

BRB No. 00-0129 BLA

BELFORD N. ROBERTS)
)
 Claimant-)
 Petitioner)
)
 v.) DATE ISSUED:
)
)
 DIRECTOR, OFFICE OF)
 WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR) DECISION AND ORDER

Respondent

Appeal of the Decision and Order Denying Living Miner's Benefits of
Larry W. Price, Administrative Law Judge, United States Department
of Labor.

Belford N. Roberts, Brilliant, Alabama, *pro se*.

Rita Roppolo (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: HALL, Chief Administrative Appeals Judge, SMITH,
Administrative Appeals Judge, and NELSON, Acting Administrative
Appeals Judge.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the
Decision and Order Denying Living Miner's Benefits (99-BLA-0391) of
Administrative Law Judge Larry W. Price 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 with the Social

Security Administration on December 9, 1971. Director's Exhibit 18. This claim merged into an application for benefits that claimant filed with the Department of Labor on August 27, 1976. *Id.* On February 21, 1984, Administrative Law Judge A.A. Simpson, Jr., issued a Decision and Order in which he determined that claimant worked for seven and one-half years as a coal miner. Judge Simpson also found that the evidence of record was insufficient to establish entitlement pursuant to the regulations set forth in 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. *Id.*

Claimant appealed to the Board which, in a Decision and Order issued on July 31, 1987, affirmed the denial of benefits. *Roberts v. Director, OWCP, BRB No. 85-0734 BLA (July 31, 1987)(unpub.)*; Director's Exhibit 18-31. In a letter dated September 21, 1987, claimant indicated to the Board that he wanted another hearing or "what it takes" to get benefits. Director's Exhibit 18-37. Claimant also wrote a letter to President Reagan concerning his claim. See Director's Exhibit 18-44. A claims examiner responded on President Reagan's behalf and informed claimant that he had not appealed the Board's Decision and Order within sixty days as is required by 20 C.F.R. §802.410(a), but had written to President Reagan within the allotted time. The claims examiner stated that the formal record of his claim would be returned to the district director and that claimant could submit a request for modification with any additional evidence that was not previously considered. *Id.*

In response, claimant submitted another letter to the Board in which he asserted that his appeal of Judge Simpson's denial was timely. Director's Exhibit 18-38. On November 30, 1987, the Board issued an Order in which it indicated that claimant's September 21, 1987 letter would be treated as a request for reconsideration of the Board's Decision and Order affirming the denial of benefits. The Board then denied claimant's request, as it was not filed within the thirty days of the issuance of the Board's Decision and Order as required by 20 C.F.R. §802.407(a). *Roberts v. Director, OWCP, BRB No. 85-0734 BLA (Nov. 30, 1987)(unpub. Order)*; Director's Exhibit 18-39. Claimant challenged the Board's action in a subsequent letter. Director's Exhibit 18-40. In a response dated May 20, 1988, the Board informed claimant that it no longer had jurisdiction to consider his appeal and advised him that if he wished to contest the Board's Decision and Order, he should file an appeal with the United States Court of Appeals for the Eleventh Circuit. Director's Exhibit 18-42.

Claimant wrote to the Court of Appeals for the Eleventh Circuit on July 2, 1988, requesting a hearing or a benefits check and attached several signed statements concerning the length of his coal mine employment, one of which was

not in the record before Judge Simpson. Director's Exhibit 18-45. In an Order dated November 17, 1988, the court dismissed claimant's appeal as untimely, as it was filed more than sixty days after the Board's dispositions on July 31 and November 30, 1987. Director's Exhibit 18-48.

The next item in the record file is a letter from a claims examiner, dated March 26, 1990, informing claimant that his claim had been administratively closed, but could be reopened if claimant submitted additional medical evidence within one year of the date of the letter, establishing good cause for his failure to timely pursue the claim, that his condition had changed "significantly," or that a "major error" in a determination of fact was made. Director's Exhibit 18-49. On October 15 and November 1, 1990, claimant submitted correspondence to the district director which included notes from Dr. Seghal indicating that claimant suffers from a number of pulmonary conditions. Director's Exhibits 18-50, 18-51.

In a letter dated January 16, 1991, a claims examiner notified claimant that his request for modification was denied. Director's Exhibit 18-54. Claimant requested a hearing in a letter dated February 7, 1991 and submitted an additional report from Dr. Seghal. Director's Exhibit 18-56. A claims examiner subsequently asked Dr. Seghal to provide the documentation underlying his opinion, but Dr. Seghal did not respond. Director's Exhibit 18-57. On May 6, 1991, a claims examiner informed claimant that although the prior denial was unchanged, he could still request a hearing. Director's Exhibit 18-58. Claimant submitted correspondence dated December 31, 1991, in which he petitioned for modification of the denial. Director's Exhibit 18-59.

A claims examiner responded on January 6, 1992, explaining the reasons for the denial of claimant's prior request for modification and stating that claimant could again request modification if he proffered additional evidence prior to May 6, 1992, *i.e.*, within one year of the May 6, 1991 letter denying claimant's initial request for modification. Director's Exhibit 18-60. Claimant replied in a letter dated April 27, 1992, stating that he had submitted enough evidence and wanted a hearing if no benefit check was forthcoming. Director's Exhibit 18-61. In response, a claims examiner reiterated that claimant had one year from the May 6, 1991 denial of his request for modification to submit additional evidence. Director's Exhibit 18-62.

No further action was taken until claimant filed a second application for benefits on October 6, 1997. Director's Exhibit 1. The district director treated the application as a duplicate claim and denied it. Director's Exhibit 11. Pursuant to claimant's request, a hearing was held before Administrative Law Judge Larry W. Price (the administrative law judge). The administrative law judge credited

claimant with fifteen years of coal mine employment and determined that a material change in conditions was established pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found, however, that the evidence of record as a whole was insufficient to support a finding of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied and the present appeal followed.

On November 16, 1999, counsel for the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for an extension of time to file a response brief. In an Order dated November 30, 1999, the Board denied the Motion. On August 3, 2000, the Director filed a Motion to Remand and a supporting brief in which the Director alleged that claimant's 1976 claim was neither abandoned nor finally closed inasmuch as within one year of each denial of the claim, claimant took some action that constituted a request for modification. The Director maintained, therefore, that the claim filed on October 6, 1997 merged into the 1976 claim and that claimant may be entitled to the application of the regulations set forth in 20 C.F.R. Part 727, rather than the those set forth in 20 C.F.R. Part 718. The Director also asserted that the administrative law judge's determination that claimant worked for fifteen years as a miner must be vacated, as the administrative law judge did not consider all of the relevant evidence of record.

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). 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 the 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).

Based upon this standard of review, we hold that the specific issues before the Board in the present appeal concern whether the administrative law judge properly determined that the 1997 application for benefits was a duplicate claim and whether the administrative law judge properly weighed the evidence of record when considering the merits of entitlement. *See McFall, supra*. We decline, therefore, to treat the Director's Motion to Remand, which followed the Board's denial of the Director's request that additional time be granted for the filing of a brief in response to claimant's Notice of Appeal, as sufficient to trigger Board review of the findings identified therein. In particular, inasmuch as the

Director should have raised the issue of the length of claimant's coal mine employment in a timely filed response brief rather than a Motion to Remand, we will not address the Director's allegation of error regarding the administrative law judge's finding. 20 C.F.R. §802.212(b). Accordingly, the administrative law judge's decision to credit claimant with fifteen years of coal mine employment is affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Turning to the procedural issue presented in this case, we hold that claimant's letters to President Reagan and to the Board following the July 31 and November 30, 1987 rejections of claimant's appeal and claimant's submission of new evidence within one year of these events qualified as requests for modification pursuant to 20 C.F.R. §725.310. See *Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995); *The Youghioghny and Ohio Coal Co. v. Milliken*, 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1989); *Searls v. Southern Construction Co.*, 11 BLR 1-161 (1988). Based upon these petitions and in light of the claims examiners' erroneous instructions informing claimant that he was required to submit new evidence in support of a petition for modification and the unexplained failure to grant claimant's April 1992 request for a hearing, claimant's 1976 claim was still viable at the time of claimant's application for benefits on October 6, 1997. See 20 C.F.R. §725.310(a); *Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987).¹ Thus, the latter claim was not a duplicate claim pursuant to Section 725.309(d), but rather merged into the 1976 claim. 20 C.F.R. §725.309(d). We must vacate, therefore, the administrative law judge's findings under Section 725.309(d) and remand the case to the administrative law judge for consideration of whether modification of the denial of the 1976 claim, based upon a finding of a mistake in a determination of fact or a change in conditions pursuant to Section 725.310, is warranted. See *Cornelius, supra*.

In addressing this issue, the administrative law judge is granted broad discretion to correct mistakes of fact, whether demonstrated by wholly new

¹The present case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as claimant's coal mine work occurred in Alabama. Director's Exhibits 2, 3; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

evidence, cumulative evidence, or merely further reflection on the evidence previously submitted. See *O’Keeffe, supra*; *Cornelius, supra*. With regard to whether the evidence submitted since the prior denial is sufficient to establish a change in conditions, the administrative law judge must perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element of entitlement adjudicated against claimant in the prior decision. See *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Finally, the administrative law judge must also consider whether reopening the present case to correct a mistake in a determination of fact at this stage of the proceedings would render justice under the Act. See *O’Keeffe v. Aerojet-General Shipyards*, 404 U.S. 254, 255-56 (1971); *Banks v. Chicago Grain Trimmers Ass’n, Inc.*, 390 U.S. 459 (1968); *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982)(*per curiam*); *Branham v. Bethenergy Mines, Inc.[Branham II]*, 21 BLR 1-79 (1998).

If the administrative law judge finds that modification is appropriate in the present case, he must consider whether claimant has established entitlement to benefits on the merits under the regulations set forth in 20 C.F.R. Part 727. If benefits are denied under Part 727, the administrative law judge must consider entitlement under 20 C.F.R. Part 718. See *Terry v. Director, OWCP*, 956 F.2d 25, 16 BLR 2-67 (11th Cir. 1992). With respect to the administrative law judge’s findings on the merits under Part 718, some of which are relevant to Part 727, the administrative law judge properly determined that claimant has not demonstrated the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and (a)(4).² The administrative law judge correctly found that all of the x-ray readings of record were negative for pneumoconiosis and acted within his discretion in determining that the report in which Dr. Goldstein determined that claimant does not have pneumoconiosis is entitled to more weight than the contrary reports of record, as it is based upon an examination that is twenty years more recent and is more consistent with the objective evidence of record. Decision and Order at 6; 20 C.F.R. §718.202(a)(1), (a)(4); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-

²The administrative law judge correctly determined that claimant could not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2), as the record does not contain any biopsy evidence. In addition, the presumptions set forth in 20 C.F.R. §§718.304 and 306 are not available in this case, as the claim was filed by a living miner and the record does not contain any evidence of complicated pneumoconiosis. 20 C.F.R. §§718.202(a)(3), 718.304, 718.306.

149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983). However, the administrative law judge did not address whether claimant was entitled to the rebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.305, based upon the filing date of the 1976 claim and the length of claimant's coal mine employment, nor did he fully consider whether claimant established total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). If the administrative law judge reaches the issue of entitlement under Part 718 on remand, he must render findings with respect to these matters.

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's Benefits is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge