

BRB No. 96-1088 BLA

JACK C. SMITH)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:
LEECO, INC.)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Charley Greene Dixon, Jr., Barbourville, Kentucky, for claimant.
Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Cathryn Celeste Helm (J. Davitt McAteer, Acting 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 and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer¹ appeals the Decision and Order on Remand (94-BLA-1493) of

¹Claimant is Jack C. Smith, the miner. Director's Exhibit 1.

Administrative Law Judge Robert L. Hillyard awarding 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). Claimant filed his initial claim for benefits on September 5, 1989. Director's Exhibit 1. The administrative law judge found that claimant established eight years of qualifying coal mine employment, that employer withdrew its controversion to the issue of the existence of pneumoconiosis, that claimant's pneumoconiosis arose from coal mine employment pursuant to 20 C.F.R. §718.203(c), and that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Director's Exhibit 24. Claimant filed a second claim for benefits on April 12, 1993, which was considered a petition for modification. Director's Exhibits 29, 30. The administrative law judge found that claimant established total disability due to pneumoconiosis pursuant to Section 718.204 and, thus, a change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's findings that Dr. Jarboe's opinion established the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c) and a change in conditions pursuant to Section 725.310, vacated the administrative law judge's finding at Section 718.204(b), and remanded the case for the administrative law judge to reconsider his length of coal mine employment finding and the effect, if any, of a significant disparity between the years alleged and the years established on the credibility of the relevant medical opinions. *Smith v. Leeco, Inc.*, BRB No. 95-1074 BLA (Jul. 27, 1995)(unpub.). On remand, the administrative law judge determined that claimant established twenty-eight years of qualifying coal mine employment, and found that since the coal mine employment finding "is consistent with the coal mine employment relied on in relevant medical opinions, there is no reason to revisit the credibility issue." Decision and Order on Remand at 2. Accordingly, benefits were awarded. In the instant appeal, employer contends that the administrative law judge erroneously overturned his prior finding of eight years of coal mine employment and erroneously failed to reconsider the medical evidence. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond urging affirmance.

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).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. Employer

first contends that the administrative law judge erred in finding modification based on a mistake of fact because claimant withheld the evidence purporting to demonstrate the mistake from the initial hearing. Employer's Brief at 6-10.

In determining whether claimant has established modification pursuant to Section 725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

Furthermore, the United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction the instant case arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989), issued *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-90 (6th Cir. 1994), holding that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made even where no specific allegation of either has been made by claimant. The Court further held that "[o]nce a request for modification is filed, no matter the grounds stated, if any, the [administrative law judge] has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions." *Id.*

In his Decision and Order on Remand, the administrative law judge stated:

In support of his allegations concerning length of coal mine employment, the Claimant has submitted a letter from the defendant employer, Leeco, Inc., which states that the Claimant was employed by Leeco, Inc. from October 23, 1972 to April 1, 1991, as a certified electrician. The commencement date of October 1972 is consistent with other evidence of record. However, the termination date of April 1991 conflicts with the Claimant's testimony and prior history of coal mine employment. There is no explanation for this disparity. Credit will be given for coal mine employment with Leeco, Inc. from October 1972 until October 1988, for a total of sixteen years of coal mine employment.

The Claimant has also submitted an employment history listing coal mine employment with Hacker Coal from 1957 to 1961; S&S Coal Co. from 1961 to 1964; Webb Branch Coal from 1964 to 1966; and Housebranch Coal from 1968 and 1972. This is generally consistent with Claimant's hearing testimony. Also recently submitted is an Opinion and Award from the Kentucky Workers' Compensation Board which credits the Claimant with more than 28 years of coal mining.

This newly submitted evidence is consistent with the earlier unsupported allegations of the Claimant. Based upon the letter from Leeco, Inc., the new employment history filed by Claimant and the Opinion and Award from the Kentucky Workers' Compensation Board, I find that the Claimant has established a total of 28 years of coal mine employment.

Since this finding concerning the length of coal mine employment is consistent with the coal mine employment relied on in relevant medical opinions, there is no reason to revisit the credibility issue.

Decision and Order on Remand at 2. Employer relies upon 20 C.F.R. §725.414(e)(1) which states:

Any documentary evidence obtained by a party during the time a claim is pending before a deputy commissioner, which is withheld from the deputy commissioner or any other party to the claim, shall not be admitted in any later proceedings held with respect to the claim in the absence of extraordinary circumstances, unless the admission of such evidence is requested by the Director or such other party.

20 C.F.R. §725.414(e)(1). See 20 C.F.R. §725.456(d); *Wilkes v. F & R Coal Co.*, 12 BLR 1-1 (1988).

Contrary to employer's contention, the evidence relied upon by the administrative law judge in the present Decision and Order on Remand is nearly identical to evidence considered in the Decision and Order denying benefits. Employer's Brief at 8. In the present Decision and Order on Remand, the newly submitted evidence consisted of the employment history submitted with claimant's second claim and the Opinion of the Kentucky Workers' Compensation Board. Decision and Order on Remand at 2; Director's Exhibits 28, 34. In fact, on May 1, 1990, employer submitted a Kentucky Workers' Compensation Board employment history form, completed by claimant on October 17, 1988, which lists an employment history nearly identical to the newly submitted employment history. Director's Exhibit 20. Although the actual evidence relied upon by the administrative law judge in his Decision and Order on Remand is newly submitted, the content of that evidence was in the record prior to the issuance of the original Decision and Order. Director's Exhibits 20, 28, 34. Thus, because employer was aware of the employment history considered by the administrative law judge and because the administrative law judge's finding of twenty-eight years of qualifying coal mine employment is supported by substantial evidence, we affirm the administrative law judge's finding as to the length of claimant's coal mine employment and that claimant established a mistake in a determination of fact pursuant to Section

725.310. *Worrell, supra.*

Employer next contends that the administrative law judge erred in failing to revisit the merits of the claim. Employer's Brief at 10. We disagree. The Board instructed the administrative law judge to reconsider the length of claimant's coal mine employment and to determine what effect any change would have on the credibility of the relevant medical opinions. *Smith, supra.* The administrative law judge properly found that his finding that claimant established twenty-eight years of coal mine employment was consistent with the length of coal mine employment relied upon by Dr. Jarboe. Decision and Order on Remand at 2; *Lafferty, supra.* Because the administrative law judge had previously found Dr. Jarboe's opinion sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b), and because the Board had previously affirmed the administrative law judge's finding that Dr. Jarboe's opinion was sufficient to establish total disability pursuant to Section 718.204(c), the administrative law judge permissibly found that he need not revisit the credibility issue. Decision and Order on Remand at 2; *Smith, supra; Lafferty, supra; Kuchwara, supra.* Thus, we reject employer's contention.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge