

BRB No. 96-0352 BLA

ROGER H. HELTON)

)
Claimant-Petitioner)

)
v.)

)
ISLAND CREEK COAL COMPANY)

)
Employer-Respondents)

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 of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Roger H. Helton, Honaker, Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant¹, without the assistance of counsel², appeals the Decision and Order

¹Claimant is Roger H. Helton, the miner, who filed a claim for benefits on October 18, 1984. Director's Exhibit 1.

²Tim White, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

(95-BLA-1263) of Administrative Law Judge Charles P. Rippey 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). This claim is before the Board for the third time. In its last Decision and Order, the Board noted that it had previously affirmed Administrative Law Judge Ben L. O'Brien's findings that claimant established the existence of pneumoconiosis arising out of coal

mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b) but failed to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(3). The Board then affirmed Administrative Law Judge Lawrence Brenner's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(4) and the denial benefits. *Helton v. Island Creek Coal Co.*, BRB No. 92-2222 BLA (Oct. 28, 1993)(unpub.). Claimant filed a timely request for modification on February 23, 1994. Director's Exhibit 80. Administrative Law Judge Charles P. Rippey reviewed the newly submitted evidence and found that claimant failed to establish total respiratory disability and denied the petition for modification.

In the instant appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that she will not participate in this appeal.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In considering the petition for modification, the administrative law judge stated that the claim was denied:

on the ground that the evidence in this record is insufficient to justify a finding that there has been a material change in the Claimant's condition since his prior claim was finally denied on October 28, 1993 on the ground that although he suffered from pneumoconiosis he was not totally disabled within the meaning of the Act.

Decision and Order at 1. The administrative law judge then stated:

All of the evidence in this record filed following the denial of the previous claim supports a finding that the claimant is not totally disabled within the meaning of the Act. Both the ventilatory and the blood gas study produced results above those required, in themselves, to support a finding of total pulmonary disability. The reports of Drs. Dahhan, Zaldivar, Endres-Bercher, Tuteur, Castle, Fino and Renn, all found that the Claimant did not have a totally disabling pulmonary impairment, and

there are no reports which concluded that he did have a totally disabling pulmonary impairment.

Decision and Order at 2. The administrative law judge then found claimant not entitled to benefits.

We initially note that in determining that claimant failed to establish a change in condition pursuant to Section 725.310, the administrative law judge erred in considering only the new evidence submitted with claimant's petition for modification. 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. As the administrative law judge only considered whether claimant established a change in conditions in the instant case, and further considered only the newly submitted evidence, we must vacate the administrative law judge's denial of benefits and remand this case to the administrative law judge for further consideration in light of *Worrell, supra*; *Nataloni, supra*.

Additionally, we note that the administrative law judge erred in stating that there was no qualifying arterial blood gas study evidence or medical opinion evidence diagnosing a totally disabling pulmonary impairment which was submitted since the final denial of the claim. Decision and Order at 2. The most recent prior Decision and Order in which evidence was considered was Judge Brenner's Decision and Order on Remand Denying Benefits, which was issued on June 30, 1992. Director's Exhibit 73. However, the record contains an arterial blood gas study with qualifying results after exercise dated July 11, 1994 and a medical report

submitted by Dr. Bailey on March 17, 1992 which states that claimant is "totally disabled from his Black Lung disease."³ Director's Exhibit 72, 88. Thus, on remand the administrative law judge must specifically discuss this evidence.

In considering the evidence on remand, the administrative law judge must include in his Decision and Order sufficient analysis and findings of fact to indicate that he has weighed all the relevant evidence of record and the basis for his decision therein. See Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Ridings v. C & C Coal Co.*, 6 BLR 1-227 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

³Dr. Bailey's report was submitted prior to the issuance of Judge Brenner's Decision and Order on Remand Denying Benefits, which is dated June 30, 1992. Director's Exhibits 72, 73. However, this report was not considered by Judge Brenner in his Decision and Order and was not discussed subsequent to that time. Director's Exhibit 73, 79.

NANCY S. DOLDER
Administrative Appeals Judge