

BRB No. 01-0592 BLA

JACK R. BLANKENSHIP)
)
 Claimant-)
 Respondent)
) DATE ISSUED:
 v.)
)
 KENTUCKY CARBON)
 CORPORATION)
)
 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 - Awarding Benefits of Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Martin E. Hall (Jackson & Kelly PLLC), Lexington, Kentucky, for
employer.

Rita Roppolo (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and
GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2000-BLA-0637)
of Administrative Law Judge Joseph E. Kane with respect to 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). The relevant procedural history of this case is as follows: Claimant filed an application for benefits on December 16, 1983. Director's Exhibit 23-413. In a Decision and Order issued on July 23, 1990, Administrative Law Judge Daniel J. Roketenetz denied benefits on the ground that claimant failed to establish that he is totally disabled. Director's Exhibit 23-53. Upon consideration of claimant's appeal, the Board, in a Decision and Order dated September 17, 1991, affirmed the denial of benefits. *Blankenship v. Kentucky Carbon Corp.*, BRB No. 90-1895 BLA (Sept. 17, 1991)(unpub.); Director's Exhibit 23-14. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, also affirmed the administrative law judge's Decision and Order.¹ *Blankenship v. Kentucky Carbon Corp.*, No. 91-3995 (6th Cir. Sept. 9, 1992); Director's Exhibit 23-4.

¹This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in the Commonwealth of Kentucky. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

Claimant filed a second application for benefits on January 26, 1985. Director's Exhibit 1. In a Decision and Order dated December 9, 1997, Administrative Law Judge Richard P. O'Neill determined that although the newly submitted evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(c), claimant did not prove, on the merits, that he had pneumoconiosis nor did he establish that he was totally disabled due to pneumoconiosis.² Accordingly, benefits were denied. Claimant filed an appeal with the Board which, in a Decision and Order dated December 18, 1998, affirmed the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Blankenship v. Kentucky Carbon Corp.*, BRB No. 98-0483 BLA (Dec. 18, 1998)(unpub.); Director's Exhibit 61. Claimant filed a timely request for modification on November 19, 1999 and submitted new evidence. Director's Exhibit 62; Claimant's Exhibits 1, 2.

In the Decision and Order that is the subject of the present appeal, Administrative Law Judge Joseph E. Kane (the administrative law judge), indicated that the case before him presented a request for modification of a denied duplicate claim. Decision and Order at 3. The administrative law judge determined that Judge O'Neill did not err in finding that a material change in conditions was established by the newly submitted evidence that supported a finding of total disability. The administrative law judge concluded that because Judge O'Neill acted within his discretion in finding a material change in conditions, claimant was entitled to a *de novo* review of entitlement to benefits based upon a consideration of all of the evidence of record. The administrative law judge

²The 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 (2001). Unless otherwise noted, all citations are to the amended regulations.

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 for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). Therefore, any arguments made by the parties in response to the Board's Order requesting briefing are now moot.

determined that claimant established the existence of pneumoconiosis arising out of coal mine employment and that he is totally disabled due to pneumoconiosis. Accordingly, benefits were awarded. Employer argues on appeal that the administrative law judge did not properly address claimant's request for modification. Employer also asserts that the administrative law judge erred in his consideration of the evidence regarding the existence of pneumoconiosis arising out of coal mine employment and total disability to pneumoconiosis. Finally, employer contends that the administrative law judge did not select the correct date from which benefits are payable. Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not responded to the merits of employer's 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 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).

Employer asserts initially that inasmuch as claimant requested modification of a denied duplicate claim, the administrative law judge should have first considered whether the evidence submitted with the request for modification established a material change in conditions. This contention is without merit, as both employer and the administrative law judge have mischaracterized the nature of claimant's request for modification. Because Judge O'Neill denied benefits *on the merits* in his Decision and Order and the Board affirmed his finding that the evidence of record, as a whole, was insufficient to establish the existence of pneumoconiosis, a requisite element of entitlement, claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000) pertained to a denial of benefits on the merits rather than a denied duplicate claim. *Blankenship v. Kentucky Carbon Corp.*, BRB No. 98-0483 BLA (Dec. 18, 1998)(unpub.); Director's Exhibit 61.

Nevertheless, the administrative law judge determined that because Judge O'Neill's material change in conditions finding did not contain a mistake in a determination of fact, claimant had established a material change in conditions and was entitled to a *de novo* review of his claim. Decision and Order at 39. The administrative law judge proceeded to address the merits of entitlement based upon a weighing of all of the evidence of record without separately considering whether the newly submitted evidence, weighed in conjunction with the prior evidence, was sufficient to establish the element of entitlement previously adjudicated against claimant. This error does not require remand, however, as the appropriate Section 725.310 (2000) change in conditions analysis is subsumed in the administrative law judge's findings on the merits.³ *See Kovac*

³The United States Court of Appeals for the Sixth Circuit has held that in

v. BCNR Mining Corp., 16 BLR 1-71 (1992), *modifying* 14 BLR 1-156 (1990). We must now turn, therefore, to the allegations of error that employer raises concerning the administrative law judge's consideration of the medical evidence of record pursuant to Sections 718.202(a), 718.203(b), and 718.204.

With respect to the administrative law judge's consideration of the evidence relevant to the existence of pneumoconiosis pursuant to Section 718.202(a)(1), employer argues that the administrative law judge erred in treating as positive for pneumoconiosis a number of x-ray interpretations that were, in fact, negative or supported a finding that claimant does not have pneumoconiosis. As employer has indicated, in order for an x-ray to be considered positive for pneumoconiosis under Section 718.202(a)(1), it must be classified as Category 1 or higher, or 1/0 or greater in accordance with the ILO/UC system. 20 C.F.R. §718.102(b). If a physician gives an x-ray reading that is positive for pneumoconiosis, but asserts that the disease process manifested is not coal workers' pneumoconiosis, the physician's comments are considered in conjunction with Section 718.203(b), rather than Section 718.202(a)(1). *See Cranor v. Peabody Coal Co.*, 21 BLR 1-201 (1999). This same principle holds true if a physician does not provide an ILO/UC classification, but states that the x-ray does not contain findings suggestive of coal workers' pneumoconiosis. Thus, the administrative law judge did not err in finding,

determining whether a mistake in a determination of fact exists pursuant to Section 725.310 (2000), the administrative law judge must consider all of the evidence of record to determine if the evidence is sufficient to establish the element or elements which defeated entitlement in the prior decision. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *see also Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), *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). The court also held that the scope of modification extends to whether the ultimate fact of entitlement was wrongly decided. *Worrell, supra*.

based upon the preponderance of readings that were positive for pneumoconiosis, that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 41; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

Employer also suggests that the administrative law judge's finding under Section 718.202(a)(1) must be vacated, as the administrative law judge did not weigh the evidence relevant to Section 718.202(a) together pursuant to the decision of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Because the present case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which has not adopted the holding in *Williams*, we decline to do as employer has requested. Accordingly, we affirm the administrative law judge's finding that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). We need not address, therefore, employer's allegations of error regarding the administrative law judge's determination that claimant established the existence of pneumoconiosis under Section 718.202(a)(4). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). To the extent that they are pertinent to the issue of whether the administrative law judge properly found that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), employer's arguments will be addressed thereunder.

In determining that the presumption that claimant's pneumoconiosis arose out of coal mine employment was not rebutted under Section 718.203(b), the administrative law judge addressed the source of claimant's clinical pneumoconiosis, as diagnosed by x-ray, and the source of claimant's legal pneumoconiosis. The administrative law judge found that the evidence was insufficient to establish that the clinical pneumoconiosis diagnosed on x-ray did not arise out of coal mine employment, as the opinions of the physicians who attributed the changes seen on x-ray to causes other than coal dust exposure were not credible. Decision and Order at 43-44. The administrative law judge also determined that the opinions of claimant's treating physicians, who agreed that claimant is suffering from clinical pneumoconiosis, were entitled to greater weight. Employer argues that the administrative law judge erred in neglecting to consider the qualifications of the physicians who provided the x-ray interpretations and in relying upon the status of claimant's treating physicians.

Employer's contentions are without merit. Although the administrative law judge did not specifically address the respective qualifications of the physicians who interpreted claimant's x-rays, he discredited the opinions of the B readers and Board-certified radiologists who stated that claimant is suffering from some process other than coal workers' pneumoconiosis on the grounds that these physicians did not provide reasoned

and documented diagnoses of the specific disease entity from which claimant suffers. *Id.* Inasmuch as employer has not identified any error in the administrative law judge's findings in this regard, we affirm his determination that the presumption that claimant's clinical pneumoconiosis arose out of coal mine employment has not been rebutted pursuant to Section 718.203(b).⁴ See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

With respect to the issue of whether claimant's chronic obstructive pulmonary disease (COPD) is related to dust exposure in coal mine employment, pursuant to Section 718.202(a)(4), the administrative law judge determined that the medical opinions of the physicians who attributed claimant's COPD to cigarette smoking were not properly documented, as there was insufficient evidence to establish that claimant smoked more than a few cigarettes a day beginning in adolescence and ending in 1984. Decision and Order at 42-43. In rendering this finding, the administrative law judge indicated that these physicians had relied upon claimant's elevated carboxyhemoglobin level as an indication that claimant continued to smoke and was consuming more than one package of cigarettes per day. The administrative law judge found that this foundation was not sound, as the elevated carboxyhemoglobin levels could be the result of a number of different factors and the record was devoid of any other evidence that claimant continued to smoke. *Id.* Employer asserts that the administrative law judge erred in finding, in essence, that Drs. Dahhan, Hippensteel, Castle, Jarboe, Fino, and Wiot relied upon an inaccurate smoking history in concluding that claimant's condition is related to smoking, rather than coal dust exposure. Inasmuch as the administrative law judge did not abuse

⁴Employer also contends that the administrative law judge should have resolved the conflict in the medical opinions of record by referring to the qualifications of the physicians and the recency of their examinations. Although the administrative law judge could have relied upon these factors, he was not required to do so. See *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983).

the discretion granted to him as fact-finder in determining that the significance of the carboxyhemoglobin values were not conclusive as to claimant's continued use of cigarettes, we decline to disturb his finding. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Accordingly, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that claimant's COPD was not related to dust exposure in coal mine employment pursuant to Section 718.203(b).

With respect to the issue of total disability causation, the administrative law judge determined, under Section 718.204(b) (2000), that the medical opinions of Drs. Sundaram, Younes, and DeJoya were sufficient to establish that claimant is totally disabled due to pneumoconiosis.⁵ Decision and Order at 45. Employer alleges that the administrative law judge erred in mechanically crediting the opinions of claimant's treating physicians without considering whether their opinions are reasoned and documented. Employer also asserts that the administrative law judge did not adequately set forth the rationale underlying his findings. These contentions are without merit. Although the administrative law judge's discussion pursuant to Section 718.204(b) (2000) was brief, he thoroughly addressed the weight accorded to the opinions in which the physicians ruled out any connection between pneumoconiosis and claimant's disability under Sections 718.202(a)(4) and 718.203(b). Decision and Order at 42-45. In addition, the administrative law judge set forth his determination that the opinions of Drs. Sundaram, Younes, and DeJoya are supported by the underlying objective evidence. *Id*; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Thus, the administrative law judge's Decision and Order, as a whole, comports with the Administrative Procedure Act (APA), 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).⁶ *See Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793 (1985); *McCune v. Central*

⁵ The provision pertaining to disability causation, previously set forth at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c), while the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b).

⁶The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record..." 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).

Appalachian Coal Co., 6 BLR 1-996 (1984); *Seese v. Keystone Coal Mining Corp.*, 6 BLR 1-149 (1983). We affirm, therefore, the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis. See 20 C.F.R. §718.204(c); see also *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Inasmuch as we have affirmed the administrative law judge's findings pursuant to Sections 718.202, 718.203(b), and 718.204, we further hold that remand is not required to permit the administrative law judge to separately address the issue of whether claimant established a change in conditions or mistake of fact pursuant to Section 725.310 (2000), as this analysis is subsumed into his findings on the merits. See *Kovac, supra*. Accordingly, we affirm the award of benefits under 20 C.F.R. Part 718, as it is rational and supported by substantial evidence. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

When ascertaining the date from which claimant's eligibility for benefits commenced, the administrative law judge determined that the evidence of record does not establish the date on which claimant became totally disabled due to pneumoconiosis. Decision and Order at 45-46. Consequently, the administrative law judge designated, January 1, 1995, the first day of the month in which claimant filed his application for benefits, as the date of onset. *Id.* Employer maintains that the administrative law judge's finding must be vacated, as claimant's eligibility for benefits cannot begin prior to the date of the prior denial of benefits. This contention has merit. In light of the administrative law judge's determination that Judge O'Neill's 1997 Decision and Order did not contain a mistake in a determination of fact, Judge O'Neill's finding that claimant was not totally disabled due to pneumoconiosis at that point in time is presumed to be correct. Based upon the administrative law judge's determination that the date on which claimant's pneumoconiosis became totally disabling cannot be ascertained, a finding that employer does not challenge, we hold that, as a matter of law, the appropriate date on which claimant's eligibility began is January 1, 1999, the first day of the month in which claimant filed his request for modification. See *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); see also *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed and the administrative law judge's finding with respect to the date of onset of total disability due to pneumoconiosis is modified to January 1, 1999.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge