BRB No. 07-0717 BLA

C.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	DATE ISSUED: 04/28/2008
	)	
and	)	
	)	
OHIO BUREAU OF WORKERS' COMPENSATION PROGRAMS	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Terrence W. Larrimer (Larrimer & Larrimer), Columbus, Ohio, for claimant.

Gregory K. Johnson (Black Lung Fund), Columbus, Ohio, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (06-BLA-5645) of Administrative Law Judge Thomas F. Phalen, Jr. (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).[1] This case involves a request for modification of a subsequent claim. The pertinent procedural history of this case is as follows: Claimant filed his first claim on December 15, 1998. Director's Exhibit 1. It was finally denied by the district director on April 26, 1999, because the evidence did not show that claimant had pneumoconiosis, that the disease was caused at least in part by claimant's coal mine employment, and that claimant was totally disabled by the disease. *Id*. Claimant filed his second claim on June 21, 2002. Director's Exhibit 2. It was finally denied by the district director on March 18, 2003, because the evidence did not show that claimant had pneumoconiosis, that the disease was caused at least in part by claimant's coal mine employment, and that claimant was totally disabled by the disease. *Id*. Claimant filed his third claim on April 27, 2004. Director's Exhibit 4. It was denied by the district director on February 1, 2005, because the evidence did not show that claimant had pneumoconiosis, that the disease was caused at least in part by claimant's coal mine employment, and that claimant was totally disabled by the disease. Director's Exhibit 15.

Claimant filed this request for modification on January 27, 2006. Director's Exhibit 16. In a Decision and Order dated April 30, 2007, the administrative law judge credited claimant with at least twenty-five years of coal mine employment based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).[2] Consequently, the administrative law judge found that the new evidence did not establish a change in conditions pursuant to 20 C.F.R. §725.310. Further, the administrative law judge found that the evidence did not establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant also challenges the administrative law judge's finding that the new medical opinion evidence did not establish total disability at 20 C.F.R.

[1] The record indicates that claimant was last employed in the coal mine industry in Ohio. Director's Exhibits 1, 2, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge did not render a finding with regard to the issue of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

§718.204(b)(2)(iv). In addition, claimant challenges the administrative law judge's finding that the evidence did not establish a mistake in a determination of fact at 20 C.F.R. §725.310. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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).

The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310, an 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 at least one element 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). In the prior decision, the district director denied benefits because claimant failed to establish that claimant had pneumoconiosis arising out of coal mine employment and that he was totally disabled by the disease. Director's Exhibit 15. Consequently, the issue properly before the administrative law judge was whether the medical evidence submitted since the prior denial of benefits (*i.e.*, the evidence submitted since the district director's February 1, 2005 denial of benefits) established any one of those elements of entitlement.[4]

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[3] Because the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] As noted above, this case involves a request for modification of a subsequent claim. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied by the district director because he failed to establish that he had pneumoconiosis arising out of coal mine employment and that he was totally disabled by

Claimant initially contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. The administrative law judge considered the new reports of Dr. Grodner and Dr. Mavi, claimant's treating physician. Dr. Grodner opined that claimant does not have pneumoconiosis. Employer's Exhibit 1. By contrast, Dr. Mavi opined that claimant has pneumoconiosis. Director's Exhibit 18. The administrative law judge gave little weight to Dr. Mavi's opinion because it was not reasoned. Decision and Order at 14. The administrative law judge then gave probative weight to Dr. Grodner's opinion because it was well-reasoned and well-documented. *Id*. at 15. The administrative law judge therefore found that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*.

Claimant argues that the administrative law judge should have given greater weight to Dr. Mavi's opinion based on his status as claimant's treating physician. The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for consideration of a treating physician's opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations. Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole.[5] 20 C.F.R. §718.104(d)(5).

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the disease. *See* 20 C.F.R. §§718.202(a), 718.203, 718.204; Director's Exhibits 1, 2. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement. 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him). The administrative law judge failed to expressly find that the evidence developed since the district director's prior denial of benefits did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. We hold, however, that this error was harmless because the administrative law judge properly found that the evidence developed since the district director's denial of benefits did not establish either the existence of pneumoconiosis or total disability. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[5] The Sixth Circuit has held that in black lung litigation, the opinions of treating physicians are neither presumptively correct nor afforded automatic deference. *Eastover*

In the instant case, the administrative law judge acknowledged that Dr. Mavi was claimant's treating physician. In considering the medical treatment records, the administrative law judge stated:

> In August 2003, Dr. Mavi considered accurate smoking and coal mine employment histories, a non-qualifying PFT, and a physical examination to diagnose that [c]laimant suffered from COPD and pneumoconiosis. In addition, over the course of the next two and one half years, he examined [c]laimant and performed similar testing. On nine separate occasions, he diagnosed pneumoconiosis by history.

Decision and Order at 14.

The administrative law judge then considered Dr. Mavi's February 7, 2006 opinion that "pneumoconiosis is strongly considered given his coal mine work for an extended period of time." Director's Exhibit 18. The administrative law judge permissibly gave little weight to Dr. Mavi's opinion because he found that it was equivocal. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). In addition, the administrative law judge permissibly gave little weight to Dr. Mavi's opinion because he found that "[Dr. Mavi] clearly demonstrates that he based his diagnosis of pneumoconiosis on generalizations about the effects of coal dust exposure and not on [c]laimant's specific conditions and test results" and that "[it] is clearly inconsistent with his previous, definitive diagnoses of pneumoconiosis (for which he never provided any reasoning as to how he came to a diagnosis of pneumoconiosis)." Decision and Order at 14; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984). Thus, we reject claimant's assertion that the administrative law judge should have given greater weight to Dr. Mavi's opinion based on his status as claimant's treating physician.

Because the administrative law judge properly discounted Dr. Mavi's opinion, the only medical opinion of record that could support a finding of pneumoconiosis, we affirm the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[6]

Mining Co. v. Williams, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). In *Williams*, the court stated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 277 F.3d at 513, 22 BLR at 2-647.

[6] In light of our disposition of the medical opinion evidence at 20 C.F.R.

Claimant next contends that because Dr. Grodner did not provide a reliable explanation for his opinion, substantial evidence does not support the administrative law judge's finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). We disagree. In a December 4, 2006 report, regarding claimant's *overall* medical condition, Dr. Grodner opined that claimant would not be able to do his usual coal mine work or comparable and gainful work. Employer's Exhibit 1. Dr. Grodner observed that besides claimant's respiratory condition, claimant has other conditions that influence his ability to perform coal mine work, including chronic obstructive pulmonary disease related to cigarette smoking, arteriosclerotic heart disease, hypertension and hyperlipidemia. *Id*. With regard to claimant's respiratory and pulmonary condition, Dr. Grodner opined that claimant has mild to moderate chronic obstructive pulmonary disease and, therefore, "it would be difficult for him to perform coal mine work or comparable and gainful work because of his lung disease." *Id*.

The administrative law judge stated that "Dr. Grodner was also the only physician to submit a report in conjunction with [c]laimant's request for modification that addressed the issue of total disability."[7] Decision and Order at 16. The administrative law judge then stated:

> I do not find Dr. Grodner's "difficult to perform" conclusion to be equivalent to a finding of total disability. Furthermore, I find that Dr. Grodner has based this "difficult to perform" opinion on a combination on (sic) pulmonary and non-pulmonary conditions, and thus, he has not definitively concluded that [c]laimant is or is not totally disabled from a pulmonary perspective.

Id. at 17.

Contrary to claimant's assertion that the administrative law judge relied on Dr. Grodner's opinion, the administrative law judge properly found that Dr. Grodner's opinion did not establish a totally disabling respiratory or pulmonary impairment. *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991). Alternatively, the administrative law judge properly found that Dr. Grodner's opinion was equivocal. *Holdman*, 202 F.3d at 882, 22 BLR 2-42; *Justice*, 11 BLR 1-94; *Campbell*, 11 BLR at 1-

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§718.202(a)(4), we decline to address claimant's contentions regarding Dr. Grodner's opinion that claimant does not have pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] Dr. Mavi did not render an opinion with regard to the issue of total disability in his February 7, 2006 report. Director's Exhibit 18.

19. Thus, we reject claimant's assertion that the administrative law judge erred in relying on Dr. Grodner's opinion.

As the administrative law judge stated, "[t]he burden,[8] however, is on the [c]laimant to prove the elements of entitlement and not just to point out the problems with the [e]mployer's evidence."[9] Decision and Order at 17 n.12. Claimant did not submit a new medical report that rendered an opinion regarding the issue of total disability. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Furthermore, because the administrative law judge properly found that the new evidence did not establish either the existence of pneumoconiosis at 20 C.F.R. 718.202(a) or total disability at 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that the new evidence did not establish a change in conditions at 20 C.F.R. §725.310. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni*, 17 BLR at 1-84.

Claimant finally contends that substantial evidence does not support the administrative law judge's finding that the evidence did not establish a mistake in a determination of fact at 20 C.F.R. §725.310. Claimant asserts that the new CT scan and catheterization test demonstrate a mistake in fact because they rebut the assumptions based on the evidentiary record in the prior claim. In considering whether there was a mistake in a determination of fact, the administrative law judge stated, "I do not find the newly submitted evidence, when considered in conjunction with the evidence before the District Director in the third claim, establishes a mistake in a determination of fact in the prior denial of benefits." Decision and Order at 17.

We find no error in the administrative law judge's determination that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

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[8] Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

[9] Employer submitted Dr. Grodner's report into the record.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge