BRB No. 00-0726 BLA

BOBBY G. CAREY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ZAKREWSKY COAL COMPANY	)	
	)	
and	)	
	)	
STATE WORKMEN'S INSURANCE FUND	)	DATE ISSUED:
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Maureen E. Calder and A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Bethlehem, Pennsylvania, for employer.

Jeffrey S. Goldberg (Judith E. Kramer, 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order (1999-BLA-01016) of Administrative Law Judge Paul H. Teitler (the administrative law judge) 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).[2] The administrative law judge determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000) and, consequently, neither a change in conditions nor a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were

[1]Claimant is Bobby G. Carey, the miner, who filed a claim for benefits on March 13, 1997, which was denied by Administrative Law Judge Ralph A. Romano on August 7, 1998 because claimant failed to establish the existence of pneumoconiosis. Director's Exhibits 1, 74. Claimant filed an appeal with the Benefits Review Board on August 25, 1998, but later moved to remand the case for modification pursuant to 20 C.F.R. §725.310. Director's Exhibits 75, 79. On March 2, 1999, the Board dismissed claimant's appeal and remanded the case for modification proceedings. Director's Exhibit 80.

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

denied. On appeal, claimant contends that the administrative law judge erred in weighing the evidence of record regarding the existence of pneumoconiosis pursuant to Section 718.202(a)(1)(2000). Employer responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, responds declining to submit a brief on appeal.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which claimant, employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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).

Pursuant to 20 C.F.R. §725.310 (2000), a party may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. The United States Court of Appeal for the Third Circuit, within whose jurisdiction the case arises, has held that in addressing a modification petition, the administrative law judge must consider all of the evidence to determine whether any mistake of fact was made in the previous adjudication of the case, including a mistake in the ultimate fact of entitlement. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *see also Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992),

[3]We affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (3), as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

modifying 14 BLR 1-156 (1990); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

Claimant initially contends that the administrative law judge failed to provide a specific explanation for his weighing of the x-ray evidence of record, other than performing a mechanical numerical count of the evidence. Claimant's Brief at 3-5. The newly submitted x-ray evidence consists of sixteen interpretations of an x-ray dated April 23, 1999. Eight of the interpretations were read as negative and seven were read as positive by physicians who are dually qualified as B readers and Board-certified radiologists, while one of the interpretations were read as positive by a physician who is a B reader. Employer's Exhibits 2-9; Claimant's Exhibits 4, 6, 8, 10, 12, 15, 17, 22. The administrative law judge considered the qualifications of all of the physicians submitting interpretations, as well as the numerical weight of the x-ray evidence, and rationally found that, because the readings are equally divided, claimant failed to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 5; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Lafferty v. Cannelton Industries,* Inc., 12 BLR 1-190 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Inasmuch as the administrative law judge acted within his discretion in considering the physicians' credentials as well as the numerical weight of the x-ray evidence, we reject claimant's contention of error and affirm the administrative law judge's weighing of the x-ray evidence pursuant to Section 718.202(a)(1)(2000).

Claimant next contends that the administrative law judge erred in assigning more weight to Dr. Dittman's opinion than to Dr. Kraynak's opinion on the basis of Dr. Dittman's superior credentials and in finding that Dr. Dittman's opinion is better supported by the evidence of record. Claimant's Brief at 6-8. Dr. Dittman, who is Board-certified in internal medicine, opined that claimant does not have pneumoconiosis. Employer's Exhibit 21. Dr. Kraynak, who is Board-eligible in family medicine, opined that claimant has pneumoconiosis. Claimant's Exhibit 20. The administrative law judge, acting within his discretion, assigned greater weight to Dr. Dittman's opinion because of his superior credentials. Decision and Order at 10; *Lafferty, supra*; *Clark v. Karst-Robbins Coal* Co., 12 BLR 1-149 (1989)(*en banc*); *McMath , supra*; *Dillon, supra*; *Martinez, supra*; *Wetzel, supra*. Additionally, the administrative law judge acted within his discretion in finding Dr. Kraynak's opinion entitled to less weight because he provided little objective evidence to support his finding of pneumoconiosis. Decision and Order at 10; *Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Hutchens v. Director,* OWCP, 8 BLR 1-16 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Inasmuch as the administrative law judge acted within his discretion in weighing the opinions of Drs. Dittman and Kraynak, we reject claimant's contention.

Finally, claimant contends that the administrative law judge erred in referring to the pulmonary function studies when weighing the medical opinion evidence because the validity or invalidity of the studies has no bearing on the existence of pneumoconiosis. Claimant's Brief at 8. However, pursuant to Section 718.202(a)(4)(2000), the administrative law judge must consider whether the physicians opinion regarding the existence of pneumoconiosis is based on objective medical evidence including pulmonary function studies. 20 C.F.R. §718.202(a)(4)(2000). Consequently, we reject claimant's contention and affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000), as well as his findings that claimant failed to establish either a change in condition or a mistake in a determination of fact pursuant to Section 725.310 (2000). Consequently, we also affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge