BRB No 00-0155 BLA

BELVIN P. GIPSON (deceased)	)	
Claimant-Respondent	)	DATE ISSUED:
v.	)	
SAVOY COALS INCORPORATED	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order on Remand of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Charley Greene Dixon, Jr., Barbourville, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (96-BLA-0866) of Administrative Law Judge Richard E. Huddleston 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). This case is before the Board for the fourth time. Previously, the Board discussed fully this claim's procedural history. *Gipson v. Savoy Coals, Inc*., BRB Nos. 95-0431 BLA and 97-1088 BLA (Apr. 15, 1998)(*en banc*)(unpub.); *Gipson v. Savoy Coals, Inc*., BRB No. 95-0431 BLA (May 30, 1995)(unpub.); Director's Exhibit 33 at 22-23, 91-92. We now focus only on those procedural aspects relevant to the issues raised in this appeal of the administrative law judge's decision to deny employer's request for modification.

The administrative law judge awarded benefits in a Decision and Order on Remand issued on September 29, 1994. Director's Exhibit 33 at 136. The Board affirmed the award of benefits. [1995] *Gipson*, slip op. at 2-4; Director's Exhibit 133 at 92-94. Thereafter, employer filed a timely Motion for Reconsideration requesting *en banc* review of the Board's Decision and Order. Director's Exhibit 33 at 66, 68. Before the Board could rule on employer's motion, employer requested modification pursuant to 20 C.F.R. §725.310, alleging that a mistake in a determination of fact was made when the administrative law judge found claimant totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 33 at 56, 61. Accordingly, the Board dismissed employer's Motion for Reconsideration, subject to reinstatement, and remanded the case to the district director for modification proceedings. *Gipson v. Savoy Coals, Inc.*, BRB Nos. 91-1904 BLA, 92-0687 BLA, and 95-0431 BLA (Aug. 4, 1995)(Order)(unpub.); Director's Exhibit 33 at 311.

On remand, both employer and claimant developed and submitted additional medical evidence. The district director denied employer's request for modification, and, pursuant to employer's request, forwarded the case to the Office of Administrative Law Judges. The administrative law judge denied modification in a Decision and Order issued on April 9, 1997, concluding that the record failed to demonstrate either a mistake in a determination of fact or a change in conditions under Section 725.310. Director's Exhibit 33 at 65. Accordingly, he again awarded benefits.

Upon consideration of employer's appeal, the Board held that the administrative law judge improperly combined his analysis of respiratory disability with the separate issue of disability causation, thereby failing to address the evidence which, employer asserted, demonstrated that a mistake in a determination of fact was made in the administrative law judge's prior decision when he found disability causation established pursuant to Section 718.204(b). Consequently, the Board vacated the administrative law judge's findings pursuant to Sections 718.204(b) and 725.310, and remanded the case for him to weigh all of the evidence relevant to disability causation and specifically address employer's assertion that a mistake in a determination of fact was demonstrated pursuant to Section 725.310. [1998] *Gipson*, slip op. at 3-5; Director's Exhibit 35 at 24-26.

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[1] The parties waived their right to a hearing on modification and requested a decision on the documentary record. Director's Exhibit 35 at 121-34; *see* 20 C.F.R. §725.461(a); *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 429, 21 BLR 2-495, 2-504 (6th Cir., 1998); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-71-72 (2000).

On remand, the administrative law judge considered all of the evidence relevant to disability causation pursuant to Section 718.204(b) and found that the weight of the evidence established that claimant's totally disabling respiratory impairment was due at least in part to pneumoconiosis. The administrative law judge therefore found that "with regard to disability causation, [e]mployer has failed to establish a mistake in a determination of fact," pursuant to Section 725.310. Decision and Order on Remand at 13. Accordingly, the administrative law judge denied employer's request for modification.

On appeal, employer contends that the administrative law judge committed several errors in his analysis of the medical evidence pursuant to Section 718.204(b), and therefore erred in finding that no mistake in a determination of fact was demonstrated. Claimant has not filed a response, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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[2] The Board also considered employer's reinstated motion for reconsideration. Because employer on appeal conceded that claimant was totally disabled by a respiratory or pulmonary impairment, the sole issue for reconsideration was whether Dr. Baker's opinion attributing claimant's totally disabling respiratory impairment to both smoking and pneumoconiosis was legally sufficient to support a finding of disability causation pursuant to Section 718.204(b). The Board granted reconsideration, but reaffirmed its previous holding that Dr. Baker's opinion was legally sufficient, if fully credited, to support a finding that claimant's disability was due at least in part to pneumoconiosis. [1998] *Gipson*, slip op. at 2-3; Director's Exhibit 35 at 23-24.

For purposes of this appeal, it is settled that claimant established the existence of pneumoconiosis arising out of coal mine employment, and that he had a totally disabling respiratory impairment. Employer's request for modification challenged the administrative law judge's previous finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b).

Section 725.310 provides that a party may request modification of the terms of an award or denial of benefits within one year on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge has the authority to reconsider all the evidence for any mistake of fact in the prior decision. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). As the party requesting modification based on an alleged mistake of fact, employer bore the burden of persuasion. *Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27, 1-34 (1996).

At the time of the administrative law judge's initial award of benefits, the record contained the medical examination reports of Drs. Baker, Broudy, and Bushey. Dr. Baker, who is Board-certified in Internal Medicine, examined and tested claimant twice. Director's Exhibits 13, 29. Dr. Baker diagnosed pneumoconiosis and concluded that claimant's totally disabling respiratory impairment was due to both coal dust exposure and smoking. *Id*. Dr. Broudy, who is Board-certified in Internal Medicine and Pulmonary Disease, diagnosed coal workers' pneumoconiosis and chronic bronchitis due to smoking, and concluded that claimant did not have a totally disabling respiratory impairment. Director's Exhibit 27. Dr. Bushey, whose credentials are not of record, diagnosed coal workers' pneumoconiosis and concluded that claimant was totally disabled, but did not address the cause of the disability. Director's Exhibit 33 at 297. In finding entitlement established previously, the administrative law judge was persuaded by Dr. Baker's opinion attributing claimant's disabling impairment to both coal dust exposure and smoking.

In support of its assertion that a mistake in a determination of fact was made in the prior decision, employer submitted a new pulmonary examination report by Dr. Broudy, two reports by physicians who reviewed the medical evidence, and copies of hospitalization records. Based upon his examination, Dr. Broudy opined that claimant did not have coal workers' pneumoconiosis and that his disabling respiratory impairment was unrelated to coal mine employment. Director's Exhibit 33 at 27. Dr. Broudy stated that claimant's impairment was due to smoking, and possibly to obesity and congestive heart failure. *Id*. Dr. Castle, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the record and concluded that claimant "retain[ed] the respiratory

capability to perform his usual employment duties," but suffered from a "whole man" disability due to coronary artery disease. Employer's Exhibit 1. Dr. Castle stated that claimant's mild to moderate, non-disabling respiratory impairment was due to smoking. *Id*. Dr. Lane, whose credentials are not of record, reviewed the medical evidence and opined that claimant had "no significant pulmonary dysfunction." Director's Exhibit 33 at 27. Dr. Lane stated that claimant's pulmonary function studies showed a mild, non-disabling impairment that "on a statistical basis," was most likely due to smoking. *Id*. The hospital records submitted by employer reflect the diagnosis and treatment of back problems and coronary artery disease. Director's Exhibit 33 at 8.

Claimant submitted copies of hospitalization records and a letter from Dr. Baker. The hospitalization records related to claimant's hospitalization following a heart attack, and consultations regarding possible coronary artery bypass surgery. Director's Exhibit 35 at 95-105. Dr. Baker's letter was addressed to the U.S. Department of Labor, Division of Coal Miners' Compensation, and stated that claimant would have an ongoing need for portable oxygen because of his worsening respiratory condition. Director's Exhibit 33 at 90.

The administrative law judge correctly inquired whether the evidence established that claimant's total disability was due at least in part to pneumoconiosis. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 743, 21 BLR 2-203, 2-210 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989). The administrative law judge found that Dr. Baker's opinion was adequately documented and reasoned, and was sufficient to establish that claimant's total disability was due at least in part to pneumoconiosis. The administrative law judge further found that, contrary to employer's contention, Dr. Baker's opinion established that claimant's pneumoconiosis was more than merely a speculative or *de minimis* cause of his disability. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-186 (6th Cir. 1997).

The administrative law judge provided several reasons for according less weight to the disability causation opinions of Drs. Broudy, Castle, and Lane. One reason the administrative law judge gave for discounting Dr. Broudy's opinion was that Dr. Broudy rendered his most recent opinion under the mistaken belief that claimant was not suffering from pneumoconiosis, contrary to the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1). Similarly, the administrative law judge indicated his concern that Dr. Castle's and Dr. Lane's view that claimant was not disabled from a respiratory standpoint ran counter to the established fact that claimant suffered from a totally disabling respiratory impairment pursuant to Section 718.204(c). For these reasons, the administrative law judge accorded greater weight to Dr. Baker's opinion and found that claimant's total disability was due at least in part to pneumoconiosis. *See Adams, supra*.

Employer contends that the administrative law judge erred in according less weight to the disability causation opinions of Drs. Broudy, Castle, and Lane based upon their underlying premises concerning the existence of pneumoconiosis or the presence of a totally disabling respiratory impairment. Employer's Brief at 25. Contrary to employer's contention, an administrative law judge may accord less weight to a physician's opinion as to the cause of disability where the physician has incorrectly concluded that claimant does not have pneumoconiosis. *See Adams*, 886 F.2d at 826, 13 BLR at 2-63-64. Therefore, the administrative law judge permissibly accorded less weight to Dr. Broudy's opinion. Additionally, an administrative law judge need not credit a medical opinion if its underlying premise runs counter to a fact already found established by the administrative law judge. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993). Since Drs. Castle and Lane relied on the premise that claimant did not have a totally disabling respiratory impairment, contrary to the administrative law judge's finding and employer's stipulation, the administrative law judge permissibly accorded their opinions less weight in the disability causation inquiry.

Employer argues that several other reasons given by the administrative law judge for discounting the opinions of Drs. Broudy, Castle, and Lane were improper. Employer's Brief at 26-35. We need not address these points, because the administrative law judge has provided a valid, independent reason for according less weight to each opinion. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983)(Miller, J., dissenting). Additionally, there is no merit in employer's contention that the administrative law judge overlooked other potential causes of claimant's total disability. Employer's Brief at 23-24. The administrative law judge considered the evidence concerning claimant's smoking history and his coronary artery disease, and concluded that the record supported a finding that claimant's total disability was due at least in part to pneumoconiosis, notwithstanding claimant's other conditions. *See Hunt*, 124 F.3d at 743, 21 BLR at 2-210. Substantial evidence supports the administrative law judge's finding, and we are not empowered to reweigh the evidence. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Anderson, supra*; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(b), and we affirm his attendant finding that employer did not carry its burden to establish that a mistake in a determination of fact was made previously. *See Worrell, supra*; *Branham, supra*.

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[3] We reject employer's contention that Dr. Baker's opinion is legally insufficient to establish that claimant's total disability was due at least in part to pneumoconiosis, for the same reasons that we gave previously. Employer's Brief at 22-23; [1998] *Gipson*, slip op. at 2-3; [1995] *Gipson*, slip op. at 3-4.

Claimant's counsel has submitted a complete, itemized statement requesting a fee for services performed in the prior appeal pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $1,425.00 for 9.5 hours of legal services at an hourly rate of $150.00. As the fee petition appears to be in order, the fee requested and hourly rate are not excessive, and no objections to the fee petition have been received, counsel is awarded a fee of $1,425.00 to be paid directly to him by employer. 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand denying modification and awarding benefits is affirmed, and claimant's counsel is awarded a fee of $1,425.00.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge