finding that claimant did not establish total disability under Section 718.204(c)(4). *Id*. at 3. Accordingly, the administrative law judge denied claimant's request for modification and claimant's appeal followed. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal filed by a claimant 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 *Stanley v. Betty B. Coal Co.*, Nos. 98-2731, 99-1057 (4th Cir. Oct. 21, 1999), a case issued subsequent to the administrative law judge's Decision and Order on Claimant's Petition for Modification, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, indicated that a claimant is entitled to a hearing on modification if he desires one. Based upon the circumstances unique to this case, we hold that claimant is entitled to a hearing on his request for modification. *See Stanley*, *supra*. We vacate the administrative law judge's Decision and Order, therefore, and remand the case to the administrative law judge for a hearing. If claimant is not represented by counsel, the administrative law judge must conduct the hearing in accordance with *Shapell.*

With respect to the administrative law judge's consideration of the evidence relevant to the issue of total disability, the administrative law judge apparently determined that neither Dr. Taylor nor Dr. Morgan diagnosed a totally disabling respiratory impairment. 1998 Decision and Order at 4; Director's Exhibits 13, 26, 64. We note, however, that the opinion in which Dr. Taylor recorded several physical limitations and the opinion in which Dr. Morgan diagnosed a moderate impairment could, when compared to the exertional requirements of claimant's usual coal mine work, support a finding of total disability under Section 718.204(c)(4).[3] Director's

[3]In *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g*

Exhibits 13, 64; *see Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g* 14 BLR 1-37 (1990)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

Accordingly, the Decision and Order on Claimant's Petition for Modification of the administrative law judge is vacated and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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14 BLR 1-37 (1990)(*en banc*), the United States Court of Appeals for the Fourth Circuit held that an administrative law judge may not reject physical limitations noted in a doctor's report as being nothing more than mere notation of the claimant's description unless there is specific evidence for doing so in the report.