BRB No. 01-0837 BLA

RHODELIA TAYLOR (Widow of HARRY TAYLOR	)	
Claimant-Petitioner	)	
v.	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Rhodelia Taylor, Caryville, Tennesse, *pro se*.[1]

Michelle S. Gerdano (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services in St. Charles, Virginia, on behalf of claimant, requested an appeal of the administrative law judge's Decision and Order, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, without the assistance of counsel, appeals the Decision and Order (2000-BLA-1035) of Administrative Law John C. Holmes denying a request for modification of a decision denying benefits on both a miner's claim and a survivor's 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).[2] This case has a lengthy procedural history.[3] The Board previously affirmed Administrative Law Judge E. Earl Thomas's Decision and Order denying modification of the denial of benefits in both the miner's and the survivor's claims pursuant to 20 C.F.R §725.310 (2000), based on his finding that the weight of the evidence

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726. All the citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The miner, Harry Taylor, filed a claim for benefits on February 28, 1984, and died on November 18, 1984. Director's Exhibits 1, 2, 8. Claimant, Rhodelia Taylor, is the miner's widow; she filed a survivor's claim for benefits on January 24, 1985. Director's Exhibit 3. On September 10, 1987, Administrative Law Judge Giles J. McCarthy credited the miner with seven and one-half years of qualifying coal mine employment, and found the evidence in the miner's claim insufficient to establish the existence of pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis. Judge McCarthy further found the evidence in the survivor's claim insufficient to establish that the miner's death was due to pneumoconiosis, and thus denied benefits in both claims. Director's Exhibit 36. While the cases were on appeal to the Board, claimant requested modification of Judge McCarthy's decisions. The Board dismissed the appeal and remanded the cases to the district director for further consideration of claimant's request for modification. *Taylor v. Director, OWCP*, BRB No. 87-1128 BLA (May 25, 1990) (unpublished Order). The district director denied claimant's request for modification and the subsequent requests filed in 1991, 1992 and 1993. Director's Exhibit 37, 41, 52, 53, 54. On March 15, 1994, after a formal hearing, Administrative Law Judge E. Earl Thomas denied claimant's request for modification of the denial of benefits in both claims, finding that claimant failed to establish a mistake in a determination of fact, and that a change in conditions could not be established in this case where the miner died before the hearing on the merits of his claim. Director's Exhibit 66. In so concluding, Judge Thomas determined that the weight of the new evidence submitted in support of modification was insufficient to establish the existence of pneumoconiosis in both claims. *Id.* Judge Thomas incorrectly stated that Judge McCarthy's findings regarding the presence of pneumoconiosis and the length of the miner's coal mine employment were not determinations of fact but rather conclusions of law which could not be challenged through modification, *id.*, but the Board held that this error was harmless. *Taylor v. Director, OWCP*, BRB No. 94-2334 BLA (Aug. 31, 1995)(unpublished).

was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). *Taylor v. Director, OWCP,* BRB No. 94-2334 BLA (Aug. 31, 1995) (unpublished). The Board also denied claimant's request for reconsideration of its decision. *Taylor v. Director, OWCP*, BRB No. 94-2334 BLA (Aug. 15, 1996) (unpublished Order). Claimant again sought modification of the denial of benefits in both claims, which was denied by Administrative Law Judge Thomas M. Burke in a Decision and Order issued on January 13, 1999.[4] Director's Exhibit 86. By letter received January 14, 2000, claimant filed the instant request for modification of Judge Burke's decision. Director's Exhibit 87. Following a formal hearing, Judge Holmes (the administrative law judge) denied benefits in both claims, finding that claimant could not establish a change in the deceased miner's condition and that claimant failed to establish a mistake in a determination of fact, as the new evidence submitted in support of modification was insufficient to establish either the existence of pneumoconiosis or death due to pneumoconiosis.

In the present appeal, claimant generally challenges the denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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 (1985).

The intended purpose of modification based on a mistake in fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has recognized that the fact-finder is not bound by previous credibility determinations,

[4]Judge Burke found that the testimony elicited at the hearing before him concerning the presence of pneumoconiosis in the deceased miner and the length of coal mine employment was not corroborated by any of the objective evidence in the formal record; that claimant could not establish a change in conditions; and that claimant failed to submit any new evidence to support a finding of a mistake in a determination of fact pursuant to Section 725.310 (2000). Director's Exhibit 86.

but has the authority to rethink prior findings of fact and to reconsider all evidence for any mistake in fact, including the ultimate fact of entitlement. *See Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942 (6th Cir. 1999), *cert. denied*, 531 U.S. 818 (2000); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994).

In support of her request for modification of the denial of benefits in both claims, claimant submitted a medical opinion from Dr. Kahn dated May 18, 2000, Director's Exhibit 96, and a hospital discharge summary authored by Dr. Sinicrope regarding his treatment of the miner between April 13, 1982 and May 13, 1982, for Wegener's granulomatosis, a myocardial infarction, and a cerebral infarction. Claimant's Exhibit 1. Dr. Kahn reviewed the medical evidence, including the autopsy report signed by Dr. deVega, the pathology slides, and the death certificate. Dr. Kahn reported:

> Only a trace of coal dust is present. There are no coal macules nor nodules...no massive fibrosis. As noted in the autopsy report, there are multiple pulmonary emboli, infarcts, and pulmonary edema as the only significant lesions present in the lungs. Mild pulmonary emphysema is seen. There is minimal anthracosis in the mediastinal lymph nodes...no Coal Workers' Pneumoconiosis present.

Director's Exhibit 96.

After reviewing the record in both claims, the administrative law judge approved of and adopted as his own the previous decisions issued in this case, and found that "the new medical evidence conclusively demonstrates" that the miner did not have pneumoconiosis, as there was no mention of pneumoconiosis in Dr. Sinicrope's records, and Dr. Kahn's report explicitly found no pneumoconiosis. Decision and Order at 2. With regard to the earlier evidence of record, the administrative law judge stated that "anthracosis by itself is not descriptive of pneumoconiosis," and found that the miner's autopsy report "clearly and unmistakably found no pneumoconiosis....no physician has in any credible manner causally related [the miner's] death to coal dust exposure....the opinion of Dr. Bruton is not credible, as has been discussed [by Judge Thomas]." Decision and Order at 2-3.

While a diagnosis of anthracotic pigmentation is insufficient by itself to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(2), both the former and the amended versions of 20 C.F.R. §718.201 identify "anthracosis" as a disease within the definition of "pneumoconiosis," and anthracosis found in lymph nodes may be sufficient to establish the existence of pneumoconiosis. *See Hapney v. Peabody Coal Co.*, 22 BLR 1-104 (2001)(*en banc*); *Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1989); *Lykins v. Director, OWCP*, 819 F.2d 146, 10 BLR 2-129 (6th Cir.

1987); *see also Daugherty v. Dean Jones Coal Co.,* 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989); *Consolidation Coal Co. v. Smith,* 837 F.2d 321, 11 BLR 2-37 (8th Cir. 1988); *Peabody Coal Co. v. Shonk,* 906 F.2d 264 (7th Cir. l990); *Bueno v. Director, OWCP*, 7 BLR 1-337, 1-340 (1984); *Dobrosky v. Director, OWCP*, 4 BLR 1-680, 1-684 (1982). Although Dr. Kahn concluded that "[t]here is no Coal Workers' Pneumoconiosis present," he also diagnosed "minimal anthracosis in the mediastinal lymph nodes." Director's Exhibit 96. In addition, while the microscopic descriptions of the miner's lungs and lymph nodes merely note anthracotic pigmentation, the autopsy report lists "anthracosis of hilar lymph nodes" as one of the final pathological and anatomical diagnoses. Director's Exhibit 72. Further, the opinion of the miner's treating physician, Dr. Bruton, that anthracosis arising out of coal mine employment contributed to the miner's death, was previously discredited on the ground that it was unsupported by the record which did not include "the disease of anthracosis among the diagnosed conditions." Director's Exhibit 66 at 4-5.

Because the administrative law judge did not determine whether the diagnoses of anthracosis in the record were sufficient to establish the existence of pneumoconiosis, we vacate the administrative law judge's denial of benefits in both claims, and remand this case for reconsideration of all the relevant medical evidence under Section 718.202(a). *See Milliken*, *supra*; *Hapney*, *supra.* The administrative law judge is instructed to perform an independent assessment of this evidence, *see Worrell*, *supra*; *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); and if, on remand, the administrative law judge finds that claimant has established the existence of pneumoconiosis, he must determine whether modification of the denial of benefits in both claims is appropriate pursuant to Section 725.310 (2000), after adjudicating the remaining issues in this case, *i.e.*, the length of the miner's coal mine employment and the etiology of the miner's pneumoconiosis relevant to both claims; total respiratory disability and causation relevant to the miner's claim; and the cause of the miner's death relevant to the survivor's claim.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL

Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge