BRB Nos. 09-0584 BLA
and 09-0585 BLA

DELPHIA PRATT, o/b/o and Widow of PEARL PRATT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIAMOND MAY COAL COMPANY	)	DATE ISSUED: 04/15/2010
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ralph D. Carter (K & L Gates LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order-Denial of Benefits (04-BLA-0147) of Administrative Law Judge William S. Colwell on both a miner's duplicate claim[2] and a

[1] Claimant is the widow of the miner, who died on October 30, 1994. Claimant filed a survivor's claim for benefits on November 4, 1994. Director's Exhibit 2. The survivor's claim was consolidated with the miner's claim for adjudication and decision on appeal.

survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)), as amended, 30 U.S.C. §901 *et seq*. (the Act).[3] This case is before the Board for the third time, and involves claimant's request for modification of the denial of benefits in both claims. In the last appeal, with respect to the miner's claim, the Board affirmed Administrative Law Judge Rudolf L. Jansen's finding that claimant failed to establish either a change in the miner's condition or a mistake in a prior determination of fact pursuant to 20 C.F.R. §725.310 (2000),[4] as substantial evidence supported Judge Jansen's finding that the previously submitted medical evidence of record, as well as the evidence submitted since the prior denial, was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b).[5] Because

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[2] The miner's first application for benefits, filed on July 18, 1980, was denied by the district director on January 16, 1981. Director's Exhibit 114. The miner's second application, filed on November 9, 1992, was denied by the district director on April 13, 1993, for failure to establish that the miner had pneumoconiosis or that he was suffering from a totally disabling respiratory or pulmonary impairment. Director's Exhibits 1, 22. The miner filed a request for modification on June 30, 1993, Director's Exhibit 29, that was pending at the time of his death. The miner's widow, claimant herein, has continued to pursue the miner's claim on behalf of his estate.

[3] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the miner's claim and the survivor's claim were both filed prior to January 1, 2005.

[4] The former version of the regulation, found at 20 C.F.R. §725.310 (2000), applies to the miner's claim and the survivor's claim herein, as both claims were filed prior to, and were pending on, January 19, 2001, the effective date of the revised regulation at 20 C.F.R. §725.310. *See* 20 C.F.R. §725.2.

[5] In reviewing the record as a whole on modification, an administrative law judge is authorized "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). In considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000), 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. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR

claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement in both claims,[6] the Board affirmed Judge Jansen's denial of benefits in the miner's and survivor's claims. *Pratt v. Diamond May Coal Co.*, BRB No. 06-0208 BLA (Nov. 29, 2006) (unpub.); Director's Exhibit 167.

Claimant filed an "appeal" of the Board's decision with the district director on January 3, 2007, which was construed as a request for modification, and denied on May 11, 2007. Director's Exhibits 168, 169, 175. Following a hearing, Administrative Law Judge William S. Colwell (the administrative law judge) credited the miner with at least nineteen years of coal mine, as stipulated by the parties and supported by the record, and adjudicated both claims pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge determined that claimant could not establish a change in the miner's condition pursuant to Section 725.310 (2000) in either claim, since the miner was deceased at the time Judge Jansen issued his prior denial of benefits. With respect to the miner's claim, the administrative law judge reviewed the evidence considered by Judge Jansen, and found no mistake of fact pursuant to Section 725.310 (2000) in his determination that claimant had failed to establish the existence of pneumoconiosis at Section 718.202(a) and total respiratory disability at Section 718.204(b). The administrative law judge further found that the evidence submitted in

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1-82 (1993). The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made. *Wojtowicz v. Duquesne Light Company*, 12 BLR 1-162, 1-164 (1989).

[6] To establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in the miner's claim, claimant must demonstrate by a preponderance of the evidence that the miner was 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 (1989). To establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the irrebuttable presumption at 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

support of modification was insufficient to establish the existence of clinical or legal pneumoconiosis at Section 718.202(a), and total respiratory disability at Section 718.204(b). Consequently, the administrative law judge found that modification was not appropriate, and denied benefits. Because the evidence of record was insufficient to establish the existence of pneumoconiosis, the administrative law judge determined that entitlement was also precluded in the survivor's claim, and denied benefits.

In the present appeal, claimant contends that the administrative law judge erred in finding that the x-ray evidence and medical opinion evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), (4). Claimant also challenges the administrative law judge's failure to address the exertional requirements of the miner's usual coal mine employment in finding that total disability was not established under Section 718.204(b)(2)(iv), and his failure to render a finding as to the cause of the miner's death pursuant to 20 C.F.R. §718.205(c). In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.[7]

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).[8]

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant contends that the administrative law judge erred by placing substantial weight on the numerical superiority of the negative x-ray interpretations and by relying exclusively on the qualifications of the physicians providing those x-ray interpretations. Claimant maintains that the administrative law judge is not required either to defer to a physician with superior qualifications or to accept as conclusive the numerical weight of x-ray

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 12, 17.

[8] As the miner's last coal mine employment occurred in Kentucky, the Board will apply the law 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*); Director's Exhibit 6.

interpretations. Claimant further contends that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's arguments are without merit.

At Section 718.202(a)(1), the administrative law judge reviewed all of the x-ray evidence of record, and concurred with Judge's Jansen's finding, as affirmed by the Board, that the weight of the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), based on a numerical preponderance of negative interpretations by the more highly qualified physicians. Decision and Order at 11-12; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). We reject, as unsupported, claimant's assertion that the administrative law judge "may have selectively analyzed" the x-ray evidence, *see White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4 (2004), and affirm, as supported by substantial evidence and within his discretion, the administrative law judge's finding of no mistake in a determination of fact in Judge Jansen's analysis under Section 718.202(a)(1). 20 C.F.R. §§718.202(a)(1), 725.310 (2000); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994) (*en banc*); Decision and Order at 11-12. As the administrative law judge accurately determined that claimant submitted no new x-ray evidence in support of her modification request, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1).

Claimant next asserts that the medical opinions of Drs. Williams and Chaney are reasoned, documented, and sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), and that the administrative law judge should not have rejected these opinions for the reasons he provided. Further, claimant argues that the administrative law judge "appears to have" interpreted medical tests, thereby substituting his own conclusions for those of a physician. Claimant also maintains that Dr. Chaney's opinion is entitled to substantial weight based on his status as the miner's treating physician. Claimant's Brief at 5-7. Claimant's arguments lack merit.

In evaluating the earlier medical opinions of record at Section 718.202(a)(4), the administrative law judge concurred with Judge Jansen's finding, as affirmed by the Board, that claimant failed to establish the existence of pneumoconiosis thereunder. Decision and Order at 13-14. In pertinent part, Judge Jansen found that Dr. Williams's 1980 diagnosis of pneumoconiosis, based on an x-ray interpretation and the miner's coal mine employment, without further explanation, was not well-reasoned and documented. Director's Exhibit 160 at 27; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Judge Jansen also declined to credit Dr. Chaney's diagnosis of pneumoconiosis, despite his status as the miner's treating physician from 1988 until 1994, because he found that Dr. Chaney failed to properly document and adequately explain the basis for his diagnosis. Director's Exhibit 160 at 22-23; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147

(2003). As substantial evidence supported Judge Jansen's findings, the administrative law judge acted within his discretion in finding no mistake in a prior determination of fact pursuant to Section 725.310 (2000). Decision and Order at 13-16; *see Kingery*, 19 BLR at 1-11.

In evaluating the new evidence submitted in support of modification, the administrative law judge determined that Dr. Chaney's 2007 opinion "suffers from the same deficiencies as those identified by Judge Jansen." Decision and Order at 15. Thus, the administrative law judge permissibly found that Dr. Chaney's opinion was inadequately documented and insufficiently reasoned to support a finding of pneumoconiosis at Section 718.202(a)(4), as the physician did not identify the specific objective studies upon which his diagnosis was based.[9] Decision and Order at 15; Director's Exhibit 172; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-647-49 (6th Cir. 2003); *Groves*, 277 F.3d at 836, 22 BLR at 2-330. By contrast, the administrative law judge found that Dr. Jarboe's opinion was sufficiently well-reasoned and documented to support his conclusion that the miner did not suffer from clinical or legal pneumoconiosis, based on his review of the medical evidence of record, including Dr. Chaney's 2007 report. Hence, the administrative law judge permissibly found that the opinion of Dr. Jarboe was entitled to determinative weight. Decision and Order at 15; Employer's Exhibit 1; *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark*, 12 BLR at 1-155. Because the administrative law judge properly considered the previously submitted medical opinions in conjunction with the new medical opinions submitted in support of modification, and substantial evidence supports his findings, we affirm his conclusion that the overall weight of the medical opinion evidence of record is insufficient to establish either the existence of pneumoconiosis pursuant to Section 718.202(a)(4) or a mistake in a determination of fact pursuant to Section 725.310 (2000).

[9] We reject claimant's additional argument, that the administrative law judge was obligated to explicitly consider the factors set forth at 20 C.F.R. §718.104(d) in weighing the opinion of Dr. Chaney, the miner's treating physician. The opinions of treating physicians are to be accorded weight in light of their documentation and reasoning, and are neither presumed to be correct nor afforded automatic deference, *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003), but "get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); *see* 20 C.F.R. §718.105(d)(5). In the present case, the administrative law judge acknowledged Dr. Chaney's status as the miner's treating physician, but found that his opinion lacked sufficient reasoning and documentation. Decision and Order at 15.

Since claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement in both the miner's claim and the survivor's claim, we affirm the administrative law judge's finding that claimant is precluded from entitlement to benefits in both claims.[10] *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Accordingly, the Decision and Order-Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[10] Our affirmance of the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) obviates the need to address claimant's argument that the administrative law judge erred in failing to find total respiratory disability pursuant to Section 718.204(b) and death due to pneumoconiosis pursuant to Section 718.205(c).